THE AMERICAN
LAW REGISTER
AND
REVIEW.

VOL. { 45 O. S. / 36 N. S. } MAY, 1897. No. 5.

DONATIO MORTIS CAUSA OF ONE'S OWN CHECK.

II. *Checks on Particular Funds.* Where a merchant gives a draft or bill of exchange, it is founded more or less on his general credit. This is so, even though the drawee may be possessed of funds or property of the drawer. The draft is not good against the drawee until accepted.

An order, on the other hand, is addressed with respect to a particular fund or indebtedness, and derives no force from the drawer's general responsibility. Excepting as modified by rights of innocent third parties who have given prior notice, it is valid, although the drawee has not been notified, or though he refuses to accept it.[1]

[1] The opinion of Kent, J., in Cruger *v.* Armstrong, 3 John. Cas. 5, 8, is often referred to in this connection: "Checks are, substantially, the same as inland bills, and are negotiable like inland bills payable to bearer. (Chitty, 16, 17, 109, *et passim.*) Lord Kenyon, in a late case (Boehm and others *v.* Sterling and others, 7 Term Rep. 423) said, he was satisfied there was no distinction between checks and bills; and in that case the check was declared upon as a bill of exchange, and so it was, also, in the case of Grant *v.* Vaughan, 3 Burr. 1516, 1 Bl. Rep. 485, in which it is called a "cash note or bill."

The question before Judge Kent was whether the check-holder was bound to exercise proper diligence in presenting the check to the bank.

And see Harker *v.* Anderson, 21 Wend. (N. Y.) 372, 1839.

It is decided by a preponderance of authority that an ordinary bank check is not an assignment, either at law or in equity. Drawn on an active, changing account which is large one day and, perhaps, small the next, the check cannot be regarded as addressed to any particular fund, and it is therefore more a promise that the check shall be honored when presented than that any certain funds shall respond to it. Moreover, a check-holder has no status against the bank, because the bank did not contract with him, and it shall not be held on a contract into which it did not enter. A bank, like any other debtor, assumes but the one responsibility, to the depositor; and cannot be exposed to as many suits as there are checks against the deposit. This is a reason which regards rather the bank than the drawer of the check. Where the bank account has ceased to be an active one, the safety of the banking business does not require that the check shall be denied any force as an assignment; and if, in sucha case, at least, it appear that the intention was to transfer either the deposit or even a part of it, equity will recognize the assignment.

There have been quite a number of adjudications to this effect, and they have just received the confirmation and support of the Supreme Court of the United States, in *Fourth Street Bank* v. *Yardley*, 165 U. S. 634. The Keystone National Bank of Philadelphia applied to the Fourth Street Bank for $25,000 of gold certificates, for which the Keystone Bank was to give its check against its reserve account in the Tradesmen's National Bank of New York City. The two banks, although located in the same city, had had no commercial transactions between each other, and in that respect had been strangers to each other. The application was explained by the statement by the Keystone Bank to the Fourth Street Bank that the Keystone owed a balance at the clearing-house which it could not meet because its funds were in the City of New York; and the Keystone Bank exhibited a memorandum showing the amount of its credit with the Tradesmen's Bank to be in the neighborhood of $27,000. The certificates applied for were given and the Keystone's check on the

Tradesmen's Bank for $25,000 was delivered to the Fourth Street Bank. The check was forwarded at once, and was presented at the Tradesmen's Bank on the following morning, when payment was refused on the ground that there were not funds to the amount of the check. Later in the day, the Keystone Bank was closed by Government. At the time of the presentment of the check, the Keystone had with the Tradesmen's Bank $19,725.62 in cash, and collection items amounting to $7181.70, in all $26,907.32. Of this amount, $18,056.21 had been remitted by the Keystone Bank on the day previous. Mr. Justice White said: "Had the transaction been an ordinary one, that of a time or even demand loan made with a person in good credit in the line of its business, and not, as it was, an extraordinary transaction, we might well presuppose that it was the expectation of the Fourth Street Bank that the borrower should merely have on hand with the Tradesmen's Bank when the check was presented a sufficient amount to pay it. But the Keystone Bank, in disclosing its hazardous situation and indicating the specific fund dedicated to the payment of the solicited accommodations, did not represent that it expected to further check against the Tradesmen's Bank before the check which it proposed to give might be presented. The statements made clearly implied to the contrary, exhibiting as they did the embarrassment of the borrowing bank, arising from the need of available cash to meet its clearings, and proposing a transaction by which the Fourth Street Bank would obtain from a bank, but a few hours distant, the prompt and certain payment of its advance." The court accordingly held that the intention of the parties was that the check, although drawn generally, should be paid out of a particular fund; and that it must therefore be treated as though an order for payment out of a specific, designated amount. The Fourth Street Bank accordingly was held by a divided court, to be entitled to demand the full amount of $25,000 from the receiver of the Keystone Bank, to whom the amount had been paid by the Tradesmen's Bank.

The citations by Mr. Justice White fully sustain the principle laid down, that where the intent of the parties is that the

check shall operate as an equitable assignment of a specific fund, it shall work such effect.

Risley v. *Phenix Bank*, 83 N. Y. 318, was as follows: "The Phenix Bank, prior to May 20, 1861, was the correspondent in the city of New York of the Bank of Georgetown, a banking corporation located at Georgetown, South Carolina; and on that date there was on its books a credit to the Bank of Georgetown to the amount of about $18,000, derived from deposits and collections, which sum was then owing by the Phenix Bank to the Bank of Georgetown. The plaintiff was a resident of Georgetown, and had dealings with the Bank of Georgetown. He was examined on the trial as a witness in his own behalf, and testified in substance that on the day when the check was dated, the president of the bank stated to him that the bank had a claim of $17,000 or $18,000 against the Phenix Bank, and offered to sell it to the plaintiff, stating as a reason, that he, the president, was afraid it might be lost during the war, and that he was unwilling to carry the risk; that the plaintiff offered to purchase the claim at fifty cents on the dollar, which offer was declined, and the president then offered to sell it for Southern bank bills at par; that the plaintiff then offered, if the bank would divide the claim, to purchase $10,000 of it, upon the terms proposed, which offer was accepted, and the plaintiff thereupon paid the $10,000; that the question arose as to what kind of a transfer should be given, and the president of the bank said he would give the plaintiff an order on the Phenix Bank for the amount, and thereupon gave the plaintiff the check before referred to, and this completed the transaction between the plaintiff and the Bank of Georgetown." *Held*, an assignment enforceable against the Phenix Bank for the amount of the check.

Risley v. *Phenix Bank* was followed by *Coates* v. *First Nat. Bank*, 91 N. Y. 26. The Emporia Bank claimed to be entitled to a part of a balance of a deposit, under the following circumstances: The Mastin Bank had deposits with Donnell, Lawson & Co., in New York city. There had been a custom between the various parties by which the Mastin Bank would cause its credits to be transferred to amounts directed

to the name of the Emporia Bank. On the occasion in question, being indebted to the Emporia Bank, the Mastin Bank was requested to transfer on account thereof $5000 of the funds to the credit of the Mastin Bank with Donnell, Lawson & Co. They replied that they would, and at once charged the Emporia Bank and credited themselves with the amount, and on the same day by letter informed the Emporia Bank that this had been done; and by letter they also notified Donnell, Lawson & Co., to credit the account of the Emporia Bank with the sum named. The Emporia Bank also gave the Mastin Bank credit for the amount. These facts were held to constitute an agreement estopping the one bank from saying the deposit had not been transferred to the amount of $5000, and estopping the other bank to deny an extinguishment of the indebtedness. "Written out, the contract indicated by the bank entries and the correspondence is one of assignment of so much of the credit or funds then to its credit with Donnell, Lawson & Co., to the Emporia Bank, and a discharge of a debt due by it to that bank. The whole was completed the moment the letter of the Mastin Bank to the Emporia Bank was placed in the post office."

In *Throop Grain Cleaner Co.* v. *Smith*, 110 N. Y. 83, 88, it was again held that while the mere delivery to a third person of a check or draft drawn by a creditor upon his debtor does not effect a legal transfer of the debt, yet an equitable assignment may be effected in this way should such be the intention.

The doctrine of these cases was approved in *First Nat. Bank* v. *Clark*, 134 N. Y. 368. In *Gardner* v. *National City Bank*, 39 Ohio St. 601, "the controversy was between assignees in insolvency and the owners and payees of a check or draft made by the insolvents. The assignees in insolvency were held to stand in the shoes of the insolvent debtors and to have only their rights in the premises, and it was adjudged that parol evidence that the draft was for the exact amount owing by the drawers, in connection with other facts appearing from the evidence, sufficiently established the intention to transfer the property in the fund and constituted an equitable

assignment thereof good as against the general creditors of the insolvent."

Reference may be made, also, to *Nesmith* v. *Drum*, 8 W. & S. 9; *First Nat. Bk.* v. *Gish*, 72 Pa. St. 13; *Jermyn* v. *Moffitt*, 75 Pa. St. 399; *Hemphill* v. *Yerkes*, 132 Pa. St. 545; *Taylor's Est.*, 154 Pa. St. 183; *Kingman* v. *Perkins*, 105 Mass. 111.

The cases which have been cited above are cases in jurisdictions where checks given in ordinary commercial transactions are held not to constitute equitable assignments. They show that even in those jurisdictions the question has been held to be one of intent. There are very strong intimations in English cases to similar effect, which are recited by Mr. Justice White, in his opinion in the Keystone Bank matter. Thus, speaking of a letter forwarded by the maker of a check, which letter it was contended created a charge in favor of the payee, Jessel, M. R., said: "You can have no charge in equity without an intent to charge."[1] So Vice Chancellor Bacon said, in respect to a bill of exchange for the exact amount of a deposit, that whether it should be regarded as an equitable assignment or not "must rest on evidence."[2] In *Citizens' Bank* v. *First Nat. Bank*, L. R. 6 H. L. 352, there was a similar dictum of strong character by Lord Chancellor Selborne. An effort was made in that case to establish a parol contract that certain bills of exchange should be paid out of a specific fund. The chancellor said, "Of course, if proved, it would have been a very clear case of contract for an equitable assignment."

All the decisions and *dicta* that have been narrated are but in strict accord with general equitable principles, relative to orders. If the check is intended by the parties to charge a particular fund, it is then an order rather than an ordinary check or draft, and as such the authorities in regard to orders are directly in point. *Simmons* v. *Cincinnati Sav'gs Soc'y*, 31 Ohio St. 457 (1877), should be mentioned as inconsistent with the decisions herein narrated. A depositor had $300 in the bank, and undertook to give that amount by giving a check

[1] Hopkinson *v.* Forster, L. R. 19 Eq. 74.
[2] Shand *v.* Du Boisson, L. R. 18 Eq. 283.

for the sum. It was held that the gift remained incomplete until the check was either paid or accepted; and that in the absence of such payment or acceptance, the death of the drawer operated, as against the payee, as a revocation of the check. See to same effect, *Matter of Smither*, 30 Hun. (N. Y.) 632.

III. *Orders.* The rule was thus announced by Lord Cottenham: "In equity, an order given by a debtor to his creditor upon a third person, having funds of the debtor, to pay the creditor out of such funds, is a binding equitable assignment of so much of the fund."[1] The rule thus stated is amply sustained by the authorities.

The leading case is *Row* v. *Dawson*, 1 Ves. Sr. 332, decided in 1749 by Lord Hardwicke. Tonson and Cowdery lent money to Gibson, who made a draft on Swinburn, the deputy of Horace Walpole, viz.: "Out of the money due to me from Horace Walpole out of the Exchequer, and what will be due at Michaelmas, pay to Tonson £400, and to Cowdery £200, value received." Gibson became bankrupt. The instrument recited was held to be an equitable assignment which would prevail against the assignees in bankruptcy. Lord Hardwicke said: "This demand, and the instrument under which the defendants claim, is not a bill of exchange, but a draft; not to pay generally, but out of his particular fund, which creates no personal demand: therefore not a draft on personal credit to go in the common course of negotiation, which is necessary to bills of exchange, by draft on the general credit of the person drawing, the drawee, and the indorser, without reference to any particular fund. . . . If this is not a bill of exchange, nor a proceeding on the personal credit of Swinburn or Gibson, it is a credit on this fund, and must amount to an assignment of so much of the debt; and though the law does not admit an assignment of a *chose in action*, this court

[1] This was in the well-known case of Burns *v.* Carvalho, 4 Myl. & Cr. 690 (1839).

Under 36 & 37 Vict., 1873, ch. 66, § 25 (6), such equitable assignments with express written notice to the debtor, etc., convey the legal title, subject to equities.

does; and any words will do, no particular words being necessary thereto."

Ex parte South, Matter of Row, 3 Swanst. Ch. 391, was decided by Lord Eldon, in 1818. There the order was given by a trader to a creditor, directed to the executor of the trader's debtor. The trader afterwards became bankrupt, before the order was paid. Lord Eldon held that the order was an equitable assignment, and undisturbed by the trader's bankruptcy.

In *Lett* v. *Morris*, 4 Sim. 607 (1831), a builder gave to the timber merchant who was to supply him with timber for the work an order upon the owners for whom the work was to be done, authorizing payment out of parts of various instalments named, the timber merchant's receipt to be a discharge. This was held to be an equitable assignment, by Shadwell, V. C.

In *Burn* v. *Carvalho*, 4 Myl. & Cr. 690 (1839), before Lord Cottenham, one Fortunato had in the first instance given bills of exchange on one Rego, in Bahia. Rego refused to accept the bills, which were dishonored. The payees wrote to Fortunato, expressing their surprise and concern, and requesting orders to Rego to deliver to them goods of value equivalent to the bills. Fortunato replied, promising to give the desired orders, and he wrote also to Rego directing the latter to deliver certain goods over to the payees. Before the delivery of the goods pursuant to this direction Fortunato failed. It was held that the letters to the payees and to Rego constituted an equitable assignment.

In *Diplock* v. *Hammond*, 2 Smale & Giff. 141 (1854), Hammond, a contractor, engaged in work upon a poor-house and being indebted to plaintiff, gave the plaintiff an order on the governors of the poor-house. This was held to be an equitable assignment, and not a mere order requiring a stamp under 55 Geo. III. c. 184.

Another prominent case in this connection is *Brice* v. *Bannister*, 3 Q. B. D. 569, decided in 1878, by the Court of Appeal. There a ship-builder gave to his creditor, the plaintiff, an order on the defendant, for whom he was constructing a ship, for £100 out of moneys due or to become due. No

moneys were then due except what had been paid, and the defendant refused to be bound by the order, and afterwards paid all the balance due to the ship-builder. It was held that the order was an assignment of all moneys due or to become due, to the extent of £100.[1]

What is known as the rule in *Dearle* v. *Hall*, 3 Russ. 1 (1823), is that "notice is necessary to perfect the title, to give a complete right *in rem*, and not merely a right as against him who conveys the interest."[2]

This notice is not essential, however, except to priority.[3] And even as to that it was held not essential, where it was impracticable to give it, in the case of an order affecting a ship at sea.[4] The assent of the depositary or debtor is not necessary to the equitable assignment.[5]

In 1873, in *Ex parte Shellard*,[6] it was held that an order was not an equitable assignment where not accepted and where for but part of the fund. This case is contrary to *Brice* v. *Bannister*,[7] and has been otherwise disapproved.[8]

A mere note to a debtor, asking the latter to pay an amount named to a person mentioned, and not engaging with respect to a particular fund, is not an equitable assignment.[9] A letter

[1] Brett, J., dissented. The case of *Ex parte Shellard*, L. R. 17 Eq. 109, decided in 1873, by Sir Jas. Bacon, C. J., was disapproved.

[2] Snell's Eq. (9th Ed.) 96; Johnson *v.* Cox, 16 Ch. D. 571.

[3] Farquhar *v.* Toronto, 12 Gr. (Upper Canada), 189; *In re* Pole's Trusts, 2 Jur. N. S. 685; *Re* Way's Trusts, 5 New Rep. 67. And see Walker *v.* Bradford Old Bank, 12 Q. B. D. 511; Rodick *v.* Gandell, 1 De G. M. & G. 780; Johnstone *v.* Cox, 16 Ch. D. 571; Freshfield's Trust, 11 Ch. D. 198; Newman *v.* Newman, 28 Ch. D. 674; Buller *v.* Plunkett, 1 J. & H. 441.

[4] Feltham *v.* Clark, 1 D. G. & Sm. 307 (1847).

[5] Farquhar *v.* Toronto, 12 Grant, 189; Yeates *v.* Grouls, 1 Ves. Jr. 285; Harding *v.* Harding, 17 Q. B. D. 446; Brice *v.* Bannister, 3 Q. B. D. 569. And see Greenway *v.* Atkinson, 29 W. R. 560; *Ex parte* South, 3 Swan. 391; Lett *v.* Morris, 4 Sim. 607; Percival *v.* Dunn, 29 Ch. D. 128.

[6] L. R. 17 Eq. 109. [7] Ante.

[8] Buck *v.* Robson, 3 Q. B. D. 686 (1878).

[9] Percival *v.* Dunn, 29 Ch. D. 128 (1885); Watson *v.* Duke of Wellington, 1 Russ. & Myl. 602 (1830); *Ex parte* Hall, 10 Ch. D. 615 (1878).

A mere letter to a depository, not communicated to the person intended to receive the money, is not an assignment: Morrell *v.* Wootten, 16 Beav. 197.

to a tenant to pay a sum named to a third person is not enough; and as rent is an interest in land under the English Statute of Frauds, the court there will not receive parol evidence to connect such a letter with the fund or amount due by the tenant.

Nor is a direction to the writer's agent to receive money due by a debtor and to pay it over to a creditor an equitable assignment, although said agent promises the said creditor to carry out the instruction. An order on a debtor, and an authority to some one else, are essentially different things.[1]

The foregoing order cases are English; but this is merely because it happened to be more convenient at the time to get them, and not because American cases are not to the same effect and equally accessible.[2]

IV. *Gifts of Donor's own Check.* All the foregoing long discussion is very pertinent to the question propounded at the outset, namely, whether a delivery of donor's own check may constitute a valid *donatio mortis causa.* On principle, it seems clear that such a gift is valid. A *donatio mortis causa*, to be valid at all, must be made under circumstances which relieve the court from doubt whether such a gift was intended and actually took place. This necessity of clear proof exists where the gift is of keys, bonds, mortgages, notes of third persons, or of whatsoever it may be. Where there is the likelihood of fraud, no donation *mortis causa* is allowed. The proof, must be clear and satisfactory. The gift must be made under circumstances which create in the donor the apprehension of an impending death. Some exceptional cases might exist where a merchant might be carrying on his business while in constant peril; but the ordinary gift *mortis causa* is by a man confined to his bed by severe illness, at a time when it would be folly to term his bank account a "current" account, to quote the term used by an English judge. Such a donor regards his account as fixed, and his check as drawn on a particular fund and not on

[1] Rodich *v.* Gandell, 1 De G. M. & G. 763 (1851).

[2] There is an excellent review of the American cases in Pomeroy's Eq. Jur. § 1280, *et seq.*

his general credit. It is impossible for us to assume that he meant the check as addressed on his general credit, for then it would be in the nature of a promise. A promise cannot be understood. If the check on the bank is not good, the donor certainly does not mean that his general estate shall compensate for it. On the contrary, he thinks he is making a present, cash gift. He knows that his bank account has ceased to be an active one, and regards the check as transferring so much of it as the check calls for.

We must then hold that it is the intent of the donor that his check shall work an immediate assignment by way of *donatio mortis causa*. This was the opinion of Ruggles, J., in the very notable case of *Harris* v. *Clark*, 3 Com. (N. Y.) 93 (1849). He expressly distinguished a check from a draft in a question of gift *mortis causa*, and intimated that a different decision might be made concerning gifts *mortis causa* of donor's check from what the court then made in respect to a gift of a bill of exchange.

The question does not seem to have arisen in the American Supreme Courts. There are a few *dicta* favorable to the upholding of such a gift *mortis causa*. Besides *Harris* v. *Clark*, just mentioned, see *Gourley* v. *Luisenbigler*, 51 Pa. St. 345; *Rhodes* v. *Childs*, 64 Pa. St. 18. *Simmons* v. *Cincinnati Sav'gs Soc'y*, 31 Ohio St. 457, stated *supra*, is somewhat obscure, in this connection. If pertinent here, it is adverse to the theory of an assignment. *In Matter of Smither*, 30 Hun. (N. Y.) 632, the gift *mortis causa* by donor's check was held invalid, in one of the departmental courts.

In England, the question has been before the courts a number of times. At first, it was held that such a donation *mortis causa* is valid. Afterwards, one or two judges in courts of the first instance have held that there is no validity either at law or in equity in such a gift. Lately, Lord Lindley intimates that he is dissatisfied with the rulings in the cases denying that such gifts can be made; and the principles established or rather confirmed in the case before him are strongly in favor of the gifts: *Re Dillon, Duffin* v. *Duffin*, 44 Ch. D. 76 (1890).

Lawson v. *Lawson*, 1 P. Wms. 439, 1718, was decided by the Master of the Rolls, in 1718. The reporter thus states the facts: "The testator being languishing upon his death-bed, drew a bill upon a goldsmith to pay £100 to his wife, to buy her mourning and to maintain her until her life-rent (meaning her jointure) should become due, and soon afterwards, (viz., about seventeen days after the drawing of the bill) the testator died." The court at first held that the testator's ordering the goldsmith to pay £100 to his wife was but an authority, and determined by the testator's death. Afterwards, the Master of the Rolls delivered his opinion solemnly, and held the bill good, and to operate as an appointment, although, if the wife had received it during the husband's lifetime, it would have been liable to some dispute; even then, he inclined to think that she should have kept it; that being for mourning, it might operate like a direction given by the testator touching his funeral, which ought to be observed, though not in the will. An extravagant gift, the chancellor ought not to make good, but the gifts here were but £200 whereas the personal estate amounted to £8000.

This case of *Lawson* v. *Lawson*, is one which has been hemmed over and looked askant at. Just why, it is hard to say, unless we dare to assume that it has not really been read and considered, which of course we cannot do; but such has been its reception of late. It is for us to jog along, nevertheless, seeking to keep the path we believe it unerringly points out.

Tate v. *Hilbert*, 2 Ves. Jr. 111, 1793. Here Lord Chancellor Loughborough had before him the case of a common check on a banker, intended to effect a gift *inter vivos*. He held that such a gift could not be regarded as an "appointment." He referred to *Lawson* v. *Lawson*, *supra*, and lamented the inaccuracy of the report in Peere Williams; which in one part attributes as the ground of decision the assumption that the bill there was an appointment; and which again lays stress on its being for mourning. He goes on to say, speaking first of *Lawson* v. *Lawson*: "Taking the whole bill together, it is an appointment of the money in the banker's hands to the

extent of £100 for the particular purpose expressed in a written appointment; which is a purpose, that necessarily supposes his death. Therefore that case is perfectly well decided. But upon that decision I cannot say, that in all events drawing a cash note upon a banker is an appointment of the money in his hands. Suppose I was to apply that idea of an appointment, this is to take effect presently, and has no relation to his death. The plaintiff might have received it immediately. There is no reference at all to the case of her surviving him. It was not appointed under such circumstances, that it could not take effect but in case of his death; but it is stronger in this particular case, as by the evidence it was given, and fairly given . . . ." The transaction before him being one *inter vivos*, could not be interpreted as meaning to effectuate an assignment as against his executor, and could only be considered in the light of a promise; for certainly he did not mean by giving the check to make an assignment good against himself. Lord Loughborough decided, therefore, that the check in the case before him was rendered void by the intended donor's death. The reasoning of Lord Loughborough has been received with the same suspicion which some would cast upon *Lawson* v. *Lawson*. Yet it is very clear that he was making a distinction between gifts *mortis causa* and gifts *inter vivos*, and would infer an intent to make an assignment in the first class of gifts where he would refuse to impute such an intent to a transaction *inter vivos*. We can certainly approve of the distinction he makes even though we may not care to adopt his reasoning in its entirety. An intent to make assignment of a closed account or of a part of it is more easily inferred than is an intent to assign part of a "current" or active account.

Easton v. *Pratchett*, 1 Cr. M. & R. 798, at 808 (1835). This was a case where plaintiff endeavored to hold defendant to an endorsement of a bill of exchange. Lord Abinger said: "If a man give money as a gratuity, it cannot be recovered back, because the act is complete; yet a man who promises to give money cannot be sued on such promise; and if so, I do not see how a promise in writing not under seal can have any binding effect. The law makes no difference between

such a promise and a verbal one. There is the same distinction as to a bill of exchange. If a party gives to another a negotiable instrument, on which other parties are liable, the man who makes the gift cannot recover the bill back, and the man to whom the bill is given may recover against the other parties on the bill; but it is a very different question, whether the giver binds himself by the indorsement, so as to make himself liable thereupon to the person to whom he gives it."

Bouts v. *Ellis*, 17 Beav. 121 (1853). Affirmed on appeal, 4 De G. M. & G. 249 (1853). This was a case of *donatio mortis causa*. The decedent gave his wife a check for £1000. Afterwards, because the check was crossed and it was feared that the bank might not pay it over the counter, the check was exchanged for a friend's check, which was likewise crossed and which was post-dated. The donor's check so given to the friend was cashed; but the crossing and post-dating of the friend's check prevented its being paid. The donor died, and subsequently the friend gave the donee another check, which was paid. It was held that there had been a valid gift *mortis causa;* that the friend received the donor's check as agent for the donee, and that when it was cashed the money was actually received on behalf of the donee and before the donor's death.

Hewitt v. *Kaye*, L. R. 6 Eq. 198 (1868). This case was decided by Lord Romilly, Master of the Rolls. It was a contest between two charities, and was not carried up. Whichever might be the decision, the money was bound to go to charity, and we may not suppose that vigor of argument and attention which ordinary contests excite. Lord Romilly held that a donor's own check could not be the subject of a gift *mortis causa* if not paid or presented before donor's death.

Bromley v. *Brunton*, L. R. 6 Eq. 275 (1868). This was a case of gift *inter vivos*. A check for £200 was given by A. to B. It was presented without delay. The bankers had sufficient assets of A., but refused payment because they doubted the signature. The next day A. died, the check not having been paid. Sir John Stuart, Vice Chancellor, held that there had been a complete gift, *inter vivos*, of the amount of

the check. The contest was between the donee and the administrator.

Hawkins v. *Allen*, L. R. 10 Eq. 246 (1870). The check here would have been sufficient, for it was cashed, and the money invested, before donor's death; but the gift was void under the mortmain law.

Beak v. *Beak*, L. R. 13 Eq. 489 (1872). This case was decided by Bacon, Vice Chancellor. He held that the donor's estate could not be bound by donor's delivery of check and pass-book, the check not being paid or presented before the donor's death. There is no discussion of principles; and the case is merely rested on *Hewitt* v. *Kaye*, *supra*, and on *Ames* v. *Witt*, the latter having respect to pass-books.

Rolls v. *Pearce*, 5 Ch. D. 730 (1877). In this case, donor and donee were English people resident in San Remo, in Italy, where they had gone for the benefit of the donor's health. The donor, seeing that he was not going to recover of his illness, gave two checks to his wife, payable to her order, for £350 altogether, and drawn on his bank in England. The checks were deposited to the wife's account, in an Italian bank. She drew upon them, and paid debts of her husband out of the money. One of the checks was long in coming to England—some two months, and a few days before either one reached the donor's bank the donor died. Malins, Vice Chancellor, held that the checks constituted good donations *mortis causa*, and for two reasons. First, "these checks are payable to order; and it is clear that the testator knew that they could not be presented for payment either on the day they were drawn or on the subsequent day. I must attribute to him the knowledge that the check would not be paid for some time, and on that ground I come to the conclusion that this case differs from the other cases of checks." The second reason was that the checks had been actually dealt with for value. The Vice Chancellor continued: "But I have also the decision of Lord Loughborough in *Tate* v. *Hilbert*, 2 Ves. 111. He there says: 'If she has paid this away either for valuable consideration or in discharging a debt of her own, it would have been good.'"

Austin v. *Mead*, 15 Ch. D. 651 (1880). In this case the donor held a deposit note for £2700, and gave a seven days' notice to the bank that he wished to withdraw the deposit. Afterwards the donor signed a form of check which was on the back of the deposit note: "Pay self or bearer £500." He then handed the note to the donee, and before the seven days' notice had expired, he died. Fry, J., held that the check was not payable until after the date when the intended donor died.

Clement v. *Cheesman*, 27 Ch. D. 631 (1884). In this case there is a *dictum* by Chitty, J., that donor's own check cannot form the subject of a *donatio mortis causa*.

Duffin v. *Duffin*, 44 Ch. D. 76 (1890). This is the first-mention we find of the question in an appellate court. All the check cases mentioned above were before courts of first instance. In *Duffin* v. *Duffin* there are but *dicta* merely. Cotton, L. J., seemed to think that donor's check could not be the subject of gift *mortis causa;* whereas Lindley, L. J., said: "It is said that there was no good *donatio mortis causa*, because a man cannot make such a gift of his own check. I will assume that to be correct, though I think it may some day require consideration." The opinions in this case are well considered, and sustain and enforce the doctrine of Lords Hardwicke and Eldon that if donor gives up the means of getting at possession, such delivery supports the gift. The court held that a deposit note, although not representing the debt, could form the subject of a gift *mortis causa*.

This is really a strong case in favor of the contention that donor's check can effect a gift *mortis causa*.

Porter v. *Walsh*, Irish Rep., Ch. D. 1895, vol. 1, 284 (1894). In this case there is a bare mention of the question.

The foregoing review of the authorities shows that both in this country and in England the authorities are not harmonious. It may be urged that the reasoning in the carefully considered case of *Duffin* v. *Duffin*, *In re Dillon*, 44 Ch. D. 76 (1890), is strongly in line with *Lawson* v. *Lawson*, where such a gift was upheld by Lord Loughborough.

Snelgrove v. *Bailey*, 3 Atk. 214, and the great case of

Duffield v. *Elwes*, 1 Bli. N. S. 497, established the principle that when the gift was one *mortis causa*, if the donor delivered the means of getting at the possession, the gift would stand. A check so intended by the parties is certainly as much a means of getting at possession as is a tally stick, an unassigned (at law) bond or mortgage, unendorsed note, or key to a safe deposit vault, especially when the donor has two such keys and delivers one. In *Thomas's Admr's* v. *Lee*, 89 Va. 1 (1892), a delivery of one of two keys to a safe deposit vault, the other having been placed at a prior date with a friend as a precaution, was held to carry a gift *mortis causa* of the contents of the box in the bank.

It has been argued against the validity of the donor's check, where he dies before it is paid or presented, that it is revocable and he may recall it or that other holders of checks may draw out the whole fund. If the donor's mind is unstable and not under his control, no gift, whether by check or howsoever, is good. Moreover, revocability attaches to all gifts *mortis causa*. Without that attribute no transaction can be a *donatio mortis causa*. As to the argument that other checks may withdraw the fund, it is submitted that this argument contemplates a state of facts contrary to conditions surrounding almost all donations *mortis causa*, which are usually by persons of exhausted vitality whose bank accounts have ceased to be "current." We ought certainly to say, therefore, that a check so given is upon a designated fund.

Before closing, it is well to recall here the observation of Lord Loughborough in *Tate* v. *Hilbert*, 2 Ves. 111. He said that if the donor's promissory note had been paid away for valuable consideration or in discharging a debt of the donee, even a gift of the donor's own note would be good because consummated in that way; the idea evidently being that third persons' rights intervening could not be disturbed; and the gift obtaining on their account a completion, the completion enured even to donee's benefit; because the gift could not be said to be both executed and not executed. If then the donee

of the check should deposit it, or should pay it away for value, the gift would seem to be good, irrespective of the argument heretofore advanced.[1]

Luther E. Hewitt.

April 15, 1897.

[1] In the former part of this article, it was said that while a savings-bank book did not represent the debt in a legal sense, it formed a valuable means of "getting at the possession" of the deposit. In this connection, see *Farmers & Mech. Bank* v. *Boraef*, 1 Rawle (Pa.), 152, decided in 1829. In that case, a plaintiff suing a bank for the amount of a deposit was allowed to give in evidence his bank-book showing the deposit, as an admission by the bank that it had received the amount of the entry.

Reference may be made also to *Hottenstein* v. *Kohler*, 37 Leg. Int. (Pa.) 333, and to *Haley* v. *Caldwell*, 2 Miles, (Phila. District Court), 334. In these cases, it was held that bank-books are instruments of writing for the payment of money, within the terms of the Pennsylvania Statute, providing for judgment for want of an affidavit of defence. Over against these stands *Walsh's Appeal*, 122 Pa. 177, which, after all, we cannot be sure was meant to affect savings-banks books in general. See *Hemphill's Estate*, 180 Pa. 87, 92.