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Testamentary Dispositions

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The human desire of judges to uphold transactions rather than let them fail is responsible for upholding as non-testamentary many a transaction which in strict logic would seem to be testamentary. Less commonly transactions are condemned as testamentary which in all logic would not seem to be testamentary at all. It may be worth while, therefore, to consider briefly the elements that distinguish a testamentary disposition from a transaction \textit{inter vivos}, and to examine the most common cases where the matter is of consequence.

A will may be defined as the means whereby one disposes of his property at his death or appoints an executor or a guardian for his orphan child or does any combination of these things. It does not affect the property until his death and is revocable until then. These two factors, ineffectiveness until death and revocability until that time, are in some respects different aspects of the same requirement that the disposition of the property to be testamentary must not bind the disposer until his death, but the two factors are by no means identical. The first relates to the effect of the transaction on the property itself while the second concerns the power of the disposer to revoke. The first relates to the property, the second to the person. The power to revoke may exist and yet there be no will because a trust has been created or a gift \textit{mortis causa} made.\footnote{See infra.} The two factors are summed up in the word ambulatory. The characteristic thing about a will as compared with other instruments is that it is ambulatory, binding neither the testator nor his property until his death. Whether a disposition of property is testamentary or not is said to depend on testamentary intent but testamentary intent goes back to these two factors. If the disposition of property is intended to bind neither the disposer nor his
property until his death, the transaction is properly testamente
d although no conscious thought of the act of disposition amounting to a will has entered the disposer's mind and its form be that of a deed or some other transaction quite different from a will.

Of the two factors that go to make a disposition testame
tary, ineffectiveness until death and revocability, the former has been by far the more conspicuous. Revocability is likely to be treated as a consequence of the testamentary character of the transaction rather than as one of its constituent elements. The fact that no interest in the property is to shift until after death is likely to over-shadow the fact that the transaction may have been intended as binding from its date and hence to lack that defeasible, revocable, ambulatory character that makes the will.

Not every disposition of property that will necessarily be deferred until the death of the transferor or after, is, therefore, testamentary. Under the familiar rule against perpetuities it is possible to limit property by a settlement at the time of marriage so that it will not vest until twenty-one years after the death of the married couple yet no one thinks of the marriage settlement, on that account, as testamentary. Under the older law freeholds could not be limited in futuro and therefore could not be made to shift after the transferor's death but neither could they be made to shift at the Christmas following the transaction. Leaseholds, however, could be made to commence in the future and might be made to commence at the lessor's death. Nor were they considered, on that account, to be testamentary. In the case of the will control of the property is retained by the testator. In the above cases of the marriage settlement and of the leasehold in futuro the transferer in his lifetime has parted with control over the property to the extent of the limitation and the transaction differs substantially and not merely technically from a will. Take the case of a trust without power of revoca
tion made to provide for an unfortunate child after the parent's death. No interest need vest in the child until after the parent's death and yet if the parents have put the property beyond their control, the case is essentially different from that of a will.

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2 See Rood on Wills (2 ed.) 61.
3 Clerk v. Clerk, 2 Vern. 323 (1694), Warren, Cases on Property 483.
4 Id.
The function then of a will is to effect a post mortem disposition of property without interfering in the slightest with the disposer’s power over the property while he lives. Logically any transaction with this function in view should be regarded as testamentary. The technique of the law however often cuts across functional lines. And it has in this case. Functionally the gift mortis causa and the revokable trust with full powers in the hands of the donor until his death⁵ are as testamentary as the will proper but they have a technical operation on the property in the donor’s lifetime, and they are therefore placed outside the testamentary circle.

The non-obligatory character of a will until the testator’s death, its inoperativeness on the property until that time, its revocability by the testator, the fact that it leaves the testator unhindered in the control of the property are summed up, as has already been said, in the technical phrase that a will is ambulatory until the testator’s death. Whether, in a given case, there is to be a disposition of the property at death will ordinarily be apparent from the terms of the instrument itself but whether the one executing the instrument intends to keep control of it and complete power of disposition over the property in the meantime is not likely to be so apparent but in the absence of extrinsic evidence to be a matter of inference. Thus in the usual form of will it is not thought necessary to reserve an express power of revocation. The difficult question of intent therefore is as to whether the instrument in question was intended to be ambulatory. Often this intent does exist although the form of the instrument be that of a conveyance inter vivos for the wish to keep the same control over property as in case of a will and yet avoid the expense of probate and administration is widespread. Often, too, there is a desire to avoid the inheritance tax but liability to the inheritance tax usually depends on the succession to the enjoyment of the property at death and does not depend, as the will does, on the ambulatory character of the disposition of the property prior to that time. With this general analysis of the character of testamentary dispositions we will proceed to consider some of the specific transactions to which this analysis is applicable.

⁵ See infra.
GIFTS MORTIS CAUSA

A gift mortis causa is a gift of personal property in apprehension of sudden death as in a last illness or by soldier on the approach of battle. It is subject to be defeated at the wish of the donor or by his recovery from the peril of death or by the prior death of the donee. Such a gift need not be a death-bed gift for the soldier may be in the best of health or the last illness may be of long duration but the emphasis placed on the fact that the donor need not be in extremis would indicate the death-bed gift as the typical case. The fact that these gifts do not become absolute until the death of the donor distinguishes them from the ordinary gift inter vivos and enables them to serve much the same function as a legacy or will. As already pointed out, the distinction between them and the legacy is highly technical and especially in England has sometimes been in name only except that to have called them legacies would have invalidated them or made their operation very different.

The gift mortis causa had its origin in the Roman or civil law where it had a wide range. There was much discussion among the Roman jurists as to whether it had more of the characteristics of a gift or of a legacy. Justinian decreed that it was predominately a legacy and should be attested by five witnesses. Two of the early English writers borrowed it from the civil law but there was little occasion to make use of it prior to the Statute of Frauds as oral wills of personal property were universal and easily proved. The Statute of Frauds made such drastic requirements for oral or nuncupative wills, as they were called, that they became relatively of little importance but there was a human appeal to death-bed gifts that could not be resisted and in the eighteenth century the Chancery judges definitely recognized the gift mortis causa as part of the English law. Their place in English and American law has never been questioned since though sometimes regretted.

The difficulties that the Roman jurists had with gifts mortis

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*Hunter, Roman Law (3 ed.) 916.
*Id.
*Bracton and Swinburne.
*29 Car. II c. 3 (1677).
*The first English case recognizing the gift mortis causa seems to have been Jones v. Selby, Prec. in Chan. 300 (1710). See Thornton on Gifts, 13.
causa were known to the Chancery judges who adopted them into the English law and the great English Chancellor, Hardwicke, definitely rejected two of the types of such gifts in the civil law but put the stamp of his approval on a third, in which there was a delivery and an immediate passing of property to the donee.\textsuperscript{11} Lord Hardwicke, however, stressed the delivery rather than the immediate passing of title and in the subsequent English authorities less stress is laid on the fact of the gift mortis causa being an immediate though defeasible gift than in the United States.\textsuperscript{12} Accordingly the gift mortis causa has had much more the character of an irregular legacy in England than in the United States.\textsuperscript{13} In England it has been something apart by itself while in the United States it has had a profound influence on the transfer of securities by gift inter vivos.\textsuperscript{14} However the real position of the English law would appear to be not that in the gift mortis causa no title passes to the donee until the donor’s death but that the title passing at the time of the gift need be equitable only.\textsuperscript{15}

The same human element that allowed the gift mortis causa in the first place has given it a wide application. The doctrine has been applied to bonds and certificates of stock, to commercial paper and insurance policies, to savings bank books and even to mortgages, although in each case the real interest transferred is a chose in action in itself incapable of delivery. And the property transferred by gift mortis causa may be of great value. Thus in a celebrated English case\textsuperscript{16} the gift was of two mortgages, one of which was for a sum between two and three thousand pounds and the other for thirty thousand pounds.

The old question that bothered the Roman lawyers as to whether the gift mortis causa has more of the characteristics of a legacy or a gift is still a troublesome one. It has the function of a legacy and even though a present but defeasible gift be insisted on, the fact that the line between such a gift and one not to take effect at all until the death of the donor is a rather shadowy one is shown by the difficulty there has been in deter-

\textsuperscript{11} \textit{Ward v. Turner}, 1 Dick 170 (1752.)
\textsuperscript{12} See 15 Halsbury, Laws of England, 431.
\textsuperscript{13} Id. 435.
\textsuperscript{14} See Rundell, Gifts of Choses in Action, 27 Yale Law Journ. 643.
\textsuperscript{15} I Jarman on Wills, (7 ed.) 49-51.
\textsuperscript{16} Duffield v. Elwes, 1 Bligh, N. S. 497 (1827).
mining which is the doctrine of the English law. If regarded as an anomalous legacy the tendency is to keep it pretty narrowly within the limits laid down by Lord Hardwicke and to insist on the physical handing over of the property or something that represents it and that at the time of the gift. If regarded merely as another kind of gift the tendency is to allow the transfer by any means whereby a gift *inter vivos* is effected and this may be by deed or other instrument of gift without delivery or by mere words if the donee is already in possession. Lord Bowen thought that to allow the gift *mortis causa* without change of possession would be to drive a coach and four through the Statute of Wills.\(^1\) We cannot help but feel that Lord Bowen was right and that especially in the United States where any written instrument is likely to have the same effect as a deed of gift, to allow the gift *mortis causa* by instrument of gift would be to leave very little application of the Wills statutes to gifts of chattels during a last illness. It would give gifts *mortis causa* a great extension. In England, a gift *mortis causa* by mere words to one already in possession is allowed\(^2\) while in the United States the authorities are pretty evenly divided.\(^3\)

If it is hard to sustain gifts *mortis causa* as anything but testamentary when the chattel is delivered directly to the donee, it is even more so where the chattel is handed to a third party to be delivered to the donee at the donor’s death or “if I (the donor) die.” If either of these cases can be construed as a present gift to the donee or as a present gift to the third party in trust for the donee, though subject to revocation by the donor, then the case is like that of the direct delivery to the donee but to find any such present title either in the donee or in the third party is to reduce title almost to the vanishing point and shows how really testamentary these gifts *mortis causa* are. Here the courts make a distinction. If the chattel is to be delivered “at the death” of the donor or words to that effect, the weight of authority is that a present gift is intended.\(^4\) If the chattel is to be delivered “if I die” or words to that effect some courts give these words their natural meaning, construe them to create

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\(^1\) *In re Hughes*, 36 Wkly. Rep. 821 (1888).
\(^2\) *Cain v. Moon*, 2 Q. B. 283 (1896).
\(^3\) See Mechem, *Delivery in Gifts of Chattels*, 21 Ill. Law Rev. 368-371.
\(^4\) Id. 600.
a condition precedent to the vesting of title and hold the gift invalid as testamentary.\textsuperscript{21} About an equal number, however, consider them to mean nothing more than the ordinary conditions implied in every gift \textit{mortis causa}, construe them to create a condition subsequent and uphold the gift as a valid gift \textit{mortis causa}.\textsuperscript{22}

\textbf{Revocable Trusts}

In contrast with the formal gift \textit{mortis causa} is the lawyerly revocable trust under which the donee is to enjoy no beneficial interest in the property until the donor’s death. Unlike the gift \textit{mortis causa} it is applicable to real as to personal property and need not be executed during the donor’s last illness. Like the gift \textit{mortis causa}, however, its technical differentiation from the will proper is due to the transfer of title in this case to the trustee, during the lifetime of the donor. A transfer defeasible at the will of the donor is distinguished from a transfer that is entirely ineffective until the donor’s death. However, such trusts are commonly deliberate attempts to avoid probate, they have not the human appeal of the gift \textit{mortis causa} and have frequently been declared of no effect as unattested wills.\textsuperscript{23} But the tendency as a whole is to regard them as valid.\textsuperscript{24}

\textbf{Revocable Delivery to Third Party for the Donee.}

Probably the most common attempt to avoid probate is by means of a deed which is left with instructions that it shall be recorded on the grantor’s death or is handed to a third party for that purpose. Unless in some way a delivery can be made out in the lifetime of the grantor the deed is of no effect although where there is no contest, the transaction may stand and be healed by the lapse of time. If delivery is made to a third party to have the deed recorded or to deliver it to the donee and the grantor puts it out of his power to recall the deed, such delivery is considered a delivery in the lifetime of the grantor and the

\textsuperscript{21} Id. 398.
\textsuperscript{22} Id. 599.
\textsuperscript{23} See McEvoy v. Boston Five Cents Savings Bank, 201 Mass. 50 (1909), Scott, Cases on Trusts, 211 and note Id. 215.
\textsuperscript{24} See Kelly v. Parker, 181 Ill. 49 (1899), Warren Cases on Wills and Administration, 101 and note Id. 105.
transaction stands. In such a case the property is effectively bound in the lifetime of the grantor and although the enjoyment by the grantee is postponed until the grantor’s death there is no power of revocation in the grantor to make the transaction testamentary. But where the deed is handed to the third party but subject to recall at the will of the grantor, neither the property nor the grantor is bound in his lifetime and the delivery to the third party cannot properly be considered a delivery to the grantee. Such is the almost universal rule. The considerable authority in favor of deliveries to third parties in the case of gifts mortis causa notwithstanding the revocable character of the gift is evidence of the real character of gifts mortis causa as essentially testamentary.

Where a deed is delivered to a third party with an irrevocable power to deliver it to the grantee on the grantor’s death, therefore, there is no difficulty in making out a valid delivery and a transaction binding on the grantor in his lifetime. The difficult matter has been to accommodate the transaction to the general law of real property. It cannot be considered as a present transfer of the entire fee for the grantor retains the property until his death. On the other hand at common law a grantor could not reserve a life estate to himself nor could he grant the freehold in futuro. Now quite commonly by statute or otherwise a freehold may be granted in futuro and if so there is no reason why the fee should not shift to the grantee on the grantor’s death. As the transaction is binding from the delivery to the third party, it is non-testamentary in essence as well as in form. Whether from the fear that the shifting of the property at death might make the transaction look too much like a will or because of the old common law rule against transfers of the freehold in futuro, many courts have preferred to treat the transaction as effecting a present transfer of the fee to the grantee with an implied life estate in the grantor although under the older law there was just as much objection to the reservation of a life estate as to the transfer in futuro. This preference for the implied life estate would therefore seem to

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25 See Wheelright v. Wheelright, 2 Mass. 447 (1807), Warren, Cases on Conveyances 632 and Id. 637 n.
26 See Cook v. Brown, 34 N. H. 460 (1857), Warren, Cases on Conveyances 641 and Id. 646 n. See also 2 Tiffany, Real Property (2 ed.)
27 See infra.
28 See 2 Tiffany Real Prop. (2 ed.) 1784.
be due to the fear that the shifting at death would, notwithstanding the irrevocability of the transaction, make it testamentary. This fear, as has been shown, is ungrounded.

A more difficult case involving an irrevocable delivery to a third party is where the deed is to be delivered to the grantee on the performance of some condition by the grantee. Here there is a real contingency precedent to the transfer of the property, that is, the performance of the condition, whereas in the former case the death of the grantor was bound to happen and only its date was uncertain. Suppose the condition is not performed in the grantor’s lifetime. The condition is a condition precedent and it is pure fiction to say that when the condition is performed the transfer relates back to the time of the delivery. Nevertheless the transaction would not seem to be testamentary. The mere fact of a post-mortem transfer is not sufficient to make it such. There is a transaction that is binding on the grantor in his lifetime although only conditionally so and this is sufficient to take the transaction out of the testamentary class. Nor would it seem to change the nature of the transaction if the condition be one that never can be performed in the grantor’s lifetime but by its very terms is to be performed after the grantor’s death.\(^2\) Such a transaction is not ambulatory and is therefore essentially and not merely technically different from a will.

**Contracts to Devise or Bequeath.**

The first impression of a contract to devise or bequeath is likely to be one of repugnancy. A man is bound by his contracts. He is not bound by his will. There is a seeming incompatibility in a man being bound to do something that when done will not be binding on him. A court of equity will not compel a man to do a vain thing and it would be a vain thing to compel a man to execute a will which he could instantly revoke. If a contract not to revoke is valid, does not that present the anomaly of an irrevocable will even though technically the court may refuse probate because of a revocation made despite the contract?

There would be much strength to these objections if the mere fact of a post-mortem disposition of property was sufficient

\(^2\) See *Nolan v. Otney*, 75 Kan. 311 (1907), Warren, *Cases on Conveyances*, 637 and Id. 641 n.
to make a transaction testamentary. However, as we have seen, even the freehold may now be granted *in futuro* by deed and if *in futuro* there is no reason why the title to the property may not be made to shift at the grantor's death. If H contracts to devise Blackacre to B that is as much as to say that he will execute the instrument that will give Blackacre to B at his death. It differs from the conveyance to take effect on death in that the latter is automatic while in the case of the contract something further is necessary, either the making of a will or the inter-position of a court of equity to compel the one who succeeds to H's title to make the transfer. The contract to devise is therefore no more objectionable than the conveyance to take effect at the death of the grantor. Neither is revokable and neither, therefore, is testamentary. Even less objectionable is the contract to bequeath which because of the personal character of the property is not subject to specific performances and would not bind any particular property but a breach of which would subject the promisor's estate to damages. There is no reason why a man should not bind his estate to pay money even though he himself can never be sued on the contract. A bare promise to pay after death is testamentary because not binding on the promisor but a contract is as binding as a conveyance and neither is testamentary. If a contract to pay money after death should be forbidden one's ability to make the most of his property in his old age would be much limited.

Courts naturally look on claims of contracts to devise or bequeath with much suspicion for entirely aside from the danger of fraud or perjury there is great danger that those who have been disappointed in what were perhaps their just expectations from the deceased will attempt to convert into contracts what were perhaps mere hopes and at best mere promises. But if the requirements for contracts are fully met including the requirements of the Statute of Frauds, there would seem to be no reason to discriminate against them merely because they remove from the testator's power property which would otherwise be subject to his free disposition.

30 At one time the law seems to have been otherwise. See Ames, Lectures on Legal History 195.
31 See *Cover v. Stem*, 67 Md. 449 (1887). Mechem and Atkinson, Cases on Wills and Administration, 133 and Id. 135 n.
32 *Gardner on Wills*, (2 ed.) 66.
TESTAMENTARY DISPOSITIONS

JOINT AND MUTUAL WILLS

Joint and mutual wills may be made by others than husbands and wives but theirs is the common case. Especially where there are no children it is a common thing for husbands and wives to make wills in favor of the survivor. Such wills are commonly called mutual or reciprocal wills. Usually they are the result of an understanding between the two and if this understanding amounts to a contract, relief may be had on this contract if in violation of it the other revokes his or her will. There is no difference in this respect between these contracts and other contracts to devise or bequeath. Sometimes it is said that such wills are revocable only on notice to the other but such notice would seem to have no bearing on the revocability of the will but merely on the breach of contract.

A more difficult case is where a joint devise or bequest is made to third parties, say, to the children. If a life interest is first given to the survivor and then the property is to go to the children there is no intended suspension of the operation of the will of the one dying first. The intention is that it shall be probated without waiting for the death of the other although of course the joint gift can not take effect in possession until that time. In these cases of joint gifts a contract is very easily found and since the death of the one precludes any notice, the revocation of the will by the survivor is almost certain to be a breach of contract on his part. Loosely it is sometimes said that on the death of the one the will becomes irrevocable. More properly it would seem the contract then becomes absolute. Joint and mutual wills of this kind are valid although they in effect divest the survivor of his testamentary power perhaps for a considerable period of his life.

Where the will is of property held jointly by the two testators and the only provision is the gift over after the death of the survivor there is difficulty in giving effect to the will as such unless it can be treated after the manner of the will in the preceding paragraph. A will subject only to joint revocation or

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33 For a criticism of joint and mutual wills see Partridge, The Revocability of Mutual or Reciprocal Wills. 77 University of Pennsylvania Law Rev. 357.
34 See 1 Page on Wills (2 ed.) 153-4.
35 See Gardner on Wills (2 ed.) 77 n. 7.
36 See 1 Page on Wills (2 ed.) 153.
to joint probate would be an anomaly in the law. If a joint will cannot be treated as the individual will of each testator subject to revocation by him as to his share and subject to probate on his death it does not lie properly within the testamentary field but should be relegated if anywhere to the domain of contracts or trusts. The fear that the joint will could not be treated as the individual will of each testator was probably what influenced the early English judges to deny the joint will any place in the testamentary law.

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1 Page on Wills (2 ed.) 151, Gardner on Wills (2 ed.) 76.
2 Page on Wills (2 ed.) 147.