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THE TESTAMENTARY NATURE OF SETTLEMENTS OF LIFE INSURANCE ELECTED BY THE BENEFICIARY

GUY B. HORTON*

INTRODUCTORY

Originally all life insurance was payable in one sum at death or other maturity, but a decade or so ago the advantage of settlements in the form of income became so well recognized that a large amount of insurance is made so payable each year, chiefly in behalf of women beneficiaries. The typical modes are these:

(1) The proceeds are retained and the interest is paid to the beneficiary until her death, when the principal is paid to her estate or to a named person.

(2) The principal and the interest are paid in installments monthly, quarterly, semi-annually, or annually to the beneficiary for a specified period, and if she dies before all are paid, the commuted value of the remaining installments is paid to her estate or a named person.

(3) The principal and the interest are paid in installments monthly, quarterly, semi-annually, or annually to the beneficiary throughout her life with a certain number guaranteed, and if she dies before all the guaranteed installments are paid, the commuted value of those remaining is paid to her estate or a named person.

In practice, these plans are combined and extended through several lives so that the modes of payment which insurance companies actually undertake are very many.

In addition, nearly every modern policy gives the same elective privilege to the beneficiary. Thus if the insured has not availed himself of the options and the policy becomes payable in one sum, the beneficiary may leave the proceeds with the insurance company under one of the typical settlements just described or under a combination of them agreed on by her and the company. Similarly, the insured, when the policy matures at endowment or he surrenders it for its cash value, or an assignee, may select such a settlement in lieu of one sum.

The optional settlements offered in the policy are for the sole benefit of the beneficiary, and rarely do they provide retention for longer than her life or for payment of principal or remaining installments to

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anyone but her or her estate. But in practice the choice of settlements goes much farther and through more than one life. The person selecting tries to give the principal or the installments she may not live to receive to someone else and perhaps to several persons successively. Not only income and periodic payments from principal (which is the primary purpose of the settlement) are reserved, but, because of that elemental human trait which makes one reluctant to relinquish control while life lasts, the selecting party retains power to withdraw part or all of the principal or to commute into one sum the unpaid installments, as the case may be, or power to change the person or persons who have been designated to receive the principal or balance when the maker of the settlement dies; often more than one is reserved.

To take a typical example of the simplest kind: The beneficiary leaves the money with the insurance company which agrees to pay the income to her as long as she lives and on her death to pay the principal to some person she has named, with power reserved to withdraw part or all of the principal or to designate a new payee of it. The question created by this more extended choice may be stated thus: What is the nature of the transaction when the option-taker selects such a deferred settlement and directs that the principal or unpaid part shall go to someone else after her death, but at the same time retains some control over it?¹ Is this direction for payment of the principal or the balance a testamentary act and invalid because not done in accordance with the statute of wills, or is it proper and enforceable? Tax statutes usually are broad enough to include situations which do not involve testamentary dispositions in the technical sense, and in dealing with these courts exhibit a willingness to disregard technicality in favor of public policy in obtaining public revenues.^{1a} Consequently, questions under them are not considered in this discussion.

I

Like all attempts to give and retain at the same time, to eat one's cake and have it too, uncertainty and trouble result.² Has the giving

¹It is possible that elective changes by a beneficiary in the mode of payment during deferred settlements as arranged by the insured, may involve some of the questions herein discussed, *e. g.*, the insured provides that the beneficiary shall have income for life with the option, say after a stated age, to select some other mode of payment.

^{1a}Rowley, *Living Testamentary Dispositions* (1929) 3 CINN. L. REV. 361, 390.

²"This is the ever recurring case of an attempt at once to give property and keep it, and as long as men keep on trying to do that lawyers will not starve." Dennison, J., in *Griffith v. Sands*, 84 Colo. 456, 457, 271 Pac. 191 (1928).

become a gift, or has the retaining become a retention? In other words, which element controls? On that depends the answer, roughly speaking, to the question of validity or invalidity under the wills acts. Has the right to the principal or commuted value so passed to the designated person as to give that one a vested interest subject to defeasance, or has he or she a mere expectancy of something, to become tangible only if and when the one arranging the settlement dies without having exercised the reserved right? Is it a gift of a present interest subject to revocation or withdrawal, or is it a present gift of whatever may be left or available when the donor's death occurs?^{2a} Is the transaction similar to a condition subsequent or is it like a condition precedent? In the former, one gives with the right to take back; in the latter case, one gives what he does not dispose of before he dies. The distinction is very subtle and much confusion results from failure of the courts to reason clearly upon it.

The distinction and its subtlety is not unlike that involved in cases of death in common disaster where the resting of the burden of proof, and conversely (in practical result) the right to the proceeds, depends on whether an interest had actually passed to the beneficiary subject to be divested, or whether the beneficiary had merely an expectancy during the insured's life. The distinction between a disposition to take effect only on the death of the donor, and one to take effect immediately but subject to be revoked by the donor, may seem to be formal rather than substantial, but it is important and has determinative effect on other problems.³ If the settlement turns out to be an attempted testamentary disposition and so fails, the principal or commuted value of installments unpaid at death belongs to the settlor's estate and is distributable to his heirs. This distribution may be entirely different from that selected, and result in giving the fund to those to whom the settlor did not wish to leave anything.⁴

It is well at the outset to clarify our thought as to the nature, testamentary or otherwise, of property dispositions, by reference to several authorities—first Mr. Jarman:⁵

“A will is an instrument by which a person makes a disposition of his property, to take effect after his decease, and which is *in its own nature* ambulatory and revocable during his life. It is this ambulatory quality which forms the characteristic of wills;

^{2a}The majority and minority opinions in *Hanigan v. Wright*, 233 App. Div. 82, 251 N. Y. Supp. 651 (3d Dept. 1931) divided on this point.

³Scott, *Trusts and the Statute of Wills* (1930) 43 HARV. L. REV. 521, 528.

⁴Seftenberg, *Border Lines of Agency, Living Trusts, and Testamentary Disposition* (1930) 5 WIS. L. REV. 321.

⁵1 JARMAN, WILLS (5th Am. ed. 1893) *17.

for, though a disposition by deed may postpone the possession or enjoyment, or even the vesting, until the death of the disposing party, yet the postponement is, in such case, produced by the express terms, and does not result from the nature of the instrument. Thus, if a man, by deed, limit lands to the use of himself for life, with remainder to the use of A. in fee, the effect upon usufructuary enjoyment is precisely the same as if he should, by his will, make an immediate devise of such lands to A. in fee; and yet the case fully illustrates the distinction in question; for, in the former instance, A., *immediately* on the execution of the deed, becomes entitled to a remainder in fee, though it is not to take effect in possession until the decease of the settlor, while, in the latter, he would take no interest whatever until the decease of the testator should have called the instrument into operation."

And next from a California court:⁶

"The essential characteristic of an instrument testamentary in its nature is, that it operates only upon and by reason of the death of the maker. Up to that time it is ambulatory. By its execution the maker has parted with no rights and divested himself of no modicum of his estate, and *per contra* no rights have accrued to and no estate has vested in any other person. The death of the maker establishes for the first time the character of the instrument. It at once ceases to be ambulatory, it acquires a fixed status and operates as a conveyance of title. Its admission to probate is merely a judicial declaration of that status.

Upon the other hand, to the creation of a valid express trust it is essential that some estate or interest should be conveyed to the trustee, and when the instrument creating the trust is other than a will, that estate or interest must pass immediately. (Perry on Trusts, sec. 92.) By such a trust, therefore, something of the settlor's estate has passed from him and into the trustee for the benefit of the *cestui*, and this transfer of interest is a present one and in nowise dependent upon the settlor's death. But it is important to note the distinction between the interest transferred and the enjoyment of that interest. The enjoyment of the *cestui* may be made to commence in the future and to depend for its commencement upon the termination of an existing life or lives or an intermediate estate."

Nothing can be clearer than the statement of the rules laid down by the courts and text writers for determining the nature of the transaction, of which these are typical:

"The test. . . is whether the grantor intended the instrument to be ambulatory, serving no purpose and having no effect until

⁶Nichols v. Emery, 109 Cal. 323, 329, 330, 41 Pac. 1089, 1091 (1895). Quoted and approved in Tennant v. Tennant Memorial Home, 167 Cal. 570, 140 Pac. 242 (1914); Sims v. Brown, 252 Mo. 58, 158 S. W. 624 (1913).

after his death, and therefore revocable, or whether he intended to convey thereby some present right or interest, absolute or contingent, in the subject-matter of the grant, with the enjoyment thereof postponed until after his death. If, by the terms of the instrument, the right or interest passes at once, subject to a contingency over which the grantor has no control, it is a deed, and irrevocable, even though the enjoyment of the thing granted is postponed until his death."⁷

"The test is the time when the instrument was designed to take effect. If it conveyed a present interest, though of a future estate, the title vested. If, on the contrary, it was to take effect only at the death of the maker of the instrument, it was testamentary in character, and could only operate as a will, if of any force at all."⁸

"If the instrument, whatever its form or the mode of its execution, *passes a present interest which vests from the time of the execution*, it will be a deed, though the possession and the enjoyment of the estate granted in it do not accrue to the grantee until a future time. On the other hand, if the instrument, though it is in form a deed, *does not convey any vested interest, right or estate until the death of the person executing it*, it will be regarded as testamentary and revocable."⁹

An instrument which purports to operate only on property which belongs to the donor at his death shows his intention not to pass any vested interest before his death; and is accordingly a will.¹⁰

These principles seem clear enough but as in many other fields and problems, the difficulty occurs in applying the test.¹¹ Courts differ in their conclusion often on facts indistinguishable, though it must be said that there is consistency in the decisions of a particular state.¹²

⁷Thomas v. Williams, 105 Minn. 88, 90, 91, 117 N. W. 155, 156 (1908) citing cases.

⁸Hitchcock v. Simpkins, 99 Mich. 198, 201, 58 N. W. 47, 48 (1894); see Shaull v. Shaull, 182 Iowa 770, 160 N. W. 36 (1916).

⁹1 UNDERHILL, WILLS (1900) § 37.

¹⁰1 PAGE, WILLS (2d ed. 1926) § 64, citing cases, § 68. An interesting and important question exists in connection with life insurance trusts. In order to avoid questions as to the effect of the trust on the rights of the insured and trustor to deal with the insurance prior to its maturity, some life insurance and trust companies take the position that the trust does not come into existence, or more accurately, that there is no trust res until the insured dies, and that the trustee has no interest until that event. It seems fairly clear that the holders of that theory have escaped Scylla only to fall on the Charybdis of a testamentary act.

¹¹"There are few, if any questions, less clearly defined in the law-books, than an intelligible uniform test, by which to determine when a given paper is a deed, and when it is a will." Sharp v. Hall, 86 Ala. 110, 112, 5 So. 497, 498 (1889).

¹²Massachusetts appears to be an exception. It is impossible to reconcile McEvoy v. Boston 5c Savings Bank, 201 Mass. 50, 87 N. E. 465 (1909), and Russell v. Webster, 213 Mass. 491, 100 N. E. 637 (1913), with the prevailing

The weight of authority is that the controlling factor is the intention of the person arranging the settlement.¹³ The intention of the grantor must be the pole-star in considering the character of the instrument.¹⁴ If the maker intended an instrument which would take effect immediately, it is a deed.¹⁵ If it is not to take effect until the death of the maker, it is testamentary.¹⁶

We then reach the question: How is the maker's intention to be ascertained? In *Sharp v. Hall*,¹⁷ the court said: "Intention is an inferential fact, and, unless it is announced at the time the act is done, it is not susceptible of direct proof." According to *Crocker v. Smith*,¹⁸ it is "to be collected from the terms of the instrument, considered in the light of the surrounding circumstances." But this leaves us far from the goal. How shall we determine the settlor's intent from the terms of the instrument and surrounding circumstances? Perhaps we can make some progress if we consider the elements which indicate the intent. In the settlements we are discussing, the important elements are his retention of the: (1) Right to income for a specified period, or for his life; (2) Right to revoke the settlement and designate a new beneficiary of the principal or unused part; and (3) Right to withdraw part or all of the principal.

It appears to be settled that the retention of income does not make the transaction testamentary and invalid.¹⁹ The reservation of a life interest does not change a deed of gift into a will.²⁰ The test seems to be whether any interest in the property itself has been retained, as

opinion in the state. So it was said in *Smith v. Ossipee Valley Savings Bank*, 64 N. H. 228, 232, 9 Atl. 792, 794 (1887): "Just what it is necessary to do to pass the title to money through the intervention of a savings-bank the authorities do not agree in the different states, and often in the same state, and it would be a difficult task to reconcile them."

¹³*Crocker v. Smith*, 94 Ala. 295, 10 So. 258 (1891); *Innes v. Potter*, 130 Minn. 320, 153 N. W. 604 (1915); see (1921) 11 A. L. R. 23, 41.

¹⁴*Mays v. Burleson*, 180 Ala. 396, 61 So. 75 (1913).

¹⁵*Lippold v. Lippold*, 112 Iowa 134, 83 N. W. 809 (1900).

¹⁶*McDaniel v. Johns*, 45 Miss. 632 (1871).

¹⁷*Supra* note 11, at 115, 5 So. at 499.

¹⁸*Supra* note 13, at 297, 10 So. at 258.

¹⁹(1919) 3 A. L. R. 902, 906. *Mays v. Burleson*, *supra* note 14; *Candee v. Conn. Savings Bank*, 81 Conn. 372, 71 Atl. 551 (1908); *Pyle v. East*, 173 Iowa 165, 155 N. W. 283 (1915); *Bone v. Holmes*, 195 Mass. 495, 81 N. E. 290 (1907); *Chippendale v. North Adams Sav. Bank*, 222 Mass. 499, 111 N. E. 371 (1916); *Hallowell Sav. Inst. v. Titcomb*, 96 Me. 62, 51 Atl. 249 (1901); *Cazallis v. Ingraham*, 119 Me. 240, 110 Atl. 359 (1920); *In re Sides' Estate*, 119 Neb. 314, 228 N. W. 619 (1930); *Smith v. Ossipee Valley Sav. Bank*, *supra* note 12; *Burns v. Nolette*, 83 N. H. 489, 144 Atl. 848 (1929), 67 A. L. R. 1051 (1930).

²⁰40 Cyc. 1091 (Wills).

distinguished from the mere use or enjoyment.²¹ In the case of real property a residue of a life estate in a deed purporting to grant a fee has been held to create a strong presumption that the deed was intended to take effect immediately as a present conveyance of a future estate, for otherwise the reservation would be useless.²²

The existence of the right to revoke the settlement and designate a new beneficiary of the principal or unused part does not make the settlement testamentary.²³ According to Jarman²⁴ it indicates a contrary intent:

“[T]he insertion of such a clause, so far from indicating an intention to make a will, imparts quite a contrary color to the transaction, as a will wants not an express power to render it revocable.”²⁵

The validity of such a reservation has been upheld in three cases.²⁶ In *Tennant v. Tennant Memorial Home*²⁷ the instrument conveyed realty to a memorial home but reserved to the grantor the exclusive possession and use of the rents and profits for her life, and continued: “further reserving to her, the said grantor, the right to revoke the deed as to the said property,” and the right during her life to sell any of it and execute deeds thereof in her individual name and convey absolute title to the purchaser, and to use the proceeds arising from such sale to her own use without any liability for her or her estate to account therefor. It was held that the instrument was not testamentary in character, but was a present conveyance of a future interest. The provision that the deed may be recalled does not make the instrument ambulatory so long as not exercised.²⁸

²¹(1919) 3 A. L. R. 902, 906, citing *Tucker v. Tucker*, 138 Iowa 344, 116 N. W. 119 (1908); *Jones v. Nicholas*, 151 Iowa 362, 130 N. W. 125 (1911).

²²(1921) 11 A. L. R. 23, 55, 58.

²³See *ibid.* 78, 99. This was not so as to real property under ancient common law, but the reason therefore has long since failed and the rule with it.

²⁴*Op. cit. supra* note 5, at *22.

²⁵Quoted and approved in *Hall v. Burkham*, 59 Ala. 349, 355 (1877).

²⁶*Mays v. Burleson, supra* note 14; *Tennant v. Tennant Memorial Home, supra* note 6; *Cleveland Trust Co. v. Scobie*, 114 Ohio St. 241, 151 N. E. 373 (1926).

²⁷*Supra* note 6.

²⁸*Lippold v. Lippold, supra* note 15. *Beaumont's Estate*, 214 Pa. 445, 63 Atl. 1023 (1906) appears to be contra. There the trust was to use income to pay premiums on a certain insurance policy and pay proceeds and accumulation to named beneficiaries, and the right to revoke was reserved. The court held it to be a mere power of attorney revoked by clause in the insured's will. This case was distinguished in *Schuylkill Trust Co. v. Klemr*, 12 D. & C. (Pa. 1928), where duties were imposed on the trustee; and in *In re Eisenlohr's Estate*, 258 Pa. 341, 102 Atl. 117 (1917), where a consideration for the transaction existed.

Power to withdraw part or all the principal²⁹ or to sell and dispose of the property³⁰ does not make the transaction testamentary. In *Hackett v. Moxley*³¹ the court held on authority of *Blanchard v. Sheldon*³² that a gift of a note was not nullified by reservation of the right to use such portions of the avails as the donor might require during her life.

The fact that the fund will not be received until the donor's death is not conclusive. "It is as competent for one to make the event in the future upon the happening of which the estate is to come into possession, and the trust is to be executed, the death of the donor, as any other event. The fact, in such case, that the event named is death, rather than some other selected event, is not at all determinative of the quality or legal character of the trust. It is a mere time when the trust, completely and perfectly constituted theretofore, is, as to the estate already thus vested in interest by it in the trustee, for the beneficiaries, to come into possession—to be enjoyed."³³ Similarly, an assignment of an insurance policy passes a present interest although payment to the beneficiary will not be made until the assignor's death. An assignment of a non-negotiable note may be good although it may not be due until a future day.³⁴ A note based on consideration is not testamentary simply because payment is postponed until death.³⁵ That a bond or agreement provides for renewal of notes from year to year, to be payable after the maker's death, does not necessarily make the instrument testamentary. It is a *debitum in praesenti solvendum in futuro*.³⁶ A valid gift may be in the way of a forgiveness or a release of a debt due from donee to donor.³⁷ Or, of so much of a debt as is not collected before the donor's death. The title to the gift passed, subject to defeasance which terminated at the payee's death. This is not testamentary.³⁸

²⁹Burns v. Nolette, *supra* note 19; Dunn v. Houghton, 51 Atl. 71 (N. J. 1902).

³⁰Smith v. Smith, 167 Ga. 368, 145 S. E. 661 (1928). *But see* Roth v. Michalis, 125 Ill. 325, 17 N. E. 809 (1888); Mould v. Rohm, 257 Ill. 436, 100 N. E. 971 (1913). ³¹65 Vt. 71, 25 Atl. 898 (1892). ³²43 Vt. 512 (1871).

³³Hiserodt v. Hamlett, 74 Miss. 37, 43, 20 So. 143, 144 (1896).

³⁴Southern Mutual Life Ins. Co. v. Durdin, 132 Ga. 495, 64 S. E. 264 (1909). On the other hand a lease providing that rents accruing after the death of the lessor should be paid to his wife was held invalid as testamentary. Murray v. Cazier, 23 Ind. App. 600, 53 N. E. 476 (1899). The fact that rents are chattels real appears to have been decisive. The court hinted that if there had been a note payable to husband and wife, the result might have been otherwise.

³⁵Gostina v. Whitham, 148 Wash. 72, 268 Pac. 132 (1928).

³⁶*In re Eisenlohr's Estate*, *supra* note 28. ³⁷Pyle v. East, *supra* note 19.

³⁸Bedford's Exr. v. Chandler, 81 Vt. 270, 69 Atl. 874 (1906); Compton v. Westerman, 150 Wash. 391, 273 Pac. 524 (1928).

In a few cases, however, the court has looked at the transaction as a gift of what might be left at the donor's death and held it testamentary and invalid.³⁹ So, a deed to a trustee "to take effect only upon the death of N," one of the trustors, of all property "we may have and own at the time of the death of N" was testamentary.⁴⁰ A New York case⁴¹ holds the opposite. A fund was deposited in a bank in trust for the depositor's granddaughter, subject to the limitation that the depositor might use so much of the fund as she desired. The bank book was handed to the donee but subsequently was redelivered to the donor so that she might withdraw funds for her support and care during illness, the donee living some distance away. The court held that the corpus was not necessarily the full amount of the deposit, but was the balance, and that the gift of the latter was irrevocable.⁴² In *Ricker v. Brown*,⁴³ a deed by a man to his housekeeper of "all the residue of my property, real or personal, not otherwise assigned to her, which may be remaining in my name and ownership at my death" was held good as a covenant to stand seised of real estate belonging to him at the time of execution of the deed, subject to a power to dispose of the property during his life. The deed was not testamentary as it took effect at the time of its execution.

On the other hand, in the Rhode Island case of *Sliney v. Cormier*⁴⁴ *B*, a wife, loaned a sum of money to *C* for a fixed term, the agreement providing that repayment was to be made to *B*, if living when the debt became due, otherwise to *A*, her husband, if he were then living, otherwise to *D*, a niece of *A* and *B*. At the due date of the loan *A* and *B* were dead. *C* refused to pay *D* who thereupon brought suit. The

³⁹*Norway Sav. Bank v. Merriam*, 88 Me. 146, 33 Atl. 840 (1895); *Sherman v. Bank*, 138 Mass. 581 (1885); see *Cazallis v. Ingraham*, *supra* note 19.

⁴⁰*Nicolls v. Nicolls*, 168 Cal. 444, 143 Pac. 712 (1914). A note in (1915) 3 CALIF. L. REV. 256 says the result might have been different if the clause had been, "that we now have, and that we may have. . ." Professor Scott, *op. cit. supra* note 3, at 523, suggests that the ineffectiveness results from non-existence, or at least lack of identification, of the subject matter of the trust during the trustor's life. See (1921) 11 A. L. R. 23, 96. The following cases held the fact to be evidence of no present transfer of interest: *Mould v. Rohm*, *supra* note 30; *Salzwedel's Estate*, 171 Wis. 441, 177 N. W. 586 (1920).

⁴¹*Hanigan v. Wright*, *supra* note 2a.

⁴²This was so held notwithstanding a further and rather extreme feature. After her repossession of the bank book, the donor withdrew \$100 and later, just prior to her death, drew an order for the balance which with the bank book she forwarded to the bank. A check for this balance was sent to the donor and the account closed, but she was not able to endorse the check when it arrived, and soon died. A minority of the court held that though the proceeds remained in the bank, they did not remain in the trust.

⁴³183 Mass. 424, 67 N. E. 353 (1903). ⁴⁴49 R. I. 74, 139 Atl. 665 (1928).

court held that as *B* retained control of the debt, *D* did not obtain title thereto until death of *A* and *B*, and the gift was testamentary. In *Hunt v. Hunt*⁴⁵ the decedent indorsed on the back of a note these words: "If I am not living at the time this note is paid, I order the contents to be paid to [A. H.]" He died before the note was paid. This also was held to be a testamentary disposition.

New Jersey appears to hold an extreme position. Its leading case is *Stevenson v. Earl*.⁴⁶ The Pennsylvania Railroad Company had established an employees' savings fund. One of the rules was that depositors must state in writing the name of the person to whom the fund was to be paid on the death of depositor, and another provided that on the depositor's death the fund should be paid over to such designated person. A depositor could withdraw at his pleasure all or any part of the fund, however, and considerable withdrawals were made in the present instance. He gave the passbook to his wife, who had been named as beneficiary, with a statement that "here was the money" and that if he died it should go to her. The court held, that in addition to a donative intention, there must be a complete stripping of the donor of all control over the thing given, and that this was the crucial test. Therefore, the attempted disposition was testamentary and the fund belonged to the donor's estate. The opinion concludes with a statement that to hold such a method of disposing of one's property at death to be valid, would practically repeal the statute of wills.⁴⁷ This conclusion and its vehement denunciation of such attempts to avoid the statute of wills was followed in *Trenton Savings Fund v. Wytham*.⁴⁸ By its charter this savings society was given power to keep a book in which a depositor might name some person to whom any balance on depositor's death should be paid. The court of chancery held that a depositor's designation under the rule was, as had been held in *Stevenson v. Earl*, a gift merely of what was left when the donor died, and testamentary. In another New Jersey case,⁴⁹ two friends executed an agreement that a described safe and its contents should on the death of one become the property of

⁴⁵4 N. H. 434 (1828).

⁴⁶65 N. J. Eq. 721, 55 Atl. 1091 (1903).

⁴⁷*Stevenson v. Earl* seems to be in the bank deposit class. See (1929) 38 YALE L. J. 1135, 1139, n. 17. A note in (1930) 28 MICH. L. REV. 603, 608, says: "If this decision is correct it would appear to make the proceeds of a life insurance policy in which the insured has reserved the right to change the beneficiary, a testamentary disposition. In what way did the depositor have any more control over the fund than the insured had over such a paid up policy?"

⁴⁸104 N. J. Eq. 271, 145 Atl. 462 (1929). The reversal of this case by the Court of Errors and Appeals, 106 N. J. Eq. 93, 148 Atl. 622 (1930), was on the relative effects of a general and special statute, and did not affect the point discussed here.

⁴⁹U. S. Trust Co. v. Giveans, 97 N. J. L. 265, 117 Atl. 46 (1922).

the other. The court held this an attempt to dispose of property after death which could not be done except by will.

New Jersey has still more recently dealt with the question. In *In re Koss' Estate*,⁵⁰ decedent was an employee of the Standard Oil Company of New York. That company had inaugurated a stock-purchase plan and contributed to it 50% of the amount paid by the employee. The stock was to be held by trustees for five years, but if an employee left the service of the company or chose to withdraw from the plan he would receive only the cash he paid in and interest. In case of death, the cash and stock would be paid to the person designated by the employee. No assignment of employee's rights or interest in the plan or in the stock, etc., was allowed. Koss, the employee, had designated a person to take upon his death. The lower court held that there was no donative interest of a present gift; and that the designation was testamentary and invalid.⁵¹ This was reversed on appeal,⁵² the court holding that the designation of a beneficiary to receive stock at the death of its owner was the mere naming of a person for whose benefit the contract is made. The reversal was on a point which illuminates the distinction between deferred settlements of insurance arranged for by the policyholder, and the same mode of income payment when selected by the beneficiary after the policyholder's death. The latter deals with specific property which belongs to her, the beneficiary, but there is no specific property to which the insured in his lifetime is entitled. The Supreme Court of Kentucky concurs with the New Jersey Court of Errors and Appeals on exactly the same facts, the corporation being the Standard Oil Company of Kentucky.⁵³ The Oklahoma Supreme Court has held a similar transaction testamentary but without citation of authorities or careful analysis.⁵⁴

A custom, recently grown up, in connection with payment in advance of premiums on insurance policies, appears to present a new phase of the general problem. The policyholder deposits a sum of money with the insurance company to be held at interest and the fund

⁵⁰105 N. J. Eq. 29, 146 Atl. 471 (1929).

⁵¹Professor Scott, *op. cit. supra* note 3, at 537, criticizes this holding as inconsistent with life insurance law. The transaction did not differ from that employed in naming a beneficiary of a life policy when the right to change the beneficiary had been reserved. This discussion by Professor Scott is cited by the higher court as potent authority for its conclusion.

⁵²106 N. J. Eq. 323, 150 Atl. 360 (1930), a 7 to 6 decision. See 79 U. of PA. L. REV. 237 (1930).

⁵³*Siter v. Hall*, 200 Ky. 43, 294 S. W. 767 (1927).

⁵⁴*Tensfield v. Magnolia Petroleum Co.*, 134 Okla. 38, 272 Pac. 404 (1928), criticized in (1929) 1 ROCKY MT. L. REV. 156.

used to pay the premiums on a particular policy as they become due. Often the depositor directs the insurance company to pay any balance of the deposit at his death to a named person, generally the person who receives the proceeds of the policy. *Quaere*: Is the gift of what may be left testamentary? It probably is if subject to depositor's control during life; otherwise, not.

The suggestion that the designated person is to be treated as a contract beneficiary has been taken up by other courts than those of New Jersey. For instance, the Supreme Court of Appeals of Virginia said:⁵⁵ "It was a pure contractual relation and no question of gift or trust arises in determining the rights of the parties under such a contract." A similar court in West Virginia upheld the right of survivorship in a deposit "payable to the order of either, or the survivor," not on the theory of a valid gift *inter vivos*, but by virtue of the contract of deposit.⁵⁶ In a Massachusetts case a deposit was to be paid to the depositor and sister (Mrs. *W*) or either of them as they should call for the deposit or a part of it, and the balance (not withdrawn during their joint lives) was to be paid to the survivor of them. The court said: "in such case there is no gift of the balance on the death of [depositor]. [Mrs. *W*, when she survived depositor] became the owner of the balance undrawn by virtue of the contract of deposit, and not by virtue of a gift which took effect on [depositor's] death."⁵⁷ In *Perry v. Levoroni* the deposit was made in the name of the depositor and his wife and payable to either or the survivor. Both signed and delivered to the bank the usual identification cards. The court held:⁵⁸

"Upon these facts there was no gift during [depositor's] lifetime and no gift of the balance upon his death. There was, however, a completed contract between the depositor and the bank, assented to by [the wife], by which, upon the death of her husband she became the owner of the balance of the deposit. . . [b]y the terms of the contract [and] the balance belonged to her as the survivor."

⁵⁵*Deal's Admr. v. Merchants and Mechanics Sav. Bank*, 120 Va. 297, 299, 91 S. E. 135 (1917) (the deposit was to the credit of the owner or another).

⁵⁶*Wisner v. Wisner*, 82 W. Va. 9, 95 S. E. 802 (1918).

⁵⁷*Chippendale v. North Adams Sav. Bank*, *supra* note 19, at 502, 111 N. E. at 373.

⁵⁸252 Mass. 390, 393, 147 N. E. 826, 827 (1925). See the dissenting opinion in *Rice v. Bennington County Sav. Bank*, 93 Vt. 493, 108 Atl. 708 (1920). It is suggested in a note in (1927) 48 A. L. R. 189, 204, 206, that all the Massachusetts court meant was that the contract took the place of delivery. But see *Sullivan v. Sullivan*, 161 N. Y. 554, 56 N. E. 116 (1900), which repudiates both contract and trust theory. This was a certificate of deposit.

An interesting and illuminating discussion of this aspect of the general problem appears in a case in the court of chancery of New Jersey.⁵⁹ A lady (A) took her niece (B) to a savings bank and caused an account then standing in her (A's) name to be transferred so as to be payable to A or B. Both signed the depositor's book. The intent of A was that she should control the deposit during her life and that B should have what might be left of it after A's death. The court held that the act vested a complete contract right in B which B could use to obtain the money, and that this was not affected by the fact that the donor had power to withdraw the entire sum and make the gift of no value to B. The theory is well stated in a recent case:⁶⁰ "[U]pon deposit of an account the bank is constituted a debtor, and when the depositor orders the bank to pay himself or another upon order of either party, notifies the second party of the completed transaction and secures her signature evidencing assent to the arrangement, he has created in the second party by contract a joint interest in his right to the deposit equal to his own."

It must be remembered, however, that of all objects of gift, bank deposits are subject to most severe and strict rules because it is well known that persons make deposits in unusual ways, or to the credit of real or fictitious persons, with no intention of divesting themselves of ownership. No such condition or reason for extreme measures exist in the insurance settlements which we are considering. It, therefore, may be assumed that less evidence of a transfer *in praesenti* is needed. Furthermore, the existence of the usual requirement that the bank book be presented for any withdrawal is an important factor in the deposit decisions on the question of delivery. This may distinguish many of them from the cases which involve purely insurance situations.

The Court of Claims of the United States has had to deal with another phase of our inquiry.⁶¹ The plaintiff as executrix of the estate of W sued to recover from the United States money represented by certain treasury savings certificates payable in case of the death of the owner (W) to beneficiaries named therein who had been so designated by W. The statute providing for this issue of securities authorized the Secretary of the Treasury to prescribe the terms and conditions of registration and payment. Pursuant to rules promulgated by him, the certificate named a payee in the event of the original owner's

⁵⁹Dunn v. Houghton, *supra* note 29.

⁶⁰Cleveland Trust Co. v. Scobie, *supra* note 26, at 253, 151 N. E. at 377.

⁶¹Warren v. United States, 66 Ct. Cl. 634, 638, 639 (1929), certiorari to the U. S. Supreme Court denied, 281 U. S. 739, 50 Sup. Ct. 346 (1930).

death. The executrix claimed the proceeds as part of *W*'s estate on the ground that the certificates were the property of *W* during his life, had never been delivered to the beneficiaries directly or constructively, and that the treasury department did not have power to make rules affecting the passing of title to property in the state where *W* was domiciled—that the passing of title should be governed by the laws of that state. The court confirmed the right of the beneficiary named in the certificate to its proceeds, saying:

“At the outset it is well to note that this is a suit on a contract between the plaintiff's testator and the United States. This contract was entered into by the Secretary of the Treasury as the representative of the defendant under authority of the act of Congress and in conformity to the regulations made and promulgated by him before the execution of the contract, under authority given him by said statute, and the statute was passed in the exercise of the constitutional powers of Congress to borrow money. The contract having been entered into in conformity to the act and under the authorized regulations previously made and promulgated, both the act and the regulations must be read into the contract, became a part thereof at the time the contract was executed, and limit and fix the rights of the plaintiff's testator as the purchaser of the certificates. . . [T]he case is simply one of contract, a part of which contract is the act of Congress previously passed and the regulations of the Secretary of the Treasury promulgated in conformity thereto.”

This concise and positive statement of the bank deposit and similar cases just discussed must not be taken as authority against the possible trust nature of transactions which involve very similar facts. The relation of depositor and bank is contractual, of course. The entire transaction arranged for may be something more than the contractual and the donee have equitable interests. An agreement often is the basis of a trust. In a contest between depositors and bank, the depositors, even the one other than the original owner, can properly stand on the contractual relation created by the deposit. The bank itself, if it has paid the fund to the one other than the original owner on his designation, can defend against the original owner on the ground that it had complied with its contract in making that payment. But the real contest usually is between the donee and the estate of the donor, with the bank or the insurance company a mere stakeholder. In the insurance cases involving matured policies, the fund belonged to the beneficiary, to the assignee, or, in case of endowment or cash value on surrender, to the insured. If a succeeding beneficiary becomes entitled to an interest, say the principal at death of the settlor, the property must have passed somehow to her

from the settlor. Since there is no valuable consideration for this transfer, it usually is said that her right to the fund must rest on a gift, trust, or bequest, and the last obviously is not the fact.

In other instances of analogous nature the courts have denied testamentary character. The legality of stock-purchase agreements whereby the survivors shall have the right to purchase the stock of a deceased stockholder has been upheld as against the contention that it was an attempted testamentary disposition, in Illinois,⁶² New York,⁶³ and North Carolina.⁶⁴ Likewise the right of partners to enter into similar agreements for purchase by the others of the share of the one first to die has been upheld in Massachusetts,⁶⁵ New York,⁶⁶ Pennsylvania,⁶⁷ and by the United States Circuit Court of Appeals.⁶⁸ On the other hand such contracts have been held testamentary and invalid in Mississippi⁶⁹ and Rhode Island.⁷⁰ Alabama is sometimes cited in this class but the transaction litigated in that state involved other features.⁷¹ In Illinois⁷² such a contract was overthrown but not for its testamentary nature. The sale price was hopelessly inadequate, \$5,000 for property worth \$70,000.

In these cases, the consideration for the stock or the partnership interest went to the estate of the seller—the deceased. The situation is radically different and the result perhaps testamentary, if, as now often attempted, the deceased stockholder or partner provides in the purchase agreement that the consideration or purchase price paid by the survivors shall go to a named person or persons, often to be held and paid by a trustee in a complicated manner over many years. This obviously imposes a testamentary settlement on the stock purchase or partnership liquidation transaction.

⁶²*Owings v. Lehman*, 190 Ill. App. 432 (1914); *Thompson v. Thompson Carnation Co.*, 279 Ill. 54, 116 N. E. 648 (1917) (conferring an irrevocable proxy to vote stock after the owner's death).

⁶³*In re Cory's Estate*, 177 App. Div. 871, 164 N. Y. Supp. 956 (1st Dept. 1917); *In re Fieux*, 241 N. Y. 277, 149 N. E. 857 (1925).

⁶⁴*Faucett v. Faucett*, 191 N. C. 679, 132 S. E. 796 (1926).

⁶⁵*Murphy v. Murphy*, 217 Mass. 233, 104 N. E. 466 (1914).

⁶⁶*Matter of Columbia Trust Co.*, 169 App. Div. 822, 155 N. Y. Supp. 676 (1st Dept. 1915); *Matter of Orvis*, 179 App. Div. 1, 166 N. Y. Supp. 126 (1st Dept. 1917); *In re Mildrum's Estate*, 108 Misc. 114, 177 N. Y. Supp. 563 (Surr. Ct. 1919).

⁶⁷*In re Eisenlohr's Estate*, *supra* note 28.

⁶⁸*McKinnon v. McKinnon*, 56 Fed. 409 (C. C. A. 8th, 1893).

⁶⁹*Thomas v. Byrd*, 112 Miss. 692, 73 So. 725 (1916).

⁷⁰*Ferrara v. Russo*, 40 R. I. 533, 102 Atl. 86 (1917). Stated to be "utterly unjust and seemingly unjustified" in (1918) 27 YALE L. J. 542, 544.

⁷¹*Gomez v. Higgins*, 130 Ala. 493, 30 So. 417 (1901).

⁷²*Buehrle v. Buehrle*, 291 Ill. 589, 126 N. E. 539 (1920).

There is thus considerable authority in various fields for the technique of holding that the beneficiary's rights rest upon a contract basis, which will preserve them, rather than on a testamentary basis which will destroy them. Virginia, West Virginia, Massachusetts, and Ohio hold that the delivery which must accompany an ordinary gift is rendered unnecessary by the contract by which the bank becomes obligated to both depositor and donee of joint-deposits. Why is there not the same effect when the donee succeeds the depositor, e.g., takes the principal on depositor's death? If the depository's contract suffices when the payees exist as a pair, why can it not have the same effect when the parties are arranged tandem? While the contract theory always has been a minority one and even in Massachusetts has been reduced to a feature of the gift rendering delivery unnecessary in joint-deposit cases, it is submitted that it has value in the special problem we are discussing.

A great deal of the difficulty exists because of failure to recognize the distinction between (1) a donative transfer of property by the *procurement* of a contract the performance of which may benefit the donee, and (2) a donative *transfer* of a contract, already existing between a third party and the donor, by the donor's delivery of the evidence of the contract to the donee.⁷³ The former is illustrated by life insurance. One may accomplish a donative transfer of a large portion of his estate to a beneficiary by procuring a life policy payable to such beneficiary. Incidentally, it may be observed that the whole beneficial enjoyment of the gift is necessarily postponed until the death of the donor, and that the validity of the donative transfer is not affected by power reserved in the policy to extinguish the liability of the insurance company, and therefore all benefit to the donee, by surrendering the policy or changing the beneficiary. The latter case referred to is illustrated by a gift of the benefits of an existing life policy, payable to the donor, by the method of his delivering the policy to the donee with an essential donative purpose.⁷⁴ Delivery is essential in this method; it is not essential when the gift is made by naming the beneficiary in the contract.

The fact that an ordinary promissory note is made payable at or after the maker's death does not affect its validity nor give it testamentary character. However, an instrument disposing of certain notes or their proceeds after the death of the person making them, is testamentary in nature and inoperative unless executed as a will.⁷⁵

⁷³Dunn v. Houghton, *supra* note 29.

⁷⁴Travelers Insurance Co. v. Grant, 54 N. J. Eq. 208, 23 Atl. 1060 (1896);
Dunn v. Houghton, *supra* note 29.

⁷⁵40 Cyc. 1089 (Wills).

One may purchase an annuity payable to himself for life and then to a donee for life and reserve the power to deprive the donee of all benefit.⁷⁶ Or the same general result may be reached in the case of a beneficiary's disposal of the proceeds of a policy.

Assume that two persons, *A* and *B*, are each entitled as beneficiaries to one-half the proceeds of a policy matured by death. *A* may return the company's check for his portion and request that it be paid in installments for a stated term or for life and any balance on his death be paid to *C*, reserving the power to designate another recipient of the balance. *B* may request that his portion be retained and the income paid him for life and on his death the principal be paid to *D*, reserving the power to withdraw the entire principal at any time. The first settlement is an annuity, with automatic periodic withdrawals of principal. The withdrawal in the second is optional with the settlor, but it exists just the same in the first. The only difference is that the option in this case was exercised in advance, and in the other, at a later time. One should not have greater testamentary effect than the other.

II

So far, we have been considering the settlement to be a gift and the right given to be legal, that is, the relation is entirely debtor and creditor, or contractual. The insurance company with which the proceeds of life insurance are left is in the position of promising to pay, for example, the income to the settlor and the principal to the person named by him. The likeness of the transaction is to deposits in a bank. But ordinary deposits in banks are for the depositor solely. Here we have a settlement for the benefit of others in addition to the settlor and often those others will derive more benefit than the settlor; sometimes the entire benefit, present and future, goes to others. The insurance company invests the fund and pays such part of the income as it believes safe, not less than a guaranteed percentage.

These differences in the fact situation have caused courts to use trust phraseology in discussing deposits in banks when they are made for the benefit of others. A casual examination of bank deposit cases will reveal its frequency. More often than one expects, they are held to be trusts. Thus a trust is created where one having a deposit in a savings bank stated to its teller that she wanted it so that either of her two sisters could, in the event of her death, draw the money without probate proceedings, and thereupon gave an order to the bank to pay to either of them or herself, and furnished their signa-

⁷⁶Dunn v. Houghton, *supra* note 29. See Murray v. Flavell, 25 Ch. Div. 89 (1883).

tures, and the bank added their names to the passbook, and in like manner changed the account in the ledger.⁷⁷

If *A* deposits money in *B*'s name, to his credit, intending it as a present gift, but to remain in the bank during the lives of *A* and his wife, and that of the survivor, subject to the income being taken by them, the bank takes the money on the trust to hold it for the term, pay the income to *A* and wife or the survivor, during the term, and at the close pay the principal sum to *B*; and when *B* is notified of the gift, and accepts it with its burdens and conditions, a title to the principal is perfected in him, subject to the equitable right of *A* and wife to take the income. *A*'s title and possession, and all right to a title or the possession of the principal, is as entirely divested at the moment of the acceptance as if it were to be paid by the bank to *B* on demand. It is an executed perfected gift as to *A*. He has delivered the money to the bank. His dominion and power to revoke are gone. His situation is not dissimilar to what it would have been had he given the money accompanied by an unqualified delivery to *B* vesting the title and possession in him on *B*'s undertaking to account to *A* for the income he might receive from it during the term; the important difference being that the payment of the income to *A* and wife is secured and made through a trustee—practically, at least, the safer way.⁷⁸

There is greater importance than first appears in this question as to the nature of the relation, i.e., whether equitable or otherwise. The alternate theory of the settlement as a gift of a legal entity is subject to the weakness that delivery or other act necessary to create a present interest in the donee is not always found, or is found only in some fictitious manner. On the other hand, it is well established that the declarant of the trust need not notify the cestui que trust. Neither knowledge on the part of the cestui, nor acceptance of the trust by him, is necessary to the complete creation of a trust.⁷⁹ The creation of a trust is but a gift of the equitable interest. An unequivocal declaration of gift as effectually passes the equitable title to the cestui que trust as delivery passes the legal title to the donee of the gift *inter vivos*. One may constitute himself trustee by mere declaration.⁸⁰ A gift must be executed by delivery; but a trust may be by declaration.⁸¹ The declaration bears the same relationship to an equitable

⁷⁷*Booth v. Oakland Bank of Savings*, 122 Cal. 19, 54 Pac. 370 (1898; *Cleveland Trust Co. v. Scobie*, *supra* note 26.

⁷⁸*Smith v. Ossipee Valley Sav. Bank*, *supra* note 19.

⁷⁹*Bogert, Creation of Trusts by Means of Bank Deposits* (1916) 1 CORNELL LAW QUARTERLY 159. ⁸⁰*Hallowell Sav. Institute v. Titcomb*, *supra* note 19.

⁸¹*Bath Sav. Institute v. Hathorn*, 88 Me. 122, 33 Atl. 836 (1895).

gift that delivery bears to a legal gift.⁸² If it be true that to perfect a trust, it must be accepted, acceptance is presumed in case of beneficial trust;⁸³ and the acceptance may be after the donor's death.⁸⁴ By the intervention of a trustee, even a *donatio mortis causa* may be effected,⁸⁵ although the deed does not come to the knowledge of the donee and is not accepted by him until after the death of the donor.⁸⁶

Illustrations of these doctrines are many. In a Missouri case⁸⁷ a settlement was in writing as follows:

"I. . . give to [naming the donees] the following described notes and bonds, or any reinvestment of the principal of the same that may be hereafter made. . . reserving, however, for my own use during my life the income and interest from said bonds and notes, and restraining them from making any disposition of the principal of said bonds and notes during my life, and also reserving the right to reinvest any money from the payment of these notes and bonds as to me may seem fit."

The notes and bonds referred to were delivered to one of the donees, for the benefit of all, with the explanation that he "would not have any of the income, or anything of that sort, during [the donor's] life." The interest on the bonds and notes was collected by the donor or his agent until his death, and several of such notes matured during his life, the proceeds of which were reinvested under direction of himself or agent. The court held that such a disposition could not be enforced as a gift since the right of control reserved by the donor was inconsistent with absolute ownership of the donee. However, since it appeared that the donor intended to make a complete disposition of the property, it constituted an executed express trust which was not invalidated by the retention of income to the donor and the power to direct reinvestment of the *res*.

The rules in connection with trusts may be analyzed and grouped as follows: (1) If the trustor retains the income for life, but directs a disposal after his death, a valid trust is created, and on the trustor's

⁸²Cazallis v. Ingraham, *supra* note 19.

⁸³Libby v. Frost, 98 Me. 288, 56 Atl. 906 (1903); Cazallis v. Ingraham, *supra* note 19.

⁸⁴Booth v. Oakland Bank of Savings, *supra* note 77; Woodling v. Bowman, 14 Me. 154 (1837); Cazallis v. Ingraham, *supra* note 19.

⁸⁵Borneman v. Sidlinger, 15 Me. 429 (1839); Dole v. Lincoln, 31 Me. 422 (1850); Dresser v. Dresser, 46 Me. 48 (1858); Cazallis v. Ingraham, *supra* note 19; Clough v. Clough, 117 Mass. 83 (1875); Sheedy v. Roach, 124 Mass. 472 (1878).

⁸⁶Cazallis v. Ingraham, *supra* note 19; Pierce v. Bank, 129 Mass. 425 (1880).

⁸⁷*In re Soulard's Estate*, 141 Mo. 642, 651, 652, 43 S. W. 617, 618 (1897).

death the property goes to the cestuis.⁸⁸ This "does not admit of doubt."⁸⁹ And *a fortiori* this is so, when part of the income goes to the trustor and part to someone else,⁹⁰ even though this requires part of the principal, the discretion as to amount being left with trustee.⁹¹ The validity of the arrangement is unquestioned so far as the objections to informal testamentary disposition are concerned. (2) If the trustor reserves power to revoke or modify the trust so created, the trust is almost universally held to be valid and the cestuis take.⁹² The most that has been said to the contrary by any American case is that the reservation of the power of revocation is a strong element in negating an intent to abandon all control.⁹³ The estate vests *in*

⁸⁸*Cramer v. Hartford-Conn. Trust Co.*, 110 Conn. 22, 147 Atl. 139 (1929), 73 A. L. R. 201 (1931); *Miles v. Miles*, 78 Kan. 382, 96 Pac. 481 (1908); *Kelly v. Parker*, 181 Ill. 49, 54 N. E. 615 (1899); *Norway Sav. Bank v. Merriam*, *supra* note 39; *Davis v. Ney*, 125 Mass. 590 (1878); *Kelley v. Snow*, 185 Mass. 288, 70 N. E. 89 (1904); *Jones v. Old Colony Trust Co.*, 251 Mass. 309, 146 N. E. 716 (1925); *Roche v. Brickley*, 254 Mass. 584, 150 N. E. 866 (1926); *In re Soulard's Estate*, *supra* note 87; *Davis v. Rossi*, 34 S. W. (2d) 8 (Mo. 1930); *Union Trust Co. v. Hawkins*, 121 Ohio St. 159, 167 N. E. 389 (1929); *Dickerson's Appeal*, 115 Pa. St. 198, 8 Atl. 64 (1887); *Lines v. Lines*, 142 Pa. St. 149, 21 Atl. 809 (1891); *Hall v. Hall*, 109 Va. 117, 63 S. E. 420 (1909). See (1931) 73 A. L. R. 209.

⁸⁹*Cramer v. Hartford-Conn. Trust Co.*, *supra* note 88, at 28, 147 Atl. at 141.

⁹⁰*Roberts v. Taylor*, 300 Fed. 257 (C. C. A. 9th, 1924); *McHenry v. McHenry*, 152 Ga. 105, 108 S. E. 522 (1921).

⁹¹*Harrod v. McComas*, 78 Kan. 407, 96 Pac. 484 (1908); *Sands v. Old Colony Trust Co.*, 195 Mass. 575, 81 N. E. 300 (1907); *Lyle v. Burke*, 40 Mich. 499 (1879); *Gilman v. McArdle*, 99 N. Y. 451, 2 N. E. 464 (1885).

⁹²*President Bowdoin College v. Merritt*, 75 Fed. 480 (C. C. N. D. Cal. 1896); *Nichols v. Emery*, *supra* note 6; *Cramer v. Hartford-Conn. Trust Co.*, *supra* note 88; *Norway Sav. Bank v. Merriam*, *supra* note 39; *Stone v. Hackett*, 72 Mass. 227 (1858); *Kendrick v. Ray*, 173 Mass. 305, 53 N. E. 823 (1899); *McEvoy v. Boston 5c Savings Bank*, *supra* note 12; *Jones v. Old Colony Trust Co.*; *Roche v. Brickley*, both *supra* note 88; *Wilcox v. Hubbell*, 197 Mich. 21, 163 N. W. 497 (1917); *Hiserodt v. Hamlett*, *supra* note 33; *Sims v. Brown*, *supra* note 6; *Witherington v. Herring*, 140 N. C. 495, 53 S. E. 303 (1906); *McGillivray v. First National Bank*, 56 N. D. 152, 217 N. W. 150 (1927); *Nat. Newark etc. Banking Co. v. Rosahl*, 97 N. J. Eq. 74, 128 Atl. 586 (1925); *Van Cott v. Prentice*, 104 N. Y. 45, 10 N. E. 257 (1887); *Von Hesse v. Mackaye*, 136 N. Y. 114, 32 N. E. 615 (1892); *Robb v. Washington and Jefferson College*, 185 N. Y. 485, 78 N. E. 359 (1906); *Union Trust Co. v. Hawkins*, *supra* note 88; *Allen v. Hendrick*, 104 Ore. 202, 206 Pac. 733 (1922); *Dickerson's Appeal*, *supra* note 88; *Lines v. Lines*, *supra* note 88; *Winthrop v. Girard Trust Co.*, 245 Pa. 349, 91 Atl. 634 (1914); *In re Dolan's Estate*, 279 Pa. 582, 124 Atl. 176 (1924); *St. Albans v. Avery*, 95 Vt. 249, 114 Atl. 31 (1921); *Richardson v. Stephenson*, 193 Wis. 89, 213 N. W. 673 (1927); see *Warsco v. Oshkosh Sav. & Trust Co.*, 183 Wis. 156, 196 N. W. 829 (1924). See (1931) 73 A. L. R. 209.

⁹³*Worthington's Admr. v. Redkey*, 86 Ohio St. 128, 99 N. E. 211 (1912).

praesenti subject to defeasance in the manner indicated in the trust.⁹⁴ The creation of a revocable trust vests in the beneficiary a present estate in all respects valid until the power of revocation is exercised.⁹⁵ (3) If there is power to change the dispositions made by the instrument, this does not affect the validity of the trust.⁹⁶ (4) If there is power to appoint new trustees, the trust is valid and enforceable.⁹⁷ (5) If power is reserved to direct or approve investments or to direct the trustee's management of the fund, or to require periodic accounts, the trust is valid and enforceable.⁹⁸ (6) Where possession of property is retained, this does not invalidate the trust if the retention does not otherwise prevent the passing of title to the trustee.⁹⁹ (7) But where the trustor reserves power to withdraw part or all the principal without revoking the trust, the courts begin to divide. The majority hold the trust valid and the principal goes to the named cestuis.¹⁰⁰ Consistent with the same views of the law detailed above, the following privileges have not invalidated the trust: trustee to turn back property on demand;¹⁰¹ trustee holds property subject to "control and demands" of trustor during his life.¹⁰² But in a few cases the

⁹⁴*Hiserodt v. Hamlett*, *supra* note 33.

⁹⁵*Corliss v. Bowers*, 30 F. (2d) 135 (S. D. N. Y. 1929), citing *Jones v. Clifton*, 101 U. S. 225 (1879); *Van Cott v. Prentice*, *supra* note 92; see *Stone v. Hackett*, *supra* note 92.

⁹⁶*Kelley v. Snow*; *Roche v. Brickley*, both *supra* note 88.

⁹⁷*Keck v. McKinstry*, 206 Iowa 1121, 221 N. W. 851 (1928).

⁹⁸*Bear v. Milliken Trust Co.*, 336 Ill. 366, 168 N. E. 349 (1929); *Forney v. Remy*, 77 Iowa 549, 42 N. W. 439 (1889); *Wilcox v. Hubbell*, *supra* note 92; *In re Soulard's Estate*, *supra* note 87; *Davis v. Rossi*, *supra* note 88; *Van Cott v. Prentice*, *supra* note 92; *Winthrop v. Girard Trust Co.*, *supra* note 92; *St. Albans v. Avery*, *supra* note 92; *Pietsch v. Marshall, etc., Bank*, 164 Wis. 368, 160 N. W. 184 (1916).

⁹⁹*Kelley v. Snow*, *supra* note 88; *Spangler v. Vermillion*, 80 W. Va. 75, 92 S. E. 449 (1917); *cf. Williams v. Evans*, 154 Ill. 98, 39 N. E. 698 (1895); *Talbot v. Talbot*, 32 R. I. 72, 78 Atl. 535 (1911).

¹⁰⁰*Hellman v. McWilliams*, 70 Cal. 449, 11 Pac. 659 (1886) (retention of powers held to indicate intention of retaining life estate only); *Booth v. Oakland Bank of Savings*, *supra* note 77; *Lovett v. Farnham*, 169 Mass. 1, 47 N. E. 246 (1897) (sums necessary for support); *Davis v. Ney*, *supra* note 88 (power treated similarly to power of revocation); *Jones v. Old Colony Trust Co.*, *supra* note 88; *Union Trust Co. v. Hawkins*, *supra* note 88 (this was based on assumed purpose of the Ohio amending statute; the court opposed the idea otherwise); *Wade v. Button*, 72 Vt. 136, 47 Atl. 406 (1900) (beneficiaries to take only such property as the trustor did "not live to use up").

¹⁰¹*Rosenberg v. Rosenberg*, 40 Hun 91, (N. Y. 1886). *Contra: Russell v. Webster*, *supra* note 12.

¹⁰²*Von Hesse v. Mackaye*, *supra* note 92. *Contra: Rudd v. Rudd*, 184 Ky. 400, 214 S. W. 791 (1919).

court reached the opposite conclusion and held the disposition testamentary and invalid.¹⁰³

It is not necessary to determine whether the control over the fund reserved by the owner is to be regarded as a power of revocation of the trust, or whether the whole transaction is to be regarded as a trust in her favor of so much of the fund as she might see proper to withdraw in her lifetime and of the remainder for her sisters. In either case the practical result is the same, for a power of revocation as to the whole may be exercised as to a part, and when so exercised does not affect the remainder.¹⁰⁴ In *Jones v. The Old Colony Trust Company*, the Massachusetts court¹⁰⁵ pointed the way to a valid trust; namely, possession by trustee of definite management powers, of investment, determination of principal and income, etc.

When the retention of the life interest is coupled with the reservation of a power of revocation the line of demarcation between the testamentary disposition and the inter-vivos transfer becomes less distinct. While the combination is generally held to be consistent with a present trust,¹⁰⁶ these trusts assume a quasi-testamentary aspect.¹⁰⁷ In these instances the settlor is retaining the benefits of his property during his life, and at the same time is rendering his transfer of the beneficial interest by way of remainder ambulatory. To be sure, he is not free to dispose of it without first exercising the power of revocation. The beneficiary has a present right to the remainder until divested by the condition subsequent of the exercise of the power. Practically it might be seriously doubted whether he has more than a robust expectancy. The situation is at least on the border-line.¹⁰⁸

¹⁰³*Demartini v. Allegetti*, 146 Cal. 214, 79 Pac. 871 (1905); *McEvoy v. Boston 5c Savings Bank*, *supra* note 12. In the above cases the parties admitted that the purpose of the transaction was to avoid probate proceedings. *Warsco v. Oshkosh Sav. & Trust Co.*, *supra* note 92 (the trust was not revocable; changed by statute, Wis. Laws 1931, § 231, 205. Followed in *Darling v. Mattoon State Bank*, 189 Wis. 117, 207 N. W. 254 (1926).

¹⁰⁴*Booth v. Oakland Bank of Savings*, *supra* note 77.

¹⁰⁵*Supra* note 88.

¹⁰⁶See *Barlow v. Loomis*, 19 Fed. 677 (C. C. D. Vt. 1884); *Nichols v. Emery*, *supra* note 6; *Brown v. Fidelity Trust Co.*, 126 Md. 175, 94 Atl. 523 (1915); *Nat. Newark, etc., Bank v. Rosahl*, *supra* note 92.

¹⁰⁷See I PERRY, TRUSTS (7th ed. 1929) § 97.

¹⁰⁸Another phase of the problem is presented in transfers in consideration of agreements to support the grantor and to pay specified sums to third parties. Vermont holds that an irrevocable trust for the third parties is created. *Saergent v. Baldwin*, 60 Vt. 17, 13 Atl. 854 (1877); and see *Barber v. Thompson*, 49 Vt. 213 (1876). New Hampshire considers the transaction testamentary and not a trust. *Fellows v. Fellows*, 69 N. H. 339, 46 Atl. 474 (1898).

It is difficult to see how a trustor can reserve power to revoke the trust without affecting its validity, while a reserved right to take part of the principal defeats the transaction, for it would seem that the greater should include the less. In the related field of federal inheritance taxation, the trustor's ability to revoke the trust is now regarded as sufficient to make the disposition testamentary; more recently the right to enjoy income appears to have a similar effect.¹⁰⁹ The distinction probably lies in different doctrines of property law. The power to change the beneficiary of a policy is the power to appoint.¹¹⁰ A power of revocation of a trust is not a power of appointment, but is a power the exercise of which is a condition precedent to the exercise of the power of appointment.¹¹¹ The law recognizes that one may be owner of property even though another has a power of appointment in regard to it. So, too, reservation of power to revoke, even though the trustor is a mere beneficiary for life, is not considered inconsistent with a presently vested interest in other beneficiaries. The right of revocation, standing alone, is not tantamount to a property right in the settlor; it possesses none of the attributes of property.¹¹² Power of revocation and power to direct division of property are not estates.¹¹³ A withdrawal of principal under right reserved is indeed a part of the performance of the trust, not a revocation of it.¹¹⁴ The cases so hold. Where an instrument of trust provided that there should be paid to the cestui "such portion of the principal as she in her judgment may deem necessary for her comfort and support," it was decided that this was not a power of revocation but an agreement for the performance of a trust in a way declared by the instrument itself, the court saying:¹¹⁵ "If he pays over to her the whole principal upon its being deemed necessary by her for her comfort and support, she has not revoked the trust, but has required its perform-

¹⁰⁹Rowley, *op. cit.* *supra* note 1A, at 390.

¹¹⁰Mutual Benefit Life Ins. Co., v. Swett, 222 Fed. 200 (C. C. A. 6th, 1915); Reid v. Durboraw, 272 Fed. 99 (C. C. A. 4th, 1921); Maryland Mut. Ben. Society v. Clendiven, 44 Md. 429 (1876); Modern Woodmen v. Headle, 88 Vt. 37, 90 Atl. 893 (1914), L.R.A. 1915A 580; see 1 SUGDEN, POWERS (3d Am. ed. 1856) *440 *et seq.*

¹¹¹Old Colony Trust Co. v. Gardner, 264 Mass. 68, 161 N. E. 801 (1928), citing *In re Thursby's Settlement*, [1910] 2 Ch. Div. 181; see *In re Brace*, [1891] 2 Ch. Div. 671; *Knocker v. Jones*, [1920] 1 Ch. Div. 527.

¹¹²*In re Dolan's Estate*, 279 Pa. 582, 124 Atl. 176 (1924); *Farmer's Loan & Trust Co. v. Bowers*, 29 F. (2d) 14 (C. C. A. 2d, 1928).

¹¹³*Bear v. Milliken Trust Co.*, 336 Ill. 366, 168 N. E. 349 (1930).

¹¹⁴*Keck v. McKinstry*, *supra* note 97; *Allen v. Hendrick*; *Warsco v. Oshkosh Sav. & Trust Co.*, both *supra* note 92.

¹¹⁵*Lovett v. Farnham*, *supra* note 100, at 2. And see *Cramer v. Hartford-Conn. Trust Co.*, *supra* note 88.

ance, and the trustee has executed it, and the instrument, having performed its office, no longer controls the disposition of the property."

It has been claimed that the trust comes to an end with the period of retention and the disposition of its principal is testamentary. In the *Hawkins* case¹¹⁶ there was provision that the trust was to "terminate" at the death of the settlor. As the court there stated:

"In the instant case the duty owing by the trust company to the children was not one of care and management. On the contrary, the moment any obligation arose on the part of the bank to the children, viz., at the death of Mrs. Hawkins, it became the duty to immediately pay the money to the children. The trust features of the agreement having ended, the right of the trust company to make distribution to the children necessarily depends upon the question whether a present interest was conveyed to the favored children by the supplementary agreement."

It is submitted that such a close interpretation is hardly warranted. The care and management duties do come to an end. But the principal cannot remain in the trustee's hands or become its property. The distribution of the fund may be more or less ministerial, but it is a duty imposed by the settlor nevertheless, and enforceable as such. At least three cases¹¹⁷ have held squarely that the disposition of the principal or termination of the trust is a part of the trust function. One of these¹¹⁸ arrives at this result by the theory of two trusts, the second not to take effect in possession and enjoyment until the death of the settlor.

There seems to be no great distinction between a provision that the trustee hold as such after settlor's death, a stipulation that the trust is to "terminate" and the trustee is to make distribution, and a simple statement that the trustee is to distribute the *res* without provision for termination.¹¹⁹

A study of the cases creates the impression that courts have been influenced by the feeling that one is evading or circumventing the wills statute and doing something wrong and against public policy if he makes a final settlement of his affairs other than by will. This attitude has made the court alert in picking flaws in other arrange-

¹¹⁶*Union Trust Co. v. Hawkins*, *supra* note 88.

¹¹⁷*Cramer v. Hartford-Conn. Trust Co.*, *supra* note 88; *Miles v. Miles*, 78 Kan. 382, 96 Pac. 481 (1908); *Wilcox v. Hubbell*, *supra* note 92. *Contra*: *Warsco v. Oshkosh Savings and Trust Co.*, *supra* note 92.

¹¹⁸*Wilcox v. Hubbell*, *supra* note 92.

¹¹⁹*Rowley, op. cit. supra* note 1a at 372.

ments. A conveyance of land reserving a life interest with remainder over is perfectly proper though the grantor has by that conveyance disposed of his property after death and intends it to take the place of a will. In *Perry v. Cross*¹²⁰ it was necessary to "evade" the statute of wills as the settlor had power under a will to dispose of property which power she could not exercise by will.

Justice Holmes well expressed the principle which should govern, however, when he said:

"We do not speak of evasion, because, when the law draws a line, a case is on one side of it or the other, and if on the safe side is none the worse legally that a party has availed himself to the full of what the law permits. When an act is condemned as an evasion what is meant is that it is on the wrong side of the line indicated by the policy if not by the mere letter of the law."¹²¹

The practical safeguard against the use of trusts to circumvent the statute of wills lies in the necessity that under them the settlor must largely divest himself of the control and management of his property.¹²²

An interesting supposition and conclusion was made in a Kentucky case:¹²³

"Suppose A. gives a sum of money to a trustee to be loaned for five years, with direction to pay principal and interest to B. if A. died within that period, but in the event of his surviving that period, to pay it to C., can it be doubted that a valid trust is created, and that both B. and C. take a present interest in the fund, though necessarily the actual enjoyment of the fund will vest in but one of them; the consummation of each right depending upon the contingency of A. dying within, or surviving, the life of the plan? The same principle would apply if A. directed the fund paid to C. at the end of the period, but reserved and exercised the right to appoint a person to take if he (A.) died in the meantime, which is entirely similar to this case. Thus construed, the plan created a trust, with power reserved in the settlor to appoint additional beneficiaries, . . ."

To make this an exact description of the election of a deferred settlement by the beneficiary of a policy, all that is needed is to change a half dozen words making the first line read, "Suppose A leaves the proceeds of a matured insurance policy with the company to be loaned," etc.

The new devices for keeping insurance protection from being dissi-

¹²⁰132 Mass. 454.

¹²¹In *Bullen v. Wisconsin*, 240 U. S. 625, 630, 631, 36 Sup. Ct. 473, 474 (1916).

¹²²*Cramer v. Hartford-Conn. Trust Co.*, *supra* note 88.

¹²³*Siter v. Hall*, 220 Ky. 43, 50, 294 S. W. 767, 771 (1927).

pated as cash in the hands of persons unused to handling cash in large sums are too useful, in every social sense, to be made the subject of judicial hostility.

SUMMARY

As the authorities stand, the test is the time when an interest passes. If the donee has a present title or interest, it is sufficient though enjoyment of the thing transferred be postponed. On the other hand, if the instrument is to have no effect until the donor's death, it is testamentary and revoked by the donor's death. In determining this the donor's intent is the controlling factor. In ascertaining his intent, the important elements are whether the donor has retained: (1) Payment of income for specified period or life; (2) Right to revoke the settlement and designate a new beneficiary of the principal or unused part; and (3) Right to withdraw part or all the principal.

It may be said with considerable certainty that possession of the first two does not indicate testamentary character, and settlements which reserve no greater rights than these or similar will be carried out.

It is with respect to the third heading, when there is power to diminish the amount which passes over, that uncertainty begins. In legal gifts, and to some extent in gifts in trust, there is almost hopeless confusion due to the circumstances in connection with the delivery and notice to the donee. In trusts this matter of notice is of lesser importance or is presumed. One authority¹²⁴ says that it is entirely a matter of policy where the line shall be drawn between testamentary and non-testamentary dispositions; that the problem is an economic one and there is a tendency to sustain them when that result is desirable.

The most that one can say is that the beneficiary or assignee of a policy payable to him or her in one sum, or an insured at endowment maturity or on surrender of the policy, may elect a deferred settlement and direct that the principal or unused portion go on his death to designated payees, and this result probably will not be prevented by the fact that he receives the income and has power to designate a new payee of the principal. Also, it is possible that the plan will be upheld even if right exists to reduce the benefit to later payees by withdrawal, etc., on the theory either of trust (which is preferred by the writer) or of contract. However, the doubt, especially when the last listed option exists, is so great that attorneys may well advise beneficiaries to omit such reservation and insurance companies may well decline to include the withdrawal privilege.

¹²⁴Rowley, *op. cit. supra* note 1a, at 403.