

Past and Future: Attempts to Prospectively Alienate Property

Alexei Tymoczko¹

Cite as: 4 J. High Tech. L. 231 (2004)

Compare the following examples:

Aunt's note to nephew promising three thousand dollars with mark "Value Received."²

Father's gift of real property and promise to pay two mortgages to disabled daughter in return for a dollar, with physical delivery of deed.³

Father's gift of a painting to son with life reservation.⁴

In each example, there is a uniform donative intent: intent to make a future transfer of property to another (hereafter, a future gift).⁵ In each example, the prospective donee made a claim against the estate of the donor to enforce the gift.⁶ In each example, the prospective gift failed to satisfy the Statutes of Wills, but the issue of wills was

1. Suffolk University Law School, J.D., 2005. Special thanks to Prof. Charles E. Rounds, Jr. and the *Journal of High Technology*. Everlasting appreciation for continuing support and assistance to my wife, Molly Donohue.

2. *See Dougherty v. Salt*, 125 N.E. 94 (N.Y. 1919) (overruling appellate decision that note was "sufficient evidence of consideration").

3. *See Fischer v. Union Trust Co.*, 101 N.W. 852 (Mich. 1904) (holding that without valuable consideration a promise cannot be enforced).

4. *See Gruen v. Gruen*, 488 N.Y.S.2d 401 (N.Y. App. Div. 1984) (concerning an attempted transfer of a Klimt painting to son for birthday, with life reservation).

5. For the purposes of this note, the future gift is an attempt to transfer property at some time in the future up to and including at the death of the donor, accompanied by a donative intent without repudiation. The outer boundary of the property transfer in a future gift is therefore the death of the donor. For this reason, the issue of wills and life estates border on the future gift. A classic literary example is the donative intent of the convict, Magwitch, in *Great Expectations*. CHARLES DICKENS, *GREAT EXPECTATIONS* (Washington Square Press 1963) (1860). A firm donative intent for future gift without present property to create a fine gentleman of Pip. *Id.* at 307 ("I swore arterwards, sure as ever, I spec'lated and got rich, you should get rich").

6. *Dougherty*, 125 N.E. at 94 (action by prospective donee against testatrix); *Gruen*, 488 N.Y.S.2d at 402 (transfer contested by step-mother); *Fischer*, 101 N.W. at 852 (action by prospective against administrator of estate).

never dispositive.⁷ Instead, the courts examined the central question of whether the legal form was sufficient for the enforcement of a transfer of goods.⁸ The courts have held that even when the donative intent is identical, the transfer of goods is defeated when the form of the transfer is insufficient.⁹ The required form extends beyond basic legal terminology: in the first two cases the donors had some understanding of contracts.¹⁰ “Value Received” and the tender of a dollar are both attempts to demonstrate consideration, without the precision of the legal art.¹¹ The required level of legal form, however, is not a physical demarcation, but merely an advanced understanding of the law. In essence, when the substance of the contract is ignored and the form is examined, the *seal* is reinstated.¹²

This note compares the fundamental policies and principles underlying the requirements of gift delivery and contract consideration with the fundamental policies and principles underlying the seal.¹³ Historically, the seal could be used to create a legal obligation allowing the enforcement of a future gift.¹⁴ Today, the courts present inconsistent results allowing future gifts only when accompanied by extremely sophisticated legal form, and disallow future gifts when legal form is inadequate, such as with the failure of delivery or consideration.¹⁵ Ironically, the modern elements of gift and contract that prevent a future gift from legal enforcement mirror the purpose of the seal.¹⁶ This paper examines the history of the seal and the problem of inconsistent holdings based on legal form, and suggests a technological solution to the problem of inconsistency.

7. *Dougherty*, 125 N.E. at 94; *Gruen*, 488 N.Y.S.2d at 402-03; *Fischer*, 101 N.W. at 852.

8. *Dougherty*, 125 N.E. at 94 (whether consideration existed); *Gruen*, 488 N.Y.S.2d at 403 (whether adequate delivery was present); *Fischer*, 101 N.W. at 852 (whether consideration was sufficient).

9. *Dougherty*, 125 N.E. at 95 (“[a] note so given is not made for ‘value received,’ however its maker may have labeled it”); *Fischer*, 101 N.W. at 853-54 (imperfect consideration not sufficient for enforcement against promisor).

10. *Dougherty*, 125 N.E. at 95 (suggesting consideration with “value received” language); *Fischer*, 101 N.W. at 853-54 (holding consideration was imperfect).

11. *Dougherty*, 125 N.E. at 95 (“The formula of the printed blank becomes . . . a mere erroneous conclusion, which cannot overcome the inconsistent conclusion of the law”).

12. The seal is a formulaic legal device that contains elements of ritual, authentication, and legal obligation. See *infra* Section I and accompanying text.

13. See *infra* Section I and accompanying text.

14. Eric Mills Holmes, *Stature and Status of a Promise Under Seal as a Legal Formality*, 29 WILLAMETTE L. REV. 617, 625-29 (1993) (describing the ability of the seal to create a legal obligation).

15. See *infra* Section II and accompanying text.

16. See *infra* Section I, Section II, and accompanying text.

The mere requirement of legal sophistication as an element of a future gift is not necessarily problematic.¹⁷ Inconsistent court holdings, however, present a legal barrier that reduces the ability of a property holder to transfer or alienate property.¹⁸ A seal is a legal form that any lay person can easily grasp and achieve, without the expenditure of excessive funds or legal knowledge.¹⁹ The absence of consistent guidance on the part of the judiciary combined with a requirement of legal sophistication create a generally insurmountable barrier to property transfer as a future gift.²⁰

This modern problem arises from the discontinuation of a historical concept, but a novel modern solution exists.²¹ Forms of modern technology can address the policies underlying the three legal concepts of seal, delivery, and consideration.²² Specifically, three types of technology embody several of the goals of the above-mentioned legal form: authentication, transmission, and storage technologies.²³ This note will examine technologies related to authentication, such as watermarks and digital signatures, to transmission, such as various high-speed data methods, and to storage technologies, including the current use of banks and registries, and suggest how future gifts could be effectuated combining a legal theory (either old or new) with technology.²⁴

This note is divided into three main sections. The first section examines the historical use of the formal seal and the related legal powers associated with authentication and legal obligation. The second section examines modern American law and various approaches to effectuating future gifts. Finally, the third section suggests the use of modern technology to solve both the historical vulnerabilities of the seal and the modern inconsistencies in

17. *But see* National Shawmut Bank v. Joy, 53 N.E.2d 113 (Mass. 1944) (holding property owners should be allowed to make inter vivos transfers of property, notwithstanding a Statute of Wills).

18. CHARLES L. KNAPP ET AL., PROBLEMS IN CONTRACT LAW 112-18 (4th ed. 1999).

19. Holmes, *supra* note 14, at 625-29 (1993) (describing various functions of the seal, including availability of channeling donative intent). *See also* Kara Peischl Marcus, Comment, *Totten Trusts: Pragmatic Pre-Death Planning or Post-mortem Plunder?*, 69 TEMP. L. REV. 861, 867-68 (1996) (explaining the general public access to will-substitutes recognized by law).

20. *Compare* Kesterson v. Cronon, 806 P.2d 134 (Or. Ct. App. 1990) (holding that quasi-agent delivery in addition to written instrument insufficient for gift) *with* Carey v. Jackson, 603 P.2d 868 (Wyo. 1980) (holding that delivery of written instrument sufficient delivery for gift validity).

21. *See infra* Section III and accompanying text.

22. *See infra* Section III and accompanying text.

23. *See infra* Section III and accompanying text.

24. *See infra* Section III and accompanying text.

effectuating a future gift.²⁵

I. HISTORY

Historically, the seal was a legal method of documentation, authentication, and, therefore, enforceability of documents.²⁶ The formal seal has been implemented as a legal method since recorded time.²⁷ Two main legal implementations of the seal are examined here: Ancient and Roman, and English common law. Over time, the seal has reflected several important functions: ritual, authentication, and legally binding significance.²⁸

Under ancient laws, functionaries, both religious and governmental in nature, used the formal seal to effect and authenticate gifts.²⁹ In pharaonic Egypt, the seal gave public status to non-will documents that would allow a post-mortem transfer of property.³⁰ Many of the early uses of the seal were religious in nature, partially reflecting the solemn nature of the seal ritual itself.³¹ Under Roman law, public

25. This note does not focus on the problem of the repudiated “pledge” or unfulfilled promise. Unlike the pledge, in which intent is often contested, the cases examined herein generally stipulate a strong donative intent. A great deal of legal theory exists concerning the implications of the repudiated pledge for charities. See Stephen K. Urice, *Promised Gifts to Museum or Would a Pledge by Any Other Name be More Enforceable?*, C989 A.L.I. & A.B.A. 463 (1995) (summarizing the problem of the pledge in the context of charities). In addition, the charitable pledge is distinct from the future gift because the law frequently creates a more liberal allowance for charities as beneficiaries of a promise. *Id.* The Restatement (Second) of Contracts allows greater flexibility in the doctrine of reliance for charities:

§ 90. Promise Reasonably Inducing Action or Forbearance

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

A charitable subscription or a marriage settlement is binding under Subsection (1) without proof that the promise induced action or forbearance.

RESTATEMENT (SECOND) OF CONTRACTS § 90 (2003) (emphasis added).

26. Pedro A. Malavet, *Counsel for the Situation: The Latin Notary, a Historical and Comparative Model*, 19 HASTINGS INT’L & COMP. L. REV. 389, 404 (1996) (stating seal was guarantee of authenticity from “earliest legal writings”).

27. *Id.* at 405-07 (examining pharaonic Egypt, Hammurabi’s Code, and other legal sources).

28. Holmes, *supra* note 14, at 620-21 (listing qualities of efficiency, channeling, legal obligation, trust, and others).

29. Malavet, *supra* note 26, at 404-05 (describing priests, scribe-priests, and ministerial positions).

30. *Id.* at 404 (explaining that documents, especially in later times, were held in the capital, Thebes).

31. *Id.* at 404-05 (describing the role of priests in formal seals). Priests and priestesses continued to play a role in maintaining security and authentication of

officials or private professionals who acted as early notaries could legally recognize documents and create a corresponding legal obligation.³² Public officials became keepers of legal documents, with the associated power of authentication.³³ Private professionals drafted and kept legal documents, which could be authenticated and recognized through judicial intervention.³⁴

The purposes of authentication and public exposure of documents through seals continued into the Middle Ages.³⁵ Documents, particularly deeds, placed under seal would be kept in a royal depository.³⁶ The seal could therefore be used to defeat fraud by use of comparison between a public document and the recorded royal seal.³⁷

Early English common law continued the requirements of the formal seal for authentication of documents, but over time and particularly under American law, the requirements began to fade.³⁸ English common law initially added greater legal significance to the seal with respect to written documents while adding further requirements to the formalities of the seal.³⁹ Property transfer and

documents in Roman Law. GEORGES DUMÉZIL, *ARCHAIC ROMAN RELIGION* 585-87 (Philip Krapp trans., Johns Hopkins University Press 1996) (1966); Suetonius, *THE TWELVE CAESARS* 41, 106 (Robert Graves trans., Penguin Books rev. ed. 1979). The vestal virgins, for instance, maintained secure document storage for many wills and other legal documents. *Id.*

32. Malavet, *supra* note 26, at 408-11 (tabularii were public officials, tabelliones were private professionals).

33. *Id.* at 408-09 (describing that tabularii accepted legal documents, which through certification of delivery, were authenticated).

34. *Id.* at 409-11 (although private professionals drafted private documents, judicial action granted public and authentic status to such documents). Judges respectfully recognized the role of the tabularii and the associated testimony concerning legal documents. *Id.* at 409. In addition, the scribed documents eventually acquired a legal status of public documents, similar to publica monumenta. Malavet, *supra* note 26, at 409.

35. *Id.* at 415-21 (describing document authentication in Western Europe in the 10th to 16th centuries). See also Mike Macnair, *Vicinage and the Antecedents of the Jury*, 17 *LAW & HIST. REV.* 537, 550 (1999) (examining the seal in Middle Ages).

36. Macnair, *supra* note 35, at 550 (describing storage facilities for royal documents and private documents under seal).

37. *Id.* (stating courts would examine authenticity of seal to prevent fraud or ineffective form).

38. Holmes, *supra* note 14, at 629-37 (several formalities required early in the history of the seal have largely disappeared over the last several centuries).

39. *Id.* at 629-30 (agreements required a seal to bind the parties). The King's court required written documents affixed with a seal in order to effectuate the transfer. *Id.* at 630. See also Gregory G. Gosfield, *The Structure and Use of Letters of Intent as Prenegotiation Contracts for Prospective Real Estate Transactions*, 38 *REAL PROP. PROB. & TR. J.* 99, 123 (2003) (examining the connection between the use of seal as evidence of an existence of duty and the

promises both required formalities, including a description of the parties and the promise, a formal seal, and the delivery of the written document.⁴⁰ Although English common law initially strengthened the doctrine of the seal, many of the benefits of the formal seal disappeared as literacy increased.⁴¹ In particular, the use of the seal became redundant because of the signature.⁴² The signed document began to replace the functions of authentication and ritual that had been associated with the seal.⁴³ As the purpose of the seal to authenticate the parties declined because of the increase of literacy and signatures, the ability of the seal to bind parties also disappeared.⁴⁴

Although the signature replaced the seal regarding the functions of authentication and ritual, it failed to create a corresponding ability to effect legal obligation.⁴⁵ In particular, the overall use of the seal as a form of public documentation and authentication, in combination with the ability to bind parties, disappeared.⁴⁶ The disappearance of the legal seal brought with it a change in the law restricting the ability of an individual to create a binding personal legal obligation.⁴⁷ The inability to freely create such a legal obligation also resulted in the inability to freely transfer property at a future time; therefore, the future promise became increasingly difficult to make.

precursors of trial by jury).

40. Holmes, *supra* note 14, at 629-30. Holmes describes the requirements: "First, the writing had to denote the parties and state a suitably definite promise. Second, the promisor had to seal the writing. Third, the writing had to be delivered to the obligee." *Id.* See also Clinton W. Francis, *The Structure of Judicial Administration and the Development of Contract Law in Seventeenth-Century England*, 83 COLUM. L. REV. 35 (1983) (describing the common law requirement of formalism in contracts). Francis examines the certainty that formal contracts under seal provide. *Id.* at 127.

41. Holmes, *supra* note 14, at 632-37 (marking the decline of the formal seal). Holmes further describes the connection between the decline in illiteracy and the decline in specificity of formal seals. *Id.* In particular, by the beginning of the 20th century, any written symbol was sufficient to constitute a seal. *Id.* at 635. See also RESTATEMENT (SECOND) OF CONTRACTS ch. 4.3 introductory cmt.

42. Holmes, *supra* note 14, at 632-37 (describing the connection between growth in literacy and obsolescence of the seal).

43. *Id.*

44. *Id.* at 637 ("with [the] relaxation of form, the significance of the seal has substantially declined"); Melvin Aron Eisenberg, *The Principles of Consideration*, 67 CORNELL L. REV. 640, 659-60 (1982) (legal obligation created by seal has become an obsolete principle with the erosion of the associated formalities).

45. Holmes, *supra* note 14, at 637; Eisenberg, *supra* note 44, at 659-60 (ritual and personal obligation removed by statute in face of literacy).

46. Holmes, *supra* note 14, at 635-36 (the ritual functions of the seal disappeared with the increase of literacy and signatory capability).

47. See *infra* Section II and accompanying text.

II. CURRENT LAW

The formal seal is now an archaic legal form in most modern jurisdictions.⁴⁸ Notwithstanding § 95 of the Restatement (Second) of Contracts, which states that a promise may be binding without consideration if sealed, the seal is now largely meaningless in modern law.⁴⁹ Currently, two-thirds of United States jurisdictions have changed the role of the seal by statute, thereby removing an effective way of creating a future gift.⁵⁰ Nevertheless, donors continue attempts to make future transfers of property. Some attempts, such as creating a legal or equitable life estate followed by a remainder, have been successful but require relatively sophisticated legal knowledge.⁵¹ Most attempts, such as an attempted gift or contract, fail under the requirements of property and contract law.⁵² This section covers modern attempts to effectuate a future gift by comparing the requirements of successful methods to the shortcomings of unsuccessful methods. This section will pay particular attention to the general invalidation of gifts when delivery is absent, with focus on the policy function of delivery as a requirement for a valid gift.

In cases involving future gifts, especially following the death of the donor, Statutes of Wills have the potential of disposing with any

48. RESTATEMENT (SECOND) OF CONTRACTS ch. 4.3 introductory cmt.

49. The Restatement (Second) of Contracts states:

- 1) In the absence of statute a promise is binding without consideration if
 - (a) it is in writing and sealed; and
 - (b) the document containing the promise is delivered; and
 - (c) the promisor and promisee are named in the document or so described as to be capable of identification when it is delivered.

RESTATEMENT (SECOND) OF CONTRACTS § 95. The introductory notes in the Restatement (Second) of Contracts, ch. 4, briefly describe the modern history of the seal, concluding, “[m]eanwhile, literacy has become almost universal, the personal signature is widely used for the purpose of authentication, and the seal has come to seem archaic.” RESTATEMENT (SECOND) OF CONTRACTS ch. 4.3 introductory cmt. *See generally* Holmes, *supra* note 14, at 617 (assessing modern statutory use of seal in American jurisprudence).

50. Eisenberg, *supra* note 44, at 659-60 (“the rule that a seal renders a promise enforceable has ceased to be tenable under modern conditions”).

51. For trusts, *see In Re Totten*, 71 N.E. 748, 752-53 (N.Y. 1904) (court upheld bank account in beneficiary’s name as a valid revocable inter vivos trust). For life reservations, *see Gruen*, 488 N.Y.S.2d at 409 (court validated present gift of future vested remainder with life reservation in donee).

52. Gifts frequently fail for lack of delivery. *See Rose v. Rose*, 849 P.2d 1321 (Wyo. 1993) (attempted inter vivos gift held invalid notwithstanding clear intent by donee); *Kesterson*, 806 P.2d at 134 (attempted causa mortis gift invalidated due to failed delivery, despite attempt by donee to have agent deliver gift at appointed time). For failure of consideration, *see Dougherty*, 125 N.E. 94 (mere formal language insufficient to constitute consideration).

problem.⁵³ Courts could decide that a future gift should at least meet the statutory requirements of the Statute of Wills, especially if the gift could be finalized after the death of the donor.⁵⁴ Nevertheless, in virtually all such cases the Statute of Wills is not even discussed.⁵⁵ In those cases in which such statutes are discussed the requirements of a legal will are rarely dispositive.⁵⁶ Instead, in those cases where a future gift is bound on the outer limit by death and therefore arguably has a testamentary nature, court decisions are still made based on underlying contract or property law.⁵⁷

The absence of Statutes of Wills in cases of future gifts is surprising considering the potential conflict between language in a future gift and language in a will.⁵⁸ Generally courts have only addressed this issue when conflicts arise between present gifts and wills through the theory of “ademption.”⁵⁹ In the event that there is insufficient or absent property in an estate to fill a specific bequest, the theory of ademption directs a court to assign the legatee either nothing if the donative intent was satisfied through prior transfer or the nearest equivalent if the donative intent was not satisfied.⁶⁰

53. See *Kesterson*, 806 P.2d at 134. In *Kesterson*, the court invalidated the gift due to failure of delivery. *Id.* at 136. The court continued to examine the effect of the Statute of Wills and only then decided that the gift was “an attempted testamentary disposition that was not accompanied by a writing executed with the formalities of a will.” *Id.* at 136. The writing concerning wills is arguably not even binding, given the court’s multiple bases for invalidating the transfer. *Id.*

54. *Kesterson*, 806 P.2d at 136 (when the intent is a testamentary disposition, the gift must meet the requirements of the Statute of Wills).

55. Only two cases examined discussed the Statute of Wills, and in both cases the language was not decisive in the court’s reasoning. See *King v. Trustees of Boston University*, 647 N.E.2d 1196 (Mass. 1995); *Kesterson*, 806 P.2d at 134.

56. *King*, 647 N.E.2d at 1196 (holding that a letter accurately declared donative intent and that through charitable estoppel the University was entitled to Dr. King’s papers). The court held that there was no statutory requirement on the writing, even though there existed a possibility of a post mortem transfer, because “the letter was not a contract to make a will, but rather was a promise to give BU absolute title to all papers in its possession either at some future point in Dr. King’s life or on his death.” *Id.* at 1203. It is unclear whether the property is transferred expressly because there was no purpose to make a will, or because of the overriding public policies designed to protect charities. *Id.*

57. See *id.* at 1196; *Kesterson*, 806 P.2d at 134.

58. See generally, Katherine R. Guzman, *Releasing the Expectancy*, 34 ARIZ. ST. L.J. 775, 780 (2002); Note, *Ademption and the Testator’s Intent*, 74 HARV. L. REV. 741 (1961).

59. Guzman, *supra* note 58, at 780; Note, *supra* note 58, at 741.

60. Note, *supra* note 58, at 741. See also Guzman, *supra* note 58, at 780 (“[a]n interest will adeem by satisfaction, in whole or in part, provided that there is sufficiently expressed intent that an inter vivos gift be charged against a beneficiary’s testate share”); Van Foreman McClellan, Note, *Inter Vivos Transfers: Will They Stand up against the Surviving Spouse’s Elective Share?*, 14 OKLA. CITY U. L. REV. 605 (1989). McClellan discusses the general effect of an inter vivos gift

Although expressed as a concern about future gifts, the issue of ademption has not played a role in courts' decisions about the practicability of future gifts.⁶¹ Therefore the absence of any discussion of ademption undermines any argument that future gifts should be invalidated because of the inherent difficulty of tracking property that is legally owned by the donor but has a legal quasi-remainder in the donee.

The most frequent classification of the future gift is as an invalid gift due to failure of delivery.⁶² In *Rose v. Rose*, the donor attempted to change ownership of a certificate of deposit to effectuate a future gift to his nephew.⁶³ The court deemed that changes to the certificate, at the direction and in the presence of the bank president, were insufficient to meet the requirement of delivery even in the presence of a clear donative intent.⁶⁴ Failure of delivery as a cause of the invalidation of future gifts may partially result from a concern that future gifts do not require present possession of property; specifically, a party should not be allowed to give what they do not have.⁶⁵ Although this concern is valid, it is not a concern limited to future gifts, and extends both to contracts and to formal wills.⁶⁶ Therefore, the concern should not be so paramount as to defeat the concept of the future gift in an independent incarnation.

Three primary functions, or policies, exist behind the requirement of delivery: ritual, evidence, and channeling.⁶⁷ The first function,

on wills when a spouse has a statutory privilege to elect a share of the estate. *Id.*

61. None of the cases examined, with the exception of *King*, contain any discussion of wills. *King*, 647 N.E.2d at 1196. There is minimal need for discussion of the theory of ademption outside of the field of wills. *Id.*

62. *Rose*, 849 P.2d at 1321 (donor attempted to create future gift by changing ownership of certificate of deposit from himself to his nephew with the help of bank, but gift failed for lack of delivery).

63. *Id.* at 1323.

64. *Id.* (holding that donor should have changed multiple copies of the certificate of deposit despite lack of any such notice of requirement by bank president). Unfortunately, the court gave no guidance absent a present gift how the donor could have effectuated such an intent. *Id.*

65. See *Carey*, 603 P.2d at 873 (delivery as a requirement to prevent mistake, perjury, and imposition).

66. The doctrines of fraud and changed circumstances govern contract and property law. See RESTATEMENT (SECOND) OF CONTRACTS § 162; RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.3 (2003).

67. Jane B. Baron, *Gifts, Bargains, and Form*, 64 IND. L.J. 155, 168 (1988) (listing the three functions of form in gifts as ritual, protective, and evidentiary); Andrew Kull, *Reconsidering Gratuitous Promises*, 21 J. LEGAL STUDIES 39, 46 (1992) (listing the functions of form in gifts as cautionary, channeling, and evidentiary). All others examine three functions, although different terminology is used. *Id.* The three functions are listed as: first, cautionary or ritual; second, evidentiary; and third, channeling or protective. *Id.* See also Chad A. McGowan,

ritual, acts to impress upon the donor the serious and permanent nature of the gift.⁶⁸ The second function of evidence provides proof of donative intent in the event of the donor's death.⁶⁹ One reason future gifts have not been upheld is because of uncertainty regarding the period between the gift and the receipt of property.⁷⁰ Unlike the enforcement of a present gift post-mortem, courts express concern that the enforcement of the future gift post-mortem may conflict with possible pre-death repudiation by the donor.⁷¹ The last function of channeling concerns the ability to create a legal obligation, to prevent attempted enforcement in the event of a contemplated but not undertaken gift.⁷²

The future gift is frequently considered in contract terms, and just as frequently courts have struck down enforcement attempts due to failure of consideration.⁷³ One classic example is the holding in *Mills v. Wyman*.⁷⁴ In that case, Mr. Wyman promised to pay for the care the plaintiff gave to Mr. Wyman's son during his son's illness.⁷⁵ *Mills* and similar decisions suggest that promises accompanied by clear donative intent and intention to bind are still void without consideration.⁷⁶ The courts held that absent consideration, a moral rather than legal obligation is created, even in the presence of a donor

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) (“the purposes and justifications for the delivery requirement are to establish the prima facie case, to provide evidence of the transaction, to caution the donor, and to allow individuals to perform specific acts to ensure the legally enforceable results they desire”).

68. Baron, *supra* note 67, at 169 (designed to signify the wrench of delivery).

69. *Id.* at 168.

70. See *Fischer*, 101 N.W. at 852 (deed to property in promisor's house for 6 ½ years after “gift” and 2 years after death of promisor).

71. See *id.* at 854 (unknown reason for lack of execution of gift as grounds for lack of enforcement).

72. See McGowan, *supra* note 67, at 357 (the channeling function serves to make the gift legally binding); Kull, *supra* note 67, at n. 28.

73. *Dougherty*, 125 N.E. at 95 (overruling appellate decision that note was “sufficient evidence of consideration”).

74. *Mills v. Wyman*, 20 Mass. (3 Pick.) 207 (1825).

75. *Id.* (promise to pay without consideration held unenforceable). Ironically, it seems that the case is complicated by the fact that several of the assumptions of the court, including the alleged death of the son in question, were not true. See Geoffrey Watson, *In the Tribunal of Conscience: Mills v. Wyman Reconsidered*, 71 TUL. L. REV. 1749, 1751 (1997) (suggesting that the underlying promise and alleged death may never have occurred).

76. *Mills*, 20 Mass. at 228 (“the law . . . leaves the execution of it to the conscience of him who makes it”). See also *Kirksey v. Kirksey*, 8 Ala. 131 (1845) (“the promise on the part of the defendant, was a mere gratuity, and that an action will not lie for its breach”). *Kirksey* does not squarely match with most cases examined here, in that repudiation did occur. *Id.*

who had the intent to be bound by a promise.⁷⁷ Notwithstanding the presence of donor intent to be legally bound by the gift, courts generally do not uphold a future gift under contract law.⁷⁸

The most successful attempts at effectuating a future gift use the life estate and remainder either under property law or in equity under trusts.⁷⁹ In *Gruen v. Gruen* the court upheld a gift in the presence of a “life reservation.”⁸⁰ In this case, Victor Gruen issued a note to his son which stated that the painting was a gift to Michael Gruen, but that Victor Gruen would continue to use it for life.⁸¹ The language, with the precise life reservation, was upheld by New York courts.⁸² Similarly, *In Re Totten* upheld a future gift through the use of bank accounts and the trust.⁸³ In *In Re Totten*, the donor established bank accounts titled after donees, with no notice to the donees in question.⁸⁴ The court held these accounts were revocable trusts that became irrevocable but valid at death, therefore satisfying the outer boundary of the future gift.⁸⁵

Although the Totten trust and the life reservation allow a form of the future gift, both have a limited application.⁸⁶ The life reservation

77. *Mills*, 20 Mass. at 228 (“a deliberate promise, in writing, made freely and without any mistake . . . cannot be broken without a violation of moral duty”). It is hard to imagine how these cases would be litigated without repudiation. Frequently, however, a dispute arises between the donee and the estate of the donor. See *Webb v. McGowin*, 168 So. 196 (Ala. Ct. App. 1935) (in which estate attempted to terminate an ongoing pledge of care for life of the donee following the death of the donor).

78. See *supra* note 77 and accompanying text.

79. *Gruen*, 488 N.Y.S.2d at 402-03 (an attempted transfer of a Klimt painting to son for birthday, with life reservation); *Totten*, 71 N.E. at 752 (court upheld bank account in beneficiary’s name as a valid revocable inter vivos trust); *Carey*, 603 P.2d at 868 (extremely legally complex drafted gift).

80. *Gruen*, 488 N.Y.S.2d at 404 (“certain types of property, being intangible in nature, can only be ‘delivered’ by means of a written instrument”).

81. *Id.* at 403 (“as long as I live”).

82. *Id.* at 408.

83. *Totten*, 71 N.E. at 752.

84. *Id.* at 749 (multiple accounts were held in various banks with bank accounts titled “trustee for” or “in trust for” named parties).

85. *Id.* at 752 (“it is a tentative trust merely, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration, such as delivery of the pass book or notice to the beneficiary”). Note that despite the testamentary effect this decision has, there is no language in the decision concerning a statute of wills. *Id.* See Marcus, *supra* note 19, at 861 (1996) (trust enforceable by beneficiary at death of donee). See generally, *National Shawmut Bank v. Joy*, 53 N.E.2d 113 (1944).

86. CHARLES E. ROUNDS, JR., LORING; A TRUSTEE’S HANDBOOK 568 (Aspen Publishers 2003) (personal property legal life estates create impracticabilities); Jane B. Baron, *The Trust Res and Donative Intent*, 61 TUL. L. REV. 45, 51 (1986) (trusts require res; property).

is limited to tangible property and therefore cannot extend to a future gift with a monetary corpus.⁸⁷ The Totten trust, as a bank account, is limited to fungible monetary property and therefore cannot extend to a future gift that is not a monetary corpus.⁸⁸ Both the Totten trust and the life reservation require a level of legal sophistication that is generally unavailable to the public.⁸⁹ The Totten trust and the life

87. ROUNDS, *supra* note 86, at 568 (personal property legal life estates create impracticabilities).

88. Baron, *supra* note 86, at 51 (trusts require res; property). Savings accounts are exclusive to money. Therefore, a trust constituting a savings account must and may only contain money.

89. Marcus, *supra* note 19, at 867-68 (Totten trusts are more accessible than many forms, but still have a legally established formality). Extremely sophisticated gifts were also occasionally upheld as valid. *See Carey*, 603 P.2d at 877-78. Even in the presence of sophisticated language, such as the following, courts have been extremely reluctant to uphold a future gift on the basis of language alone. *Id.* The following written gift, including a notary seal, had to be argued to the Supreme Court of Wyoming before it was validated. *Id.* The following abbreviated gift is presented here as an example of the difficulty of using gift terminology to effectuate a future gift notwithstanding incredibly detailed language:

“WHEREAS, Bernice E. Jackson, hereinafter called the Donor, is the owner and in possession of certain articles of personal property located in Laramie County, Wyoming, and

‘WHEREAS, it is Donors (sic) intention to give said articles, irrevocably, to her daughter, Genevieve B. Carey, hereinafter called the Donee, and

‘WHEREAS, it is Donees (sic) intention and wish to receive and accept said articles as an irrevocable gift,

‘NOW THEREFORE Donor and Donee, as mother and daughter, do hereby agree as follows:

‘1) Donor hereby agrees to give and by these presents does hereby voluntarily give and transfer all her right, title and interest in and to the following described personal property to Donee; to-wit,

(List of items deleted.)

‘2) Donee hereby, upon delivery to her of said articles and upon execution, delivery and receipt of this instrument, accepts said articles as a gift.

‘3) Both parties further agree that Donee may, at her option, loan any or all of said articles to Donor for her temporary use of the same, and agree that any future delivery of any of said articles to Donor shall not in any manner affect the validity of this transfer as a gift and is not intended to re-transfer ownership or title of said articles.

‘Dated, signed and delivered this 3rd day of July, 1969.

‘/s/ Bernice E. Jackson

DONOR

‘/s/ E. L. Patrick

WITNESS

‘/s/ Genevieve B. Carey

DONEE

‘Subscribed and sworn to before me, a Notary Public, this 3rd day of July, 1969.

‘/s/ Marguerite Offutt

NOTARY PUBLIC

‘SEAL

‘My Commission Expires Jan. 18, 1970.’”

reservation require a legal understanding of property relationships, and the trust frequently requires legal action accompanied by financial institution action.⁹⁰ In addition, both the life reservation and the Totten trust require a present possessory interest in property.⁹¹ Generally, the division of an estate into present and remainder interests, such as through a trust, will effectuate a future gift.⁹² This division, however, is nonobvious and generally unavailable to the lay person.

Absent the sophisticated knowledge of a legal professional, donors are left without an accessible method of effectuating a future gift. Those methods that do exist for the purpose of making a future gift, such as the life reservation, are substantially equivalent to an invalid contract or gift.⁹³ In addition, the consideration and delivery requirements are based on the same principles as the seal: authentication, ritual separation, and legal obligation.⁹⁴ The similarity in function between the delivery requirement and the seal, although distinct in terminology, suggests that courts look for a legal “seal” in order to effectuate future gifts.⁹⁵ This “seal” is characterized not by physical accessibility, but by advanced legal understanding.⁹⁶ Unlike the classical seal, the modern legal requirements are therefore inaccessible to the majority of the population.⁹⁷

III. SUGGESTED SOLUTIONS

The holdings examined in Section II reflect inconsistent results based on the relative sophistication of the parties.⁹⁸ This section of the paper examines different proposals about how to reconcile the property owner’s interest in making a future gift with the legal reality

Id. at 870-71. The fact that the Supreme Court of Wyoming reversed the lower courts further demonstrates the difficulty of making a future gift, even with the presence of advanced legal consultation, drafting, and formal seals. *Id.*

90. ROUNDS, *supra* note 86, at 638 (Totten trusts require a savings account). For instance, the Totten trust requires opening a bank account. *Id.*

91. *See supra* note 88 and accompanying text. Neither the life reservation nor the Totten trust would be able to effectuate the proposed future gift form with a specific delay of 1 to 5 years. *See supra* note 86 and accompanying text.

92. *See supra* note 79 and accompanying text.

93. *See supra* Section II and text.

94. *See supra* note 28 and accompanying text (bearing the similar characteristics of the seal: ritual (of legal nature), legal obligation (upheld by courts), and authentication (as through written notice)).

95. *Compare supra* note 28 and accompanying text with *supra* note 67 and accompanying text.

96. *See supra* note 28 and accompanying text.

97. *See supra* note 89 and accompanying text. *See generally Gruen*, 488 N.Y.S.2d at 401; *Carey*, 603 P.2d at 868; *Totten*, 71 N.E. at 752.

98. *See supra* note 20 and accompanying text.

that limits such attempts. The first portion focuses on the simplest solution: restricting the alienability rights of property owners by limiting future gifts and donative intent to the domain of wills and trusts. The second portion puts forward a proposal based on modern technology that would allow the popular use of the future gift without requiring the donor to be legally sophisticated.

A. *Consistency Within Legal Principles*

Inconsistent treatment of the future gift could simply be cured through either general invalidation of future gift attempts by upholding Statutes of Wills or general validation of future gift attempts under property law. Courts could simply invalidate donative attempts when the donee contemplates a future transfer up to and including at death when the attempt fails to meet the requirements of a Statute of Wills.⁹⁹ Although a simple solution, this legal interpretation would have serious consequences in a broad range of legal fields, particularly in the field of trusts.¹⁰⁰ The strict reading would also undermine the principle of free alienation of property.¹⁰¹ Both weaknesses would overturn the doctrine set forth in *National Shawmut Bank v. Joy*, in which the courts initially allowed inter vivos trusts to serve as will-substitutes and create post-mortem transfers of property without a will.¹⁰² It is therefore unlikely, given the extreme effect such a change would have in the area of trusts alone, that this is a viable solution. The future gift could also be interpreted as valid either under contract law with a waiver of consideration or property law with a waiver of delivery. Despite the availability of these options, as detailed in the preceding section, courts have been

99. See *Kesterson*, 806 P.2d at 136. The outer limit of death, and therefore the testamentary nature of such a gift, exists because life is uncertain: notwithstanding an intent to make a gift in a year, a donor can always die before that time passes. See MASS. GEN. LAWS ch. 191, § 1 (2003):

Every person eighteen years of age or older and of sound mind may by his last will in writing, signed by him or by a person in his presence and by his express direction, and attested and subscribed in his presence by two or more competent witnesses, dispose of his property, real and personal, except an estate tail, and except as is provided in this chapter and in chapters one hundred and eighty-eight and one hundred and eighty-nine and in section one of chapter two hundred and nine.

Id.

100. *National Shawmut Bank*, 53 N.E.2d at 113.

101. *Id.*

102. *Id.* “If a property owner can find a means of disposing of [property] inter vivos that will render a will unnecessary for the accomplishment of his practical purposes, he has a right to employ it. The fact that the motive of a transfer is to obtain the practical advantages of a will without making one is immaterial.” *Id.* at 122.

reluctant to undertake any of these options.¹⁰³

B. Application of Modern Technology

Modern technology provides methods of satisfying the principles of both the seal and delivery while satisfying the concerns of modern American jurisprudence. The historical purpose of the seal was primarily threefold: authentication, public documentation and transmission, and legal binding.¹⁰⁴ The loss of the seal, however, made obsolete by the signature and independent methods of authentication, also removed a legal method of creating legally enforceable or binding obligations.¹⁰⁵ Nevertheless, specific technologies hold advantages which would provide a method of utilizing the three principles of the seal and create a legally recognized gift with effective delivery.

1. Authentication

One legal concern regarding the future gift is the legal authentication of the gift. Current technology has already addressed this concern for widespread market uses.¹⁰⁶ Two current methods of authenticating data are “watermarks” and digital signatures.¹⁰⁷ Watermarks operate to secure the identity of a document: in particular the “provenance and characteristics” of the object.¹⁰⁸ This

103. See *supra* Section I and accompanying text.

104. Malavet, *supra* note 26 (stating seal was guarantee of authenticity from “earliest legal writings”); Holmes, *supra* note 14 (describing the ability of the seal to create a legal obligation).

105. Holmes, *supra* note 14, at 635-36 (the ritual functions of the seal disappeared with the increase of literacy and signatory capability).

106. David Bearman & Jennifer Trant, *Authenticity of Digital Resources; Towards a Statement of Requirements in the Research Process*, D-LIB MAGAZINE (June 1998) (many companies and institutions provide methods of digital authenticity).

107. Clifford Lynch, *Authenticity and Integrity in the Digital Environment: An Exploratory Analysis of the Central Role of Trust*, at <http://www.clir.org/pubs/reports/pub92/lynch.html> (last visited Mar. 31, 2004). Lynch examines various methods of authentication, including a close examination of fundamental terminology with an eye on future research. *Id.*

108. Lynch, *supra* note 107. The following discussion distinguishes the use of the term “authenticate” in the legal use from the computer science use. For the sake of legal analysis, the watermark authenticates the provenance of a document. *Id.* Although somewhat susceptible to fraud, a watermark can be copied but it does not effect an underlying document. *Id.* Although a watermark could be placed on a false document, the original document stored in a public location could not be altered. *Id.* Therefore watermarking is sufficient to meet the legal standard of authentication. Lynch, *supra* note 107. Watermarking permits copies, although on a binary analysis of the data there will be some corruption. *Id.* Watermarking is frequently used to prevent misuse and duplication of licensed software, such as

use of watermarks would mirror the seal principles of authentication and documentation by providing an evidentiary basis of document authenticity.¹⁰⁹ Digital signatures also provide a legal basis for determining the identity, and therefore legal authentication, of an author.¹¹⁰ Although not legally recognized, digital signatures constitute a cryptographic technique to guarantee point of origination and lack of alteration.¹¹¹ Digital signatures and watermarks provide a method of authenticating documents for legal purposes and therefore satisfy one of the functions of the property gift doctrine.

2. Public Documentation and Transmission

Modern technology provide a plethora of options for electronic transmission of documents: email, fax, and a number of other electronic transmissions. These channels of commerce provide both secure and normal transmission.¹¹² The purposes of the future gift are generally encapsulated by the over-all push to recognize legal transmission of documents, as detailed in the American Bar Association Digital Signature Guidelines.¹¹³ The purpose of that document is to suggest a method of allowing certified documents to

music CDs or DVDs. *Id.* This is because, for the computer science use of authentication, the byte stream which represents the underlying material is altered slightly whenever a watermark is placed on a document. *Id.* Therefore, a watermarked document is not “authentic” in the computer science use of the word. Lynch, *supra* note 107.

109. *Id.* (an object with a watermark gives good basis for knowing the provenance of a document).

110. *Id.* (digital signatures are efficient at establishing a connection between a public key and an entity, in addition to providing a method for knowing when the connection has become corrupted). Currently, digital signatures are not precise in use to distinguish between a signature which connotes authorship in contrast with a signature which connotes consent or agreement. *Id.* It is not clear whether this difference is relevant if the signature is only applied for a single purpose, rather than conceptual problems of only having one method in place for distinguishing multiple purposes. Lynch, *supra* note 107.

111. *Id.*; Jim Miller, *PICS Label Distribution Label Syntax and Communication Protocols*, at <http://www.w3.org/TR/REC-PICS-labels> (last modified Sept. 8, 2000) (software examination of digital signatures). The technique is based on paired keys, or numbers, which allow examination by any party but only authorship by a party maintaining the original key. *Id.* (“within the United States, RSA Laboratories (100 Marine Parkway, Redwood City, CA, 94065-1031) distributes a source code kit called RSAREF which provides all of the code required to implement the cryptographic components of the PICS spec”). See generally American Bar Association, *Information Security Committee Electronic Commerce and Information Technology Division Section of Science and Technology*, at <http://www.abanet.org/scitech/ec/isc/dsgfree.html> (last visited Mar. 31, 2004).

112. American Bar Association, *supra* note 111.

113. *Id.*

be transmitted legally.¹¹⁴ Modern data transmission, in any of its forms, is extremely accessible to the lay person and therefore provides a benefit that is not necessarily present in Totten trusts or in complicated legal property transfers.¹¹⁵

One of the historical purposes of the seal was to make a document publicly recognized. Public documents, by their nature, provide a level of authentication through certification and availability for public comparison.¹¹⁶ The aspect of storage and publicity can be achieved through the use of the digital signature, and through storage in a variety of public or quasi-public locations.¹¹⁷ If a donor sent an authenticated document to either a public location, such as a registry, or a quasi-public location, such as a bank, the certification of receipt could serve the function of public documentation.¹¹⁸

3. Legal Obligation

The underlying restriction of alienation is troubling mainly when a donor has the desire to effectuate a future gift of property, but has no legal avenue available. The seal, either as a function of technology or historically, legally bound a property owner to a promise.¹¹⁹ Although one method of enforcing the future gift through a modern seal would be statutory, the method of electronic and authenticated transmission could also serve to fulfill an existing legal theory.¹²⁰ The

114. *Id.*

115. *Id.*

116. Bearman & Trant, *supra* note 106 (including registration, certification, comparison, and other manners of proving authenticity through public storage). *See also* Macnair *supra* note 35 and accompanying text.

117. *See* Bearman & Trant, *supra* note 106 and text. *See also* MASS. GEN. LAWS 233 § 76 (2003). Massachusetts law allows any such document held in public storage and certified by an appropriate public official to be sufficient for evidentiary admissibility:

Copies of books, papers, documents and records in any department of the commonwealth or of any city or town, authenticated by the attestation of the officer who has charge of the same, shall be competent evidence in all cases equally with the originals thereof; provided, that, except in the case of books, papers, documents and records of the department of telecommunications and energy in matters relating to common carriers, and of the registry of motor vehicles, the genuineness of the signature of such officer shall be attested by the secretary of the commonwealth under its seal or by the clerk of such city or town, as the case may be.

Id.

118. *See supra* notes 116, 117 and text.

119. *See supra* note 28 and accompanying text.

120. *See* Susan Tracey Stearns, Note, *Compressing Testamentary Intent into Inter Vivos Delivery: What Makes a Conveyance Effective? – In Re Estate of O'Brien*, 109 Wash.2d 913, 749 P.2d 154 (1988), 64 WASH. L. REV. 479, 482 (1988) (legal delivery of property with delay of donee's enjoyment).

receipt and certification of an authentic document by a public resource, such as a bank or registry, serves the purposes demanded by the delivery requirement of gifts.¹²¹ Therefore, with the presumption of acceptance where value exists, and the strong donative intent, a future gift could be effectuated through modern technology.

Modern technology provides an avenue to create a document which is authenticated, publicly documented, and legally binding to the relevant parties. These three elements satisfy both the historical purposes of the seal and the modern common law principles behind the gift requirement of delivery.¹²² The ritual of the seal is analogous to the wrenching of delivery. In both cases, the donor becomes aware of the physical transfer of property and therefore the solemnity and importance of the gift.¹²³ The public nature of the seal is analogous to the evidentiary requirement of the gift. In both cases, storage of a document in a public location with certification by a public official provides notice which defeats the lost document or gift, and therefore provides a simple resolution of property interests even in the event of a death and post-mortem distribution.¹²⁴ Finally, the legally binding nature of the seal is created with the delivery of a notarized document to a public official. Through transmission to a public or quasi-public source, the document will satisfy property law and therefore legally bind a donor, according to the donor's own donative intent.¹²⁵

This future gift carries two potential concerns: fraud and funding.¹²⁶ All legal documents are subject to the risk of fraud.¹²⁷ Although this certainly remains a concern for technological communication, fraud ultimately is solved through law enforcement in addition to legal remedies.¹²⁸ Furthermore, the law has developed many methodologies for dealing with fraud. The future gift also raises the

121. See *supra* notes 116, 117 and text.

122. Compare *supra* note 28 and accompanying text with *supra* note 67 and accompanying text.

123. Compare *supra* note 28 and accompanying text with *supra* note 67 and accompanying text.

124. Compare *supra* note 28 and accompanying text with *supra* note 67 and accompanying text.

125. See *supra* note 28 and accompanying text.

126. See *supra* notes 58, 65 and accompanying text.

127. See *supra* Section III:B:i.

128. Kathleen A. Lacey, Barbara Crutchfield George, *Crackdown on Money Laundering: A Comparative Analysis of the Feasibility and Effectiveness of Domestic and Multilateral Policy Reforms*, 23 *Nw. J. INT'L L. & BUS.* 263, 298 (2003) (discussing implementation goals of existing legislation in the National Money Laundering Strategy reports). The authors generally discuss fraud, legal remedies, and implementations in the context of global money laundering. *Id.*

concern of either lack of property or “double-gifts.”¹²⁹ Again, however, failure of funding is a legal concern in any case of property transfer including present gifts, future interests, contracts, and wills.¹³⁰ In addition, the “double-gift” is covered through the will theory of ademption: if there is insufficient property to fill a bequest, the legatee either receives nothing if the legacy is “specific” or the nearest equivalent if the legacy is “general.”¹³¹ Therefore, although legal problems exist with a future gift, most if not all are problems that are inherent in any type of property transfer.

The reinstatement of the seal, as provided through modern technology, allows an average property owner to alienate personal or real property without limitations based on sophisticated legal knowledge. In effect, modern technology provides for the authentication, delivery, and public documentation of a gift at a present time.¹³² The result is a consistent legal theory allowing for an expanded ability to transfer property where the donative intent is clear and explicit.

IV. CONCLUSION

Ultimately, the fate of the seal lies within the hands of legislatures. Unfortunately the current state of the law allows inconsistent results which are largely governed by the relative sophistication of the parties involved. The majority of parties, who are not legally sophisticated, are legally barred from making enforceable present declarations of future transfers of either personal or real property, even when clear donative intent exists. More sophisticated parties may make future transfers with vehicles such as the Totten trust or the life reservation with remainder, which although relatively accessible are still limited. If the law seeks consistency and permits the alienability of property, formal requirements defining the future promise would allow such alienability. The irony behind the disappearance of the seal is that the principles which underlie the formal seal are the exact principles which underlie the requirements of delivery and consideration. In many ways, the seal remained as an abstract requirement but disappeared as a tangible object that could

129. See *supra* note 58 and accompanying text. For instance, where there is similar language in a gift and in a will. Note, *supra* note 58, at 741.

130. See *supra* note 58 and accompanying text.

131. Note, *supra* note 58, at 741. See also Guzman, *supra* note 58, at 780 (2002) (“[a]n interest will adeem by satisfaction, in whole or in part, provided that there is sufficiently expressed intent that an inter vivos gift be charged against a beneficiary’s testate share”).

132. See *supra* Section III and accompanying text.

be applied without legal sophistication. Any construction which requires legal sophistication to effect property alienation is an inequitable device. Today, with electronic transmission, authentication, and storage, the seal could be resurrected in a way which allows any property owner to transfer that property at will. If the property owner's rights are paramount, inconsistencies in court holdings must be avoided.