THE

AMERICAN LAW REGISTER.

NOVEMBER, 1852.

GIFTS IN VIEW OF DEATH.

THE *donatio mortis causa* is one of those perplexed topics in the law which are at once the despair of judges, and the delight of law schools. On either side of most of the questions which may arise within its fortunately narrow range, cases could be found to support an argument which might embarrass if it did not convince. Its very definition, indeed, and the fundamental idea which it involves, are still, after a century of discussion, quite unsettled. Thus in England the inference appears to be, that in such a gift, the title does not vest till the death of the donor, when if necessary, a trust will arise in the executor;[1] while in Pennsylvania, and other of the United States, it has been held to be essential that the property should pass at once.[2] That is to say, by the one, the *donatio mortis causa* is treated merely as a conditional gift; in the other, it is considered as an exceptional species of testamentary disposition.

[1] Duffield *v.* Elwees, 1 Bligh, N. S. 543; Edwards *v.* Jones, 1 My. & Cr., 235; See Brown *v.* Brown, 18 Conn., 414.

[2] Nicholas *v.* Adams, 2 Whart. 17; Craig *v.* Craig; 3 Barb. Ch. 116; Harris *v.* Clark, 3 Comst. 121; Penny *v.* Gitting, 2 Gill & J. 209; Jones *v.* Dyer, 16 Ala. 225; McDowell *v.* Murdock, 1 Nott & McCord, 237.

In this state of the law, the report which we give in another part of this journal, of a very recent case in the Supreme Court of Pennsylvania,[1] cannot fail to prove acceptable to our readers, both from the importance of the point involved, and the clearness with which the questions, of which we have spoken, are treated. It is unnecessary to refer here with particularity to the facts of the case; it is enough to say that rejecting the inferences which the general course of decision might seem to justify, as founded on exceptions not to be extended by analogy, the court rule that a gift mortis causa of all the donor's property, though that be actually present, is invalid as within both spirit and letter of the Wills Act. To decide otherwise, indeed, as was said, would be to repeal its provisions.

It is not, however, so much to the actual question in controversy, that we would now call attention as to some general observations of Judge Lowrie, in delivering the opinion in the case, on the influence and authority of the civil law upon the subject. That law, to which the *donatio mortis causa* unquestionably owes its origin, has been so constantly looked to in its development, and invoked for the elucidation of new points as they arose, that the assertion of the learned judge that "the rules of the Roman lawyers are no guide to us" in the determination of a question of this nature, might seem at first sight almost a paradox. But a careful cousultation of the writers on Roman Jurisprudence, will convince the inquirer of the general justness of Judge Lowrie's views, and force him to the conclusion that, except with the greatest caution, and in rare cases, he cannot look with safety beyond the limits of his own books, for the principles which he must adopt. Such, at least, has been the result of our own investigations, which, as the English authors in treating of the subject seem to have somewhat misapprehended the passages in the civil law, which they cite,[2] we shall proceed briefly to detail, hoping that the unpractical character of

[1] Headley *v.* Kirby, post.

[2] For instance, Mr. Williams, in his Treatise on Executors, p. 650; Mr. Roper on Legacies, page 7. So also Lord Hardwicke in Ward *v.* Turner, 2 Ves. 436.

our remarks may be compensated for by the importance of the point on which they bear.[1]

As the *donatio mortis causa*, is, in one point of view, only a species under the general head of gift, it will be proper to begin with a glance at the nature and limitations of the latter in the Roman law. And as nothing was a greater characteristic of the prudent citizens of the Republic than the care with which in earlier times, they guarded against fraud and prodigality, it is necessary to consider first the formalities required to constitute a valid donation. With regard to these a variety of legislative provisions appear to have existed from time to time. A *lex Cornelia*, is the first which is mentioned on the subject, a fragment of which, preserved in Ulpian, prohibits any one from becoming surety for another for more than a sum amounting to about $800 in each year.[2] This was followed by the *lex Cincia*, passed about B. C. 200, whose objects and purpose have been a fruitful source of discussion amongst the foreign jurists, Savigny having made it the subject of an elaborate essay.[3] The better opinion seems to be that a sum was established, above which certain formalities were required in order to make a gift binding;[4] though others consider the law to have prohibited donations beyond the amount fixed, except to near relatives, and to have prescribed the forms for those below it.[5] Whichever be right, it is certain that the gift of corporeal property, must have been in one of three ways; by mancipa-

[1] In the succeeding remarks the writer has followed Mackeldey, (Lehrbuch, trans. Brussels, 1846,) Mullenbruch, (Doctrina Pandectarum,) Hugo,)Histoire de Droit, Rom.,) and Savigny, (Hist. Rom. Law, by Cathcart, and system des heut. Rom. Rechts. vol. IV.) who are at present the standard authorities on the Continent.

[2] Hugo, p. 172.

[3] Ueber die lex Cincia, Zeitschr. Vol. IV. It is from this law that the rule in England which precludes the barrister from maintaining suit for his fees, is remotely derived. See Tacitus Ann. XI. 5. *Ne quis ob causam orandam pecuniam donumve accipiet.* As this statute was aimed against fraud and extravagance, Blackstone's conclusions from it (3 Comm. 28) as to the honorable character of the Roman advocacy appear to be as unfounded with regard to earlier, as they are unquestionably untrue as to later times.

[4] Savigny system, vol. IV. § 144, 155.

[5] Mackeldey, § 468.

tion, to which the presence of seven Roman citizens was necessary; by the *in jure cessio*, a fictitious suit like our common recovery; or by tradition, which answered pretty nearly to a delivery with us,[1] but which was applicable only to one kind of property, *the res nec mancipi*, comprehending money and certain moveables. With regard to incorporeal rights, as debts and the like, it was, until the time of Justinian, a principle, that a voluntary promise, though available by way of exception, gave rise to no action, unless made in the form of a *stipulatio*, which was a symbolic proceeding, to which the presence of several witnesses was also necessary. A valid promise, however, it seems, be created without consideration when set down in the family registry, or in after times when transcribed in the books of the *Argentarii*, the Roman Bankers, which were received as the highest authority in Courts of Justice.[2] As to the assignment or cession of debts, it is sufficient to say, that at the period of which we are speaking, such assignment gave, as in our law, only the right to sue in the assignor's name, and then only when nominated in a very particular manner.[3] The regulations thus fixed by the *lex Cincia*, are supposed to have undergone changes, of which, however, we have no authentic information,[4] until we come to the time of Constantine, who in 316 A. D., promulgated an edict, in the opinion of some rather in the nature of instructions to a public officer, than a formal constitution, which required to give validity to donations, an act in writing before witnesses, containing the names of the parties and a description of the thing, to which registration was to be added.[5] These provisions

[1] Owing to the peculiar theory of the Roman lawyers on the subject of possession, it is not always safe to apply their rules as to the *traditio* requisite to transfer property in a thing, to cases in the common law. The whole doctrine is investigated by Savigny in a learned treatise, recently translated by Sir Erskine Perry, which was quoted and commented on with much approbation in Bridges *v.* Hawkesworth, 7 Eng. Law and Eq. Rep. 434. See 19 Am. Jur. 13.

[2] Savigny ut supra; Smith Dict. Antiq. sub verb *Argentarii*. The articles in the latter work on the Roman law by Prof. Long, are by far the best and clearest exposition of the system in the English language.

[3] Mackeldey, § 369. Walter, Proceed. Rom. ch. 12. [4] Savigny, § 165.

[5] *Insinuatio*, may be thus translated for want of a better word. But it did not in

do not appear to have been absolutely binding in all cases, but only precautionary in their character. Subsequent constitutions dispensed with writing and witnesses, where there was registration.[1] With Justinian, however, an entirely new epoch in the law of gifts was begun. In the first place, he provided that all gifts amounting in value to more than 500 solidi, or about $1250, should be registered; those below following the ordinary course of transfer. In neither of the cases, however, was writing made necessary. The next and most material change was in authorizing an action on a simple promise of donation, so that as in a sale, to which it was expressly assimilated, delivery was not essential.[2] As also the contract of sale was merely consensual, requiring neither writing, nor witnesses, no especial formalities were any longer required, except registration when above the sum fixed.

While the ancient strictness with which the donation was hedged in, was thus relaxed, it is not, however, to be supposed that the donor was left without protection from the consequences of heedless generosity, or from the ingratitude of his beneficiary. What had been taken from the formalities of its creation, was fully compensated for in the alterations introduced in its character. Before absolute, it now became revocable; not indeed at pleasure, but under fixed rules.[3] A donation once made, whether perfected by delivery, or yet remaining in promise, may now be annulled either by third persons, as children whose share in the estate has been unlawfully diminished thereby, or creditors; or by the donor himself. In the latter case the revocation is allowed on the subsequent birth of children, for the ungrateful or criminal conduct of the beneficiary, or when the donor suffers afterwards any considerable loss in his fortune.[4]

itself require writing, being merely a note of the declarations of the parties, taken down by a magistrate, and deposited *in actis curiæ.* 1 Savig. by Cathcart, 91. This constitution is to be found with some variations in Gaius, the Codex Theodos and as the 25th Const. Code VIII. 54.

[1] Const. 29, 31, Code VIII. 54.

[2] Const. 34–37, Code VIII. 54. See § 2, Instit. II. 7.

[3] Savigny, § 168, &c.

[4] Savigny, § 168, &c.

As may be gathered from what has gone before, the subjects of a donation, since the time of Justinian, comprehend all property corporeal, or incorporeal. A voluntary promise is valid, and debts may be created, transferred, or released without consideration.[1]

We now come directly to the *donatio mortis causa*, which as Savigny says, "is always comprised as a species within the definition of a donation," though subjected by legislation to the rules which govern legacies.[2] Three kinds are enumerated in the Digest[3] which prove, that though usually made in the presence of some immediate danger, and under that was comprehended even a departure on a journey,[4] yet the condition of the gift might be also death viewed merely as the natural termination of life, *sola cognitione mortalitatis*, which last Mackeldey considers as the true *donatio mortis causa*.[5] In every case, however, the donor reserved to himself, tacitly, the right of revocation.[6]

[1] Savigny, § 155, &c. The modern law on the continent and in Louisiana is to the same effect. Mouton *v.* Noble, 1 Louis. Ann. Rep. 194. See as to the misapplication by English lawyers of the maxim *ex nudo pacto non oritur actio*, 10 Law Rev. 56.

[2] System, § 170.

[3] Fragm. 2, D. XXXIX; 6. This passage is to be found verbatim in Bracton. It was quoted in the leading case of Ward *v.* Turner, 2 Ves. 431; and has been too frequently repeated to need particularization here. Lord Hardwicke, in the case cited, has made an odd mistake as to the meaning of the sentence "mortis causa donatur, quod præsens præsenti dat," occurring in the 38th fragment of the same book and title of the Digest, which he says requires, "that both donor and donee should be *present* at the time." *Præsens*, besides its general meaning, is used particularly in the law, (as opposed to *in diem*) in the sense of "immediately, at once," (Freund Lex. sub verb,) which signification it has in the passage of which he speaks, where the *donatio mortis causa* is contradistinguished from cases of the *mortis causa capio*, in which, as a direction in a will to the heir to pay a sum to an intended donee, the gift does not come into existence, so to speak, till after the death of the donor. That the bodily *presence* of the donee is immaterial, is obvious rom § 2, fragm. 18, of the same title, which, as well as fragm. 28, shows that contrary to Lord Hardwicke's inference from the passages he cites, the delivery of the written evidences of a debt was sufficient.

[4] Fr. 3, Id.

[5] Lehrb. § 738, 2. Mr. Roper, Mr. Williams, (*ut surpra*,) and Lord Rosslyn (2 Ves. p. 119,) erroneously assert this, and the second species enumerated in the Digest, to be merely gifts *inter vivos*. But the institute (B. II, tit. 7) on which they rely, really wrought no change in this respect, as may be seen by the contemporary

The usual mode of perfecting this species of gift, was as in other cases, by the transfer of the property, which was at first by mancipation, without delivery; in later times, by tradition. The property either vested at once in the donee, subject to be divested on the survivor or recovery of the donor; which was the usual, and implied condition; or else did not pass till the latter's death, which was a special case, and needed to be expressed. Where there was no actual transmission of property, a stipulation, or under Justinian a simple promise, was an efficient mode of gift, but as the donor had always the power of revocation, it could be enforced only as against his heirs. Such a promise would of course render delivery unnecessary.[1]

So far of the *donatio mortis causa*, treated as a gift. But as its objects were obviously testamentary, it was long a question among jurisconsults how far the rules which governed legacies should be applied to it. Justinian cut the knot, by expressly subjecting it to most of those rules; he at the same time allowed it in all cases to be proved by five witnesses, as in the case of a legacy.[2] There has been some difference of opinion among the modern writers on this last point, but the reasoning of Savigney and others appears conclusive that the edict was not restrictive, and that the proof by five witnesses was only necessary where, from want of registry, or for other causes the gift could not operate *inter vivos*.[3] Below the sum of 500 solidi, before mentioned, no particular form, therefore, was essential.

From this hasty sketch of the provisions of the Roman Law on the subject of our inquiry, we may discover in them the following marked characteristics: 1. The gift *causa mortis* was the means of transferring every species of property, whether in possession or in action, and with or without delivery. 2. Fraud or prodi-

commentary of Theophilus thereon. See also Vinnius on the passage. Lord Rosslyn in the case cited, corrects, quite sarcastically, Swinbourne, a writer whom he might have supposed acquainted with the Civil law; but is himself entirely wrong.

[6] See Mackeldey, § 758, &c.

[1] Savigney, ut supr.

[2] Novel, 87, c. 1. Legacies and *fidei commissa* did not need to be written.

[3] Savigny, ut sup. Mackeldey, § 759.

gality was guarded against, beyond certain limits at least, by means that obviously ensured certainty of proof. 3. These gifts occupied a consistent position, with relation to the testamentary system; for legacies, as we observed, did not need to be in writing, and any other differences were expressly abolished.[1]

So far we have been pursuing the natural development of well understood principles, but when we turn to the common law for the purpose of comparing with its doctrines, the results at which we have arrived, we find ourselves, since the gift in view of death is not indigenous in England, upon less certain ground.

Before the Statute of Frauds no particular formalities were required to constitute a good bequest of personality, except, if Bracton and Swinburne be correct, two or more witnesses. Devises of lands, however, until the statute of 34 Henry VIII., were invalid, except in certain cities and boroughs, which probably retain the Saxon Law, where a disposition *in lecto mortali* was permitted.[2] There could therefore have been then no noticeable differences between gifts *mortis causa*, and other testamentary dispositions, among which they are, indeed, ranked by Bracton and Fleta, who describe them in the terms of the Roman law. After, however, the statute of Charles was passed, it was found that notwithstanding the care with which it was framed, it omitted to provide for cases where a gift made by a dying man, was so far perfected by delivery as to be good *inter vivos*, while its purpose was legatory. From a decision mentioned by Mr. Swinburne, and those cited by Lord Hardwicke from the ecclesiastical court,[3] the tendency appears to have been, at first to treat such gifts as testamentary. This also would seem to have been somewhat the inclination of Lord Cowper.[4] It is to

[1] In the principal civil law countries, at the present time, as France and Louisiana the donatio mortis causa is only valid as a will.

[2] Swinbourne. Abbreviatio Placitarum, 56 Hen. 3, rot. 21, p. 180. Livery of seizen was however necessary. (Abbr. Plact. Ed. 1, p. 272, rot 17.) The course is said in an old case to have been to prove the will before the ordinary, and then the Mayor of the town made livery. (Id. p. 284; 19 Ed. 1, rot. 51.)

In an instance mentioned in the introduction to Kemble's Codex Diplom. Sax., a Saxon matron disposes all her property by parol will.

[3] Swinburne B. 1, sect. 7. Ward *v.* Turner, 2 Ves.

[4] Hedges *v.* Hedges, Prec. Ch., 269.

be regretted that in a matter so much within the spirit of the statute, this extreme had not rather been followed, at least where the object was clearly legative. But Courts of Equity had found ready to their hand, in the Roman Law, a head corresponding to their purpose, and with rules extending to such a variety of cases, that they were content to adopt them, without caring to scrutinize too closely the principles upon which they were founded. But it is easy for us to perceive the error into which they fell, when we place alongside of what have been just stated to be the distinguishing marks of the civil law, the correspondent doctrines of our own.

To take the first point in order, it is needless to observe that at common law a gift without delivery is void. So, too, from the earliest period it has been the doctrine of Equity, that the Court would never interfere to perfect a voluntary disposition; nor as it has been repeatedly ruled, would it enforce against the executor, what it could not enforce against the party, unless the legal title has passed from the latter in his lifetime.[1]

In the next place, as to the precautions against fraud, it is only necessary so say, that as neither writing nor any particular number of witnesses is required, a fortune might be transferred in this way in bonds, mortgages, notes, or the like, with nothing to authenticate the gift, but such evidence, as unfortunately, in any large city may be had for the asking.

Finally, instead of being a part of a harmonious system, as we observed it in the civil law, the gift in view of death is anomalous and exceptional. The same thing which, when called a legacy, is guarded with the greatest strictness, when styled a donatio mortis causa, is left to be established by such means as are most convenient to the donee. The absurdity does not stop here. If the donor instead of declaring the gift in words, puts it, out of greater precaution, at the same time in writing,[2] or if, which would be per-

[1] Duplege's case, in 15 Hen. 7, cited in Carry's Rep. 7. Antrobus v. Smith, 12 Ves. 47. Meek v. Kettlewell, 1 Hare, 464; 1 Phil. 342. Hughes v. Stubbs, 1 Hare, 476; McFadden v. Jenkins, 1 Hare, 458; Dillon v. Coppin, 4 Myl. & Cr., 647, &c. &c.

[2] Edwards v. Jones, 1 My. & Cr., 226.

fectly good *inter vivos*,[1] instead of delivering the chattels he makes a deed of gift to take effect on his death, it must be proved as a will.[2] We might easily point out other inconsistencies, such as the fact that a subsequent will does not work a revocation,[3] the evasion of the collateral inheritance tax, and the like; but we have already drawn sufficiently upon our limits.

These radical and important points of difference then, between the two systems of law, must satisfy any one, we think, of the propriety of the strictures of the Supreme Court in the case which has been the occasion of our remarks. They might indeed lead us into a broader inquiry. Taking in view the salutary policy of the Statute of Wills, and the care with which modern legislation has endeavoured to guard against fraud and imposition under circumstances, when they can be most easily practised and least readily detected, the propriety of making this whole matter the subject of statutory regulation, very naturally suggests itself. The gift *causa mortis* is, we have seen, anomalous in its character, and based upon principles, the reverse of which obtain in the common law. The practical inconveniences resulting from it, have moreover, led to the abolition of its distinguishing peculiarities in those countries where a deference to the Roman Law might be supposed to have retained it the longest. It has been the fruitful source of litigation, of those contests which, with their recriminations of perjury and fraud have embittered families, and disgraced society. It has, on the other hand, nothing to recommend it, beyond what has already been provided for by the ordinary testamentary legislation; nor any convenience to counterbalance the dangers by which it is accompanied.

[1] Y. B. 7 Ed. 4, 20. Irons *v.* Smallpiece, 2 B. & Ald. 551. Lunn *v.* Thornton, 1 M. G. & S. 381. Butler & Baker's case, 3 Co. 26, (b.)

[2] Powell on Dev. note; Ward *v.* Turner, 2 Ves. Sr. 431; Thorold *v.* Thorold, 1 Phillimore, 1; Atty. Gen. *v.* Jones, 3 Price; Dana *v.* Bank of Mobile, 2 Alab. 152; Gage *v.* Gage, 21 N. H. 371; Jackson *v.* Culpepper, 2 Kelley, 594; Gilmore *v.* Whiteside, Dudley Eq. 14; Watkins *v.* Dean, 18 Yerg. 321; Welsh *v.* Kinnaird, Spear Ch. 256; Taylor *v.* Taylor, 2 Humph. 597; Lightfoot *v.* Colgin, 5 Mumf. 42; Morrell *v.* Dickey, 1 John. Ch. 153; Grattan *v.* Appleton, 3 Story, 755; Heston *v.* Young, 2 Kelly, 32.

[3] Nicholas *v.* Adams, 2 Wh. 7.