GIFTS OF *CHOSES* IN ACTION

OLIVER S. RUNDELL
Professor of Law, University of Wisconsin

Is a consideration necessary to make effective the assignment of a *chose* in action? This is a question which has aroused some interest of late years.[1] The recent discussion of the nature of the assignment of *choses* in action by Professor Cook and Professor Williston in the Harvard Law Review[2] should serve to reawaken that interest. It has stimulated the writer to offer certain suggestions on the subject.

By making effective the assignment is meant the acquisition by the assignee of rights not subject to the control of the assignor. So far as the debtor is concerned, the defense of want of consideration in the assignment is not one that he can make, except so far as the want of consideration may prevent the assignee from giving an effective discharge of the obligation.[3]

It is universally admitted that *choses* in action were originally unassignable.[4] There is general accord in agreeing that the doctrine of agency furnished the first escape from this unsatisfactory position.[5] The assignor gave to his assignee a power of attorney which enabled the assignee to sue in the name of the assignor. So long as the assignor offered no obstruction to the use of his name, the assignee required no relief and was entitled to no relief in equity.[6]

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[1] Edward Jenks, *Consideration and the Assignment of Choses in Action* (1900) 16 LAW QUAR. REV. 241; W. R. Anson, *Assignment of Choses in Action* (1901) 17 LAW QUAR. REV. 90; Geo. P. Costigan, Jr., *Gifts Inter Vivos of Choses in Action* (1911) 27 LAW QUAR. REV. 326. See article by Walter W. Cook entitled, *The Alienability of Choses in Action* (1916) 29 HARV. L. REV. 816, 821.

[2] Walter W. Cook, *The Alienability of Choses in Action* (1916) 29 HARV. L. REV. 816; Samuel Williston, *Is the Right of an Assignee of a Chose in Action Legal or Equitable?* (1916) 30 HARV. L. REV. 97; Walter W. Cook, *The Alienability of Choses in Action: A Reply to Professor Williston* (1917) 30 HARV. L. REV. 449.

[3] *Walker v. Bradford Old Bank* (1884) 12 Q. B. D. 511; W. R. Anson, *Assignment of Choses in Action* (1901) 17 LAW QUAR. REV. 90, 93.

[4] 2 Pollock & Maitland, *Hist. Eng. Law* (2d ed.) 226; Pollock, *Principles of Contract* (5th ed.) App. Note F; Ames, *Lectures on Legal History*, 210.

[5] See Ames, *Lectures*, 213, Pollock & Maitland, 226.

[6] *Hammond v. Messenger* (1838) 9 Sim. 327; cases cited in note, Ames, *Cases on Trusts* (2d ed.) 60. It is probable, however, that equity would give relief in cases where the power of attorney was not effective at law to enable the assignee to recover in the assignor's name, as where either the assignor or the debtor had died before suit brought. See W. T. Barbour, *The History of Contract in Early English Equity*, in 4 *Oxford Studies in Social and Legal History* (edited by Vinogradoff) 108.

In case the assignor objected to the use of his name by the assignee it seems altogether unlikely that equity would aid the assignee except where the assignment was made for a consideration.[7] If a consideration was given, however, equity would permit the assignee to enforce his claim against the debtor by bill in equity.[8] This was true only where the consideration was valid at law. An extreme fear of maintenance led to the view that no consideration, other than an assignment in satisfaction of an existing debt,[9] was valid at law.

Such was the state of the law in the time of Lord Keeper Bridgman,[10] but by the time of Lord Hardwicke it was decided that an assignment for valuable consideration, even though not in consideration of an existing debt, would be sustained in equity.[11] Lord Hardwicke was apparently willing to go still further.

Thus, he is reported as saying in *Snelgrave v. Bayly*[12] that "the testator might have assigned this bond, and though he had done it voluntarily, this court would have maintained it against himself, or any person claiming under him."[13] But this *dictum* did not represent, so far as the writer can discover, the law at the time it was made, and in *Edward v. Jones*[14] the opposite was decided.

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[7] See Hil. 37 Hen. VI, 13, pl. 3, cited in Pollock, *Contracts*, App. Note F, and in Ames, *Lectures*, p. 213, n., in which it appears that the court of chancery acted on an opinion of the justices to the effect that an assignment of debts, not in satisfaction of an existing debt, was not consideration for a bond, by decreeing the bond to be delivered up.

[8] See Wald's *Pollock on Contracts* (3d ed. by Williston) 279.

[9] See Ames, *Lectures*, 213. Maintenance was, of course, a defense open to the debtor.

[10] See Freeman, 145, c. 185. Sir Orlando Bridgman was Lord Keeper from 1667 to 1672.

[11] *Row v. Dawson* (1749) 1 Ves. 331.

[12] (1744) Ridg. t. Hardw. 202, 204.

[13] Mr. Jenks quotes this statement from *Lord Carteret v. Paschal* (1733) 3 P. Wms. 197, 199, in support of the proposition that a consideration is not necessary in the assignment of a *chose* in action: "It was admitted on all sides, that if a man in his own right be entitled to a bond, or other *chose in action*, he may assign it without any consideration." *Consideration and the Assignment of Choses in Action*, 16 LAW QUAR. REV. 241, 242.

The statement must be read, however, in the light of the question in the case, which was: To whom did the surplus result upon the assignment for a consideration by a husband of a wife's *choses* in action upon trusts which left a surplus undisposed of, the husband's or the wife's administratrix? It is obvious that this statement may have been made with reference to the validity of this assignment as against the debtor. In this sense, it is unquestionably correct. In the sense of its validity as against the assignor, its correctness is more than doubtful.

It should be noted that Mr. Jenks does not distinguish between the validity of a gratuitous assignment as against the debtor and as against the assignor. See comment to this effect by Anson, *Assignment of Choses in Action*, 17 LAW QUAR. REV. 90, 93.

[14] (1836) 1 Myl. & C. 226.

If the assignee of a *chose* in action gets a power of attorney, the right that he gets is *prima facie* revocable by his principal. If he gives a consideration for the assignment it may well be held that it is inequitable for the assignor to revoke it. Following this, to save their jurisdiction over *choses* in action, the courts of law have apparently recognized as irrevocable those assignments which the courts of equity had held to be irrevocable.[15] So far as either courts of law or of equity recognized the irrevocable quality of the assignment, they gave legal effect to the non-representative character contemplated by the parties.

If the assignment is gratuitous, however, it is difficult to see anything inequitable in the revocation of the power of attorney created by it.[16] Yet it is undeniable that many gratuitous assignments are enforced against the assignor or his representatives in equity. Is this because equity in such cases prevents the assignor from revoking the rights of representation he has created, or because equity recognizes, for reasons of its own, the non-representative character of the assignee's position?

As is well known, Mr. Ames took the former view.[17] The doctrine being limited in all jurisdictions to *choses* in action evidenced by a written instrument, the assignment being accomplished by a delivery of the instrument, he took the following distinction: The power, even though gratuitous, is irrevocable where coupled with an interest.

There being on this theory no logical distinction between gifts *inter vivos* and *causa mortis*, he was compelled to disapprove of the distinction taken between such gifts in the English cases.[18]

To the present writer there are several objections to this view which together justify a search for another explanation.

First, this is not the conscious view of the courts.[19] This objection, though possibly of little weight when you assume that as a matter of accurate analysis a *chose* in action is, in its nature, unassignable, except so far as an assignment creates representative rights in the assignee, becomes significant when it is perceived that the assumption is unsound.[20]

Second, it seems a strained application of the doctrine of a power coupled with an interest. By assumption, the *chose* in action is not assignable. No interest in it passes by the assignment. What interest is it that accompanies the giving of the power of attorney? The title

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[15] See article by Professor Cook, 29 HARV. L. REV. 816, 822.

[16] *German v. Yates* (1915) 32 T. L. R. 52.

[17] See Ames *Cases on Trusts* (2d ed.) notes pp. 139, 145, 155. See an exposition of Mr. Ames' views by Geo. P. Costigan, Jr. 27 LAW QUAR. REV. 326.

[18] Ames, *Cases on Trusts* (2d ed.) 145, note.

[19] See statement by Mr. Costigan to this effect with regard to the English cases, 27 LAW QUAR. REV. 326, 329. It is believed that the same is true of the American courts.

[20] See Professor Cook's article 29 HARV. L. REV. 816.

to the paper evidencing the *chose* in action? But that is merely an evidential document. It is not the *chose* in action with respect to which the power was given. It is believed to be a novel application of the "power of attorney coupled with an interest" to hold that the power may relate to one thing, while the interest is in another thing.[21]

Third, it furnishes no clue to the distinction which exists in the English cases between gifts *inter vivos* and *causa mortis.*

The writer believes that this distinction furnishes the clue to the law of gifts of *choses* in action. The explanation of the validity of such gifts is found *not* in any principle of agency, but in the law of *donatio mortis causa.*

Bracton[22] and Swinburne[23] wrote of gifts *causa mortis,* but the report of no case in the English common-law or equity courts before the eighteenth century, so far as discovered, refers to such a gift. Shortly after the opening of that century the *donatio mortis causa* found its way into the reports, its validity was sustained, and a judicial definition was formulated.[24]

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[21] According to Mr. Ames, this interest could be created either by delivery of the instrument evidencing the *chose* or by deed of gift: *Cases on Trusts* (2d ed.) 155, n. If the interest is an interest in the instrument evidencing the obligation, it is difficult to see how the interest is created by delivery of a deed of assignment of the obligation. It is conceivable that the grantor might intend the deed to operate as a transfer of the title to the instrument regardless of the effect of the transfer upon the title to the obligation, but it is believed that such an intent is so unusual that it can not be presumed.

Mr. Costigan in *27* LAW QUAR. REV. 326, 338, says, with reference to the desirability of applying the theory of Professor Ames in the English courts:

"To be sure, under the English cases about power coupled with an interest, it would be difficult to find an interest sufficiently great in these gift-assignment cases to meet the test heretofore applied where a power is sought to be made irrevocable by being coupled with an interest, and hence the doctrine of Professor Ames probably will not appeal very strongly to the English judges; but because of the public policy favouring the alienability of those *choses* in action that are not essentially personal, a special test of irrevocability might well be applied to the power implied on an assignment of a legal *chose.*"

He appends to this statement at the word "judges" the following note: "But see Lord Atkinson's opinion in *Frith* v. *Frith* [1906] A. C. 254, 260, where an irrevocable power is referred to as authority 'given to a particular individual to do a particular thing, the doing of which conferred a benefit upon him, the authority ceasing when the benefit was reaped.' Professor Ames's doctrine could rest on that definition."

The difficulty with the suggestion is that the definition is as applicable to an assignment of a *chose* in action not evidenced by a written instrument, as to an assignment of one that is, and therefore the suggestion raises the question of the basis of the distinction between gifts of such *choses* in action. Ames, *Cases on Trusts* (2d ed.) 163.

[22] 1 (Twiss ed.) 475.

[23] *Wills,* Pt. I, sec. VII.

[24] The early cases are *Hedges v. Hedges* (1708) Prec. Ch. 269, 2 Eq. Cas. Abr. 573; *Jones v. Selby* (1710) Prec. Ch. 300, 2 Eq. Cas. Abr. 573; *Drury v. Smith*

The sudden influx of cases under this head leads one to suspect a newly discovered need. The need is easily found. The Statute of Frauds, recently passed, had put an end to informal wills by its provisions regulating nuncupative wills.[25] But it was still attempted to make informal death-bed gifts, and the disappointed legatees sought relief. They discovered the applicability of the *donatio mortis causa* to their needs and obtained the indorsement of the courts to that application.[26]

The earliest cases on the subject of gifts *causa mortis* involved the validity of gifts of goods and chattels. In them it was repeatedly intimated that delivery was necessary to make the gift effective.[27] This view resulted in its being held that this new form of gift, in spite of its resemblance to a legacy, could not be applied to *choses* in action even though the *chose* in action was evidenced by a written instrument which was in fact delivered. Thus, when a note not payable to bearer was delivered as a gift *causa mortis,* it was declared that it

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(1717) 1 P. Wms. 404, 2 Eq. Cas. Abr. 575; *Lawson v. Lawson* (1718) 1 P. Wms. 441, 2 Eq. Cas. Abr. 575; *Thompson v. Hodgson* (1727) 2 Str. 777; *Miller v. Miller* (1735) 3 P. Wms. 356, 2 Eq. Cas. Abr. 575. In a memorandum note to the report of *Drury v. Smith,* the case of *Smith v. Casen* (Dec. 8, 1718) is referred to.

[25] 29 Car. II, c. 3, secs. 19, 20, 21.

[26] The relationship of cause and effect between the Statute of Frauds and gifts *causa mortis,* through perhaps not generally recognized, has occasionally been noted:

"Before the Statute of Frauds, 29 Car. 2 c. 3, s. 19, 20, 21, parol expressions of an intention to give in the event of death, even though, not being accompanied by delivery, insufficient to constitute a *donatio mortis causa,* might have been valid as a nuncupative will. The earliest cases in our courts of law or equity on the subject of these donations are subsequent to that act." Note to *Walter v. Hodge* (1818) 2 Swanst. 92, 101.

"The commencement of the cases upon this head seems to have been the effect of that part of the *English* statute of frauds, which relates to nuncupative wills, and a struggle to support, in courts of equity, claims, which, but for that statute, would have been brought forward in the spiritual courts." *Raymond v. Sellick* (1835) 10 Conn. 480, 485.

"There is a close and perceptible analogy between those testamentary dispositions by word of mouth to which our law gives the name of nuncupative wills and the death-bed gift or *donatio causa mortis.* We borrow these two kinds of transfer from the Roman jurisprudence, but without those safeguards against fraud and error, at the outset, which surrounded them in the age of Justinian. . . . Scarcely was the nuncupative will securely locked in the iron grasp of the Statute of Frauds, before this donation for posthumous effect of Roman paternity sprung up in its place. Chancery protection was invoked for these gifts, and not in vain, early in the eighteenth century; and in 1708, or about thirty years from the date of Charles II's enactment, we find the gift *causa mortis* defined in nearly the precise terms of a nuncupative will. One might almost believe that the Chancery lawyers of England were trying to circumvent Parliament by finding a place for the oral will under a new and assumed name." James Schouler, *Oral Wills and Death-Bed Gifts* (1886) 2 LAW QUAR. REV. 444, 447.

[27] *Hedges v. Hedges,* Prec. Ch. 269, 2 Eq. Cas. Abr. 573; *Drury v. Smith,* 1 P. Wms. 404.

"was merely a *chose en action* and must still be sued in the name of the executors, that cannot take effect as a *donatio mortis causa,* in as much as no property therein could pass by the delivery."[28]

It is not difficult to perceive that delivery was insisted upon in order to distinguish this gift from a legacy. This appears clearly in the case of *Ward v. Turner,*[29] where Lord Hardwicke made an elaborate examination of the law of gifts *causa mortis.* He referred to the three classes of gifts *causa mortis* recognized by writers on the civil law, and concluded that delivery was required in only one of them. But on comparison with the statement of Swinburne and the cases in the Court of Chancery, he came to the conclusion "that the civil law has been received in *England* in respect to such donations only so far as attended with delivery."[30] In consequence he held that an attempted gift *causa mortis* of certain South Sea annuities by the delivery of the receipts for them was ineffective, saying,

"I am of opinion it would be most dangerous to allow this donation *mortis causa* from parol proof of delivery of such receipts, which are not regarded or taken care of after acceptance; and if these annuities are called *choses in action,* there is less reason to allow of it in this case than in any other *chose in action;* because stocks and annuities are capable of a transfer of the legal property by act of parliament which might be done easily; and if the intestate had such an aversion to make a will as supposed, he might have transferred to *Mosely;* consequently this is merely legatory, and amounts to a nuncupative will, and contrary to the stat. of frauds, and would introduce a greater breach on that law than was ever yet made; for if you take away the necessity of delivery of the thing given, it remains merely nuncupative."[31]

How then did *choses* in action come to be deemed capable of gift *causa mortis?* It is believed that it was somewhat as follows. Lord Hardwicke held in *Snellgrove v. Bailey,*[32] decided in 1744, that a bond might be the subject of gift *causa mortis.* This was in full recognition, apparently, of the fact that the bond was evidence merely of a *chose* in action.[33] But it was made, evidently without any careful examina-

[28] *Miller v. Miller* (1735) 3 P. Wms. 356, 2 Eq. Cas. Abr. 575, 22 Eng. Reprint, 484.

[29] *Ward v. Turner* (1752) 1 Dick. 170, 2 Ves. 431 (the latter is the more complete report).

[30] 2 Ves. 431, 441.

[31] 2 Ves. 431, 443.

[32] 3 Atk. 214.

[33] Professor Ames says, in referring to the distinction taken in *Edwards v. Jones,* 1 Myl. & C. 226 (see n. 14, *supra*) between gifts of *choses* in action *inter vivos* and *causa mortis:* "This distinction between a gift *inter vivos* and a *donatio mortis causa,* it is safe to say, was not contemplated by Lord Hardwicke in *Snellgrove v. Bailey.*" Ames, *Cases on Trusts* (2d ed.) 145 n. Still it appears

tion by the Lord Chancellor himself of the limits within which gifts *mortis causa* should be sustained. Eight years later in the case of *Ward v. Turner,*[34] being convinced upon a careful consideration of the law of gifts *causa mortis,* that delivery was an essential element, he held that South Sea annuities could not be given *causa mortis* by the delivery of the receipts for the same.[35] He apparently recognized that the principles upon which his decision was founded were applicable to *choses* in action generally. He made an attempt, however, to preserve a consistency between the case at hand and *Snellgrove v. Bailey* by distinguishing the latter case upon the ground that the *chose* in action there involved was a specialty. He said:

"If I went too far in that case, it is not a reason I should go farther: and I chuse to stop there. But I am of opinion that decree was right, and differs from this case; for though it is true, that a bond, which is specialty, is a *chose in action,* and its principal value consists in the thing in action, yet some property is conveyed by the delivery; for the property is vested; and to this degree that the law-books say, the person to whom this specialty is given, may cancel, burn, and destroy it; the consequence of which is, that it puts it in his power to destroy the obligee's power of bringing an action, because no one can bring an action on a bond without a *profert in Cur.*"[36]

This distinction harks back to two early conceptions. First, that there can be no transfer of rights without a transfer of a thing.[37] Second, that in the case of a bond, the document is itself the obligation.[38]

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from the report of the case in Ridgeway, *Snelgrave v. Bayly* (1744) Ridg. t. Hardwicke, 202, that the attorney general, who appeared on behalf of the defendant—the claimant under the gift—, had been directed by the Lord Chancellor to search for precedents on the question: Whether a bond or other *chose* in action may be granted by way of *donatio mortis causa?* The precedents produced by the attorney general were *Lawson v. Lawson,* 1 P. Wms. 441, and *Jones v. Selby,* Prec. Ch. 300. These were cases expressly decided upon the law of gifts *causa mortis.* Hence, it appears that the question involved was as to the validity of a gift *causa mortis* and the authorities relied upon were cases involving the validity of such gifts. There might have been a more satisfactory consideration of the question had *Miller v. Miller* (1735) 3 P. Wms. 356, been called to the attention of the Lord Chancellor in this case as it was in *Ward v. Turner.*

[34] *Supra,* n. 29.

[35] It is interesting to note that, although it has long been held in England that *choses* in action may be given *causa mortis* by delivery of the evidence thereof, the influence of the decision in *Ward v. Turner* has kept the general rule from being applied to shares of stock. See *Moore v. Moore* (1874) L. R. 18 Eq. 474; *In re Weston,* L. R. [1902] 1 Ch. 680.

[36] *Ward v. Turner,* 2 Ves. 431, 442.

[37] 2 Pollock & Maitland, 84, 180, 226.

[38] 2 Pollock & Maitland, 227; Wald's *Pollock on Contracts* (3d ed. by Williston) 875; 2 Street, *Foundations of Legal Liability,* 9.

The first conception is still potent in the law of gifts *inter vivos*.[39] The distinction taken by Lord Hardwicke between the case of a bond and other *choses* in action shows that, though he recognizes that delivery is essential to distinguish a *donatio mortis causa* from a legacy, he is applying it in the sense in which it is applied in gifts *inter vivos, i. e.,* a manual tradition of the thing in which rights were being transferred. A bond could be the subject of a gift *causa mortis* only because the document which was the obligation could be delivered. So long as this view was taken, it was impossible to extend the *donatio causa mortis* to cover gifts of *choses* in action in general, even though the authority of *Snellgrove v. Bailey* continued to be recognized. Hence, when the question of the validity of a *donatio causa mortis* of a bond and the mortgage securing it came before Sir John Leach, V.C., he said:

"The case of a Bond I consider to be an exception, and not a rule. Property may pass without writing, either as a *donatio mortis causâ,* or by a nuncupative Will, according to the forms required by the Statute. The distinction between a *donatio mortis causâ,* and a nuncupative Will is, that the first is claimed against the Executor, and the other, from the Executor. Where delivery will not execute a complete gift *inter vivos,* it cannot create a *donatio mortis causâ,* because it will not prevent the property from vesting in the Executors; and, as a Court of Equity will not, *inter vivos,* compel a Party to complete his gift, so it will not compel the Executor to complete the gift of his Testator. The delivery of a Mortgage Deed cannot pass the property *inter vivos;* first, because the action for the money must still be in the name of the Donor; and secondly, because the Mortgagor is not compellable to pay the money without having back the mortgaged Estate, which can only pass by the Deed of the Mortgagee; and no Court would compel the Donor to complete his gift by executing such a Deed."[40]

But when the case came before Lord Eldon on appeal, he declared that the reasoning of the Vice-Chancellor was at fault in that it proceeded upon the assumption that in the case of a gift of a *chose* in action *donatio mortis causa,* equity was called upon to make effective, as against the donor, a gift which is not complete at law. He held that the claim was not against the donor, that the title is not complete until the donor's death, and the question is therefore not what equity will compel the donor to do, but, what claim it will enforce against his representatives.[41]

The significance of the holding that the investiture of title is not synchronous with the delivery, but is complete only upon the death of donor, is two-fold.

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[39] *Cochrane v. Moore* (1890) 25 Q. B. D. 57. See especially the opinion of Lord Esher, M. R.

[40] *Duffield v. Elwes* (1823) 1 Sim. & St. 239, 244.

[41] *Duffield v. Elwes* (1827) 1 Bligh N. S. 497.

First: It makes clear the difference between a transfer of rights and a transfer of things. It also constitutes, so far as *choses* in action are concerned, an acceptance of the principle that the requirements of delivery in gifts *causa mortis* are satisfied by the delivery not of the thing in which the rights are transferred—the *chose* in action—, but of the evidence of the thing, the written instrument in which the *chose* in action is expressed. This renders the delivery competent to accomplish more completely its real end, *i. e.*, to supply a substitute for the Statute of Frauds.

Second: It clearly indicates the underlying causes for the development by equity of this new species of gift. It is attempting to carry out the will of the donor as against his personal representatives. In doing this the absence of consideration is not a bar to the action of the court in aiding the donee of the *chose* in action once it has found a formal substitute for the Statute of Frauds.

It will be perceived from the above that there is a sharp limit to gifts of *choses* in action *causa mortis*. *Choses* in action not evidenced by a written instrument cannot be so given. Nor it is believed that those which are evidenced by a written instrument can be given by deed. This would be regarded as a testamentary disposition and subject to the provisions of the Statutes of Frauds.[42]

It may also be seen that the principles upon which gifts *causa mortis* are sustained are inapplicable to gifts *inter vivos*. The donee cannot urge that he is asking the court to carry out the intention of the donor as against those whom he has not desired to benefit. Besides, there is a well-defined law of gifts *inter vivos* in the law courts.[43] By that law delivery means a manual tradition of the thing in which rights are being transferred.

In the face of such a definition of delivery, it is difficult to conceive of a gift *inter vivos* of a *chose* in action; and accordingly it was held in *Edwards v. Jones*[44] that a gift *inter vivos* of a *chose* in action represented by a bond was not binding upon the executor of the donor, at least to the extent of preventing him from keeping as against the donee money collected from the debtor.

In the case of the gift *causa mortis*, it had been held that the gift was effective to pass the property, but that it passed not upon the

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[42] "Now it is perfectly true that there may be *donationes mortis causa* of policies and bonds and other documents evidencing the title to *choses* in action; but speaking broadly, the subjects of *donationes mortis causa* must be things the title to which, passes by delivery. Where, as in the present case, there is no change of possession operating as an immediate transfer, the court cannot allow the doctrine of *donatio mortis causa* to be applicable. If we decided otherwise we should, in effect, be enabling persons to drive a coach and four through the Wills Act." Lord Bowen, *In re Hughes* (1888) 36 Wkly. Rep. 821.

[43] *Cochrane v. Moore*, n. 39, *supra*.

[44] 1 Myl. & C. 226.

delivery, but upon the death of the donor.[45] The English courts of equity were not averse to voluntary transfers, but they did not see their way clear to holding that the gift of a *chose* in action by delivery of a document representing it constituted a transfer. Treating the attempted gift as creating a power of attorney, they found no equity in the position of the donee to justify their denying to the donor the benefits of its revocability.

The donee almost succeeded, however, in securing effective relief. The recognition of voluntary trusts in *Ex parte Pye*[46] furnished the opportunity. Encouraged by the facts of that case, disappointed donees of *choses* in action began asking that their defective gifts be construed as declarations of trust. For some time they succeeded, and the whole law of gifts was threatened with upheaval.[47]

But it was finally decided that no man should be held as a trustee who had intended and attempted to make merely a gift.[48]

This defeat was not altogether complete, however, for while an attempt to give will not be construed as a declaration of trust, an attempt to create a trust will not be defeated merely because a perfect transfer has not been made to the intended trustee.[49] This seems to be merely an application of the principle that equity will not allow an intended trust to fail for want of a properly constituted trustee.[50]

Although, as has been indicated, there is a wide difference between the legal effect of the delivery in gifts *causa mortis* and *inter vivos*, the formal requirements are similar. If one wishes to give a horse *causa mortis*, he must make delivery in the same manner as though he were going to make a gift *inter vivos*. Hence, it has often been said that there is no difference between gifts *inter vivos* and *causa mortis* so far as delivery is concerned.[51] It is easy to assume that the statement applies to the legal effect as well as to formal requirements (and undoubtedly the statement has been made not infrequently with that

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[45] Thornton, *Gifts and Advancements*, 23; 15 Halsbury, 431.

[46] (1811) 18 Vesey, 140.

[47] *Morgan v. Malleson* (1870) L. R. 10 Eq. 475; *Richardson v. Richardson* (1867) L. R. 3 Eq. 636.

[48] *Richards v. Delbridge* (1874) L. R. 18 Eq. 11.

[49] *Fortescue v. Barnett* (1834) 3 Myl. & K. 36; *In re Patrick* [1891] 1 Ch. 82. See article by Sir W. R. Anson, 17 LAW QUAR. REV. 90.

[50] Perry, *Trusts* (5th ed.) sec. 38.

[51] In *Noble v. Smith* (1806, N. Y.) 2 Johns. 52, 56, C. J. Kent stated a delivery was essential to a gift in gifts *inter vivos* and *causa mortis*. In *Ewing v. Ewing* (1830, Va.) 2 Leigh, 337, 341, Carr, J., stated that with respect to delivery, gifts *causa mortis* "stand precisely on the same ground as a gift *inter vivos*."

Green, J., said, p. 344: "The only difference between the donation *causa mortis* and *inter vivos*, is, that the latter is absolute and unconditional, the other is in contemplation of death, and therefore subject to the implied condition, that the thing is to be restored if the donor recovers; but to give a right to the donee, the gift must be perfected alike in both cases, by delivery."

thought in mind), and to conclude that if *choses* in action may be given *causa mortis* they may be given *inter vivos*. This conclusion was reached in this country in two early decisions which have since become leading cases.[52] Following these cases it has been held almost universally by the American courts that gifts may be made of *choses* in action by delivery of a paper evidencing such *chose* in action.[53]

Mr. Ames said:

"If a chose in action is not in the form of a common law or mercantile specialty, so that there is no document to pass by delivery or deed, a gift of it by the obligee is so far operative as a power of attorney, that the obligor cannot set up the gratuitous character of the assignment against the donee. . . . It seems to be conceded, however, that the donor may revoke the power of attorney. The reason for this concession is not obvious."[54]

It is believed that the foregoing pages explain the reasons for the concession. As a legal power of attorney, the assignment of a parol *chose* in action by gift is revocable. Its gratuitous character prevents the assignee from securing equitable relief against a revocation. It cannot be supported upon the grounds hitherto discussed because it lacks the essential quality of "deliverability."

As has been indicated, the history of the law of gifts *causa mortis* of *choses* in action precludes the acceptance of a deed of gift as a substitute for delivery.[55] Since the law in America with respect to gifts *inter vivos* of *choses* in action is founded upon the authority of the English cases relating to *donationes mortis causa*, it might well be held that a deed is not acceptable as a substitute for delivery even in such gifts.[56]

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[52] The cases referred to are *Grover v. Grover* (1837, Mass.) 24 Pick. 261, and *Elam v. Keen* (1833, Va.) 4 Leigh, 333.

[53] The proposition is too well established to require citation of authorities. Many of the cases are cited in Ames, *Cases on Trusts* (2d ed.) 162, n. 4.

Through a similar process of reasoning it has been held in many of the courts of this country that title passes upon delivery in the case of a gift *causa mortis*. *Basket v. Hassell* (1882) 107 U. S. 602. See an excellent discussion in *Hatcher v. Buford* (1895) 60 Ark. 169, 174.

[54] Ames, *Cases on Trusts* (2d ed.) 163, n.

[55] "The actual delivery of the thing given is made the substitute for the formal writing required for a testamentary disposition, but without such delivery the words of the donor are unavailing to constitute a gift. . . . A written instrument may be available for designating the property intended to be given, as well as to show the intention of the donor, but by itself it no more establishes the gift than would the same words orally delivered by the donor." *Knight v. Tripp* (1898) 121 Cal. 674, 678, 679.

"As a gift *causa mortis*, it is not aided by the execution of the written instrument, except so far as that may contribute to greater certainty in the proofs. Such gifts cannot be effected by formal instruments of conveyance or assignment. They are manifested by, and take their effect from, delivery." *McGrath v. Reynolds* (1875) 116 Mass. 566, 568.

[56] *Allen-West Commission Co. v. Grumbles* (1904) 129 Fed. 287.

On the other hand, the same lack of comprehension of the nature of delivery in gifts *mortis causa* whereby our courts failed to distinguish between gifts *inter vivos* and *causa mortis* of *choses* in action, has not infrequently resulted in the holding that since a gift of chattels may be made by deed, a gift of *choses* in action may be made the same way and, since *choses* in action may be given by deed *inter vivos,* they may be given by deed *causa mortis.*[57]

To sum up: *Choses* in action were originally inalienable. This rule was evaded by giving to the assignee a power of attorney. The power of attorney was revocable. Where a consideration was given, equity denied to the assignor the benefit of this legal quality by permitting the assignee to enforce his claim against the obligor in equity. The law courts, to save their jurisdiction, followed the lead of equity. But the lead of equity went no further than assignments for a consideration, for in an assignment without consideration the assignor was a volunteer, and equity would not deny him the benefits of the revocability of the legal right created. Equity was, however, busily enforcing one class of gifts, the *donatio mortis causa.* This was due to its desire to assist legatees who had been disappointed because their gifts failed to comply with the Statute of Frauds. To preserve the appearance of consistency with the statute, equity insisted upon delivery of the gift. So long as delivery was regarded as operating to transfer title to the thing delivered, *choses* in action could not be given in this way. Eventually delivery was held not to transfer title. This made

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[57] "The authorities which were cited on the argument, and others which are scattered through the reports, generally declare that delivery of the chattels or securities is necessary to establish a gift *causa mortis.*

"This, however, is not because the gift is made *causa mortis,* but because the rule is supposed to apply to all gifts. Tradition or some equivalent seems to have been necessary at common law, to pass chattels by gift. But it has always been competent to transfer them by writing, which is less ambiguous than parol delivery, and there can be no doubt of that at the present day,— delivery under writings being chiefly necessary to avoid questions with third persons, but not between the parties. And the unwillingness of the early courts to sustain gifts *causa mortis* of *choses in action,* arose from the fact that no legal transfer could be made of them at all, because they only represented rights but were not themselves intrinsically valuable. Since the equitable doctrine has prevailed that they can be assigned by delivery, they are placed with all other chattels, as subject to gift; and the same rules have been enforced. But no doubt ever existed as to their being transferable by writing so as to vest the beneficial title in the assignee, and the questions have been in all cases, not whether they *could* be, but whether they *had* been transferred in that way." *Ellis v. Secor* (1875) 31 Mich. 185, 188.

See 20 Cyc. 1234, 1235, and cases cited n. 25, p. 1235.

Mr. Ames was of the opinion that a deed of gift should be as effective as a delivery: *Cases on Trusts* (2d ed.) 145, 155, 163. If such a deed should be construed to apply to the *chose* in action alone, and not to the written evidence of it, might not such a holding result in the separation of the ownership of the *chose* in action and the written evidence of it? This was the situation cited by him in his criticism of the holding of the English courts that a gift *inter vivos* by delivery of a *chose* in action is revocable. *Op. cit.* 145.

possible the holding that the requirement of delivery was satisfied by delivery of the written instrument evidencing an obligation. Under this holding it became possible to make gifts *causa mortis* of *choses* in action. It still remained impossible to give *choses* in action *inter vivos*, a different view of delivery prevailing in gifts *inter vivos*. The distinction between the delivery in the two cases was not perceived in the early American cases, with the result that *choses* in action which were susceptible of gift *causa mortis* were held capable of being given *inter vivos*. But delivery being an essential requirement of a gift *causa mortis*, gifts can be made only of those *choses* in action which are susceptible of delivery. Gifts of parol *choses* in action are revocable at the option of the donor.

[*Ed. Note.*—Granting all that the learned author has said concerning the history of the law relating to gifts of *choses* in action, it seems to the editor doubtful whether he gives sufficient weight to the modern law, especially that of the United States. With the growing recognition that there are no reasons of logic or of policy for not allowing *choses* in action (with certain exceptions) to be transferred as freely as interests in chattels, it was to be expected that the tendency would be for the courts to recognize in both cases the same formalities as sufficient to bring about a transfer. Consequently, decisions that *choses* in action may be assigned by deed as well as by delivery of the tangible evidence of their existence merely reflect the change in the point of view of our courts. Although these decisions depart from older ideas, they are in no wise unsound. When once this change of view has taken place, it is not hard for courts to hold that gifts as well as transfers for value of *choses* in action may be made by deed without delivery of the tangible evidence of their existence. The final step is taken when it is held that an irrevocable gift of a "parol" *chose* in action, *i. e.*, a *chose* in action not evidenced by any writing, may be made by deed.

For discussion and authorities dealing with the matter from this standpoint see: 2 Kent, *Com.* 439; *Driscoll v. Driscoll* (1904) 143 Cal. 528, 77 Pac. 471 (statutory); *Sanborn v. Goodhue* (1853) 28 N. H. 48; *De Caumont v. Bogert* (1885, N. Y. Sup. Ct.) 36 Hun, 382; *Matson v. Abbey* (1894) 141 N. Y. 179, 36 N. E. 11; *Bond v. Bunting* (1875) 78 Pa. St. 210. Of course if the gift of the "parol" *chose* in action is not by deed, it is revocable. *Re Richardson* (1883) 30 Ch. Div. 396. A recent California case has, however, held that a valid gift of a *chose* in action may be made by a writing not under seal, apparently for the reason that in California a seal is no longer necessary to the validity of a deed. *Burkett v. Doty* (1917, Cal.) 167 Pac. 518, discussed in (1917) 27 YALE LAW JOURNAL, 269. To-day courts are asking not whether *choses* in action can be assigned, but whether restraints on their alienation are valid. *Portuguese-American Bank v. Welles* (1916) 242 U. S. 7, 37 Sup. Ct. 3, commented upon in (1917) 26 YALE LAW JOURNAL, 304.]