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THE AMOUNT WHICH MAY BE GIVEN BY A DONOR MORTIS CAUSA.

AT LAW. The law of the Twelve Tables allowed a testator to dispose of all his effects to the exclusion of the heir; but the love of offspring which may be relied on in the case of descendants known to be such, must have become of questionable applicability in the decadence of Roman virtue. At a time when respectable matrons found it advantageous to be entered on the municipal lists of prostitutes, it was necessary that the law should throw some protection around the heir. The *lex Falcidia* was a *plebiscitum* passed 714 A. U. C. It required that there should be left to the heir at least one-fourth of the property of the testator. Justinian altered the proportions to a half or a third, according to the number of heirs. The emperor Severus extended the *lex Falcidia* to donations *mortis causa*. In English and American polity, the shameful necessity of such a law has not been experienced. With us, no limit has been fixed at law beyond which donations *mortis causa* are forbidden.

As is said in Kent,¹ a "branch of parental duty consists in

¹ Vol. 2, 202.

making competent provision according to the condition and circumstances of the father, for the future welfare and settlement of the child; but this duty is not susceptible of municipal regulations, and it is usually left to the dictates of reason and natural affection. Our laws have not interfered on this point, and have left every man to dispose of his property as he pleases, and to point out in his discretion the path his children ought to pursue. . . . A father may at his death devise all his estate to strangers, and leave his children upon the parish; and the public can have no remedy by way of indemnity against the executor. 'I am surprised,' said Lord Alvanley, 'that this should be the law of any country, but I am afraid that it is the law of England.' "

No limit as to pecuniary amount or proportion has been placed on gifts *mortis causa*. In *Duffield v. Elwes*, 1 Bli. N. S. 497, the value of the property given was £30,000; and that was seventy years ago, when money was more valuable. In *Thomas's Adm'r v. Lewis*, 89 Va. 1, decided lately in Virginia, the property was worth \$200,000. It was there said that a gift *mortis causa* is none the less valid, if properly proved, because it embraces the entire personal estate of the donor. See, also, *Chase v. Redding*, 13 Gray (Mass.), 418; *Marshall v. Berry*, 13 Allen (Mass.), 41.

One Pennsylvania case, *Headley v. Kirby*,¹ has been thought to hold that a donor cannot by donation *mortis causa* dispose of his whole estate. A recourse to the report of the case compels a different opinion of the decision, in the mind of the writer, at least. Of the decision, we may well adopt the language of Chief Justice Waite respecting a certain ruling quoted before the United States Supreme Court: "The language of the court in the opinion is to be construed with reference to the question actually under consideration, and should not be extended beyond for any purpose of authority in another and different case."²

The value of *Headley v. Kirby* consists in the recognition it gives to the testamentary intent of a donor who uses language

¹ 18 Pa. 326.

² *Wright v Nagle*, 101 U. S. 796.

and acts comprehensive enough to affect the whole or a large portion of his entire personal estate.

One witness in this case said that the words of the decedent were: "Ann, I am dying; all that is here with you is yours; do the best for me when I am gone; there are the keys." The property consisted of a variety of clothing, watch and chain, pencil-case, spoons, trunks, a promissory note for \$1600, and a savings deposit book. They were contained some in two trunks, others in a band-box, others in a closet in the room where the decedent was.

Manifestly, there could be no delivery of such property, situated in various parts of the room, in trunks, a band-box and in a closet. The law requires specific delivery to validate such gifts. It is very clear, then, that the decision of the court in denying the validity of the attempted disposition was correct. The court first alluded to the careful guards which the Roman law threw around gifts, of testamentary nature, requiring the proof to be by five witnesses of full age, of good character, and not related either to the donor or donee. The absence of such guards in our own law requires that we should be strict in preventing such dispositions as are really testamentary from having effect except according to the Statute of Wills. The court, per Lowrie, J., then went on to say: "It is not pretended that any gift like this has ever been held good, and it may be safely declared, that no mere gift made in prospect of death, and professing to pass all one's property to another, to take effect after death, can be valid under our Statute of Wills, no matter what delivery may have accompanied it. If this is not true, then it is plain that the Statute of Wills, so far as it is intended to exclude all modes of disposing of personal property at death which it does not provide for, is repealed by the decisions of the courts."

It is clear from this recital of the case that the decision does not relate to a gift of an article or valuable or of a number of such, specifically delivered, and where the words of gift are in the present tense.

That case was decided in 1852. In 1854, *Michener v. Dale*,¹ was decided by the same tribunal, Judge Lowrie

¹ 23 Pa. 59.

being still a member of the court. In delivering the opinion in the latter case, Judge Woodward said: "It was greatly insisted on in argument, that the court ought to have instructed the jury that if the gold was the *principal* part of Mr. Dale's property, he could not make a *donatio mortis causa* of it, and for this *Headley v. Kirby* was relied on. In that case, there was a variety of chattels—they were not specified by the donor—nothing more than a constructive delivery occurred, the language was evidently testamentary, and it referred expressly to all the property." "In these particulars, the case is broadly distinguishable from the present, and it does not decide that where a single chattel is the whole of a man's property, or the 'principal part of the property,' it may not be given *mortis causa*. The doctrine of that case, predicated of the circumstances then before the court, is not to be questioned, for it rests on sound reason; but, if applied to a case like this, it would defeat all gifts made as memorials of gratitude and affection in the most solemn circumstances of life."

Headley v. Kirby, in the sense in which it is here explained, was approved in *Marshall v. Berry*, in Massachusetts. Wells, J., said: "This mode of transmission can apply only to specific articles capable of passing by delivery, and not as a disposition of the donor's estate. Such a general disposition would be void."¹

¹ 13 Allen (Mass.), 46. *Headley v. Kirby*, is understood by Judge Woerner, in the sense in which it is interpreted in this article. He said of the decision, that it was rendered, "not because a man may not so dispose of all his property, but because there is no specific reference to the property, and because the language is testamentary, and the delivery only constructive:" 1 Woerner on Administration, § 63.

The language in the opinion in the recent case of *Debinson v. Emmons*, 33 N. E. 706, appears to corroborate strongly this view of *Headley v. Kirby*. Barker, J., said: "The defendant contends that the gift was invalid because it attempted to dispose of the donor's whole estate, citing *Marshall v. Berry*, 13 Allen, 43. But, fairly construed, the evidence shows a gift only of specific articles, two trunks and their contents. This question does not appear to have been raised at the hearing below. Although some expressions of the donor may be taken as declarations—that all her property was in the trunks, they may also mean that all that was in the trunks belonged to her," *i. e.*, to donee.

In *Meach v. Meach*,¹ Redfield, C. J., delivering the opinion of the court, thus referred to *Headley v. Kirby* (misunderstanding it): "It may be somewhat questionable how far a *donatio mortis causa* is to be altogether invalidated, by reason of its embracing the major part, or the whole of one's property, if it be in other respects unobjectionable. Neither the English or American cases have attempted any such criterion before; and it would seem, at first blush, rather difficult of application. But if these cases [alluding, also, to *Moore v. Darton*, 7 Eng. L. & E. 134, wherein Vice Chancellor Bruce displayed hesitation in holding that the English Wills Act had not abolished donations *mortis causa*] show no more, they may be regarded as evidencing a disposition on the part of courts in both countries, not to extend these informal testamentary dispositions of property in manifest abuse and disregard of the salutary enactment in regard to wills." In that case, a *donatio mortis causa* of personal property, consisting of stock on a farm and choses in action to a considerable amount, was upheld.²

In *Seabright v. Seabright*,³ it was laid down that if such a gift is of a very large amount and nearly the whole of the donor's personal estate, whether the gift be *inter vivos* or *mortis causa*, the court would require the most clear and satisfactory proof of the gift; though it would require less evidence to show, if the gift was established, that it was a gift *mortis causa* and not a gift *inter vivos*. The court in this case said further that despite *Headley v. Kirby* (misapprehending it), the fact that a gift constitutes the principal or whole of the donor's personal property, cannot be held to prevent absolutely any effect to the gift. Such limitation of the extent of a gift, whether *mortis causa* or *inter vivos*, can be brought about at this late day only by legislation.

EQUITABLE AID. As the common law⁴ allows total disinherison, relying only on the parents' love and wisdom, no reason can be perceived how any limit can be set as to the amount

¹ 24 Vt. 591.

² See, also, the note by Judge Redfield, at p. 600.

³ 28 W. Va. 415.

⁴ 2 Kent, 327.

of such donation, unless, perhaps, in those imperfectly executed donations where there is no legal transfer of the title; as where an unendorsed promissory note payable to order is delivered to donee.

A passive permission on the part of the law is different from an active aid afforded a parent in his endeavor to disinherit, and when such attempt is made, to the extent, if successful, of leaving the next of kin without means, why should equity go beyond the law and put a title where the common law has refused it, even to injury of little children? The chancellor's aid is matter of grace. Sarcastic this would sound in such case. Reference may here be made to Lewin on Trusts, 81, 82, where it is said that imperfectly created trusts, on meritorious consideration, will not be executed either against the settlor himself, or against his representatives, where they, too, could claim meritorious consideration, as if they were the settlor's children without adequate provision, or, probably, even where there is adequate provision.

This view seems to have been taken by the Master of the Rolls in *Lawson v. Lawson*.¹ In a case of donation *mortis causa*, he observed: "£200 out of £8000, being deemed reasonable, decree allowing it is made."

It may be urged that equitable assignments are now recognized, frequently, at law; but this is only because the law, in its development, is taking up equitable principles. Shall we not say, let the development be confined to those principles which *are* equitable?

LEGISLATION. In view of the danger of fraud attendant more or less upon the recognition of the *donatio mortis causa*, some legislation may be thought prudent. The New Hampshire Statute is as follows: "No gift in expectation of death, often called *donatio mortis causa*, shall be valid, unless the actual delivery of the property to the donee shall be proved by two indifferent witnesses, upon petition of the donee to the judge of probate to establish such gift, filed within sixty days after the decease of the donor": New Hampshire Public Statutes, 1891, § 18.

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¹ 1 P. Wms. 440 (1718).