SOME PROBLEMS OF MORTUARY DISPOSITIONS

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It is proposed to discuss some old and well-known problems, but from a particular point of view. The problems concern two basic situations: one in which A announces his intention to make a gift to B, but a gift that is not to take effect before A dies; another situation where A purports to make a gift to B, yet the gift happens to remain incomplete because of A's intervening death. Despite their differences, the two situations are much alike; their similarity is that, as *post mortem* dispositions, they both lack recognized testamentary form.[1] Even if, in the first situation, A had stated his donative intention as firmly as he might, without the formal requisites of writing, signature and attestation, his intention would have no legal effect.[2] Nor does it matter that, in the second case, A's completion of the gift was prematurely interrupted by an Act of God, for the Wills Act makes no allowance for this.[3] In brief, the ostensive impediment to legal enforcement is in either case the same.

Yet this impediment has had a far wider effect: it considerably sharpened the distinction between *inter vivos* and *post mortem* gifts. An admirable illustration is the famous case of *Irons v. Smallpiece*[4] in 1819. The plaintiff, the donor's son, claimed two colts from the defendant, the executrix and residuary legatee. Twelve months before his death, the father had verbally given the colts to the son, though they remained in his possession until he died. Six months before his

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[1] The statutory requirements are, in England, laid down by the Wills Act, 1837, s. 9. The same or similar requirements obtain in the United States: Bordwell, 'The Statute Law of Wills' (1928) 14 *Iowa Law Review*, 1.

[2] For a functional justification of these requirements, see Gulliver and Tilson, 'Classification of Gratuitous Transfers' (1941) 51 *Yale Law Journal*, 1, 5 ff.

[3] The situation was slightly different before 1838, when in England the position briefly was that personal estate (including copyholds), but not real property, could pass by a nuncupative or verbal will under the Statute of Frauds. But, as Blackstone said, 'the legislature provided against any frauds in setting up nuncupative wills, by so numerous a train of requisites, that the thing itself fell into disuse; and is hardly ever heard of, but in the only instance where favour ought to be shown to it, when the testator was surprised by sudden and violent sickness.' *Bl. Comm.*, ii, 501. Even this small concession was swept away by the Wills Act, 1837. The reason, as given in the *Fourth Report, Real Property Commissioners* (England, 1833), 16, was that such unfinished wills were attended with more mischief than benefit, since it was impossible to ascertain the complete intentions of a testator unless he had given full and formal expression to them. In the U.S., many States however still permit nuncupative wills in a last illness, although subject to such formalities as writing or the presence of witnesses. Bordwell, *loc. cit.* (*supra* n. 1), 26; Gulliver and Tilson, *loc. cit.* (*supra* n. 2), 14-15. Apart from these limited exceptions (and soldiers' and sailors' wills) it remains true that no Anglo-American Wills Acts now validates an informal or 'unfinished' bequest.

[4] (1819) 2 B. & Ald. 551.

death, father and son discussed the upkeep of the colts, when the father agreed to furnish the hay, provided the son paid a stipulated price. The son was non-suited on these facts. Although their 'testamentary flavour'[5] was noticed by the court, it was insisted that there had to be either an 'instrument of gift' such as a will, or an actual delivery to the donee.[6] From that day on, the frame-work of the law of gifts has remained as stated in that case:[7] a donor has either to transmute the property to the donee or to observe the testamentary rules. This distinction looks simple enough, but some little discussion will show what, and how great, its difficulties are.

To begin with, the requirement of an actual delivery would have made better sense, if the father had still been alive and had himself refused to complete the gift. The argument could then have been that a donor is not bound to complete a gratuitous promise to a donee.[8] Further, even if the father had made the gift in proper testamentary form, the gift would still have been revocable, since a will is ambulatory until the testator's death.[9] In this sense, therefore, an *inter vivos* gift is 'incomplete' not only because it lacks a physical delivery to the donee, but also because the lacking delivery leaves the donative intention revocable or indeed revoked. But suppose a second case where the donor suddenly dies without any intention to revoke. Surely the reason for requiring a delivery no longer holds, however much it may apply for the protection of a living donor. That the two situations are not the same is, in fact, recognized in the validity attached to testamentary gifts, since these are valid independently of whether they are gratuitous or not. However, the distinction between these situations was submerged by the sweeping nature of the testamentary

[5] *Cf.* Pound, 'Juristic Science and Law' (1918) 31 *Harvard Law Review*, 1047, 1055.

[6] '[By] the law of England, in order to transfer property by gift there must either be a deed or instrument of gift, or there must be an actual delivery of the thing to the donee.' (1819) 2 B. & Ald. 551, 552, *per* Abbott C.J. The words 'or instrument of gift' have caused some doubt what other instrument, besides a deed, could have been meant: see Mechem, 'Delivery in Gifts of Chattels' (1927) 21 *Illinois Law Review*, 568, 579. The explanation surely is that the reference is here to wills, including both proper and nuncupative wills still possible at that time. It seems most unlikely that the reference could have been to such instruments as bills of lading *etc.*, which, if not unknown, were then not within the usual view of a court; nor, indeed, were such commercial papers transfers by gift.

[7] It is worth mentioning that as in this case the action was in trover against the executor, there had previously been some authority for thinking that 'if A give a thing to B, which is at York and a stranger take it, B may maintain trespass for it'. Brooke, *Abridgment, Trespass*, 303; but see *Spratley v. Wilson* (1815) Holt N.P. 10.

[8] This argument would today not be free from doubt. For example, if the son has 'relied' on the gift, promissory estoppel might possibly apply: *Restatement, Contracts*, § 90. This and similar variations, however, may be present purposes be disregarded. On the whole problem, see generally Stoljar, 'A Rationale of Gifts and Favours' (1956) 19 *Modern Law Review*, 237.

[9] '*Nam omne testamentum morte consummatum est: et voluntas testatoris est ambulatoria usque ad mortem*': *Co. Litt.* 112; *Bl. Comm.*, ii, 502. Thus Lord Mansfield's remark that the making of a will gives the devisee no more than 'mere possibilities'. *Windham v. Chetwynd* (1757) 1 Burr. 414, 422 and *cf.* Note in (1940) 53 *Harvard Law Review*, 858.

rules. For, as we have seen, whether the donor intended to make a strictly *post mortem* gift, or whether his purported donation could, if at all, only become effective after his death, the statutory requirements applied in either case. And this, again, had several peculiar and subtle results. It pushed the law into saying that, apart from a disposition by will, delivery was necessary for the completion of a gift. Moreover, the necessity for delivery was, as it were, implicit in the testamentary rules; the implication was that, as far as a dead donor was concerned, a donee could *either* claim his property by virtue of a will *or* keep the gift already delivered to him. This, too, explains why, and how, the cases specifically establishing a delivery-requirement for *inter vivos* gifts were curiously not directly concerned with claims from a living donor, but (paradoxically) were concerned with situations where the donor was already dead.[10] The practical outcome of this was an extremely narrow conception of complete, as distinct from incomplete, gifts; in fact, so narrow that certain palliative doctrines soon emerged.

There is another preliminary point. Consider again A's announcement (in any form) as a statement of his intention to benefit B after his death. We do not usually call this announcement a 'promise'; we call it by some other names such as 'trust', or 'will' or 'gift', names which at once suggest a specific and specialized category of property law. But what explains this absence of promissory language? Since A states a dispositional intention, without intending or being able to execute the subsequent transfer, is not his statement essentially promissory, especially when (as in our previous examples) A addresses himself directly to B? There are several answers. Unlike a promise *inter vivos,* the mortuary situation excludes any dispute between promisor and promisee. Once the promisor is dead, and his promise has remained unrevoked, no question of breach of promise can arise. This feature certainly strengthens the belief that promise-language is here out of place; indeed, an impression not worth disputing were this the only point involved.[11] But suppose another situation in which A, having announced to B his mortuary gift, then repudiates it while alive. Here it would be relevant to ask what sort of original announcement A had made; was it, in particular, a vague, uncertain or tentative statement, or was it of a firmer and more definite kind? Obviously, only definite statements could be seriously considered and loose intimations would have to be dismissed.[12] Any inquiry concerning A's donative intention thus presupposes a promissory statement by the

[10] *Cf.* Mechem, *op. cit.* (*supra* n. 6), 350 n.; Gulliver and Tilson, *op. cit.* (*supra* n. 2), 4.

[11] For this point see also Stoljar, 'Offer, Promise and Agreement' (1955) 50 *Northwestern University Law Review,* 445, 449, n. 17.

[12] An example is *Bayley v. Boulcott* (1828) 4 Russ. 345; and see also *Kelly v. Walsh* (1878) 1 L.R. Ir. 275; *Re Smith* (1890) 64 L.T. 13.

donor, at least to this extent that the statement must be, for example, 'I shall give', not merely 'I may give'. With a statement such as the latter we could do nothing at all.[13] But even granting that A's statement is a promise, or at least akin to one, does anything of legal significance turn on this? If true that on a purely 'practical' level nothing consequential is involved, it is also true that on a theoretical level, the identification of a donative statement with a promise can be of considerable help. It may help to separate the facts from the rules, by bringing into focus the factual character of a situation, apart from its technical categorization of 'trust' or 'gift'. It will help us to see what happens when A's mortuary promise re-appears under other names.

Of such other names the most significant is the declaration of trust, since it touches upon the very central difficulties in this area of the law. It is common knowledge, and the books agree, that a trust can be created in two ways.[14] A donor can either fully constitute the trust by transferring the property to a trustee; or he can create a trust by declaring himself a trustee, for by 'the declaration of trust . . . the legal title, possession and control of the trust estate [passes] irrevocably from the grantor as an individual to himself as trustee.'[15] Although this metamorphic process may be 'the simplest method by which one can give to another an interest in property',[16] it is by no means simple in relation to our classical theory of gifts. For, as we shall see, the declaration of trust drives a wedge into the noticed distinction between *inter vivos* and *post mortem* gifts, since it represents a type

[13] This can also be shown in another, and more indirect, way. Even executed gifts pre-suppose that the donor fully consented to give. So where a donee obtains by gift a benefit from the donor, the donee must prove not only that the donor completed or delivered the gift, but that it was a willing, deliberate and well-understood act of the donor, and that the latter fully appreciated its effect and nature. See this clearly brought out in two Canadian cases: *Kinsella v. Pask* (1913) 28 O.L.R. 393, 12 D.L.R. 522; and *Doyle v. Doyle* (1920) 46 N.B.R. 45. Thus what is true of completed gifts, must be true of incomplete ones, for the latter, though incomplete as regards execution, cannot also be incomplete as regards their donative intention. Moreover, since in *post mortem* gifts final execution is always a matter for the future, the word 'promise' perhaps best describes the inevitable hiatus between a present donative intention and its postponed fulfilment or completion. Needless to say, this type of promise differs from a contractual promise, simply because it does not (usually) require a promisee's return-performance: the promise presently considered, in short, firmly announces a gift; it does not initiate a bargain.

[14] Keeton, *Law of Trusts* (6th ed., 1954), 78; Snell, *Principles of Equity* (24th ed., 1954) 109; *Lewin on Trusts* (15th ed., 1950) 51; *White and Tudor's Leading Cases in Equity* (9th ed., 1928), ii, 802; *Scott on Trusts* (1939), i, §§ 17, 28 ff; Scott, *Cases on Trusts* (4th ed., 1951) 98; *Restatement, Trusts*, §§ 17, 18. Despite its general recognition, the trust-declaration can occasionally receive surprisingly cavalier treatment. Thus Gulliver and Tilson, *op. cit. (supra* n. 2), 17, state that because of 'relative scarcity of decisions involving oral declarations of trust . . . they need not be considered of any marked significance in the gift-making habits of human beings.' Although this is, in a sense, strictly true, the statement is somewhat misleading in another respect. For the point of the declaration of trust, as we shall see, is not so much that a person declares a trust, but that certain mortuary gifts are treated as declarations of trust to save them from the (unfulfilled) requirement of completion by delivery or by will.

[15] *Becker v. St. Louis Union Trust Co.* (1935) 296 U.S. 48, 50.

[16] *Scott on Trusts* (1939), i, § 28. But it 'is perhaps not [an] artistic method of creating [a] trust': *ibid.*, § 17. 1.

of disposition that is neither strictly *post mortem,* nor strictly *inter vivos.* To understand the nature of this wedge, let us begin with the more familiar distinction between completely and incompletely constituted trusts.[17] The latter distinction is clear enough, because equity here merely follows and 'translates' the legal rule, namely, that an enforceable gift is one completed by the donor. Thus in a completed trust the settlor has transferred the property either in his life-time or by will, its one peculiarity being that this transfer is made to a trustee, and not directly to the donee. In the incomplete trust, on the other hand, no transfer of property has taken place; all that the donor has done is to manifest his intention to give, for without such manifestation no question of trust or gift could arise at all. But whether we call this manifestation an imperfect gift, or a gratuitous donative promise, or an incompletely constituted trust, the legal effect is the same, an effect generally summarized in the famous phrase that equity refuses to perfect an imperfect gift.[18] Indeed, all this is elementary, were it not for the intrusion of the declaration of trust. The question now is how a declaration of trust compares with an incompletely constituted trust. For in both cases the main element is the manifesttion or declaration of a donative intention, yet in one case there is a trust, and in the other there is not. What, then, is the precise difference between them?

One difference, it is thought, is that in the trust-declaration the donor converts himself into a trustee, so that this change of status dispenses with the completion of the trust.[19] Yet can one say this, without also challenging the basic rule that a trust has to be completely constituted before equity will grant enforcement of the gift? A more significant difference, however, may be that in declaring himself trustee, the settlor assumes his office immediately, while generally in an incomplete trust he only promises to convey property to a trustee in the future. Now it is true that the law has distinguished between the creation of a trust *de praesenti* and the creation of one *de futuro,* or between the immediate assumption of a trust and the promise to create one in the future.[20] But, one possible situation apart,[21] the distinction seems entirely artificial. One example may speak for itself. If A says to B: (i) 'I promise to give you this piano next Monday' or (ii) 'I am a trustee for you of this piano as from today' the two statements mean the same, except of course for the operative dates. But

[17] *Ibid.,* § 32. 2 and *passim.*

[18] For an excellent illustration, see *Farmers' Loan & Trust Co. v. Winthrop* (1924) 238 N.Y. 477, 144 N.E. 686. But see Sheridan, 'Informal Gifts of Choses in Action' (1955) 33 *Canadian Bar Review,* 284, 290.

[19] *Supra,* n. 15.

[20] *Cf. Nathan's Equity Through The Cases* (3rd ed., 1955) 81; *Scott, op. cit.,* i, §§ 26 ff.

[21] The exceptional situation is the trust of after-acquired property where at the time of stating his donative intention, the donor has nothing to give. See *Scott, op. cit.,* i, § 26. 3.

even this difference alters little; for what both statements actually *tell* B is that he can come as soon as possible (in (i)) or only on the following Monday (in (ii)) to collect the piano from A. In other words, without an immediate delivery of the piano, there will be an inevitable gap between the time of announcing the gift and the time of its collection by the donee. Nor would it presently help to say that whereas in statement (i) the gratuitous promise is and remains revocable, statement (ii) is irrevocable because the trustee is kept to his trust obligation from the moment he declares his trust. For this argument would miss the point. All that it would do is to restate two legal rules, and precisely those rules on which the issue is now joined. Both in the trust-declaration and the incomplete trust we are faced with the same fact of a donor intending, stating or promising to give something to someone in the more or less near future, and the unanswered question is why this fact or act should give rise to differing legal consequences.

Of this a further aspect needs to be considered. According to an orthodox line of thought, a donor must, in declaring a trust, use formal language; so he must say 'I hereby declare myself trustee' or use similarly explicit words of trust.[22] How does this verbal innovation matter? In particular, is it true that formal, as distinct from informal, words convey an 'irrevocable intention' or a 'present irrevocable declaration of trust';[23] or rather, is it true that words like 'I declare myself trustee' do, but words like 'I shall give' do not, imply a donor's irrevocable intention to be presently bound? This inference is as mysterious as the phrase 'irrevocable intention' is strange. Surely one can always change one's intention – do we not know what the road to hell is paved with? But if one *can* change one's intention, one *may* not always do it. This 'may' (or 'may not'), however, does not depend upon the speaker, but depends upon a legal tribunal. In other words, the phrase 'irrevocable intention' confuses two layers of thought, the factual and the normative: the phrase, as it were, jumps to a legal conclusion. As a description of fact, the so-called 'irrevocable intention' is more or less sincere, rash, firm and so on than any other intention without 'irrevocable' pretentions.

Since the addition of formal language has no analytical substance, when and why did the courts discover it? The earlier history of trust-declarations furnish a most illuminating answer, which we must therefore trace though only in bold and brief outline. The well-known

[22] *Cf. Milroy v. Lord* (1862) 4 De G. F. & J. 264; *Grant v. Grant* (1865) 34 Beav. 623; *Jones v. Lock* (1865) L.R. 1 Ch. App. 25; *Young v. Young* (1880) 80 N.Y. 422, 36 Am. Rep. 634; and *cf.* cases cited *Scott, op. cit.*, i, § 31. But see Marshall, *The Assignment of Choses in Action* (1950), 85 and *passim*.

[23] *Cf. Re Cozens* [1913] 2 Ch. 478, 486; and see *Re Caplen's Estate* (1876) 45 L.J. Ch. 280, *per* Jessel M.R.

starting-point is *Ex parte Pye*.[24] A donor bought an annuity which, though bought in his own name, was intended to support his former mistress, who had gone to France. That this was his intention was clear from the power of attorney by which he authorized his son-in-law to complete and execute the transfer; but the power lapsed with the donor's death, thus ending the possibility of a valid execution of the transfer. The question was whether this gift, although incomplete, was still effective, and if effective, upon what theory it could be supported. Lord Eldon's explanation was that, 'It has been decided that upon [a voluntary] agreement to transfer stock, this court will not interpose:[25] but if the party had declared himself to be the trustee of that stock, it becomes the property of the *cestui que trust* without more.'[26] Here, as the Lord Chancellor added, the donor had by his power of attorney 'committed to writing what seems to me like a sufficient declaration, that he held this part of the estate in trust for the annuitant.'[27] Similarly, in *Kekewich v. Manning*,[28] a person who had an equitable reversionary interest in some shares, by deed assigned that interest to trustees for the benefit of a niece. On the assumption that this gift was incomplete, the court held that it amounted to a declaration of trust. 'Nor do we know', said Knight Bruce L.J.,[29] 'that an instrument may not be effectual as a declaration of trust, or tantamount to a declaration of trust, though it contain not the word "confidence", the word "trust", or the word "trustee". And this we should have said, even if Lord Eldon had not in *Ex parte Pye* expressed himself and acted as he did with respect to the French annuity there in question'. Again, in *Morgan v. Malleson*[30] a grateful patient signed a memorandum purporting to 'give and make over' a bond to his doctor. He handed the memorandum to the physician, but did not deliver the bond to him. After the patient's death, the doctor claimed the bond; and it was decided that the memorandum amounted to a declaration of trust. As was said by Lord Romilly M.R., 'If . . . [the donor] had said, "I undertake to hold the bond for you", or if he had said, "I hereby give and make over the bond in the hands of A", that would have been a declaration of trust, though there had been no delivery. This amounts to the same thing; and . . . [the doctor] is entitled to the bond, and to all interest accrued thereon'.[31] Nevertheless, these cases are matched by a parallel development where on similar facts the courts arrived at the opposite con-

[24] (1811) 18 Ves. 140; *White and Tudor's Leading Cases in Equity* (9th ed., 1928), ii, 802. [25] *Ellison v. Ellison* (1802) 6 Ves. 656. [26] (1811) 18 Ves. 140, 149-150.
[27] *Ibid.*, 150. [28] (1851) 1 De G. M. & G. 176.
[29] *Ibid.*, 194. The facts in this case could amount to a perfect or completed gift, and such is sometimes the interpretation given to it; see *Bridge v. Bridge* (1852) 16 Beav. 315, 324. Knight Bruce L.J., however, was clearly following the doctrine of *Ex parte Pye*. [30] (1870) L.R. 10 Eq. 475.
[31] *Ibid.*, 476. See also *Richardson v. Richardson* (1867) L.R. 3 Eq. 686.

clusion. From *Antrobus v. Smith*[32] to *Richards v. Delbridge*[33] the courts refused, with ever growing conviction, to perfect incomplete gifts or assignments, however clear a donor's intention and however easy it might have been to construe his donative manifestation as a declaration of trust. Even the three decisions previously mentioned came under severe criticism;[34] yet, strangely enough, it was never doubted that a trust could be created by a donor's declaration. Indeed, the law reached a state of astonishing indecision: while distinctly recognizing the declaration as a mode of trust-creation, it increasingly refused to apply that method in concrete examples. The climax was *Milroy v. Lord*.[35] The donor had executed a voluntary deed which purported to assign certain shares to a trustee for the benefit of the plaintiff. The shares were not transferable except by registration in the company's books, but the trustee held a general power of attorney authorizing him to transfer the shares. For three years after the execution of the deed until the donor's death, the dividends on the shares were remitted to the beneficiary, usually by the trustee but sometimes by the donor personally. Although the gift was incomplete without registration, could it not be construed as a declaration of trust? In the light of *Ex parte Pye*[36] nothing could have been simpler. It is true that the donor had not registered the transfer of the shares, but this was either a purely technical omission or was precisely what the donor wanted, that is, he intended to donate an equitable interest in the shares rather than their full legal title. Furthermore, the donor specially executed a deed to manifest his donative intention: his promise to give was therefore one which, if gratuitous, was also under seal. In spite of this, the gift was regarded as invalid. Nor were the reasons for this, given by Lord Justice Turner,[37] unrespectable. He obviously realized that if incomplete gifts were hopelessly void, there being no equity to complete them, the same fate would have to be shared by declarations of trust which looked like 'intended transfers' rather than 'perfect trusts'.[38] However, declarations of trust had by

[32] (1805) 12 Ves. 39. See also *Edwards v. Jones* (1835) 7 Sim. 325.

[33] (1874) L.R. 18 Eq. 11.

[34] Thus *Ex parte Pye* (*supra* n. 24) was criticized in *Forrest v. Forrest* (1865) 34 L.J. Ch. 428, 432 : 'In some cases this Court has gone extremely far, and particularly in that of *Ex parte Pye*, . . . where Lord Eldon went extraordinarily far, certainly, to hold a gift valid which was very imperfect. But Lord Eldon found his way, with that extraordinary power which he possessed, to satisfy his mind that a power of attorney by the donor . . . could be construed to amount to a declaration of trust.' See further *Meek v. Kettlewell* (1842) 1 Hare 464. Again, *Morgan v. Malleson* (*supra* n. 30) was sharply disapproved of in *Richards v. Delbridge* (*supra* n. 33). Perhaps the most outspoken dislike of declarations of trust was voiced by Lord Cranworth L.C.: see *Scales v. Maude* (1855) 6 De G. M. & G. 43, 51; *Jones v. Lock* (1865) L.R. 1 Ch. App. 25, 28. See generally, *Scott on Trusts*, i, § 28. 1.

[35] (1862) 4 De G. F. & J. 264. For an attempt to qualify this decision, see *Re Rose* [1952] Ch. 499; *Re Rose* [1949] Ch. 78. All this is fully discussed by Sheridan, *op. cit.*, (*supra* n. 18), 302 and *passim*.

[36] *Supra* n. 24. [37] (1862) 4 De G. F. & J. 264, 274-275. [38] *Ibid.*

now long been recognized; hence the need to harmonize them with the rule concerning incomplete gifts. One way, perhaps the only way, of doing this was to single out one type of trust-declaration to which legal validity could be ascribed, and that type was the trust expressly and formally declared by the donor. Indeed, this also seemed to be the easiest solution, as one could put the (formally declared) 'trust' into a legal category different from the (incomplete) 'gift'. Yet it can at once be seen that this categorization was (as the scholastics would have said) nominal and not real. For, as previously explained, statements such as 'I declare a trust' and 'I shall give' have on a factual level practical identity of meaning, since either statement only tells the donee when he can collect the gift. The historical lesson is therefore clear. The requirement of formal language in declaring trusts is but the product of the judicial ambivalence to incomplete gifts; more precisely, the requirement emerged from a superficial and purely nominal compromise between two opposing lines of decisions, one line beginning with *Ex parte Pye,* which upheld this type of incomplete gift, and another line which defeated such gifts on orthodox grounds, that is, because of the absence of complete delivery or a valid testamentary paper.

Concerning these older English authorities, represented by *Milroy v. Lord,* some qualifying remarks are germane. They dealt with gifts and assignments of *choses in action,* a subject then, and now, particularly confused.[39] While it seemed to be agreed that the voluntary assignment of a *chose in action* was possible by way of trust, it could not be inferred or implied from the circumstances; the trust had to be mentioned as such.[40] In part, this was due to a very practical reason, namely, that a donor's (or assignor's) words also happen to be uncertain, unless more specific donative words were used.[41] But, in the main, the new emphasis on formal language derived from the artificial belief that it was one thing to make a gratuitous promise and another thing to declare a trust. It was this nominal categorization of (future) 'promise' and (present) 'trust'—a categorization exactly similar to the one of 'trust' and 'gift'—which helped to by-pass the basic rule that equity would not complete incomplete gifts. All these difficulties appear to have been less severely felt where the gift was not of a *chose in action,* but of an ordinary chattel. The evidence for this is *Grant v. Grant.*[42] A widow claimed from her deceased husband's executor some pictures, a piano and other things as gifts. It transpired that the husband had 'given' these things to his wife, using entirely informal words, although his donative intention was proved. Despite

[39] See generally Marshall, *op. cit.,* (*supra* n. 22), *passim;* Sheridan, *op. cit.* (*supra* n. 18), *passim.*

[40] Marshall, *op. cit.,* 89 ff.

[41] *Cotteen v. Missing* (1815) 1 Mad. 176; *Bayley v. Boulcott* (1828) 4 Russ. 345; *Dillon v. Coppin* (1839) 4 My. & Cr. 647.

[42] (1865) 34 Beav. 623.

the lack of delivery or proper bequest, the widow succeeded in her claim. It was held that the gift 'came under that class of cases in which . . . though there is not an absolute delivery a declaration of trust is sufficient'.[43]

We may now turn to a different point. If it is no accident that the doctrine of declaration of trust arose and evolved almost exclusively within the context of intermediary gifts (neither strictly *inter vivos* nor regularly *post mortem*),[44] it also provides a striking similarity with the *donatio mortis causa*.[45] The resemblance may not be immediately apparent. In modern law, an effective *donatio mortis causa* depends on two conditions: (i) that the gift be in contemplation of death;[46] and (ii) that the property, though capable of complete delivery, be constructively delivered to the donee. The first condition may possibly be compared with the usual mortuary effect of a declaration of trust, but the second condition seems to make for contrast rather than comparison. For unlike a trust-declaration where (at any rate, a formal) donative manifestation will be enough, a gift *mortis causa* requires not only a donative intention, but an additional act of transfer. Yet the second condition needs further scrutiny. At one time the law was that *causa mortis* gifts required the actual or complete delivery of a thing; they were exactly like gifts *inter vivos*, except that the donee had to return the thing if the donor failed to die as expected.[47] Then, in the course of the nineteenth century, a curious reversal took place. While gifts *inter vivos* held fast to the requirement of actual delivery, gifts *mortis causa* developed and extended the theory of constructive or symbolical delivery, thus permitting the delivery of certain *indicia* instead of the thing itself.[48] On the face of

[43] *Ibid.*, 625.

[44] The mortuary effect of trust-declarations is borne out by the decisions previously discussed. Indeed, only one decision seems discoverable where a trust-declaration arose in an *inter vivos* gift: *Cochrane v. Moore* (1890) 25 Q.B.D. 57. Even here, however, the facts were peculiar, inasmuch as the donee's action was not against the donor himself, but against an assignee under a bill of sale.

[45] *Cf. Williams on Personal Property* (18th ed., 1928), 551; Snell, *op. cit. (supra* n. 14), 336. The *donatio mortis causa*, it has specifically been held, has not been affected by the Wills Act: *Moore v. Darton* (1851) 20 L.J. Ch. 626; *Ashton v. Dawson* (1725) 2 Coll. 363 n., Cas. *temp.* King 14.

[46] *Cain v. Moon* [1896] 2 Q.B. 283; *Wilkes v. Allington* [1931] 2 Ch. 104. It is enough if the gift be *sola cogitatione mortalitatis, ex sorte humana. Cf. Spratley v. Wilson* (1815) Holt N.P. 10. The gift remains revocable until death: *Tate v. Hilbert* (1793) 2 Ves. 111; *Woodman v. Morrel* (1678) Freem. Ch. 32, 34 n.; *Mapletoft v. Mapletoft* (1708) Gilb. Ch. 8; *Staniland v. Willmott* (1852) 18 L.T.O.S. 338.

[47] *Ashton v. Dawson* (1725) 2 Coll. 363 n., Cas. *temp.* King 14; *Miller v. Miller* (1735) 3 P. Wms. 356, 2 Eq. Cas. Abr. 575; *Hungerford v. Wintor* (1736) Amb. 839; *Hardy v. Baker* (1738) West *temp.* Hard. 519; *Spratley v. Wilson* (1815) Holt N.P. 10; *Bunn v. Markham* (1816) 7 Taunt. 224; *Farquharson v. Cave* (1846) 15 L.J. Ch. 137. Indeed, it is partly because of this line of cases that complete delivery was insisted on for *inter vivos* gifts: *Irons v. Smallpiece* (1819) 2 B. & Ald. 551; *Shower v. Pilck* (1849) 4 Exch. 478.

[48] *Williams on Personal Property* (*supra* n. 45), 552. This notion of constructive delivery had some earlier origins: (i) In *Jones v. Selby* (1710) Prec. Ch. 300, 2 Eq. Cas. Abr. 573, it was thought that the transfer of a key of a receptacle containing securities

it, this may have looked like a 'slight' or 'reasonable' extension of the concept of delivery, but the extension meant very much more. It meant that whereas before the donee was already in possession of the gift, he could now demand its being handed over by the executor;[49] whereas before, the gift being delivered was thus complete, nor on the donor's death returnable by the donee, the *causa mortis* now became the occasion for legal intervention to complete an incomplete gift.[50] Nor, in addition, were these gifts kept confined to the proverbial death-bed scene.[51] In short, once a donor had stated his donative intention and had given some symbol to the donee, the gift became effective after his death, although it was patently incomplete.

It is against this background that the *donatio mortis causa* and the declaration of trust can be compared. What distinguishes, for example, the delivery of a deposit-note in a *donatio mortis causa*[52] from the execution of a power of attorney that occurred in *Ex parte Pye*?[53] Or, to turn the question around, the delivery of a deposit-note constitutes a valid gift of a bank account even though legal ownership does not pass and the donor's executor has later to complete the gift; but the execution of a power of attorney or of a deed is criticized as being no more than an imperfect gift. When the matter is examined in terms not of separate legal categories, but of underlying reasons and practical facts, these situations become so similar in type that a rational distinction cannot really be drawn. Indeed, the technical distinction between them is not scientific demarcation, but is the result of a growth in separate compartments, thus developing separate clusters of rules. Each doctrine went its own way without hint or suggestion that there might be a deeper link between them.

What, finally, is this link? In the first place, both types of disposition are clearly incomplete. The main reason is that they equally violate the basic distinction between *inter vivos* and *post mortem* gifts, since neither can boast of a complete delivery or of a will. In both cases, again, the completion is a posthumous event to be per-

would be a sufficient delivery; see further on this *infra* n. 50. (ii) In *Snellgrove v. Baily* (1744) 3 Atk. 214, a bond debt was allowed to pass by the delivery of the bond, but this was later refuted: *Miller v. Miller* (1735) 3 P. Wms. 356; *Ward v. Turner* (1752) 1 Dick. 170, 2 Ves. Sen. 431. (iii) In *Ward v. Turner* it was also said that things *incapable of manual delivery* might be constructively transferred. In the nineteenth century, however, these more limited notions were gradually abandoned and constructive delivery was put on the broadest basis.

[49] *Duffield v. Elwes* (1827) 1 Bli. N.S. 497. The necessity for posthumous completion is greater still where the gift is coupled with a trust: see *Blount v. Burrow* (1792) 4 Bro. C.C. 72; *Hills v. Hills* (1841) 8 M. & W. 401. Where the constructive delivery is by a key, the situation might be different, inasmuch as a donee could perhaps sometimes gain access to the goods without the executor's assistance.

[50] For the full extent of the new development, compare for example, *Bunn v. Markham* (1816) 7 Taunt. 224 with *Re Wasserberg* [1915] 1 Ch. 195.

[51] See, *e.g. Reddel v. Dobree* (1839) 10 Sim. 244; *Moore v. Darton* (1851) 20 L.J. Ch. 626; *Cain v. Moon* [1896] 2 Q.B. 283.

[52] *Re Dillon* (1890) 44 Ch. D. 76; *Re Weston* [1902] 1 Ch. 680; *Birch v. Treasury Solicitor* [1951] Ch. 298.

[53] *Supra* n. 24.

formed by the executor outside the terms of the will. In sum, to the extent that these gifts are enforced, they are intermediary or 'amphibious'[54] gifts; and to the extent that these gifts have failed they were wrecked by the same impediments of the Statute of Wills.[55] Secondly, and more importantly, the *donatio mortis causa* and the declaration of trust acquire a common relevance through their combined effect. It is apparent that the law will in one way or another enforce some mortuary gifts, even if they are not in testamentary form. Their cumulative effect also forces a third class of gifts to the direct notice of the law, an intermediary class sharing the features both of *inter vivos* and *post mortem* gifts. Yet the very possibility of this tertiary classification shows how unworking and unworkable the classical frame-work has become. For in spite of the sharp division between 'living' and testamentary gifts, it is clearly no longer true, and since *Ex parte Pye* has never been true, that there is no law or equity to perfect an incomplete gift. However this be, our existing rules are chaotic and mutually inconsistent to an astonishing degree. Clearly, overall re-thinking and revision is far too long overdue.

[54] For this expression describing *donationes mortis causa*, see *Re Beaumont* [1902] 1 Ch. 889, 892, *per* Buckley J.

[55] *Supra* nn. 1-3.