



Selected Readings 04

CONCISE
HORNBOOKS

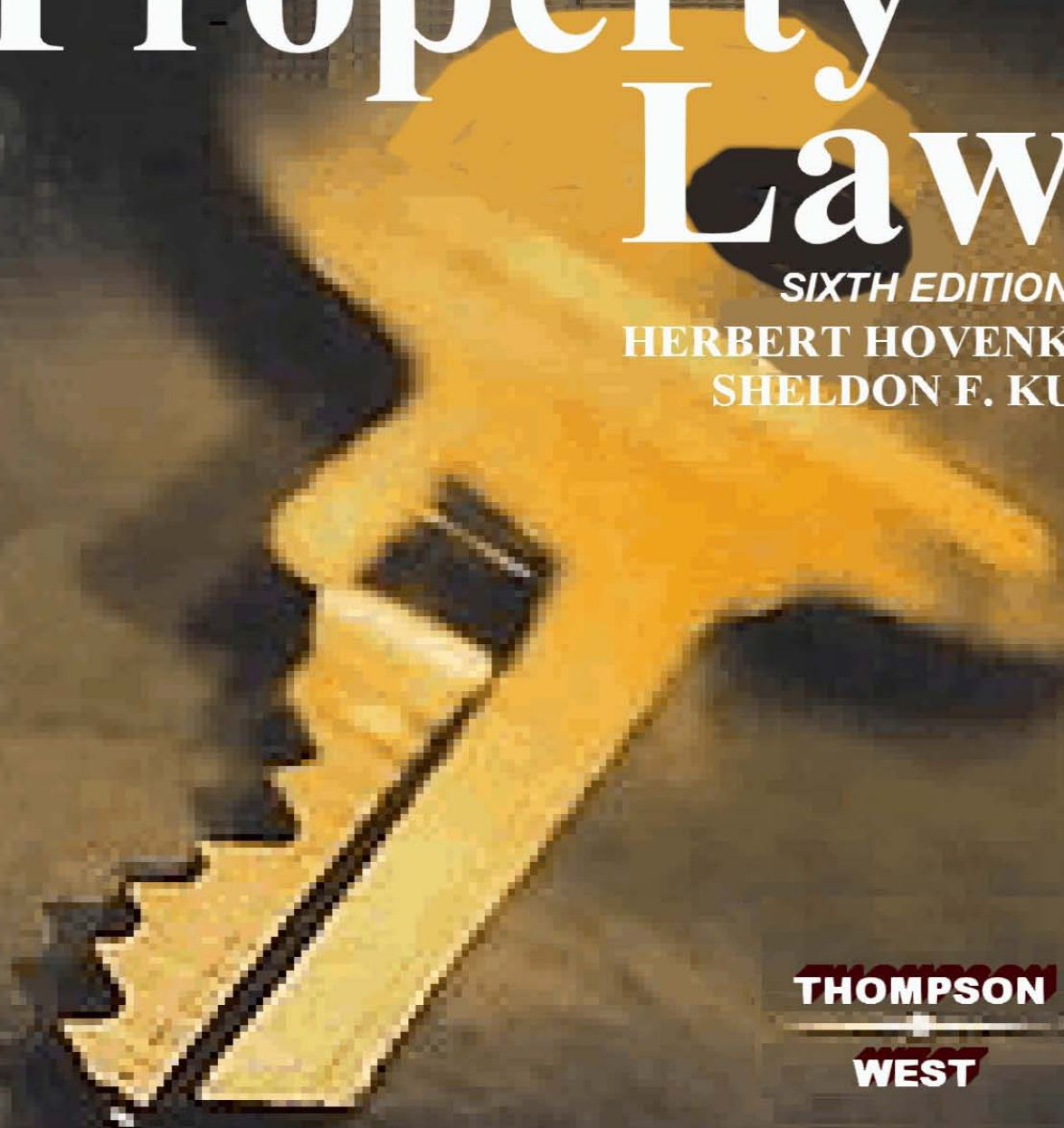


PRINCIPLES OF

Property Law

SIXTH EDITION

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Chapter 3

GIFTS, INCLUDING BANK ACCOUNTS

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SUMMARY

§ 3.1 Introductory Principles

1. A gift is a voluntary transfer of property by one person to another without consideration or compensation. The person who makes the gift is called the "donor" and the person to whom the gift is made is called the "donee."

2. A gift is a present transfer of an interest in property. The gifted interest can be either a present interest¹ or a future interest.² There is no necessity that the gift be of the entire interest in the property.

3. If the transfer is intended only to be effective in the future and to create no rights in another at the present time, it is a mere promise to make a gift and unenforceable in the absence of consideration.

4. A gift made in a person's will³ does not take effect when the will is signed. It takes effect when the person dies unless

1. A present interest is an interest in property that is presently possessory by the holder of the interest. For example, a life estate is a present interest.

2. A future interest is an interest in property that is not presently possessory. It is an interest that will or may

become possessory in the future. For example, if O gifts land to A for life, and then to B, B's interest is future since B's right to possession is postponed until A dies. See generally, Chapters 5 & 6.

3. A will is a legal document executed by a person who is called a testator.

between the time the will was signed and the person's death the will was revoked. Gifts made in wills are called bequests, legacies, or devises. The recipient of the gift in the will has no property right in the subject matter of the bequest until the testator dies.

5. A gift of property during the donor's lifetime is valid only if there was intent, delivery and acceptance.

§ 3.2 Intent to Make a Gift

Donative intent is determined primarily by the words of the donor. In doubtful cases, however, the court, in determining whether there was intent, will consider the surrounding circumstances, the relationship of the parties, the size of the gift in relation to the total amount of the donor's property, and the conduct of the donor towards the property after the purported gift.

§ 3.3 Delivery

1. Delivery is essential for a gift. The delivery requirement serves a ritualistic, evidentiary, and protective function.

2. The delivery must divest the donor of dominion and control over the property.

3. What constitutes delivery depends upon the circumstances. Ordinarily the delivery requirement is met if the donor turns over possession of the subject of the gift to the donee. This is sometimes called "manual delivery."

4. If the subject matter of a gift cannot reasonably be delivered manually, or the circumstances do not permit it, a symbolic or constructive delivery may suffice. In either of these cases, something, other than the subject matter of the gift, is delivered to the donee.

5. A delivery is symbolic when something is transferred to the donee in place of the subject matter of the gift; a constructive delivery is the transfer to the donee of the means of obtaining possession and control of the gifted property.

6. If the subject matter of the gift is already in the hands of the donee, delivery is not necessary.

7. A delivery to a third person on behalf of the donee is a sufficient delivery to satisfy the delivery requirement if the third person is acting as a trustee for the donee⁴ and not an agent of the

Generally, to be valid a will must be signed by a testator and witnessed by at least two witnesses. Each state sets forth a number of formalities that must be followed by the testator and the witnesses for the will to be validly executed.

4. While some courts may refer to the third person as an agent of the donee, use of the word "trustee" is more appropriate. A person acts as an agent for another as the result of a consensual agreement to that effect between the agent and the principal. In this gift situ-

donor. Whether the person to whom the property is transferred is an agent of the donor or a trustee for the donee depends upon the facts and circumstances of the case.

§ 3.4 Acceptance

Acceptance by the donee is required for a valid gift. The donee may refuse to accept since one cannot have property thrust upon him in an inter vivos transaction against his will. However, acceptance generally is presumed if the gift is beneficial to the donee.

§ 3.5 Inter Vivos or Causa Mortis

1. A gift may be either inter vivos or *causa mortis*.
2. An inter vivos gift is an irrevocable transfer of property made to the donee during the donor's lifetime.
3. A gift *causa mortis* is one made in contemplation of the donor's imminent death. It is revocable by the donor at any time before the donor dies and is automatically revoked if the donor does not die from the anticipated peril. The gift *causa mortis* becomes absolute on the donor's death from the anticipated peril if the donee survives the donor and the donor had not revoked the gift.

§ 3.6 Joint Bank Accounts

1. Joint and survivorship bank accounts when effectively created permit either party to exercise control over the deposited funds during their lifetimes. At the death of one party, the entire balance belongs to the survivor.

2. Joint and survivorship bank accounts frequently are used for the purpose of directing the devolution of funds on the death of the depositor. The effectiveness of these accounts to accomplish that purpose where one of the parties is the sole depositor depends, in part, upon the governing state law and the facts as to the particular joint bank account.

3. The validity of a joint bank account to pass title to property to the surviving joint tenant by means that are essentially testamentary without complying with the Statute of Wills is supported by either the contract or gift theory.

a. In a jurisdiction following the contract theory of joint bank accounts, the survivor is entitled to the proceeds of the account simply because the contract between the deceased depositor and the bank so provides.

ation, the donee may have no knowledge of the transfer to the third person or even the third person's identity. Thus, it

is inappropriate to characterize the third person as the donee's agent.

b. In a gift theory jurisdiction, the noncontributing survivor is entitled to the account if he can establish that a gift was effected by which he acquired an interest in the account when it was created. The requirements of donative intent, delivery, and acceptance must be proved. The subject matter of the gift is an interest in the account during the joint lives of the depositors and not the entire proceeds of the account. The finding of a gift is facilitated when both parties make deposits and withdrawals during the joint lives. Any inference of a gift is rebutted by a finding that the account was created in both names merely for the convenience of the principal depositor and that there was no intent to make a gift.

§ 3.7 Tentative Trust Accounts and POD Accounts

1. A bank account in the name of the depositor "as trustee for another" is a valid bank account trust so that on the death of the depositor the proceeds of the account belong to the named beneficiary. These tentative trusts are revocable at any time during the life of the depositor and are commonly referred to as "Totten trusts." Typically, assets in a Totten trust are subject to the claims of the depositor's creditors during his life and at his death. However, in some states creditors of the estate must first be paid with assets from the deceased depositor's probate estate.

2. POD accounts are bank accounts made payable on death to one other than the depositor (a so-called "POD account"). These tend to function much like Totten trusts.

PROBLEMS, DISCUSSION AND ANALYSIS

§ 3.2 *Intent to Make a Gift*

PROBLEM 3.1: F wrote his son S a letter stating: "I give you my Y painting for your 21st birthday but I am retaining possession of the painting until I die." At F's death the executor of F's estate claims that the painting is properly an asset of F's estate. S claims the painting is his. Who is correct.⁵

Applicable Law: In order to make a valid gift there must an intent to transfer an interest in the gifted property to the donee at the present time. The interest can be an absolute interest or less than an absolute interest such as either a life estate or a future interest. Gifts of future interest are valid.

5. Gruen v. Gruen, 68 N.Y.2d 48, 505 N.Y.S.2d 849, 496 N.E.2d 869 (1986).

Answer and Analysis

S is correct. In order to make a valid gift there must be intent, delivery and acceptance. The intent must be to make a gift of some interest in the gifted property at the present time, whether that interest be a present interest or a future interest. A donor may gift a future interest and retain the present interest in the gifted property. Here, for example, F's letter reflects his intent to gift a future interest in the painting to S, while retaining a life estate in the property for himself. The gift of the remainder interest is immediate and vests title in the donee subject only to the retained life estate in the donor.

Since the donor intends to retain possession of the painting until his death, actual delivery of the painting to S would be inappropriate and inconsistent with the nature of the gifted interest, a remainder interest in the painting. The best delivery under the circumstances would be a symbolic delivery such as the letter F sent to S.

PROBLEM 3.2: F, an elderly man but in good health, endorsed a stock certificate over to his daughter, D, placed the stock certificate in an envelope, and delivered the envelope to B, saying that it "should be delivered to D in case of my death." Sometime later, F died and the stock certificate was delivered by B to D. The administrator of F's estate brings an action to recover the stock or its value from D. May the administrator succeed?⁶

Applicable Law: An inter vivos or *causa mortis* gift may be made by delivery to a third party for the donee. If the directions to the third party are to deliver the subject matter to the donee on the death of the donor, meaning whenever and however such death should occur, and the donor presently intends to divest himself of ownership and control of the gifted interest, then, regardless of how the contingency is expressed, the transaction constitutes a valid inter vivos gift. An interest vests presently in the donee even though possession and enjoyment are postponed. The relationship is similar to that of fee simple ownership and executory interest, or life estate and remainder.

Answer and Analysis

The answer is no but a contrary answer is possible. The facts suggest a somewhat ambiguous transaction, and the result depends upon how the court construes F's intent. Since F was suffering no ill health and was not facing an immediate peril, it is clear that no

6. Innes v. Potter, 130 Minn. 320, 153 N.W. 604 (1915).

gift *causa mortis* was intended. The general awareness of the inevitability of death is insufficient to support a gift *causa mortis*.

The delivery requirement of a gift is satisfied by delivery to a third person for the benefit of, or for further delivery to, the donee if the donor intends the third party to act as trustee for the donee. Thus, the only question, and the crucial one in this case, is the intent of the donor at the time he delivered the stock certificate to B.

The directions were to deliver the stock to D in case of F's death. Did F mean that D was to get the stock and all interests therein only at the death of F and nothing before? If so, the transaction is testamentary and ineffective because of noncompliance with the Statute of Wills. The direction to deliver "in case of death" sounds as if death is a condition precedent, and hence the transfer should be ineffective. Death, however, is inevitable, and the only contingency is time. If the directions were to deliver "on my death" instead of "in case of my death," the transaction would not be testamentary since death is certain to occur. The difference is explained in the next paragraph, but in the meantime, it may be noted that an ordinary layperson is just as likely to use the expression "in case of death" as use "upon my death," or "when I die."

In the event that a donor transfers personal property to a third person to be delivered to a donee on the death of the donor, meaning whenever and however the donor may die, then the donor has effectively divested himself of sufficient dominion and control over the property. The inevitability of death makes it certain that the full title eventually will vest in the donee. The situation is analogous to delivery of deeds to real estate upon the donor's death and can be construed as vesting presently a future interest in the donee. The relationship can be categorized as that of a life estate in the donor with a future interest (called a "remainder") in the donee. Title to the property passes to the donee but the donee's possession and enjoyment is postponed until the donor dies. In the case of a gift of stock, therefore, the fact that the donor collects dividends during his life, or votes the stock, is immaterial since these are rights that are essentially equivalent to the possession of real estate. There is a valid gift which takes effect immediately on transfer of the subject matter to the third party, and on the donor's later death, the future interest previously vested in the donee becomes possessory.

Thus, in this problem, if the donor's intent can be construed as meaning that the donee is to get the stock on the death of the donor, no matter when or how that event occurs, then the gift is complete on the delivery of the stock to B, and a future interest

vests at once in the donee. The fact that the donor said "in case I die" instead of "when I die" should not be too significant because of a lack of appreciation of the legal differentiation. Further, natural conceit or reluctance to accept the inevitability of death may lead to the use of a contingent expression when in fact such inevitability is recognized. After delivery to B, F in fact exercised no dominion or control over the stock other than that which was consistent with the reservation of a life estate. Therefore, F made a valid gift of a future interest to D and the administrator of F's estate cannot recover the stock as the stock is properly D's and not an asset of F's estate which would have been the case if the gift was ineffective.

§ 3.3 Delivery

PROBLEM 3.3: O desired to give D 100 bearer bonds of the X Corporation which O kept in her safe deposit box at the local bank. Since it was Sunday and O could not get to her box, she gave D the key to the box and told D to go to the box on Monday and take the bonds. D takes the bonds from the safe deposit box on Monday. One week later O dies and the executor of O's estate seeks to recover the bonds from D. Who wins?

Applicable Law: The delivery requirement can be satisfied by a delivery of the subject matter of the gift to the donee or by a delivery of something else to the donee which either symbolizes the gift (symbolic delivery) or gives the donee a means to gain access to the gift (constructive delivery). Generally, neither symbolic nor constructive delivery can be used if the subject matter of the gift can be conveniently delivered to the donee. The delivery requirement serves a ritualistic, evidentiary, and protective function. The ritual of delivery reenforces to the donor the seriousness and finality of the act of transferring possession of property to another and protects the donor from the consequence of inadvised oral statements. Delivery also serves as objective evidence that a transfer has actually occurred.

Answer and Analysis

D wins. The executor of O's estate can win only if the gift was ineffective. If that were true, then D, who is in possession of the bonds, would be required to turn them over to the executor to be distributed to the persons entitled to O's estate. On the other hand, if the gift were effective, D could keep the bonds.

In order to make a valid gift there must be intent, delivery, and acceptance. There appears to be no dispute that O intended to give the bonds to D. Rather, the issue is whether there has been a sufficient delivery under the facts and circumstances. The facts

indicate that it was not possible for O to retrieve the bonds and give them to D on Sunday. Therefore, if there was a good delivery it had to be a constructive delivery evidenced by the delivery of the keys to the safe deposit box to D. These keys give D the means to acquire possession of the bonds. This delivery should be sufficient.

Delivery of only the keys to a safe deposit box might not be a sufficient delivery of the bonds in the box if D could obtain entry to the box only with both a key and the signature of O on a access card, and D had never taken possession of the bonds prior to O's death.

PROBLEM 3.4: O, in accordance with her custom of the past five years, desired to give her son, S, and her daughter, D, a Christmas gift of \$1,000,000. In order to make this gift O decided to transfer to each child 8,000 shares of Stock X worth \$992,000 and \$8,000 in cash. O's 16,000 shares of Stock X were kept in S's safe deposit box; S had a general power of attorney from O as to all the stock in S's vault.

After O, vacationing in California, had communicated to S her desire to make these gifts, S's bookkeeper in New York wrote to S, by then also in California, suggesting a plan whereby 8,000 shares of Stock X, together with \$8,000 in cash would be credited to the accounts of each S and D. O approved the plan and then authorized S to send a telegram "Credit 8,000 shares of Stock X to each of S and D as indicated in your letter." The bookkeeper credited the accounts of S and D accordingly. Each entry indicated that the transfer as to the stock had already taken place. O died prior to the transfer of any cash to S and D.

Under state law, death taxes are payable on decedent's property owned at death. Did O own the 16,000 shares of Stock X and the \$16,000 of cash at the time of her death?⁷

Applicable Law: In order to make a valid gift of personal property there must be a donative intent, delivery, and acceptance. Acceptance is generally presumed if the gift is beneficial. Manual delivery of the subject matter of the gift is not required

7. See *In re Mills' Estate*, 172 App. Div. 530, 158 N.Y.S. 1100 (1916), affirmed 219 N.Y. 642, 114 N.E. 1072 (1916) (the donor, living in California, instructed his son in New York to present \$1,000,000 each to himself and to the donor's daughter, of which \$16,000 was cash and the rest in stock, the court held there was sufficient delivery of the stock to the son to support an inter vivos gift to the son as well as a sufficient delivery of the stock to the son for

the benefit of the daughter to support an inter vivos gift to the daughter, given that the son had general power of attorney). Compare, *Bickford v. Mattocks*, 95 Me. 547, 50 A. 894 (1901) (Donor delivered the property to his attorney as the agent of the donor for the purpose of delivering it to the donee but attorney neglected to deliver the property to the donee, the delivery to the donor's agent was not a delivery to complete the gift to the donee).

in all circumstances and delivery can be satisfied by a constructive or symbolic delivery. Further, where actual transfer of possession would serve no useful purpose, or where it would be impossible or a vain and useless act, it is not required. Thus, if the intended donee is already in possession of the subject matter of the gift as bailee of the donor, no further delivery is necessary. In this case, release to the bailee with the proper donative intent is sufficient.

Delivery can be made to a third party for the benefit of a donee if the donor intends to constitute the third party as trustee for the donee. If the intended trustee is already in possession of the subject matter of the gift because, for example, he'd previously been designated as the donor's bailee, no further delivery would be required. In this case, re-characterizing the bailee's role as trustee for the intended donee is sufficient.

Answer and Analysis

O did not own the 16,000 shares of Stock X at her death but did own the \$16,000 of cash.

The traditional rule is that for a valid gift there must be both a donative intent to make a gift and a valid delivery of the subject matter of the gift. Delivery of a deed of gift, however, will satisfy the requirements of a delivery of the subject matter itself. The policy behind the rule requiring delivery is to protect alleged donors from fraudulent claims of gifts based only on parol evidence.

The requirement of delivery to the extent it entails an actual transfer of the personal property has been considerably diluted over the years. The nature of the delivery requirement depends in a large measure upon the circumstances of each case. Where actual transfer of possession is either impossible or ridiculous, various substitutes have been recognized as sufficient. For example, if the subject matter of the gift is already in the possession of the intended donee, as here where the donee is a bailee of the donor, then the law does not require the donee to redeliver the items to the donor to have him transfer them back to the donee. Under such circumstances, the requirement of delivery is obviated, and all that is necessary is donative intent. Under these circumstances, the requirement of delivery is usually satisfied by a clearly expressed intent that the title, or a portion thereof, be presently transferred to the donee.

In this problem, S was in possession as bailee of all the stock of his mother, the donor, O. The stock certificates were physically located in New York, but the donor and S, one of the donees, were in California. As to S, physical delivery was not only unnecessary

but actually impossible. Therefore, as to his gift, any further delivery is unnecessary and all that is required is a complete manifestation of intent to transfer title at the present time. This was done by the telegram, and further, the book entries were actually made indicating that a transfer had taken place. Accordingly, there was a completed gift as to S.

The validity of the gift to D, however, rests upon additional principles. Delivery need not be made to the donee; it can be made to a third party for the donee's benefit. If there is an absolute transfer of possession to a third party to act as trustee for the donee, the fact that the donee is unaware of the transfer is immaterial. In the absence of evidence to the contrary, acceptance by the donee is presumed. In gifts to third parties for donees, what is required is a transfer of possession of the subject matter of the gift, and a clear manifestation of intent to make a gift. In this problem S is already in possession of the stock of the donor. Thus, in common with the analysis concerning the gift to S, any further delivery at this time is not only unnecessary but also impossible. All that is required is a clear manifestation of intent to release to S the beneficial interest in the stock for the benefit of the donee, D. This was clearly done as evidenced by the telegram and by the book entries before O's death. Therefore, there was a completed gift of the stock to both S and D.

The cash transfers needed to complete the respective gifts are a different matter. No entries were made upon O's books showing actual payment of this amount until after her death, and the telegram manifesting an intent to make a present gift only referred specifically to the stock. Thus, there is insufficient evidence to show an inter vivos gift of the cash.

Since state law taxes only decedent's property owned at death, the cash but not the stock is subject to death taxes.

PROBLEM 3.5: M was admitted to the hospital to undergo major surgery. Before entering the operating room M wrote a note to F stating that cash would be found in a various places in their home and this money, together with two bank books, were for F. The letter concluded as follows:

God be with you. Please look out for yourself. I cannot stay with you. My will is in the office of my Lawyer. There you will find out everything.

Your loving wife,
M

M placed the note in the night table beside her hospital bed and asked a nurse to tell F about it. Later in the day while

M was still unconscious, F came to the hospital and was told about the note. F read the note, went home, found the cash and bank books and has retained them ever since. M died nine days later. Under her will, M left F \$1 and the balance of her estate to her children and grandchildren. In the suit by her personal representatives F claims ownership of the cash and bank books on a gift *causa mortis*. The trial court held there was no gift. On appeal, what result?⁸

Applicable Law: In order to make a valid gift, *inter vivos* or *causa mortis*, there must be intent, delivery, and acceptance. Many courts carefully scrutinize *causa mortis* gifts because if valid they circumvent the policies underlying the Statute of Wills that transfers that are not complete until death should be evidenced by a writing that is witnessed by at least two witnesses.

Answer and Analysis

A gift *causa mortis* is essentially a testamentary act and, as such, represents an invasion of the policies underlying the Statute of Wills designed to avoid fraudulent transfers. In some states they are not favored. Accordingly, in such states transactions that might be classified as gifts *causa mortis* must be closely scrutinized.

The first issue is whether there had been sufficient delivery. One must consider whether the note was a sufficient delivery of the cash and bank books or whether manual delivery of these items was required. While some courts would hold that the delivery of the note was a sufficient symbolic delivery of the cash and bankbooks under these facts (neither money or bankbooks immediately available to M), in *Foster*, the court concluded that the delivery of the note was not sufficient to complete the gift. In the case of the bank books the court concluded that delivery of the passbooks rather than the notes would be required. Said the court: "In the case of a savings account, where obviously there can be no actual delivery, delivery of the passbook or other indicia of title is required." Then the court concluded: "Here there was no delivery of any kind whatsoever. We have already noted the requirement so amply established in our cases . . . of 'actual, unequivocal and complete delivery during the lifetime of the donor, wholly divesting her of the possession, dominion, and control' of the property. This requirement is satisfied only by the *donor*, which calls for an affirmative act on her part, not by the mere taking of possession of the property by the donee."⁹ This analysis is suspect. First, to suggest there can be no actual delivery of a bank account is wrong. The

8. *Foster v. Reiss*, 18 N.J. 41, 112 A.2d 553 (1955).
9. *Id.* at 50-51, 112 A.2d at 559.

donor can take the donee to the bank, withdraw the money and hand it to the donee. Courts have long recognized that as an alternative there can be a constructive delivery of the account by delivering the passbook to the donee, and the majority recognizes this. If delivery of the passbook can be a constructive delivery, why cannot a letter have the same effect?

Further the court rejected the notion that the note was an authorization for the husband to take delivery of the property consummating the delivery. The court reasoned that the note failed as an authorization "since at the time he took the note from the drawer the decedent was under ether and according to the findings of the trial court unable to transact business until the time of her death."¹⁰ The agent's authority terminates, the court concluded, when the principal has no capacity. This rationale is peculiar. M's intent was not to make F her agent, it was to make him her donee.

The court also rejected the notion that the donee already had possession of the gift property making delivery unnecessary because the gift property was in the family home. Even if delivery is dispensed with where the donee has possession of the property, the court stated that in this case the house was decedent's property and although the husband resided in the house he did not know the property was in the house or its exact location.

The court then noted that the intent requirement is separate from the delivery requirement. Strangely, the court stated: "Although the writing established her donative intent at the time it was written, it does not fulfill the requirement of delivery of the property, which is a separate and distinct requirement for a gift *causa mortis*."¹¹ Thus, the court was willing to achieve an intent-defeating result by stringently construing the requirement of delivery in the context of a gift *causa mortis*.

The dissent decried the result. "Although the honesty of the husband's claims is conceded and justice fairly cries out for the fulfillment of his wife's wishes, the majority opinion . . . holds that the absence of direct physical delivery of the donated articles requires that the gift be stricken down." The dissenters then cited Chief Justice Stone's article¹² that the reasons for the delivery requirement, while perhaps historically justified, are no longer true and "courts should evidence a tendency to accept other evidence in lieu of delivery as corroborative of the donative intent." It characterizes the delivery requirement as widely entrenched and perhaps advisable as "a protective device to insure deliberate and unequivocal conduct by the donor and elimination of questionable or fraudu-

10. Id. at 54-55, 112 A.2d at 561.

11. Id. at 52, 112 A.2d at 560.

12. Stone, Delivery in Gifts of Personal Property, 20 Col. L. Rev. 196 (1920).

lent claims." Nonetheless, it should not be so strictly applied under the facts of this case where the donative intent is clear. Furthermore, given the setting in which M apparently decided to make the gift to F, M's only reasonable alternative was to write F a note since neither the cash nor the bank books were in M's possession or readily available to her.

§ 3.5 *Inter Vivos or Causa Mortis*

PROBLEM 3.6: Prior to undergoing an operation for the removal of a life threatening tumor, D delivered to X various pieces of jewelry with instructions to give them to named donees "in the event of my death from the operation." After making an incision, the surgeon decided that removal of the tumor was too dangerous and then sewed up D's wound. One week later D, who was aware that the tumor was not removed, was released from the hospital. Thereafter, D died from the tumor. Between the time D was released and the time she died, D expressed a continuing desire that the named donees should receive the items of jewelry that still remained in X's possession. Although advised by her attorney that the gifts were probably no longer valid, D did nothing to change the nature of the deposit or to make a will bequeathing the jewelry either to the intended donees or to anybody else. After D's death, the personal representative of D's estate brought an action to recover the items of jewelry from X. The administrator claimed that the gifts of jewelry were ineffective and therefore the jewelry was properly an asset of D's estate. Is the administrator correct?

Applicable Law: Gifts are divided into two principal categories: *inter vivos* and *causa mortis*. A gift *causa mortis* is a gift made in contemplation of death. It is automatically revoked if the donor recovers from the contemplated peril. It can also be revoked by the donor at any time prior to the donor's death. Most courts construe gifts *causa mortis* as taking effect immediately but subject to an implied condition subsequent that the gift is revoked if the donor recovers. Other courts disregard or minimize formal distinctions dependent upon the manner of expression when a donor purports to make a gift *causa mortis*, since the expression "if I die," expressing a condition precedent, is more likely to be used than the more appropriate words expressing a condition subsequent. A gift *causa mortis* made in contemplation of death from an operation is revoked automatically if the operation is not performed even though death comes later from the underlying cause.

Answer and Analysis

The personal representative can recover the property from X. Gifts are divided into two principal categories: *inter vivos* and *causa mortis*. A gift *inter vivos* is absolute and unconditional. It takes effect at the time of delivery and cannot be revoked by the donor. A gift *causa mortis* is made in contemplation or apprehension of death as a result of an existing peril. It is not absolute but conditional upon the donor's death. It also is revocable by the donor at any time before the donor's death and is revoked automatically if the donor recovers from the peril. For a valid gift *causa mortis*, the peril of the death that is contemplated must be immediate and specific. A concern for the normal vicissitudes of life is not sufficient.

A fully effectuated *causa mortis* gift is dependent or conditioned on the death of the donor. Some courts require that the condition be a condition subsequent rather than a condition precedent in order to meet the general requirement that a valid gift requires an intent to transfer an interest in the property presently and not merely in the future. Whether the condition is precedent or subsequent, however, has engendered considerable verbal gymnastics and subtle rationalizations. The difficulty with construing the gift as being subject to the condition precedent of the donor's death is that if the gift doesn't take effect until the death of the donor, then it is too late for the donor to make a gift in this manner since the donor can only direct the transmission of property after death by means of a will. This would require compliance with the state's Statute of Wills.

Most jurisdictions construe gifts *causa mortis* as transferring title presently but subject to revocation on recovery by the donor or earlier if the donor changes her mind. Under this rationale, the gift becomes absolute on removal of the conditions subsequent. In effect, the gift operates thus: "This item is yours, take it now and enjoy it, but if I recover from this peril, I want it back." The difficulty of requiring the donor's intent to be expressed in this manner is that most donors would not be aware of the distinction between conditions precedent and subsequent, and in fact most donors would most likely express the gift in terms of a condition precedent, e. g., "I want you to have this if I die." Thus, some courts may utilize the condition subsequent analysis but liberally construe statements accompanying the transfer of the subject matter of the gift as evidencing a gift *causa mortis* although grammatically they may in fact be expressed in terms of a condition precedent. Some courts simply repudiate the distinction. Here, the facts support an intent by D to make a gift *causa mortis* by delivering property to a third party acting as trustee for the intended donees.

The donor wanted the items to be delivered to the donees "in the event of my death from the operation." The facts show that the donor did not die from the operation and the donor made a sufficient recovery to return home from the hospital. D, in fact, died from the tumor. The immediate peril, as evidenced by D's statement to X, that motivated the gifts was the *operation*. Since D did not die on the operating table, the gift was revoked. The donor did have time after returning home to draft a will or to make an inter vivos gift of the jewelry to the intended donees, neither of which D did. Therefore, D's personal representative may recover the items since the gift was revoked.

If D had stated to X at the time D delivered the jewelry to X: "give these to the donees in the event of my death," the donees might have a strong argument that the peril D feared was death from the tumor, not merely death during the operation. This argument would support the donees because D did die from the tumor even though it was after D had been released from the hospital.

It also might be argued that D's later statements to X that the donees should receive the property resulted in an inter vivos gift to them. This assumes X is the trustee for D's intended donees.

Suppose the donor dies of a different peril from the one that motivated the gift. For example, what if D died in the hospital from pneumonia contracted after the operation and while D was recovering. If D intended to make a gift only if she died during the operation, then the gift was automatically revoked when the operation ended. On the other hand, the phrase "in the event of my death from the operation" may be a surrogate for "if I don't come home from the hospital." As so construed, the gift would not be revoked.¹³

PROBLEM 3.7: On December 23, 1998, A suffered a severe and disabling heart attack from which A remained hospitalized for approximately two months. On March 23, 1999, A gave a note for \$10,000 to a trusted employee, B. On the note, A penned in the following words, "Only Good In Case of Death." Due to A's incapacity, A could only return to work on a part time basis. A died on October 16, 2001 of "acute pulmonary edema, arteriosclerotic heart disease and chronic congestive heart failure." After A died the administrator of A's estate refused to pay B the \$10,000. B sued the administrator claiming there was a gift *causa mortis*. Can B succeed?¹⁴

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

14. *Fendley v. Laster*, 260 Ark. 370, 538 S.W.2d 555 (1976).

Applicable Law: A gift *causa mortis* is a gift made in contemplation of death. It is automatically revoked if the donor recovers from the contemplated peril.

Answer and Analysis

B cannot succeed. There is no difficulty in finding that the subject matter of the gift has been delivered by the donor to the donee at a time when the donor was under the apprehension of death from some existing disease; both requirements of a valid gift *causa mortis*. The difficulty comes with the requirement that the donor must not recover from his infirmity. A finally died of his heart ailment but more than two years after delivery of the gift to B. The fact that A did leave the hospital and showed some interest in his business is at least convincing evidence that A "recovered" from the depth of the disease that caused A to be concerned about chances of prolonged life. B's claim against the estate must fail.

§ 3.6 Joint Bank Accounts

PROBLEM 3.8: A opened a savings account in the names of "A and B as joint tenants with the right of survivorship." Both A and B signed the signature cards which provided that the funds in the account were payable to "A or B or to the survivor." A kept possession of the passbook. All deposits to, and withdrawals from, the account were made by A. After A's death, B withdrew all the funds from the account, and A's administrator then brought an action against B to recover the funds withdrawn. May the administrator recover?

Applicable Law: Joint and survivorship bank accounts, when created by only one of the depositors contributing the funds, are analyzed either on the basis of a contract or gift theory, depending upon the jurisdiction. According to the contract theory, the depositors and the bank stand in a contractual relationship and either depositor or the survivor, after the death of one of the parties, is entitled to deposit or withdraw funds, including the entire amount. Under this approach, the survivor is entitled to the funds remaining simply on the basis of the contract.

Under the gift theory, the non-contributing survivor is entitled to the account only if the contributing depositor did in fact intend to make an inter vivos gift of an interest in the account to the other. The requirements of donative intent, delivery, and acceptance must be satisfied. The subject matter of the gift is not of the entire funds in the account but simply of a co-interest therein.

Answer and Analysis

No. Joint bank accounts are in common usage and are the frequent subject of litigation. When one of the parties makes all of the deposits and exercises complete control over the account during his lifetime, the courts follow either one of two theories in determining the rights of the survivor after the death of the cotenant who made the deposits. These theories are the contract theory and the gift theory.

The contract theory is predicated on the proposition that a bank deposit constitutes the bank a debtor. Then, when the depositor orders the bank to pay himself or another upon the order of either party, and secures the signature of the second party evidencing an assent to the arrangement and notifies him of the completed transaction,¹⁵ there is created in the second party by contract a joint interest in the account equal to his own. Thus, under this theory, B is entitled to the funds simply because this was the contract with the bank.

Under the gift theory, B, the survivor, gets the funds only if a valid gift was made. The requisites of donative intent, delivery, and acceptance must be shown. Acceptance causes little difficulty because of the presumption of accepting beneficial gifts and because of the signing of the signature card. Donative intent and delivery are more difficult problems. In order to sustain a gift, it is not necessary that the subject matter of the gift be the entire bank account or that the entire funds be delivered to the donee. In the joint bank account case, the intended gift and the subject matter thereof are an interest in the account, not the account itself. Delivery is sufficient if there is a vesting of an equal right to control, that is, to deposit and withdraw funds from the account. Thus, under the gift theory, B is entitled to the funds if A intended to vest in him presently an interest in the account, and if A did in fact give him an equal right of control. In cases such as this where no dispute arose until after the death of the donor-depositor, the form of the account constitutes prima facie evidence of the gift. Thus, if no rebuttal testimony is introduced, B will be allowed to keep the funds. If, however, it is shown that the alleged donee never made any deposits or withdrawals during the lifetime of the donor, that the donor did not intend him to have any such control, that the only purpose of the account was to pass it to the donee on the donor's death, that until then the funds were to be regarded solely as those of the donor, and that the account was put in both

15. Some courts have held that it is not necessary for the survivor to have signed the signature cards. See *In re Stamets' Estate*, 260 Iowa 93, 148 N.W.2d 468 (1967). A non-signing co-

owner of the account could be viewed as a third-party beneficiary of the contract between the depositor and the bank. See also, *In re Estate of Michaels*, 26 Wis.2d 382, 132 N.W.2d 557 (1965).

names for the convenience of A, then no present gift was created and the administrator would be entitled to the funds. The degree of liberality with which the courts construe these accounts varies considerably. In this problem, however, since there are few, if any, facts to rebut the inference of a gift arising from the joint account, the decision should be in favor of B. That B did not in fact make any deposits or withdrawals is not conclusive that B had no right to do so.

§ 3.7 *Tentative Trust Accounts*

PROBLEM 3.9: A opened two savings accounts. Each pass-book listed the ownership as "A in trust for B." A exercised full control over both accounts, making additional deposits and withdrawals whenever A desired. The money withdrawn was used by A for personal uses and A made no effort to account to B for any funds in the account. At one time one account had a balance of \$10,000 but at A's death this account was closed. The other account had a balance of \$15,000 at A's death. None of these funds had apparently come from the closed account. At the death of A, both B and A's administrator claimed the right to the proceeds of the remaining account and B also claimed the \$10,000 that had been in the closed account. (1) As between the administrator and B, who is entitled to the proceeds of the active account? (2) May B recover from A's estate the \$10,000 which was in the closed account?

Applicable Law: A bank account in the name of "A in trust for B" is valid as a tentative or revocable trust with the named beneficiary being entitled to the proceeds in the account, if any, upon the depositor's death. During the depositor's lifetime, however, the account is revocable by the depositor. This revocation can be evidenced merely by withdrawing funds from the account.

Answers and Analysis

B is entitled to the funds in the active account but may not recover the \$10,000 from A's estate. Bank accounts in the name of the depositor in trust for another person ("A in trust for B") are widely used and are designed for the convenience of the depositor who controls the account during his or her lifetime. By naming a beneficiary the depositor also is able to designate who shall receive the funds in the account at the depositor's death. These accounts are sometimes called "poor persons' wills." They are, in effect, tentative trusts or trusts in which the depositor reserves the right to revoke. Clearly, no irrevocable trust is intended, but on the other hand, there is an intent that the beneficiary of the account has an interest in the account from the time that the account is opened. It

is thus a revocable trust with the grantor-depositor reserving complete control and power of revocation in whole or in part. Thus, when A withdraws money from an account or closes it entirely, A is in effect revoking the trust either pro tanto or completely. Until revoked, however, the beneficiary of the trust has a beneficial interest in the account similar to such an interest in a more formally prepared trust in which the settlor reserves the power to revoke.

Accordingly, the unrevoked account in trust for B became absolute on the death of A. At A's death A no longer had the power to revoke the account. Therefore, the entire beneficial and legal interest in the account vested in B. This is consistent with A's intent and unless some strong public policy should invalidate this type of arrangement, B should get the account. With respect to the closed account, however, B is not entitled to recover. The trust was only tentative or revocable, and A revoked this trust by closing the account. Therefore, B is not entitled to recover.¹⁶

Although B is entitled to the funds in the active account at A's death, B may take subject to the claims of A's creditors, if any. As a general rule, the funds on deposit in a Totten trust are liable for payment of the debts of the deceased depositor once the assets of the deceased depositor's estate have been exhausted.¹⁷ Assets of the deceased depositor's estate include only property capable of passing by the deceased's will or by intestacy and do not include assets passing by reason of a Totten or tentative bank account trust.¹⁸

16. See *Matter of Totten*, 179 N.Y. 112, 71 N.E. 748 (1904): "[a] deposit by one person of his own money in his own name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely, revocable at will, until the depositor dies or completes the gift in his lifetime by

some unequivocal act...."; see also Uniform Probate Code § 6-104. Such tentative trust accounts are often called "Totten trusts."

17. See Unif. Prob. Code § 6-107.

18. See *Brown on Personal Property* 174-1888 (3d ed., Rauschenbush, 1975).

EXAMPLES & EXPLANATIONS

Property

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3

Law of Finders and Prior Possessors

As noted in the first two chapters, possession is important in determining rights to things. Although familiar sayings such as “possession is nine-tenths of the law” and “finders keepers, losers weepers” are inaccurate as statements of the law, they do echo the law’s recognition that a person in possession of a thing has greater rights to that thing than do most other persons.

The study of finders of personal property (property other than real property — see *supra* page 13) serves many purposes. For one, the concept is easy: Someone lost something; someone else found it; now who owns it? More importantly, some less-than-sensible black-letter rules have evolved when the true owner, the original owner, cannot be found.

The study of finders law gives you the opportunity to rethink the law. How should a court resolve issues pertaining to finders? Should it try to fit the facts into a box of arbitrary rules to determine who has the higher right to the thing? Or should the court determine who prevails based on instrumental goals — i.e., considerations other than black-letter rules? Or should the court simply say, “Finders win.”

As a starting point, the common law holds that a finder of lost property has greater rights to the found property than all the world except the true owner.¹ The rule is often stated, “The title of the finder is good as against the whole world but the true owner.” Ray A. Brown, *The Law of Personal Property* (3d ed. 1975). If the true owner is located, the true owner can recover the lost property. The goal of much of the common law is to facilitate the return of lost property to the true owner. Most of what you study in Property class is who gets the property if the true owner never surfaces.

1. “Lost property” and “found property” refer to the same object. One person’s lost property is another person’s found property.

A finder of lost property is a person who (1) first takes control of the lost property (2) with an intent to maintain possession of the property. To illustrate, three children, Andy, Brad, and Charlie, are playing. Andy finds a bag weighty enough to be tossed. Andy tosses the bag to Brad. As Brad catches the bag, the bag breaks open and money spills on the ground. Charlie snatches up the money. To which child would you give the money, assuming the true owner cannot be located?

One answer, of course, is to say the boys are acting in unison and thus should split the money equally. Another is to say Andy took control of the bag with an intent to possess it, and thus he should get the money since the money was in the bag. A third option gives the money to Charlie since it was Charlie who took control over the money with the intent to possess it. Brad, it seems, never had the requisite control or intent to possess. The issue may turn on whether you feel Andy ever had actual control or, more likely, any intent to possess the bag or the money. Since we have found no cases on point, the authors leave the final decision and rationale to you.

Let's explore the practical application of the general rule that a finder of lost property has greater rights to the property than all the world except the true or rightful owner. First, the easy case. TO (true owner) loses her watch. F1 finds the watch. F1 lays the watch on a table surrounded by a group of people. While F1 is standing there, F2 picks up the watch. F1 demands F2 return the watch. F2 refuses. Which of the two has the right to leave with the watch? Answer: F1. F1 has greater rights to the watch than all the world except the rightful owner. F2's only argument is that F1 is not the true owner, but that argument does F2 no good. F1 as finder has greater rights to the watch than does F2 and all other persons except the true owner.

The result is a good one as a practical matter since it would be very difficult for a person to prove he or she owns that which he or she possesses. For example, you probably do not carry "proof" that you own your casebook, your laptop, or your backpack.

Now a more difficult scenario. TO loses her watch; F1 finds the watch. A week later F1 loses the watch in the park. Four days later F2 walks into a room, with F1 present, and announces that she found a watch in the park. F1 asks if the watch has certain characteristics. The watch does. F1 claims the watch. F2 does not want to give the watch to F1. Question: Who should get the watch? F1 or F2?

The answer is F1 has greater rights to the watch than the whole world except the rightful owner, and thus F1 gets the watch. F1 and F2 are both finders. The common law rule as stated does not anticipate our scenario. The rule must be modified to say a finder of lost property has greater rights to the found property than the whole world except the rightful owner, a prior or rightful possessor, or a person holding through the rightful owner or rightful possessor. F2 has greater rights than everyone except TO and F1. Once F1 appears, however, F1 gets the watch.

Conversion, Replevin, and Trover

Generally a finder will return found property to the rightful owner if the rightful owner appears. But what happens if the finder, a borrower, or another person to whom the property has been entrusted refuses to return the property, has sold it or given it to another person, or has modified the property such that it may not be acceptable to the true owner? When a person wrongfully exerts control over an asset inconsistent with the true owner's rights to the property, that person has engaged in an act of conversion.

Conversion is a common law action for the tort of using another's property as one's own. The true owner or rightful possessor can recover the property. The action or remedy to recover the asset itself (plus money damages for injury to the asset) is called *replevin*. Alternatively, the rightful owner or rightful possessor can seek monetary damages for the asset. The action or monetary compensation conversion of personal property is called *trover*. In effect, trover is a forced sale. A person who is compensated pursuant to a trover action loses his rights to have the asset returned. The decision whether to seek trover (compensation) or replevin (the return of the property) lies with the true owner or rightful possessor, not with the present possessor.

Armory v. Delamirie

Most casebooks introduce finders through the short but sweet case of *Armory v. Delamirie*, 1 Str. 505, 7 Term R. 396 (King's Bench, 1722). There a chimney sweep found a piece of jewelry and delivered it to a goldsmith's shop for an appraisal. The goldsmith's apprentice removed the stone and then refused to return it to the sweep. The jewelry's appraisal without the stone was for three half-pence. The goldsmith offered the sweep that sum of money for the jewelry, but the sweep refused to accept and brought an action in trover — for the value of the jewelry — against the goldsmith.

The *Armory* court held that “the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover.” 7 Term R. at 398. In this holding, the term “prior possessor” might be substituted for the word “finder” — and the rightful or true owner then stands for any person whose possession is prior to that of the litigating parties.

The sweep wins this case because he is the prior possessor of the jewel. He could have stolen it from the house whose chimney he last cleaned and, still, as against the goldsmith, he would be the prior possessor, even though the rule of law is that “a thief's title is void” against the true owner's. *Anderson v. Gouldberg*, 53 N.W. 636 (Minn. 1892) (a replevin action for

stolen logs); and see *Gissel v. State*, 727 P.2d 1153, 1156 (Idaho 1986) (stating, “[m]ere possession alone is sufficient to sustain a trespasser’s cause of action for conversion against all but the true owner,” over a strong dissent that a thief should receive no reward for her crime). In the litigation here, the goldsmith is the greater wrongdoer, even assuming that the sweep was a thief.

Extensions of the *Armory* Rule — and a Right of Subrogation

Suppose that the jewel’s true owner found out about the facts and outcome in *Armory* and brought a lawsuit against the goldsmith. What might be the theory of such a suit? It might be brought for conversion. Why? Because the goldsmith treated the jewel as his own when refusing to return it, as he was bound to do. And because the goldsmith does not have the jewel itself anymore, the suit will have to be brought for trover rather than replevin. The complaint says, in essence, “You converted it, you bought it.” In this suit, the court applying the rule in *Armory* will give judgment for the owner. By paying the judgment, the losing party — here, the goldsmith — acquires the rights in the jewel upon which the owner based his suit — i.e., the right to sue for the conversion of the jewel perpetrated by the goldsmith.

This goldsmith’s acquisition of the true owner’s rights is an example of the doctrine of *subrogation*. The owner had a right to sue, sued, and by winning transferred her rights to the defendant goldsmith. Subrogation is a succession to another’s right or claim. It puts another in the place of a person originally holding the claim, substituting the former for the latter.

Suppose further that the smith uses the right acquired by subrogation to sue the chimney sweep. In this second suit, the smith is here attempting to put the parties back status quo ante. Because the smith (1) now holds some of the rights of the owner, and (2) because that owner is the holder of a right to the jewel prior in time to the sweep, the judgment should be given to the smith. Up to now, the smith has run the risk that the sweep will take the money from the *Armory* suit and move beyond the jurisdiction of the court. It is better for the smith to bear that risk than it is for the owner to do so, but now things can be put right by the sweep returning the money to the smith. The law should do so.

Lost Property, Mislaid Property, Abandoned Property, and Treasure Trove

The law of finders discussed to this point has had a semblance of rationality. Unfortunately, judges over the centuries have complicated the analysis, and

someone other than the finder may get the found property. Often the courts look at various factors to determine who keeps found property.

The most typical disputes occur between the finder of the property and the owner of the land or building where the property was found. Courts have categorized ways the true owner was separated from his property. Over time judges began to characterize found property as lost property, mislaid property, abandoned property, or treasure trove. The judges, feeling bound by *Armory v. Delamirie*'s holding that the finder of lost property has a greater right to the found property than all except the true owner, continued that holding.

The judges created a second category — mislaid property — to justify giving the found property to the possessor of the realty on which the property was found (*locus in quo*). The idea is that the possessor of the real estate would be in a better position to give the found property back to the true owner if the true owner came back looking for the object. *Lost property* — property the true owner unintentionally and unknowingly drops or loses — belongs to the finder (unless and until the true owner is located). *Mislaid property* — property the true owner intentionally placed in a given location and then left, or intentionally left intending to return for it later — belongs to the owner or possessor of the premises (unless and until the true owner is located).

To illustrate, a finder finds a watch with a broken watchband in a shop. If the true owner's watchband broke and the watch fell to the ground, the watch is lost property. The finder keeps the watch. On the other hand, if the true owner put the watch on a table after discovering the watchband was broken and left without picking up the watch, the property is characterized as mislaid property and the owner of the shop keeps the watch.

The difficulty with this approach is that the only person who truly knows whether the object was lost or mislaid is the true owner, who never appears. (If the true owner appears he claims the watch, and the ownership issue as between the finder and the owner of the *locus in quo* is moot.)

The judicial inquiry becomes only slightly more complex when two more categories are introduced. *Abandoned property* is property the true owner intentionally and voluntarily relinquished, with the intent no longer to own the object, and without transferring his rights to another person. Abandoned property belongs to the finder.

The finder also keeps *treasure trove*, which is gold, silver, and, in some jurisdictions, currency, intentionally concealed or underground, with indications it has been so long concealed that the true owner has long since died. Treasure trove carries a sense of antiquity. In England, treasure trove belongs to the crown; in the United States, treasure trove goes to the finder.

Other Considerations

Some courts find other factors to be important. These remaining factors carve out exceptions to the general rule that the finder keeps found property. The exceptions favor employers and owners of the locus in quo. For example, courts disfavor trespassers. Therefore, a trespasser who finds lost property, abandoned property, or treasure trove will lose out to the landowner (unless the trespass is “trivial”).

Similarly, a finder who is on premises for a limited purpose must relinquish any found property to the landowner. In an abstract way, the finder does not have permission to find things, and so is acting outside the scope of his authorized entry.

Many cases have held that employees are acting for the benefit of their employers and therefore must give all found items to their employers (mislaid objects still go to the owner of the locus in quo). Other courts require the employee to turn over the object to the employer only when the employee found the object in a place not open to the public. Hotel staff, for example, often are required to give objects found in guest rooms to the hotel; many courts would rule in favor of the hotel employee if the employee found the object in a public way such as a lobby, however.

Even visitors may lose out to the owner of the property. In addition to the lost/mislaid dichotomy discussed earlier, many judges will award even lost property (as well as mislaid property) to the owner of the premises if the object was found in a private place, such as a private office, rather than in a public part of the premises.

Items found in a residence belong to the owner or renter of the residence, assuming the owner or renter lives there. In *Hannah v. Peel*, 1 K.B. 509 (1945), the finder prevailed even though the item was found in a residence because (a) the owner had never used the house as his residence and (b) the current tenant, the British Royal Artillery, did not use the house as a residence either.

Another analytical distinction that results in a landowner rather than a finder getting possession of found property centers on whether the found object was embedded in the soil or was on the surface of the property. Objects embedded in the soil belong to the property owner and not to the finder, even if the object is foreign to the native soil. See, e.g., *Goddard v. Winchell*, 52 N.W. 1124 (Iowa 1892) (aerolite/meteorite), and *Allred v. Biegel*, 219 S.W.2d 665 (Mo. App. 1949) (ancient Indian conoe). Objects found on the *surface* might stay with the finder subject to all the earlier rules that award found property to the owners of the premises or others (mislaid property, private place, residence, limited purpose access, employee). While a few states even award treasure trove embedded in the soil to the landowner, many courts modify the embedded/surface dichotomy to award treasure trove to the finder unless the finder is a trespasser.

Instrumental View

As a policy matter, should labels of lost, mislaid, abandoned, or treasure trove; or the happenstance of where the property was found; or who found it dictate who should get ownership rights of found property? Many commentators think not, and favor an instrumental view that asks what conduct or goals should be encouraged. All, for example, agree that any rule should facilitate the return of the property to the rightful owner. You can argue that giving the finder the property encourages disclosure; otherwise, the finder may not disclose to anyone that he found the property. The same instrumental goal of returning the found object to its rightful owner also justifies giving the found object to the owner of the premises. The true owner is more likely to return to the premises where the object was lost than he is to happen upon the finder of the object. The premises owner, moreover, must store and care for the found object in case the true owner returns to claim it. As a helpful exercise in evaluating laws, list the reasons why the finder should keep the found object and the reasons why the premises owner should get it. Once you have your lists, draft what you think would be the best law.

Legislation

Many states have statutes addressing this issue. Some simply modify common law or provide that finders keep the property if the true owner cannot be found. Others require a finder to report the find to the local police department. The police will take custody of the found object. After a period of time, if the true owner does not claim the property, the finder may claim the property as his own. Some statutes provide that the true owner pays a reward based on the value of the property to the finder.

EXAMPLES

I Know the Owner

1. Would the result in *Armory v. Delamirie* be the same if the true owner were known? Assume the same facts as *Armory* except that the chimney sweep found the jewel outside the Pickering home. The chimney sweep sues the goldsmith as before. As a defense, the goldsmith proves the jewel belongs to Mrs. Pickering. What result?

The Oil Painting Caper

2. Owen purchases an expensive painting to hang in his home. Owen thereafter gives the painting to Seth, his son, with a letter saying that "if and

when you don't have a place to hang it, I want it back." Owen keeps the bill of sale for the painting. Seth moves to a studio apartment with no place to hang the painting. Seth consigns it to an art dealer for sale. Ted steals the painting from the dealer. Ted sells the painting to Ben. The police recover the painting from Ben. Who should the police give the painting to? Clue: Who has the right to present possession of the painting?

Cash Preserves

3. In 1970 Charles buried \$25,000 in coins and paper money in tin cans and glass jars in his backyard. It was commonly known that Charles did not trust banks and hid money on his property. Charles died in 1990. All his property passed to his daughter, Opal. Opal sold the land to David in 2000. That year David hired Ellison to tear down and replace a garage. In removing the garage Ellison found the tin cans and glass jars containing the \$25,000.

- (a) Opal, David, and Ellison all claim the \$25,000. Who prevails?
- (b) Was the money lost, mislaid, abandoned, or treasure trove?
- (c) Assume Opal cannot be found. Who gets the cash: David or Ellison?

Finders Keepers

4. Kapiloff collects stamps. In 1995 he purchased a set of stamps for \$150,000. Last year Kapiloff donated a dresser to charity. Gantor bought the dresser for \$30. Gantor found the stamps in the dresser and advertised them for sale in a nationally circulated stamp catalog. Kapiloff saw the ad and demanded the stamps be returned to him. Gantor refused and Kapiloff sued. Gantor defended by arguing, "Finders keepers, losers weepers."

- (a) Is Kapiloff's action one for replevin or one for trover?
- (b) As a judge, how would you rule on Gantor's "finders keepers, losers weepers" argument?

Plane Old Money

5. Central Bank repossessed an airplane when the owner defaulted on a loan. Four months later Central Bank took the plane to Lindner Aviation for its annual inspection. Lindner Aviation conducted its business in a hanger leased from the City Airport. Benjamin, an employee of Lindner Aviation, inspected the plane. As part of the inspection Benjamin removed panels from the wings. Although these panels are supposed to be removed annually at the inspection, a couple of screws were rusted into place. Benjamin used a drill to remove the rusted screws and panels. Inside the left wing, Benjamin discovered two packets of \$20 bills with mint dates primarily in the 1950s. The bills totaled \$80,000.

- (a) As between Benjamin and Lindner Aviation, who gets the \$80,000?
- (b) As between the prevailing party in (a) and City Airport, who gets the money?
- (c) As between the prevailing party in (b) and Central Bank, who gets the money?
- (d) As between the prevailing party in (c) and the previous owner of the airplane (who defaulted on the loan to Central Bank), who gets the money?

EXPLANATIONS

I Know the Owner

1. The case of *Jeffries v. The Great Western R.R. Co.*, 119 Eng. Rep. 680 (Queen's Bench 1856), was a trover action for the value of "trucks" or railroad cars. It held that the outcome would be the same as in *Armory*. The rationale of *Jeffries* was that a defendant in a prior possession case should win (if at all) on the strength of his own claim to the chattel, not because someone else, not before the court, has a better claim than the plaintiff. In other words, a party should litigate on the strengths of his own claim, not on the weakness of another's.

The Oil Painting Caper

2. The police should give the painting to Owen, as Owen has the present right to possession. Seth, his son, was given the painting subject to a condition that he return it upon the happening of a certain event. That event occurred. Seth's consignment to the dealer attempted to give the dealer a power (to sell) that Seth did not have. A thief has void title — i.e., no title and cannot transfer good title — so Ted acquires no rights at all by his theft, and Ben consequently acquires no rights from Ted.

Cash Preserves

3. (a) Opal gets the money. She inherited all of George's property, including the money and the land. She is the rightful owner of the money and prevails over David, the current landowner, and Ellison, the finder.

David's main argument is that by selling him the land, Opal included everything buried on the property. The money and land, however, are separate assets. The sale of one is not the sale of the other. See *Ritz v. Selma United Methodist Church*, 467 N.W.2d 266, 269 (Iowa 1991). David loses. Any right Ellison might have is subject to the rights of Opal, the rightful owner.

- (b) The money was not lost because Charles intentionally placed the money in the ground. The fact that the money is in cans and jars is some indication of that; the value of the money is further indication that it has not been abandoned. The money lacks the feel of antiquity. That it has been hidden so long and that the true owner is not discoverable are the hallmarks of treasure trove. The only characterization that comes close is that the money was mislaid — intentionally placed in the ground and the whereabouts forgotten, or at least not told to Opal.
- (c) This Example is based loosely on *Corliss v. Wenner*, 34 P.3d 1100 (Idaho App. 2001). Ellison must argue that the money was lost, abandoned, or treasure trove since David as owner of the premises wins if the money was mislaid. As discussed in (b), the money was mislaid. Mislaid property goes to the owner of the land. Hence David, the landowner, gets the cash. David, moreover, could persuade a court that Ellison was on David's land for a limited purpose, which limited purpose did not include finding and claiming the money. Anything Ellison found in or on David's land belongs to David. Finally, David could argue the money was embedded in the soil and not on the surface. Embedded objects belong to the owner of the soil rather than to the finder. David gets the money if Opal is not located.

Finders Keepers

- 4. (a) Kapiloff brought an action for replevin to obtain possession of personal property wrongfully detained by another.
- (b) Under the holding of *Armory v. Delamirie*, Gantor had greater ownership rights against the whole world except the true owner. Once Kapiloff proves he is the true owner, he wins and Gantor loses. The sale or contribution of the dresser to the charity was not a gift of the stamps inside. Finders keepers, losers weepers is not the law. See *Gantor v. Kapiloff*, 516 A.2d 611, 613-614 (Md. App. 1986).

Plane Old Money

- 5. (a) The Example is based on *Benjamin v. Lindner Aviation, Inc.*, 534 N.W.2d 400 (Iowa 1995). Using the labels and categories, Benjamin is the finder, but as an employee in a place solely because of his employment, a court likely would award the money to his employer, Lindner Aviation. From an instrumental view, if a court finds that the true owner may return, it may award the money to Lindner Aviation as being the easiest for the true owner to locate. On the other hand, giving the money to Benjamin rewards honesty

and encourages people to publicize their findings. Despite the instrumental view, most courts would characterize the find as one by an employee and award the money to Lindner Aviation.

- (b) As between Lindner Aviation and City Airport, Lindner Aviation prevails. Although City Airport owned the land and hanger, Lindner Aviation had legal possession. While courts often speak in terms of the owner of the locus in quo, the legal possessor — the tenant in this case — keeps the money.
- (c) As between Lindner Aviation and Central Bank, the issue is whether the packets of money were “lost” or “mislaid.” The packets do not have the taint of antiquity to be treasure trove. While debatable, it does not seem the money is abandoned. The very circumstance of its being \$20 bills placed in packets that ended up inside the wing of an airplane suggests that someone intentionally placed the money there. Therefore, the money was mislaid and not lost. Mislaid property belongs to the owner of the place where the money was found. The money was found in an airplane owned by the Central Bank, even though the plane was in a hanger under Lindner Aviation’s control. Central Bank wins.
- (d) As between Central Bank and the owner of the plane before Central Bank foreclosed, Central Bank as current owner of the plane prevails. The only chance the previous owner has is to show he was the true owner of the money. Merely owning the plane at one time avails him nothing unless there is evidence he owned the money before it was placed in the wing.

6

Gifts

Gifts play an important role in life and law. We saw in Chapter 5 that a donee — the recipient of a gift — cannot be a bona fide or good-faith purchaser because she is not a “purchaser.” Similarly, you will learn later in the course that the real estate recording acts do not protect donees the way they protect good-faith purchasers and creditors. Much of the complicated material in future interests soon to be discussed in the course begins with a gift or a bequest.

A *gift* is a noncontractual, gratuitous transfer of property. It is made without legal consideration. If there is consideration, the law of gifts does not apply. A transfer for consideration is a sale, and the rules of contracts apply.

There are two types of gifts: first, a gift between living persons is called an *inter vivos gift*; a gift made on account of a donor’s impending death is called a *gift causa mortis*. A transfer of property by will after a person’s death is called a *devise* or *bequest* and not a gift.

Inter Vivos Gifts

An *inter vivos gift* is a gift between living persons. For an inter vivos gift to be effective between the giver (the donor) and the recipient (the donee), the donee must show three things: first, a clear and convincing intent in the donor to transfer the object to the donee (donative intent); second, the donor in most cases must actually deliver the object to the donee; and third, the donee must accept the object. Thus, the donor’s donative *intent*, plus physical *delivery* and *acceptance*, are the three elements required for a valid gift.

(a) Donative Intent

For a gift to be effective the donor must intend to make the gift. Mere delivery is not a gift. The delivery may have been part of a loan, or a bailment, for example. Courts are suspicious of claimed gifts, and will scrutinize the facts of a transfer to ensure that the donor had the requisite intent. The donee

bears the burden of proof to show that the donor had the donative intent. The evidentiary standard for the showing of donative intent — i.e., clear and convincing evidence — is high. Often vague terms evidence a transfer of an object, as when someone says, “Take charge of this.” It should be, and will be, up to the alleged donee to show that a gift was intended. Thus the law’s suspicion about gifts is soundly grounded in a skeptic’s view that a person would not freely give away property.

Intent to make a gift and delivery usually occur simultaneously, but not always. If someone lends a book to a friend, but later discovers that he has two copies of it and says that the friend can keep the loaned copy, the donative gift exists; proving that a gift of the book was intended will be difficult, however, its delivery and the intent to deliver it being shown to exist at different times. Certainly the lender’s statement that the friend can keep the book is evidence of a donative intent; while evidence after the time of delivery is admissible, it is not as convincing as evidence of intent at the time of delivery. On the other hand, when a donor says, “I’ll give you the book next week,” and does so, the evidence of intent shows an upcoming delivery, and acceptance that next week by the donee will complete the gift transaction. The latter transaction has completed the elements of the gift in a typical, nonsuspicious chain of events. In a third transaction, when the donor says, “I’ll give the book to you, friend, if I find out that I have a second copy of it,” there is no gift until there has been a delivery. A gift cannot be subject to a condition precedent (an act or event that must occur or not occur before the gift will be made or become effective).

Note that if the donor makes a gift of a book because he thought he had two copies of it and discovers after delivering the book that he did *not* have two copies of it, he cannot demand the book back. The gift was complete — and irrevocable — when the gift was accepted by the donee.

(b) Delivery

Delivery is a necessary element of a gift. Delivery usually is the actual physical delivery of the object. An agreement that a donor will transfer, and another receive, an object is insufficient for a delivery. A promise to make a gift is unenforceable by the donee, and the donor can decide not to make the gift (revoke the promise) anytime before delivery. The law otherwise would be akin to saying that, as a matter of contract law, an offer and acceptance without consideration constitute an enforceable contract. Similarly, a gift may be accomplished by the donor’s first executing a deed of gift expressing a present intent to give, and then delivering the deed to the donee; the gift is complete once the deed is delivered, but not before.

When physical delivery is impossible (the chattel is large or heavy) or impractical (it is in the hands of a third party, or in a bailee’s possession),

physical delivery is not required and courts have shown a willingness to recognize other types of delivery. In such circumstances, the delivery element may be satisfied by a symbolic delivery. A *symbolic delivery* occurs when the thing delivered stands in the place of the property. Symbolic delivery occurs, for example, when a picture of a large chest of drawers is delivered to the donee; that would be a symbolic delivery of the chest. Another example involves the delivery of one item, along with a written inventory of similar items: The one in such a situation stands for the many. Symbolic delivery in these situations might better be termed either a representational (in the former situation) or a representative (in the latter) delivery. Generally, a sale deed or deed of gift stands for the thing itself; likewise, a corporate share certificate stands for the interest in the entity.

A delivery may also be *constructive*. The property itself is not transferred, but something giving access to and control over it is. Examples involve giving the keys to an automobile or the keys to a safe deposit box to the donee. Here a constructive delivery gives the donee access, or the means of exercising possession and control, over the chattel. Other examples of this type of delivery occur when the donee is already in possession, or has possession in some other capacity, as a bailee or employee. Actual delivery would be a fruitless action, one that most persons would not think worth taking.

Still another example of constructive delivery involves lost chattel, the donor giving instructions to the donee as to how to go about finding it; upon its recovery by the donee, the chattel has been constructively delivered. Likewise, a donor's revealing the hiding place of chattel is also its constructive delivery.

Intent and delivery are separate elements. Clear evidence of the donor's intention is needed to complete the gift. Although physical delivery is evidence of the intent to make the gift, delivery is only one bit of evidence and not a conclusive substitute for evidence of intent: It is too easy to obtain the keys to a chest, or a car, and claim it was the subject of a gift. This is particularly true when the donor is in ill health, is dying, or is otherwise unable to put his or her hands on the chattel at the moment. Constructive delivery only emphasizes that the rationale for the concept of delivery is to have the donor relinquish possession and control over the chattel.

(c) *Acceptance*

For a completed gift, the recipient must accept the gift. Although a donee may refuse or reject a gift, acceptance in most situations is presumed from the benefit received by the donee; thus, acceptance has not been the subject of much reported litigation. Without evidence to show rejection, there is no rejection. The presumption of acceptance is a rebuttable one. No one is required to accept whatever "gift" someone else thinks would be to his or her benefit. No benefit or property may be forced on the unwilling.

Gifts Causa Mortis

A *gift causa mortis* is made when the donor has an apprehension or expectation of his or her own impending death and delivers the chattel with the intention that control over the subject of the gift takes effect immediately, but becomes absolute only upon the donor's death. Jewelry is often the subject of gifts causa mortis.

The expectation of death required is subjective; an objective or reasonable expectation is not required. Whether the expectation of death is present is a question of fact. The illness, disease, or peril prompting the expectation must be objectively present, however. A threatened assassination, minor surgery, a perilous journey, and a perilous enterprise undertaken voluntarily have all traditionally been regarded as insufficient.

The donor must have a present intention to deliver absolute ownership of the property in the future, at death; an attempt by the donor to reserve control over the property until death invalidates this type of gift. Such an attempt would result in a gift (if recognized) that was subject to a condition precedent, and invalid as such. There is a presumption that a gift made while death is impending is a gift causa mortis, rather than a gift inter vivos. This presumption is rebuttable by proof of the donor's intention to part unconditionally over the property given.

The title of the donee causa mortis is not absolute until the donor is dead. Death must result from the same illness, disease, or peril producing the donor's initial expectation, not some other illness or event, although it is not necessary that the sole cause of the donor's death be the same as that causing the donor's expectation of death.

Meanwhile, the donee is the donor's bailee. Gifts causa mortis are revocable. In some jurisdictions, revocation is automatic if and when the donor recovers from the illness, accident, or other event that made death seem likely. Recovery is seen as a determinable event.¹ In some jurisdictions, however, a gift causa mortis is revoked only if the donor affirmatively revokes the gift after recovery. An automatically revoked gift causa mortis belongs to the donor as though no gift causa mortis had ever been made. The gift is not thereafter revived by a relapse or another, equally grave, illness. To illustrate, if just before heart surgery Mother gives her wedding ring to her youngest daughter at her bedside, and Mother survives surgery, Mother gets her wedding ring back. If Mother a month later dies from a heart attack or any other reason, Mother's wedding ring passes according to her will, and her youngest daughter has no superior claim to the ring because Mother at one time made the ring the subject of a gift causa mortis.

1. A determinable event (or condition subsequent) automatically terminates the donee's ownership and returns title to the donor without any action on the donor's part.

A person cannot make a gift causa mortis to escape the claims of creditors. Gifts causa mortis are subject to the claims of creditors when other assets of the donor are insufficient to repay the debts. Whether such gifts are subject to marital rights is generally a matter for state probate codes and statutes — and generalizations about this subject are hazardous. Real estate may not be the subject of a gift causa mortis.

The gift causa mortis is the functional equivalent of a devise (a transfer of property by will). Every state has enacted elaborate requirements in a Statute of Wills that must be fulfilled to give effect to a will or testamentary transfer. The gift causa mortis is thus an extraordinary power and, being in derogation of the jurisdiction's Statute of Wills, is not favored. A high standard of proof, that of clear and convincing evidence, is generally required to uphold such gifts. Courts are also likely to strictly construe statutes and cases upholding such gifts. As with inter vivos gifts, the judicial rationale for strictly construing the elements of this type of gift has to do with the evidentiary problems associated with them. In the instance of gifts causa mortis, however, the evidentiary problems are acute because the donor is dead.

EXAMPLES

Dresser Delivery

1. Is the giving of the keys to a dresser a symbolic or a constructive delivery?

Revocation and Donative Intent

2. Owen executes an otherwise valid deed of gift. The deed contains a power to revoke. Does the power to revoke indicate a lack of donative intent sufficient to invalidate the gift?

Christmas Carol

3. (a) In September Lee hands Peter a signed paper promising that Lee will give Peter 10,000 shares of Profit Corporation as a Christmas present. Lee dies in November, devising all his "stock and bonds" to Carol. Carol and Peter both claim the Profit Corporation stock. Who gets the stock?

(b) In September Lee transfers 10,000 shares of Profit Corporation stock to Peter, with the qualification that Lee (the grantor) will receive all dividends paid by Profit Corporation on the stock on or before Christmas. Lee dies in November, devising all his "stock and bonds" to Carol. Carol and Peter both claim the Profit Corporation stock. Who gets the stock?

The Uncashed Check

4. Odysseus writes and signs a check to Don, drawn on Odysseus' checking account, but dies before Don cashes it. Does Don have a right to cash the check?

Suicide and the Gift Causa Mortis

5. Ollie, contemplating suicide because of recent business and personal problems, executes a deed of gift of the contents of her safe deposit box to Del. Is suicide a life-threatening illness justifying a gift causa mortis?

War

6. Fred is a member of the armed forces and is about to go to war. Is he contemplating death in the way required to make a gift causa mortis?

EXPLANATIONS

Dresser Delivery

1. Giving the keys may be a symbolic delivery of the piece of furniture, but could be a constructive delivery of the contents of the dresser, found in the drawers. These two concepts are easily confused, but both are useful means for courts to uphold a gift when there is sufficient evidence of donative intent but no actual delivery.

Revocation and Donative Intent

2. No. If the deed adequately indicates a present donative intent — i.e., an intent at the time Owen delivered the deed to make a gift — the gift is good. The donee owns the property. Owen made the gift with a qualification, and retains the right to demand that the property be returned to him. The gift was complete and belongs to the donee until and unless Owen affirmatively revokes.

Some courts refuse to enforce revocation clauses as a matter of public policy. See dicta in *Gruen v. Gruen*, 496 N.E.2d 869 (N.Y. 1986) (“Once the gift is made it is irrevocable . . . and the donor is not an owner.”) As you will learn, revocable trusts are common. A revocable trust arises when a grantor transfers property to a person (the trustee) to hold for the benefit of a third party (the beneficiary). The grantor can retain the right to revoke the trust and get the property back. If the revocable trust is permissible, the revocable gift should be permissible. The only reason to differentiate between the two is that revocation rights in a trust usually are in writing, whereas many gifts are oral.

Christmas Carol

3. (a) Carol wins. Lee's promise is unenforceable because Peter gave no consideration. When Lee died, he was the legal owner and the stock passed according to his will.

(b) Peter keeps the stock. The gift in September was a present gift, with a present intent to make a gift, delivery, and acceptance. Lee's retaining the income for four months does not make the gift incomplete.

The Uncashed Check


4. No. The donor could have stopped payment on the check any time before it was cashed, and the donor's death revoked the authority of the bank to cash it, so the gift was incomplete because of the donor's retention of a power to revoke the gift. The donor could have cashed a check and given the donee the money. The check is not a deed of gift, and the power to cash it is not the same as a gift. See *Woo v. Smart*, 442 S.E.2d 690 (Va. 1994) (holding that the delivery of a check is an incomplete assignment of the funds on account).

Suicide and the Gift Causa Mortis

5. A person contemplating suicide has traditionally not been regarded as being in imminent peril of death sufficient to justify an exception to the Statute of Wills, so older authorities would answer this query in the negative. A suicide is traditionally an insane act. A few more recent cases reason that mental illness is just as pressing a backdrop for a gift causa mortis as physical illness; they hold that the contemplation of a suicide should be treated as one in contemplation of death. *Scherer v. Hyland*, 380 A.2d 696 (N.J. 1977). The analogy between a person facing major surgery (being allowed to make a gift causa mortis) and a suicide makes it difficult to deny a suicide donative power. The recent view is that some mental illnesses (e.g., depression) are accompanied by an irresistible urge to commit suicide, putting a person in contemplation of death. More generally, it might be said that if a jurisdiction recognizes (as most do) that a suicide may have testamentary capacity, a suicide's will becoming valid on that account, it should also be possible for a suicide to make a gift causa mortis.

War

6. A person about to go to war is not facing an imminent peril giving rise to an expectation of death. There are, however, English cases to the contrary.



UNDERSTANDING
PROPERTY LAW

SECOND EDITION



John G. Sprankling



LexisNexis

Chapter 4

FINDERS OF PERSONAL PROPERTY

SYNOPSIS

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§ 4.01 Finders as Owners

Suppose that F finds a gold ring. Does she own it? Over the centuries, finders' claims to jewelry, currency, gold, shipwrecks, ancient artifacts, and other valuable personal property have produced an immense (and somewhat inconsistent) body of case law in England and the United States. As one court noted, “[t]hese cases . . . have long been the delight of professors and text writers, whose task it often is to attempt to reconcile the irreconcilable.”¹ Many states have simplified the area through legislation.

¹ *Hibbert v. McKiernan*, 2 K.B. 142, 149 (1948).

This chapter explores the law concerning finders of personal property.² American decisions often recite pithy formulas intended to summarize this law, e.g., “A finder of property acquires no rights in mislaid property, is entitled to possession of lost property against everyone except the true owner, and is entitled to keep abandoned property.”³ Yet the law is substantially more complicated than these efforts suggest, turning on artificial distinctions and muddled policy rationales that have long been criticized by legal scholars.

The discussion below is organized around three factors that dominate the judicial analysis of finders’ rights:

- (1) the presumed intent of the original owner, reflected in four categories of “found” property;
- (2) the identity of the competing claimants; and
- (3) the location where the item is found.

§ 4.02 Who Is a “Finder”?

[A] Definition of “Finder”

The first person to take possession of lost or unclaimed property is a “finder.” Possession requires both (1) an intent to control the property and (2) an act of control.⁴ In cases involving portable personal property, application of this standard is simple. For example, if F picks up a lost gold ring and places it in her pocket, she has exhibited both intent and actual control and is deemed a finder. Conversely, if F merely sees the ring and passes by, she has not become a finder. As in the case of wild animals (see § 3.02), discovery alone is insufficient to confer title.

[B] Finders of Nonportable Objects

The application of this standard to nonportable personal property is more complex, as illustrated by a series of decisions involving finders of sunken ships. What constitutes “possession” of a shipwreck? In *Eads v. Brazelton*,⁵ for example, plaintiff located a wreck under the Mississippi River, attached buoys to the wreck, and blazed shoreline trees to mark its location; although plaintiff intended to return to recover the wreck’s cargo, he failed to do so.

² See generally Edward R. Cohen, *The Finders Cases Revisited*, 48 Tex. L. Rev. 1001 (1970); Richard H. Helmholz, *Wrongful Possession of Chattels: Hornbook Law and Case Law*, 80 Nw. U. L. Rev. 1221 (1986); Richard H. Helmholz, *Equitable Division and the Law of Finders*, 52 Fordham L. Rev. 313 (1983); Mark D. West, *Losers: Recovering Lost Property in Japan and the United States*, 37 Law & Soc’y Rev. 369 (2003).

³ *Michael v. First Chicago Corp.*, 487 N.E.2d 403, 409 (Ill. App. Ct. 1985).

⁴ See, e.g., *Powell v. Four Thousand Six Hundred Dollars (\$4,600.00) U.S. Currency*, 904 P.2d 153 (Okla. Ct. App. 1995) (motorists who spotted currency scattered across road, notified sheriff, and then returned to area to prevent third parties from recovering it had “possession,” even though—at the sheriff’s request—they refrained from touching the money).

⁵ 22 Ark. 499 (1861).

About eight months later, defendants found the wreck, and began removing the cargo. In the ensuing litigation, the court concluded that plaintiff had never acquired possession of the wreck. Certainly, the buoys and blazes indicated plaintiff's intent to take possession. But they were not accompanied by any acts of control, such as "placing his boat over the wreck, with the means to raise its valuables and with persistent efforts directed to raising [the cargo]."⁶

§ 4.03 Categories of "Found" Property

[A] Four Traditional Categories

The common law recognizes three basic categories of "found" property:

- (1) abandoned property;
- (2) lost property; and
- (3) mislaid property.⁷

English law traditionally included a fourth category—known as "treasure trove"—which most jurisdictions have not adopted. "Found" property is assigned to one of these categories according to the presumed intent of its original owner. The rights of a finder and other claimants turn in part on how the property is categorized. Broadly speaking, if a "found" object does not fit within these categories, it is not subject to the law of finders.⁸

[B] Definitions

[1] Abandoned Property

Property is *abandoned* when the owner intentionally and voluntarily relinquishes all right, title, and interest in it.⁹ For example, if O deposits a broken toy on the sidewalk so that it can be removed by garbage collectors, he has abandoned it. On the other hand, if O merely leaves the toy on the sidewalk overnight, intending to reclaim it in the morning, no abandonment has occurred. Thus, one illustrative decision held that the owners of "up to one billion dollars in gold" sunk in an 1857 shipwreck did not abandon their rights merely by failing to recover the gold.¹⁰

⁶ *Id.* at 512.

⁷ See, e.g., *Benjamin v. Lindner Aviation, Inc.*, 534 N.W.2d 400 (Iowa 1995).

⁸ See, e.g., *Goodard v. Winchell*, 52 N.W. 1124 (Iowa 1892) (meteorite that was found by defendant after it "fell from the heavens" onto plaintiff's land was not subject to the law of finders).

⁹ *Ritz v. Selma United Methodist Church*, 467 N.W.2d 266 (Iowa 1991). See also *In re Seizure of \$82,000 More Or Less*, 119 F. Supp. 2d 1013 (W.D. Mo. 2000) (money hidden by drug traffickers in car gas tank deemed abandoned, so money was owned by car purchasers who found it).

¹⁰ *Columbus-America Discovery Group v. Atlantic Mutual Ins. Co.*, 974 F.2d 450 (4th Cir. 1992). See also *Charrier v. Bell*, 496 So. 2d 601 (La. Ct. App. 1986) (Native American tribe did not abandon jewelry, pottery, and other items buried with the dead centuries ago).

[2] Lost Property

Property is deemed *lost* when the owner unintentionally and involuntarily parts with it through neglect or inadvertence and does not know where it is.¹¹ Thus, if O's lucky silver dollar accidentally falls through a hole in his pocket onto the ground, it is considered lost.

[3] Mislaid Property

Property is considered *mislaid* when the owner voluntarily puts it in a particular place, intending to retain ownership, but then fails to reclaim it or forgets where it is.¹² For example, if O momentarily places his wallet on a store counter while paying for a purchase, and then leaves the store without it, the wallet is mislaid.

[4] Treasure Trove

Finally, *treasure trove* consists of gold, silver, currency, or the like intentionally concealed by an unknown owner for safekeeping in a secret location (e.g., buried underground or hidden in a house) in the distant past. As one court described the concept, "it carries with it the thought of antiquity."¹³

[C] Criticism of the Category System

In theory, the category system helps implement the wishes of the object's original owner. For example, if O intends to relinquish his rights in a toy left on the sidewalk (abandoned property), the law will vest title in finder F. Conversely, if O left the toy there temporarily, intending to reclaim it (mislaid property), F has no rights. In practice, however, proving the owner's intent is difficult in most cases, because the typical dispute is between a finder and the landowner or other occupant of the land where the object is found; the object's true owner is usually unknown and thus not a party to the dispute. The court must attempt to discern the missing owner's intent by the only evidence available—the nature of the item and the circumstances under which it was found.

Commentators generally agree that this approach is an unreliable method for determining intent.¹⁴ For example, suppose that F finds a gold ring near a gopher hole in City's park. If F and City dispute ownership, their respective rights pivot on how the ring is classified. What was the intent of the original ring owner? Four conclusions are possible:

- (1) the ring accidentally fell off the owner's finger (lost property);
- (2) fearing an accidental loss, the owner placed the ring there for temporary storage but then forgot it (mislaid property);

¹¹ *Benjamin v. Lindner Aviation, Inc.*, 534 N.W.2d 400 (Iowa 1995).

¹² *Ritz v. Selma United Methodist Church*, 467 N.W.2d 266, 269 (Iowa 1991).

¹³ *Id.*

¹⁴ See, e.g., Richard H. Helmholz, *Equitable Division and the Law of Finders*, 52 *Fordham L. Rev.* 313, 316 (1983).

- (3) following a failed marriage, the heartbroken owner dropped the ring on the ground and walked away (abandoned property); or
- (4) the owner hid the ring underground years ago for safekeeping (treasure trove).¹⁵

§ 4.04 Rights of Finder Against Original Owner

[A] Rights to Lost or Mislaid Property

Suppose that O's valuable watch accidentally slips off his wrist while he is strolling down the sidewalk and is later found by F. O demands its return; F refuses. Who owns the lost watch? The childhood refrain "finders keepers, losers weepers" suggests that F now owns it. Yet—as between these two claimants—all American courts would conclude that O is still the owner.¹⁶ F holds the watch as a mere bailee for O's benefit (see § 7.03). Thus, F may be liable to O for damages if he delivers the watch to another person who falsely claims to be the true owner.¹⁷

As a general rule, an owner retains title to lost or mislaid property found by another.¹⁸ In *Ganter v. Kapiloff*,¹⁹ for example, the defendant discovered rare stamps worth over \$150,000 in a dresser he had purchased at a used furniture store for \$30. When the true owners of the stamps brought a replevin action to regain possession, the defendant finder claimed ownership under a "finders keepers" theory. Affirming summary judgment in favor of the true owners, the court dismissed the finder's theory as a mixture of "hot air, folklore, and wishful thinking."²⁰

The policy rationale for preferring the true owner over the finder is straightforward. Under utilitarian theory, the law seeks to encourage the productive labor that an owner undertakes to acquire property, not to reward a finder's minimal effort. Similarly, the rule provides an owner with the security of title that is necessary to use property for maximum social benefit, rather than keeping it hidden and idle for fear of loss. In addition, a contrary rule would tend to encourage theft because a thief might obtain title by pretending to be a finder.

¹⁵ For example, in *Hendle v. Stevens*, 586 N.E.2d 826 (Ill. App. Ct. 1992), a child playing with friends on undeveloped land kicked a small mound of earth near two animal burrows, revealing \$6,061 in currency fastened together with string or a rubber band; the court was unable to conclude from this evidence whether the currency was lost, mislaid, or abandoned.

¹⁶ See, e.g., *Clark v. Maloney*, 3 Del. 68 (Super. Ct. 1840) (owner of logs that floated away during storm prevailed over finder).

¹⁷ See, e.g., *Fisher v. Klingenberg*, 576 N.Y.S.2d 476 (City Ct. 1991) (finder's agent who mistakenly delivered found tools to third party claiming ownership, but failed to check claimant's identity, held liable in damages to true owner).

¹⁸ In other words, "owners keepers, finders weepers"! However, for example, a finder may acquire title to personal property through adverse possession. See § 7.02.

¹⁹ 516 A.2d 611 (Md. Ct. Spec. App. 1986).

²⁰ *Id.* at 612.

[B] Rights to Abandoned Property

In contrast, the first person who takes possession of abandoned property acquires title that is valid against the world, including the prior owner.²¹ For example, suppose that O suddenly throws his watch on the sidewalk and hurries away shouting: "I never want to see that watch again." This conduct would be considered abandonment; it demonstrates that O has voluntarily and intentionally relinquished his title to the watch. When bystander F picks up the watch and places it in his pocket, his possession confers title. O has no legal right to demand its return.

When an owner releases his or her rights through abandonment, the property becomes unowned. Much like an escaped wild animal (*see* § 3.02[D]), the property is now available for "capture" by another who will place it in productive use, thereby benefiting society in general.

§ 4.05 Rights of Finder Against Third Persons Generally

[A] "Finders Keepers"?

Decisions often proclaim that the finder of lost property obtains title sufficient to prevail over every other claimant except the true owner. This is a vast oversimplification. The owner or occupant of land where the object is found often receives title (*see* § 4.06), despite the finder's claim. Setting aside this special situation, however, as a general rule the finder acquires title to lost property that is superior to the claims of all other persons except the owner.²² Thus, broadly speaking, if F finds O's lost watch, F obtains title to the watch that prevails over the claims of everyone *except* O. Thus, if F now loses the watch and it is found by X, F can recover the watch from X.

[B] *Armory v. Delamirie*

The leading case illustrating this rule is *Armory v. Delamirie*.²³ Plaintiff, a poor "chimney sweeper's boy," found a "jewel" in 1722 and took it to the defendant's goldsmith shop for identification. After an apprentice removed the "stones" from their socket, the defendant refused to return them to the boy. The court concluded that by finding and possessing the jewel the boy had acquired "such a property as will enable him to keep it against all but the rightful owner." The defendant was accordingly held liable in trover²⁴ for the value of the jewel.

²¹ *See, e.g.*, *Haslem v. Lockwood*, 37 Conn. 500 (1871) (manure dropped on public street by passing animals was abandoned property; plaintiff acquired ownership by an act of possession—raking the manure into piles).

²² Indeed, as a general rule, even one who acquires possession of property through theft acquires title that is superior to that of others except the true owner.

²³ 93 Eng. Rep. 664 (K.B. 1722).

²⁴ "Trover" is a common law theory to recover damages for interference with personal property that is owned or possessed by another person.

The facts in *Armory* help illustrate the justifications for the general rule preferring the finder over third parties. The rule allows a finder like the sweeper's boy to return a "found" item to productive use, rather than encouraging him to keep it hidden. Moreover, the boy's prior possession is an efficient standard for determining ownership, with minimal expenditure of societal resources. Finally, this result honors the reasonable expectations of the competing parties; the goldsmith is the moral equivalent of a thief.

[C] Relativity of Title

The respective rights of competing claimants in cases like *Armory* illustrate the doctrine of "relativity of title," which extends to both real and personal property. It is a basic precept of American property law that title is relative, not absolute.

Suppose that the jewel in *Armory* was lost by O. As between O and F, the boy finder, the law would hold that O owned the jewel. Yet, as the case demonstrates, as between F and the goldsmith, the court held that F was the owner. *How can O and F both "own" the jewel at the same time?* The answer is found in relativity of title. Depending on the circumstances, the law may choose to recognize different persons as the "owner" of the same property. O is still an "owner." But until O reclaims the jewel, the law also recognizes F as an "owner."

§ 4.06 Rights of Finder Against Landowner

[A] The Issue

Suppose F finds a diamond ring on land owned by L. As between F and L, who owns the ring? Most of the complexity (and inconsistency) in the law of finders stems from judicial efforts to resolve this thorny question. Some courts assert that the finder of lost property prevails over all claimants except the object's true owner; under this view, F owns the ring. In practice, however, this approach has been virtually swallowed by a series of exceptions that tend to vest title in the person who owns or occupies the land where the object is found. In short, an American court is more likely to award the ring to L than to F.

[B] Rights to Objects Found on Private Land Generally

[1] Location of Object

In general, objects found either within a house²⁵ or embedded in the soil on private land²⁶ are awarded to the landowner, not the finder. For

²⁵ *But see* *Hannah v. Peel*, 1 K.B. 509 (1945) (under English law, brooch found by lawful occupant of home awarded to finder, rather than to landowner who had never lived in the home).

²⁶ *See, e.g.,* *Favorite v. Miller*, 407 A.2d 974 (Conn. 1978) (portion of statue buried in swamp);

example, in *Favorite v. Miller*²⁷ defendant believed that pieces of a 200-year-old lead statue of King George III hacked apart during the chaos of the Revolutionary War might be located on swamp land owned by plaintiff. Without seeking plaintiff's permission, defendant entered the land, used his metal detector to locate a statue fragment buried 10 inches below the soil surface, removed the fragment, and sold it to a museum. Applying the rule for objects "embedded in the earth" and stressing that defendant was a trespasser, the court awarded the fragment to the landowner.

The rationale for this rule is somewhat elusive. Courts often recite that such objects were already in the "constructive possession" of the landowner before the find, but this fiction explains little. Similarly, some courts rely on the distinction between "mislaid" and "lost" property, suggesting that vesting possession in the landowner will facilitate its return to the true owner; yet, as *Favorite* illustrates, the true owner may never return. These cases are better explained by focusing on the reasonable expectations of the parties. Consistent with the traditional rule that title to land carries with it title to everything attached to or under the land, landowners would reasonably expect that they own objects within their house or under their land. In general, persons entering onto the land of another should have no expectation that the law will award them title to objects they find there.

This focus on expectations helps decipher the well-known case of *Hannah v. Peel*.²⁸ Defendant acquired title to a house in England, but never entered into occupancy. The house was requisitioned by the government for quartering soldiers during World War II. Plaintiff, a soldier stationed at the house, discovered a brooch covered with "cobwebs and dirt" loose in a crevice in his bedroom wall; he turned the brooch over to the police, who delivered it to the defendant landowner. In a remarkably vague opinion, the court ruled for the soldier.

If the doctrine of constructive possession is to be taken seriously, one might try to explain this outcome by pointing out that the defendant landowner in *Hannah* had never physically occupied the house and thus never held possession. But this explanation cannot suffice. For example, if the brooch had been found by a plumber who entered the house at the landowner's request to fix a leaky pipe, the court would have awarded it to the absentee landowner, not the plumber. The key lies in the expectations of the landowner. Once possession of the house was lawfully transferred to the government, the landowner's expectation of owning objects later found within the house was greatly diminished; after all, an object like the brooch might have been hidden in the crevice by another soldier after the government took possession.

Given the judicial focus on awarding objects found *within a house* or *embedded in the soil* to the landowner, one might expect to encounter a line

Allred v. Biegel, 219 S.W.2d 665 (Mo. Ct. App. 1949) (ancient Indian canoe embedded in river bank); South Staffordshire Water Co. v. Sharman, 2 Q.B. 44 (1896) (gold rings in mud at bottom of pond).

²⁷ 407 A.2d 974 (Conn. 1978).

²⁸ 1 K.B. 509 (1945).

of authority holding that objects found elsewhere on private land (i.e., *outside on the land surface*) are awarded to the finder. Yet this scenario rarely arises; and even when it does, the finder's status may be enough to defeat the claim.

[2] Status of Finder

The status of the finder also plays an important role. For example, the successful plaintiff in *Hannah v. Peel* was a lawful occupant, akin to a tenant, with broad rights to use and enjoy the land. In contrast, if the finder is a mere employee of the landowner (e.g., a gardener) or is present on the land for a special purpose (e.g., to deliver mail), the claim of the landowner normally prevails.

Trespassers pose special problems. Treatises and courts sometimes broadly assert that even the trespassing finder prevails over the landowner. But many courts are concerned about endorsing a rule that would encourage trespass. They hold that a trespassing finder acquires no rights in found objects, unless the trespass is merely trivial or technical.²⁹ Indeed, Professor R.H. Helmholz concludes that courts routinely rule against the trespassing finder: "[A] trespassing finder can acquire no rights in the fruits of his wrong."³⁰

[C] Rights to Treasure Trove

Under English law, neither the finder nor the landowner owned treasure trove; rather, it belonged to the king. American courts uniformly reject the English approach, but differ on what standard should replace it. Some older authorities treat treasure trove like any form of lost property, vesting title in the finder. But modern courts—seeking to deter trespass by would-be finders—increasingly award treasure trove to the landowner, either treating it as an object embedded in the soil³¹ or as mislaid property.³²

[D] Rights to Objects Found in Public Places

A valuable object left in a public place such as a store, bank, or restaurant is usually considered mislaid property and awarded to the owner or

²⁹ See, e.g., *Favorite v. Miller*, 407 A.2d 974 (Conn. 1978); *Bishop v. Ellsworth*, 234 N.E.2d 49, 52 (Ill. App. Ct. 1968).

³⁰ Richard H. Helmholz, *Wrongful Possession of Chattels: Hornbook Law and Case Law*, 80 Nw. U. L. Rev. 1221, 1231 (1986).

³¹ See, e.g., *Morgan v. Wiser*, 711 S.W.2d 220, 223 (Tenn. Ct. App. 1985) (buried gold coins awarded to landowner, on rationale that "the discouragement of trespassers contributes to a preservation of the peace in the community"); *Schley v. Couch*, 284 S.W.2d 333 (Tex. 1955) (currency buried under dirt floor awarded to landowner).

³² As Professor Helmholz has observed, it "makes little sense to award what may be intentionally buried property to the finder and yet maintain the distinction between lost and mislaid property for the avowed purpose of protecting the true owner." Richard H. Helmholz, *Equitable Division and the Law of Finders*, 52 Fordham L. Rev. 313, 318 n.26 (1983).

occupant of the premises, not the finder.³³ The rule rests on the legal fiction that mislaid property has been entrusted to the custody of the owner or occupant.

In *McAvoy v. Medina*,³⁴ for example, a customer claimed title to a "pocket-book" containing money that he had discovered on a table in defendant's barbershop. The parties agreed that the true owner was a prior customer who had "voluntarily placed" the pocketbook on the table. The court concluded that it had been mislaid, not lost; thus, arguably it was already in the barber's "constructive possession" before its discovery. The pocketbook was awarded to the barber on the basis that this result would best ensure its return to the true owner. Remembering his loss, the owner would presumably return to the shop and demand his property. As a bailee, the barber was obligated to "use reasonable care for the safe keeping of the same until the owner should call for it."³⁵

[E] Ensuring Return to the True Owner?

Are the rules governing the respective rights of the finder and the landowner designed to ensure a "found" object's safe return to its original owner, as the mislaid property cases suggest? This explanation seems to falter somewhat when applied to lost property. For example, the true owner is more likely to return and reclaim property accidentally left on the land surface (recent loss, easy to locate) than property embedded in the soil (old loss, difficult to locate). If so, then a "return to owner" principle would tend to support awarding possession of objects found on the surface to the landowner (as custodian until the owner's probable return), but awarding possession of embedded objects to the finder (because the owner is unlikely to return). But the law is just the reverse; objects embedded in the land belong to the landowner, while courts continue to imply that objects found on the land surface should be awarded to the finder.

§ 4.07 Statutes Defining Rights of Finders

In many states, statutes governing rights in "found" property supersede the confusing common law. These statutes commonly adopt two simplifying reforms. First, either expressly or implicitly, most of these statutes abolish the traditional distinctions between lost property, mislaid property, and treasure trove; some extend to abandoned property as well. Second, they replace the tangled common law doctrines governing the respective rights of landowners and finders with a clear rule: *the finder wins*.³⁶

³³ *But see* *Bridges v. Hawkesworth*, 21 L.J.Q.B. 75 (1851) (banknotes in parcel found on floor of shop were not "intentionally deposited" there by owner; they were thus considered "lost" property and awarded to finder, not shopkeeper).

³⁴ 93 Mass. (11 Allen) 548 (1866).

³⁵ *Id.* at 549.

³⁶ *Hurley v. City of Niagara Falls*, 289 N.Y.S.2d 889 (App. Div. 1968), illustrates the operation of such a statute. Defendants hired plaintiff, a contractor, to build a recreation room in the basement of their home; while trying to remove a pipe, plaintiff found \$4,990 in currency

These statutes usually follow the same basic pattern. Typically, the finder must turn over the "found" item to the local police department or other law enforcement agency, often with a written description of the circumstances of the find.³⁷ Either the finder or the local authority may be required to advertise the find. The true owner of the item may recover it within an established time period (generally ranging from 90 days to one year); some jurisdictions require that the owner pay a reward to the finder. If no one claims the item within the required time period, it becomes the property of the finder.

The most remarkable feature of this statutory approach is its departure from the common law tendency to award "found" property to the landowner or occupant. The approach is designed to maximize the likelihood of returning property to its true owner by giving the finder an incentive to turn it over to local authorities.

hidden behind a sink partition. Under the common law approach, a court would presumably have awarded the money to the landowners as mislaid property, while stressing that finder was on the premises only for a limited purpose. Relying on the New York statute, however, the court vested title in the finder as "the person who first took possession of the money."

³⁷ See, e.g., Cal. Civ. Code §§ 2080-2080.3; N.Y. Pers. Prop. Law §§ 251-257.

Chapter 5

GIFTS OF PERSONAL PROPERTY

SYNOPSIS

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- § 5.02 What Is a Gift?
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§ 5.01 Gifts in Context

The right to transfer property by gift is uniformly recognized as a fundamental right.¹ From the utilitarian perspective, legal recognition of a gift provides mutual benefits to both parties, thus optimizing social happiness; the donor derives altruistic satisfaction, while the donee receives the value of the item.²

This chapter examines gifts of personal property—both tangible personal property such as artwork, jewelry, and antiques, and intangible personal property such as copyrights and choses in action—made during the donor's lifetime; Chapter 28 examines the transfer of property at death. The rules governing gifts—once remarkably rigid—have been in transition for several decades, torn between the conflicting policies of certainty and donor autonomy. Concerned that judicial enforcement of the traditional “delivery” requirement may frustrate a donor's intent, modern courts increasingly

¹ See Carol M. Rose, *Giving, Trading, Thieving, and Trusting: How and Why Gifts Become Exchanges, and (More Importantly) Vice Versa*, 44 U. Fla. L. Rev. 295 (1992).

² See generally Richard A. Posner, *Gratuitous Promises in Economics and Law*, 6 J. Legal Stud. 411 (1977); Steven Shavell, *An Economic Analysis of Altruism and Deferred Gifts*, 20 J. Legal Stud. 401 (1991).

ignore or circumvent this standard. Under this emerging view, clear evidence of the donor's intent obviates the need for formal delivery.

§ 5.02 What Is a Gift?

A gift is a voluntary, immediate transfer of property without consideration from one person (the *donor*) to another person (the *donee*). Consider a hypothetical party celebrating B's birthday. Each party guest (donor) voluntarily presents a colorfully-wrapped package (gift) to B (donee), without receiving payment or other consideration; the transfer of ownership rights in the package to B is immediately effective. A transfer that takes effect in the future is not a valid gift; for example, a transfer effective upon the donor's death is governed by the law of wills, not the law of gifts.

The law recognizes two categories of gifts. The *gift inter vivos* is an ordinary gift made by one living person to another, as in the birthday example above; once made, it is irrevocable. The *gift causa mortis* is also a present gift between living persons, but one made in anticipation of the donor's imminent death; thus, if the donor survives the anticipated peril, the gift is revoked.

One scholar suggests that the boundaries between gift and two other types of property transfers—larceny (involuntary transfer without consideration) and sale (voluntary transfer for consideration)—may overlap.³ If elderly R "gives" a valuable jewel to her young friend E, was the jewel given in exchange for the services that E has provided in caring for R, and hence more like a sale than a true gift? Or was this transfer the product of undue influence that E exerted over R, and thus like larceny?

§ 5.03 Gifts Inter Vivos

[A] General Rule

There are three requirements for a valid gift inter vivos:

- (1) *intent* (the donor must intend to make an immediate gift);
- (2) *delivery* (the donor must deliver the gift); and
- (3) *acceptance* (the donee must accept the gift).

In practice, intent is usually the most important element. The requirement of delivery is controversial; while still significant, it is being increasingly eroded by courts concerned that it may frustrate the donor's intent. Finally, acceptance of a valuable gift is usually presumed and thus rarely becomes an issue.⁴

³ Carol M. Rose, *Giving, Trading, Thieving, and Trusting: How and Why Gifts Become Exchanges, and (More Importantly) Vice Versa*, 44 U. Fla. L. Rev. 295, 303 (1992).

⁴ See generally Roy Kreitner, *The Gift Beyond the Grave: Revisiting the Question of Consideration*, 101 Colum. L. Rev. 1876 (2001) (discussing how modern courts apply these elements).

[B] Intent

The donor must intend to make an immediate transfer of ownership to the donee. The statements and actions of the donor usually provide the best evidence of intent. In *Gruen v. Gruen*,⁵ for example, the donor's intent to transfer rights in a painting to his son as a birthday present was established in part by a letter that expressly stated: "I therefore wish to give you as a present the oil painting by Gustav Klimpt of Schloss Kammer."⁶ Alternatively, intent may be inferred from the donor's act of giving possession of the item to the donee, the nature and value of the item, the relationship between the parties, and other circumstances.

If the donor intends the "gift" to take effect in the future (e.g., upon the donor's death), it is a nullity that confers no rights on the donee. Suppose R plans to produce a musical comedy, and tells E: "After my musical is produced, I'll give you 5% of my share of the profits." Because R intends a future transfer only, no gift results. But the requisite intent for a present transfer will be found if R states instead: "I give you 5% of my share of the future profits from the musical."⁷

Under the same logic, if a condition precedent must be fulfilled before a gift becomes effective, no immediate transfer has occurred and thus no gift will be found. But an invalid conditional gift may be enforceable as a valid contract. If R tells E, "when you bring me that photograph, I'll give you that rare stamp we discussed," R's statement could be seen as an offer for a unilateral contract, which E can accept through the act of bringing R the photograph. However, a gift that takes immediate effect may be made subject to a condition subsequent (e.g., "I give you this rare stamp, but if you don't visit me next week the gift will be void.").

Conditional gift issues arise most commonly in the special context of engagement presents. Suppose that M gives W an engagement ring, the engagement is later broken, and W refuses to return the ring. Who is entitled to the ring? Courts uniformly agree that an engagement ring is given subject to the implied condition subsequent of future marriage. Many courts still cling to the traditional view that the donor can recover the ring only if the engagement were dissolved by agreement or if the donee were at fault in breaking the engagement.⁸ But a growing minority of courts follows a "no fault" approach to the issue, always allowing the donor to recover the ring.⁹ Three rationales underpin this modern view: (1) because

⁵ 496 N.E.2d 869 (N.Y. 1986).

⁶ *Id.* at 871.

⁷ *Speelman v. Pascal*, 178 N.E.2d 723 (N.Y. 1961) (letter demonstrated donor's intent to make a present gift of 5% of future profits from the musical "My Fair Lady"); *see also Gruen v. Gruen*, 496 N.E.2d 869 (N.Y. 1986) (father intended the immediate transfer of a remainder interest in a painting to his son, even though the father retained a life estate).

⁸ *Vann v. Vehrs*, 633 N.E.2d 102 (Ill. App. Ct. 1994) (agreement); *Coconis v. Christakis*, 435 N.E.2d 100 (Ohio County Ct. 1981) (recognizing rule, but finding no fault by donee).

⁹ *See, e.g., Fierro v. Hoel*, 465 N.W.2d 669 (Iowa Ct. App. 1990); *Heiman v. Parrish*, 942 P.2d 631 (Kan. 1997); *Aronow v. Silver*, 538 A.2d 851 (N.J. Super. Ct. Ch. Div. 1987) (condemning majority rule as "sexist and archaic"); *Gaden v. Gaden*, 272 N.E.2d 471 (N.Y. 1971); *Lindh v. Surman*, 742 A.2d 643 (Pa. 1999).

the engagement period is intended to allow a couple to test the permanency of their mutual feelings, the donor should not be penalized for avoiding an unhappy marriage; (2) it is extraordinarily difficult to assess fault in this setting; and (3) just as fault has become irrelevant to divorce proceedings, it should be irrelevant to breaking an engagement.

[C] Delivery

[1] The Requirement of Delivery

The second traditional requirement for the validity of a gift is delivery.¹⁰ The United States inherited the English common law rule that words alone were insufficient to effect a gift of personal property. As a leading English decision explained: “[I]n order to transfer property by gift . . . there must be an actual delivery of the thing to the donee. Here the gift is merely verbal.”¹¹ Under this early view, “delivery” meant physically handing over the chattel to the donee. Over time, three additional types of delivery have been accepted: constructive delivery, symbolic delivery, and delivery through a third person.¹²

Why require delivery at all? Its genesis is found in the feudal mindset which inextricably linked title and possession; title to a chattel could be transferred only by transferring possession. The requirement survived the centuries because—as Philip Mechem summarized in a famous article¹³—it arguably serves three policy goals. First, the donee’s possession helps to demonstrate the donor’s intent to make a gift. Second, the delivery requirement warns the donor about the legal significance of the act, preventing impulsive conduct that the donor might later regret. Finally, the donee’s possession provides *prima facie* evidence that a gift was made.

English law recognized one exception to the delivery requirement: if title to a chattel was transferred by a *deed of gift*, manual delivery was unnecessary. In this context, a deed of gift meant a formal written instrument that:

- (1) contained language reflecting the donor’s intent to make a gift;
- (2) described the subject matter of the gift;
- (3) identified the donee; and
- (4) was “sealed” (that is, bore a wax impression of the donor’s personal seal).

¹⁰ See, e.g., *Irvin v. Jones*, 832 S.W.2d 827, 827 (Ark. 1992) (finding no gift of certificates of deposit where the alleged donee had “retained sole possession of the certificates at all times and . . . never delivered them to appellants”); see also *Irons v. Smallpiece*, 106 Eng. Rep. 467 (R.B. 1819) (the landmark English decision imposing the delivery requirement).

¹¹ *Irons v. Smallpiece*, 106 Eng. Rep. 467, 468 (R.B. 1819).

¹² There are, of course, various exceptions to the delivery requirement (e.g., property already in the possession of the donee need not be delivered).

¹³ Philip Mechem, *The Requirement of Delivery of Gifts in Chattels and of Choses in Action Evidenced by Commercial Instruments*, 21 Ill. L. Rev. 341 (1926).

The American reaction to this exception was mixed; some states followed the English approach, while others permitted the use of a deed of gift only if manual delivery was impractical. Since then, virtually all states have eliminated the traditional distinction between sealed and unsealed instruments. In light of this, would an unsealed, informal writing such as a letter obviate the need for manual delivery even if such delivery could easily be made? Certainly the main current of American law is flowing in this direction, though with a semantic twist. Rather than relying on deed of gift terminology, modern courts refer to the use of a writing as *symbolic delivery*.

[2] Methods of Delivery

[a] Manual Delivery

Traditionally, "delivery" connoted *manual delivery*, sometimes called *actual delivery*. In order to deliver an item of personal property, the donor physically transferred possession of the item to the donee. If the item was small and portable—like a ring—the donor usually handed it directly to the donee. For example, R, a guest at E's birthday party, delivers her wrapped present by placing it into E's outstretched hands. Manual delivery is the main method of delivery today for items of tangible personal property.

The limitations of manual delivery, however, are readily apparent. Some items of tangible personal property are too cumbersome and bulky to be handed to a donee (e.g., a large marble statue), while others may not be readily available (e.g., located in a distant state or pledged to a creditor). And manual delivery is impracticable when the donee receives less than complete title to the item (e.g., a one-tenth interest or a remainder interest). Finally, intangible personal property—by definition—cannot be manually delivered.

[b] Constructive Delivery

All jurisdictions permit *constructive delivery* when manual delivery is impracticable or impossible. Under the conventional view, constructive delivery occurs when the donor physically transfers to the donee the means of obtaining access to and control of the property, most commonly by handing over a key. For example, in *Newman v. Bost*¹⁴ the donor effected constructive delivery of a bureau and other household furniture by handing the donee the keys that unlocked these items. Similarly, buried coins are constructively delivered when the donor informs the donee of their location, while range cattle are deemed delivered when the donor rebrands them with the donee's brand.¹⁵

Suppose that R receives a check, endorses it in favor of her apartment roommate E, places it on the kitchen table during E's absence, and then

¹⁴ 29 S.E. 848 (N.C. 1898).

¹⁵ See also *Braun v. Brown*, 94 P.2d 348 (Cal. 1939) (delivery of key to safe deposit box was constructive delivery of contents). But see *In re Estate of Evans*, 356 A.2d 778 (1976) (contra).

abandons the apartment. Is this constructive delivery of the check to E? Because manual delivery of the check was possible, the traditional answer is "no." In the landmark decision of *Scherer v. Hyland*,¹⁶ however, the New Jersey Supreme Court dramatically expanded the definition of constructive delivery and found a valid gift on these facts. As the *Scherer* court explained, this approach "would find a constructive delivery adequate to support the gift when the evidence of donative intent is concrete and undisputed, there is every indication that the donor intended to make a present transfer . . . and when the steps taken by the donor . . . must have been deemed by the donor as sufficient to pass the donor's interest."¹⁷

[c] Symbolic Delivery

Most jurisdictions also permit *symbolic delivery* when manual delivery is difficult. Under this approach, an object that represents or symbolizes the gift is physically handed to the donee. Although in theory virtually any symbol might suffice (e.g., a Rolls-Royce hood ornament might symbolize the car), in practice this type of delivery is almost always effected by giving the donee some type of writing. In *Speelman v. Pascal*,¹⁸ for example, the donor's letter giving the donee a share in future profits from the musical "My Fair Lady" was held an effective symbolic delivery.

The modern trend is to recognize an informal writing as symbolic delivery even when manual delivery is possible,¹⁹ as evidenced by the well-known New York decision of *In re Cohn*.²⁰ There, the donor signed and dated a memorandum that recited "I give this day to my wife . . . five hundred shares of American Sumatra Tobacco Company common stock," but failed to hand over the stock certificates to her.²¹ As the dissent protested, "there was no physical or other impossibility to the actual delivery of the stock."²² Reasoning that the delivery requirement was intended to guard against fraud, mistake, or undue influence—and finding none—the majority found the memorandum to be effective symbolic delivery.²³

[d] Delivery to Third Person

Delivery of a gift may be effected through a third party intermediary. Suppose that R manually delivers a gold watch to T, with instructions that T in turn deliver it to E; T then hands over the watch to E. This is a complete

¹⁶ 380 A.2d 698 (N.J. 1977).

¹⁷ *Id.* at 701.

¹⁸ 178 N.E.2d 723 (N.Y. 1961).

¹⁹ While most states reach this result through case law, others have adopted statutes that provide that symbolic delivery is always permitted. See, e.g., Cal. Civ. Code § 1147.

²⁰ 176 N.Y.S. 225 (App. Div. 1919).

²¹ *Id.* at 225.

²² *Id.* at 232 (Page, J. dissenting).

²³ See also *Gruen v. Gruen*, 496 N.E.2d 869, 874 (N.Y. 1986) (letter from donor to donee constituted valid symbolic delivery of vested remainder in painting; physical delivery of painting to donee not required because "it would be illogical for the law to require the donor to part with possession of the painting when that is exactly what he intends to retain").

gift. But which transfer constituted delivery: R's transfer to T or T's transfer to E? The answer turns on T's status. If T was an agent of R (and thus subject to R's control), then the gift was not complete until T handed the watch to E. Conversely, if T was an agent of E, the gift was complete when T obtained possession.

What if R changes her mind while T still possesses the watch and demands its return? The central question is again T's status. If T is R's agent, then the gift has never been completed and R may revoke it; but if T is E's agent, the gift is irrevocable.

It is well-settled law that the status of the third party intermediary turns on the donor's intent. Thus, the donor's express statement of intent at the time of the transfer to the intermediary is usually controlling (e.g., suppose R handed the watch to T, saying: "Hold this watch as trustee for E"). All too commonly, however, the donor's intent is unclear and must be judicially determined from the circumstances of the case.

A donor may use third party delivery to create a valid conditional gift. For example, assume that R hands the watch to T, saying: "Deliver this watch to E when he passes the state bar examination and hold it as his trustee until then." Because T is E's agent, the transfer to T constituted immediate delivery of the watch, completing the gift. But E is not entitled to possession of the watch until he passes the state bar examination.

[3] Demise of the Delivery Requirement

Enforcement of the delivery requirement may defeat the donor's intent. Suppose that R tells her friend E, in the presence of ten witnesses: "I hereby give you the Rembrandt painting hanging on my living room wall; I wouldn't want my greedy nephew N to get it." E replies: "Thanks, I accept." Ignorant of the law, R fails to hand over the painting to E and dies the next day, leaving no will. Under the rules of intestate succession, all the property R owned at her death is inherited by N, her only living relative. Many courts would invalidate R's attempted gift on these facts due to lack of delivery and award the painting to N, even though R's contrary intent was clear.

The delivery requirement is slowly disappearing. Over 80 years ago, a farsighted legal scholar criticized delivery as a feudal anachronism and predicted its demise.²⁴ Since then, judicial expansion of constructive and symbolic delivery has eroded the traditional rule.²⁵ Thus, although the text of the Restatement (Third) of Property: Wills and Other Donative Transfers formally asserts that delivery is required,²⁶ one of the comments recognizes

²⁴ Harlan F. Stone, *Delivery of Gifts in Personal Property*, 20 Colum. L. Rev. 196 (1920); see also Chad A. McGowan, *Special Delivery: Does the Postman Have to Ring at All—The Current State of the Delivery Requirement for Valid Gifts*, 31 Real Prop. Prob. & Tr. J. 357 (1996); Patrick J. Rohan, *The Continuing Question of Delivery in the Law of Gifts*, 38 Ind. L.J. 1 (1962).

²⁵ See, e.g., *In re Drewett*, 34 B.R. 316 (E.D. Pa. 1983) (finding a valid gift of diamond ring, even though donor continued to wear ring and never executed any writing).

²⁶ Restatement (Third) of Property: Wills and Other Donative Transfers § 6.2 (2003) (providing that the required "transfer" may be made either by "delivering the property to the donee" or by "inter vivos donative document," that is, through symbolic delivery).

a special exception: “[T]his Restatement adopts the position that a gift of personal property can be perfected on the basis of donative intent alone if the donor’s intent to make the gift is established by clear and convincing evidence.”²⁷

The law of gifts will remain unsettled while the delivery requirement lingers. In the interim, courts will continue the trend of subordinating delivery to intent. When evidence of donor intent is compelling, many courts will ignore delivery; if evidence of donor intent is weak, however, courts may rely on a lack of delivery to invalidate a gift.

[D] Acceptance

The third element for a valid gift—acceptance by the donee—is easily established in almost all instances. Even absent any affirmative statements or conduct by the donee indicating acceptance, courts universally presume acceptance of a gift that is unconditional and valuable to the donee.²⁸ Thus, if R intends to give an antique vase to E and delivers it to him, E’s acceptance of the vase is presumed. The gift will fail only if E expressly refuses to accept it.²⁹

§ 5.04 Gifts Causa Mortis

[A] General Rule

A gift causa mortis may be defined as a gift of personal property in anticipation of the donor’s imminently approaching death.³⁰ Unlike a gift inter vivos, a gift causa mortis is revocable. The donor may revoke such a gift at any time before his death. In addition, if the donor does not die from the anticipated peril, the gift is automatically revoked as a matter of law.³¹ A valid gift causa mortis requires all three gift inter vivos elements (intent, delivery, and acceptance) plus a fourth element: the donor’s expectation of imminent death.³²

The gift causa mortis is best viewed as an emergency substitute for a will. Suppose that D collapses and is rushed to the hospital by her niece N, where the doctor advises D that her death is only minutes away; there is insufficient time for D to prepare and execute a will. D privately hands

²⁷ Restatement (Third) of Property: Wills and Other Donative Transfers § 6.2 com. yy (2003).

²⁸ Scherer v. Hyland, 380 A.2d 698 (N.J. 1977); see also Restatement (Third) of Property: Wills and Other Donative Transfers § 6.1(b) (2003).

²⁹ Why might a donee like E refuse a valuable gift? Possible reasons include: (1) to avoid adverse tax consequences; (2) to thwart creditors; and (3) to avoid a moral obligation to the donor.

³⁰ Coley v. Walker, 680 So. 2d 352 (Ala. Civ. App. 1996).

³¹ Most American courts view the gift causa mortis as a gift subject to a condition subsequent that the donor die from the anticipated peril.

³² See, e.g., Foster v. Reiss, 112 A.2d 553 (N.J. 1955) (attempted gift of money, bank account, and stock via decedent’s handwritten note held invalid due to lack of delivery).

her diamond ring to N, saying: "I give you this ring." Under these circumstances, it makes sense to enforce D's gift.³³

[B] Donor's Anticipation of Imminent Death

Although the classic gift *causa mortis* occurs at the donor's deathbed, the doctrine also extends to other situations where death may be weeks or even months away. Most gift *causa mortis* decisions involve a donor confronting the substantial certainty of death in the near future from a particular illness or affliction, such as a cardiac patient about to undergo a risky operation. A gift made by a donor contemplating suicide may also meet this standard.³⁴ A donor's natural apprehension of death in the distant future, however, does not support a gift *causa mortis*.

[C] Criticism of Doctrine

The typical gift *causa mortis* lacks the formal safeguards that the law requires for a valid will (e.g., a writing, disinterested witnesses). Thus, courts often view the doctrine with disfavor (and even hostility), fearing that it encourages fraud, perjury, and undue influence.³⁵

For example, assume that after A dies, his brother B begins wearing A's valuable ring; when questioned, B asserts that A gave him the ring when they were alone in A's hospital room a few moments before A died. How can a court now determine if A actually intended a gift? In a case involving a claimed gift *inter vivos*, the donor is usually alive to testify concerning intent; if the donor is dead, evidence that the donee held long-term possession of the item without any objection allows an inference of donor intent. In contrast, here both A's testimony and evidence of A's acquiescence in B's possession of the ring are unavailable. B is the only witness to the alleged gift, raising concerns that his story is a tangle of lies. Or was the gift the product of undue influence that B exerted while A was in a highly vulnerable condition?

§ 5.05 Restrictions on Donor's Autonomy

Suppose that R exchanges some of his property for a stack of \$100 bills and begins handing the bills to strangers passing by on the sidewalk. Assuming that the elements of intent, delivery, and acceptance are all present, the legal system will not question R's actions. The competing jurisprudential theories that underpin American property law agree that R has the right to give his property away to anyone he chooses.³⁶

³³ See, e.g., *Newman v. Bost*, 29 S.E. 848 (N.C. 1898) (former manager of opera house, on deathbed and stricken with paralysis, made gift *causa mortis* to housekeeper).

³⁴ See, e.g., *Scherer v. Hyland*, 380 A.2d 698 (N.J. 1977). In some states, however, a gift in contemplation of suicide is void as against public policy.

³⁵ See, e.g., *Newman v. Bost*, 29 S.E. 848, 848 (N.C. 1898) (noting that the doctrine arose in an era when "[l]earning was not so general, nor the facilities for making wills so great then as now").

³⁶ Moreover, public policy encourages charitable donations, as evidenced by the charitable deduction available under the Internal Revenue Code.

Statutory exceptions have somewhat eroded this general rule in extreme situations. For example, elderly parent P cannot freely give away assets to her child C in order to impoverish herself and thus qualify for federal Medicaid benefits.³⁷ Similarly, most states restrict lifetime gifts by one spouse that are intended to nullify the property rights that the law accords to a surviving spouse (see § 11.03[D]).

³⁷ 42 U.S.C. § 1396p(c); see also Jan Ellen Rein, *Misinformation and Self-Deception in Recent Long-Term Care Policy Trends*, 12 J.L. & Pol. 195, 219-27 (1996).

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law outlines



PROPERTY

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- F. **Accession:** Accession occurs when a person *in good faith* adds his labor to the property of another, or when a person *in good faith* mixes his labor and his property with the property of another. The problem is who owns the resulting product.
1. **General rules:** When only labor is added the owner of the original property owns the resulting product, unless the value added by the labor is substantial. In that case, the laborer owns the resulting product but must compensate the owner of the original property for the trespass. When labor and new material is mixed with another's original property the resulting product goes to whichever person supplied the more significant and valuable material. If that is the good faith improver, she must pay for her trespass.
 2. **Mistaken improver of real property:** The mistaken improver doctrine is a variation of accession that is applied to real property. A person who *in good faith* constructs an improvement on the land of another (usually a neighbor) creates in the neighbor an *option* to either (1) *sell the land to the improver at its fair market value (net of the improvement)* or (2) *paying to the improver the fair value of the improvement itself.*

III. PERSONAL PROPERTY

- A. **Introduction:** Issues concerning personal property are present in many areas of law: e.g., contracts (particularly sales of goods), commercial transactions, and intellectual property. This section deals briefly and selectively with only some personal property issues.
- B. **Bailments:** A *bailment* is a *legitimate possession* of personal property by someone who is *not the owner* of the property. The person who owns the property is called the *bailor* and the non-owner in possession is called the *bailee*. Bailments can be created voluntarily or involuntarily.

Example: You leave your watch with the jeweler to be repaired. A voluntary bailment is created. But if you forgetfully leave your car keys on the jeweler's counter when you leave an involuntary bailment is created.

In order for a bailment to exist the bailee must have *actual control* of the property *together with intent to possess* the property.

1. **Bailors, bailees, and third parties:** A bailee has a better claim to the property than any third party and is thus entitled to damages from any third party who wrongfully injures the property, but must turn over the damage proceeds to the bailor. Bailors may recover from a third party for injury to the property if the third party has not already paid the bailee. A bailor of a *voluntary* bailment may not proceed against a third party who has already paid the bailee. The bailor's remedy is to recover from the bailee, his chosen agent. This rule is sometimes called the *Winkfield doctrine* after a case so holding: *The Winkfield*, [1902] P. 42 (1901). The Winkfield doctrine does not apply to an *involuntary* bailment: The *bailor may recover from a third party who has already paid the bailee*. The rationale is that the bailor had no opportunity to select his bailee and thus ought not be bound by whatever settlement or judgment the bailee obtained.
- C. **Gifts:** A gift is a *voluntary transfer* of property for *no consideration*. To accomplish a gift of personal property the donor must *intend to make a gift*, the property must be *delivered to the donee* (the recipient of the gift), and the donee must *accept* the property. Gifts are commonly divided into gifts *inter vivos* (during life) and gifts *causa mortis* (in contemplation of impending death). A gift is *inter vivos* if it is made with no knowledge or threat of impending death. *Inter vivos*

gifts are irrevocable. A gift is *causa mortis* if it is made with knowledge or under threat of immediate death and motivated by that fact. Gifts *causa mortis* are revocable if the donor recovers from the illness or threat causing the donor to make the gift in contemplation of death, or if the donor dies of some other cause that did not prompt the gift. Courts view gifts *causa mortis* with some skepticism because the donor is likely to be dead and the completed gift is a substitute for a will, a form of giving at death that is laden with formalities to be sure that the dead person's wishes are accurately carried out.

1. **Intent:** For a gift to occur the donor must intend to transfer *title*. If the donor's intent is *merely to transfer possession*, no gift has been accomplished. Evidence on this element is usually circumstantial, unless the donor executes a deed or some other written expression of donative intent.
 - a. **Gifts causa mortis:** Recall that gifts *causa mortis* are revocable if the donor recovers from the threat of death that motivated the gift. The donor's intention is presumed to be to make the gift *only because of impending death*. But if a donor intends the gift to be irrevocable regardless of her impending death, it is not a gift *causa mortis* (revocable) but is an irrevocable *inter vivos* gift.
2. **Delivery:** The general rule is that the subject of the gift must be *delivered* to the recipient in order for the gift to be complete. The best form of delivery is *actual physical possession*, but that is not always required. When physical delivery is *impractical* or *impossible*, delivery may be accomplished by *symbolic delivery* or *constructive delivery*.
 - a. **Rationale:** Delivery is thought to perform three valuable functions:
 - **Making abstraction a reality:** When a donor must part with a cherished possession, the idea of giving becomes real. A donor will part with possession of an object only if she truly wishes to give. As the ancient bromide has it: "Actions speak louder than words."
 - **Objective evidence of intent:** Intent is subjective, but delivery is objective. Delivery acts as a secondary check on intent.
 - **Objective evidence of acceptance:** Delivery of property is presumptive evidence of acceptance by the donee.
 - b. **Relationship of delivery to intent:** To the extent that the element of delivery is easily satisfied by something other than delivery of *actual physical possession* — either *symbolic delivery or constructive delivery* — the element of delivery becomes virtually the same as intent. In both cases the issue becomes, "What did the donor intend by her acts?"
 - c. **Delivery by deed:** Delivery can be accomplished by a *deed of gift* or some other *writing under seal*. Although the law no longer makes much of the distinction between sealed instruments (those that bore a ritual indication of authenticity, as a notarial seal) and unsealed instruments (merely signed by the maker), this distinction persists here. Some courts only recognize sealed instruments as adequate to deliver by writing. But unsealed instruments may accomplish the work of delivery if they are adequate to constitute symbolic or constructive delivery.
 - d. **Symbolic delivery:** When actual physical delivery is *impossible* or *impractical* delivery can be accomplished by delivering some object that is *symbolic of possession*.

Example: Tom, author of a series of hugely successful adventure novels, decides to give to his daughter the copyright in his latest novel, *Last Clear Chance*. He writes the following on his letter paper: "I hereby give my daughter Jane my copyright in *Last Clear Chance*. [signed] Tom." Tom physically gives the paper to his daughter. Jane owns the copyright. It is impossible to physically deliver intangible personal property like a copyright. Tom's writing is symbolic of possession of the intangible right. Cf. *In re Cohn*, 187 App. Div. 392 (N.Y. 1919) (gift of corporate stock). Symbolic delivery is adequate when physical delivery is simply not practical.

Example: Tom decides to give his daughter Jane his concert grand piano, even though she has no room for it in her apartment. He gives to Jane a signed letter: "Dear Jane, I hereby give you my concert grand piano. Come play it whenever you wish and take it away whenever you can. Love, Tom." The letter constitutes symbolic delivery of the piano.

- e. **Constructive delivery:** When actual physical delivery is *possible but impractical*, delivery of some object that is the *means of obtaining possession* of the property constitutes *constructive delivery*.

★**Example:** On his deathbed, Jack gives to Julia all the keys to the household furniture, saying that he intends for her to have everything in the house. Delivery of the keys constitutes constructive delivery of the furniture, because it is impractical to make physical delivery under the circumstances. But delivery of the keys does not constitute constructive delivery of a life insurance policy locked in a bureau drawer, because it was not impractical to deliver the tangible evidence of the life insurance right — the policy itself. *Newman v. Bost*, 122 N.C. 524 (1898). Constructive delivery cases often raise the problem of whether delivery is an independent element or merely a double check on donative intent.

Example: Phyllis has two keys to her safe deposit box, which is stuffed with valuable stocks, bonds, and jewels. She gives one key to Maude, saying, "Everything in this safe deposit box is yours." Is the gift complete? Cases split on this. Some say that retention of the second key negates constructive delivery because Phyllis did not surrender her control over the box. In essence, this view focuses on doubts about Phyllis's intent. The contrary view — holding that delivery of one of two keys constitutes constructive delivery — focus more on the fact that the key is, literally, the key to possession. Most often, courts look to other factors to decide whether the donor really intended to make a gift. Compare *Hocks v. Jeremiah*, 759 P. 2d 312 (Ore. 1988), and *Estate of Abramowitz*, 38 App. Div. 2d 387 (N.Y. 1972) (no delivery; no gift) with *Gilkinson v. Third Ave R.R. Co.*, 47 App. Div. 472 (N.Y. 1900) and *In re Parkhurst's Estate*, 402 Pa. 527 (1961) (constructive delivery; valid gift).

- f. **Special problems:** Some delivery problems warrant special mention.

Agents: When donors deliver the property to an agent of the donee, delivery is complete. But sometimes it's not clear whether the third person is an agent of the donor or the donee. If the delivery is to the *donor's agent there is no delivery* because it is as if the donor had "delivered" the gift to himself. This problem usually comes up when the donor delivers property to his own attorney for the benefit of a donee. The lawyer's client is the donor, but can she also be the agent of the donee? Yes, but courts split on this. This form of delivery is risky at best, and involves courts in the debate over whether delivery is of independent significance or just a redundant test of donative intent.

- **Delivery on death:** If a donor delivers property to a third party (even a conceded agent of the donee) under instructions to deliver the property to the donee on the death of the donor, there may be *no gift*. The condition attached (death) to ultimate delivery is sometimes seen as an impermissible attempt to avoid the formal requirements for a will, and thus invalid. The preferred (and more modern) view is that the gift is complete upon delivery to the donee's agent, regardless of the condition attached. There are two reasons for this view. First, delivery has been made to the donee through his agent. Second, the attached condition amounts to little more than the creation of a valid *oral trust*, with the donee's agent as trustee.
 - **Choses in action:** The delivery requirements of a *chose in action* (an inchoate legal right) depend on whether the chose in action has assumed tangible form by a writing. Choses in action reduced to a writing (e.g., a promissory note, or an insurance policy) must be delivered in the same way as tangible personal property. To deliver by written assignment it is necessary to show that the assignment is a valid symbolic delivery. Those not reduced to a writing (e.g., a personal injury claim) may always be delivered by a written assignment without the necessity of proving symbolic delivery.
 - **Donee in possession:** When a donee already has possession there is no need to perform the useless act of shifting the property back and forth to prove "delivery." It has been delivered. Once is enough.
3. **Acceptance:** A gift is not complete until it has been accepted by the donee. Delivery triggers a presumption of a completed gift, which presumption can be rebutted by the donee's rejection of the gift. The presumption of acceptance is strongest when the gift benefits the donee and virtually nonexistent when the gift is (rarely) of no benefit. A donee's delay in rejecting known unwanted gifts also endangers the donee's ability to claim that there was no acceptance.
4. ★**Gruen v. Gruen: an illustration:** The elements of an inter vivos gift are nicely combined in *Gruen v. Gruen*, 68 N.Y. 2d 48 (1986), in which Gruen wrote a letter to his son (an undergraduate student at Harvard) telling him that for his twenty-first birthday he was giving his son a valuable Klimt painting that was displayed in Gruen's home, but that he wished to retain possession for the remainder of his life. The New York Court of Appeals held that the letter constituted a completed and valid gift to Gruen's son of a remainder interest in the painting, a property right that would automatically become possessory upon the elder Gruen's death. Father Gruen retained a life estate in the painting. The elder Gruen manifested his donative intent at the time of the gift because the remainder interest was a *presently existing* property right (even though not one that entitled the younger Gruen to immediate possession). The letter was sufficient to constitute delivery because it "would be illogical for the law to require the donor to part with possession of the painting when that is exactly what he intends to retain." Acceptance of a gift by a donee is essential to a completed, valid gift. While the law presumes acceptance where the other elements of a gift are present, the younger Gruen manifested acceptance by acknowledging the gift to his friends and retaining for 17 years (until the elder Gruen's death) the letter evidencing the gift.



Exam Tips on
**CONCEPTUAL BASICS, POSSESSION, AND
PERSONAL PROPERTY**

- Finders' law is an easy way to test your ability both to apply common law doctrine and to display your knowledge of how public policies affect doctrine. Answer questions here by invoking the common law doctrine but *don't neglect to apply sensible policy choices* that ought to affect doctrine. Justify and explain your policy choices; don't be content with a mere recitation of the doctrine and mechanical application of it to the facts.
- The resolution of adverse possession issues often depends on what you perceive to be the purposes of adverse possession. Pay attention to the policies justifying adverse possession, emphasize the policy that supports your resolution, and explain why that policy is a good idea and why it dictates the resolution you advance. This is particularly (but certainly not exclusively) true with respect to issues of tacking and the hostility, or claim of right, element.
- Adverse possession of personal property can easily be combined with finders' issues. If a person is not entitled to possession as a finder perhaps he has acquired lawful possession as an adverse possessor. Pay attention to the fact that adverse possession principles (developed for real property) do not work well for personal property; justify the method you apply to assess claims of adverse possession of personal property by reference to the policies that you think are applicable, and explain why those policies should apply.