

volved are tersely and withal fairly stated in argument by the distinguished counsel for the plaintiff Commonwealth, Hon. David Dudley Field, as follows: "1. Can a State of the Union implead another State, in this court, for a money demand? 2. Can it do so, when the demand has been assigned to it by one of its citizens for the purpose of the suit? 3. Can it do so, as the sovereign and trustee of the citizen, without an assignment of his demand? 4. If a suit against the State itself could not be maintained in the case supposed, could the officers of the State of Louisiana, under the circumstances of this case, be required, by the judgment of this court, to apply the money in their hands to the payment of interest on the bonds? 5. And if the money on hand be sufficient to pay the interest now due, can the officers be furthermore directed to go on in the execution of their offices, and assess and collect the taxes required by the Constitution and laws of 1874, and pay the arrears of interest out of the same?" When the case is decided, we shall take pains to give our readers the earliest practicable report, or (if of great length), *resume* of the opinion.

GIFTS CAUSA MORTIS.

Justinian, in describing a *donatio mortis causa*, says that it is "when the donor wishes that the thing given should belong to himself rather than to the person to whom he gives it, and to that person rather than to his own heir."¹ In illustration of which he cites the words which Homer puts into the mouth of Telemachus when the latter gives to Piræus: "Piræus, for we know not how these things shall be, whether the proud suitors shall secretly slay me in the palace, and shall divide the goods of my father. I would that thou thyself shouldst have and enjoy these things rather than that any of those men should; but if I shall plant slaughter and death amongst those men, then indeed bear these things to my home, and joying give them to me in joy."

Gifts *causa mortis* have not been generally favored in the law. It is now more than a hundred years since Lord Chancellor Hard-

wicke declared it to be a pity that the statute for the prevention of frauds and perjuries did not set aside all such gifts.² A *donatio mortis causa* was required by the law of Justinian to be made in the presence of five witnesses.³ But the common law does not require the gift to be executed in the presence of any stated number of witnesses, notwithstanding the fact that such donations amount to a revocation *pro tanto* of written wills.⁴ As they lack all those formalities and safeguards which the law, in its wise precaution, throws around wills, it can not be denied that a strong temptation is created to the commission of fraud and perjury. Such gifts are, therefore, said by Chancellor Kent in the note last cited, to be "of a dangerous nature." "Cases of this kind demand the strictest scrutiny. So many opportunities, and such strong temptations," says Lord Chelmsford, present themselves to unscrupulous persons to pretend these death bed donations, that there is always danger of having an entirely fabricated case set up. And, without any imputation of fraudulent contrivance, it is so easy to mistake the meaning of persons languishing in a mortal illness, and by a slight change of words, to convert their expressions of intended benefit into an actual gift of property, that no case of this description ought to prevail, unless it is supported by evidence of the clearest and most unequivocal character."⁵ Such gifts are never presumed, and the maxim is applied, *nemo donare facile prae sumitur*. Such gifts "must be established beyond suspicion;"⁶ and "where a gift *causa mortis* is alleged, the presumption being against it, clear proof on the part of the claimant is required."⁷ And there is no doubt that they have been "a fruitful source of litigation, often bitter, protracted and expensive."⁸

Now, a *donatio mortis causa* is defined to be a conditional gift, depending on the contingency of expected death, and defeasible by revocation, or deliverance from the peril.⁹

² Ward v. Turner, 2 Ves. 431, 437 (1752).

³ Sandars' Justinian (Hammond's ed.) 219.

⁴ 2 Kent's Com. 444.

⁵ Cosnahan v. Grice, 15 Moore P. C. 215, 223.

⁶ Grey v. Grey, 47 N. Y. 552, 556.

⁷ Conklin v. Conklin, 20 Hun, 278, 280. See, also, Walter v. Hodge, 2 Swans. 97; Contant v. Schuyler, 1 Paige, 316.

⁸ Hatch v. Atkinson, 56 Me. 326.

⁹ Nicholas v. Adams, 2 Wharton, 17.

¹ Sandars' Justinian (Hammond's ed.), 218.

And the rule is that in order to render perfect a *donatio mortis causa* three things must concur:¹⁰ 1. The gift must be made with a view to the donor's death. 2. It must be made with a condition, either express or implied, that it shall take effect only on the death of the donor by a disease from which he is then suffering. 3. There must be a delivery of the subject of the donation.

While it is essential that the donor make the gift in his last illness, or in contemplation or expectation of immediate death,¹¹ yet it is not necessary that it should be made *in extremis* like a nuncupative will.¹² Where a citizen of Tennessee, on leaving his home in Tennessee to enlist in the Federal army in Kentucky, delivered money and notes to be a gift to the donee in case he perished in the war, it was held that the peril and apprehension were sufficiently immediate to justify a gift *causa mortis*.¹³ On the other hand, the Supreme Court of New York has held that the delivery of a promissory note, by a person about entering the army, to his brother, with directions to give it to his mother should he not return alive, was not a valid gift to the mother.¹⁴ And where a gift was made in expectation of immediate death from consumption, and the donor afterwards recovered so far as to attend to his ordinary business for eight months, and then finally died from the same disease, the court held that the gift could not be supported as a *donatio mortis causa*.¹⁵ The expectation or apprehension of death may arise from infirmity or old age, or from external and anticipated danger.¹⁶

¹⁰ Taylor v. Henry, 48 Md. 550; Murray v. Cannon, 41 Md. 466; Dole v. Lincoln, 31 Me. 422; Smith v. Kittridge, 21 Vt. 238; French v. Raymond, 39 Vt. 623; Blanchard v. Sheldon, 16 Vt. 266; Raymond v. Sellick, 10 Conn. 484.

¹¹ Lawson v. Lawson, 1 P. W. 441; Miller v. Miller, 3 P. W. 358; Blount v. Burrows, 1 Vesey, Jr. 546; Cosnahan v. Grace, 15 Moore P. C. 215, 222; Grattan v. Appleton, 3 Story C. C. 755; Gourley v. Linzbigler, 51 Pa. St. 345; Rhodes v. Childs, 64 Pa. St. 18; Robinson v. Ring, 72 Me. 144; Case v. Dennison, 9 R. I. 88; Gass v. Simpson, 4 Coldw. (Tenn.) 288; Chaplin v. Seeber, 56 How. Pr. (N. Y.) 46; Irish v. Nutting, 47 Barb. (N. Y.) 370; Sheldon v. Button, 5 Hun. (N. Y.) 110; Merchant v. Merchant, 2 Bradf. (N. Y.) 432; Barker v. Barker, 2 Gratt. (Va.) 344; Sheegog v. Perkins, 4 Baxter (Tenn.), 273; Knott v. Hogan, 4 Met. (Ky.) 101.

¹² Nicholas v. Adams, 2 Wharton (Penn.), 17; Gass v. Simpson, 4 Coldw. (Tenn.) 288.

¹³ Gass v. Simpson, *supra*.

¹⁴ Sheldon v. Button, 5 Hun. 110.

¹⁵ Weston v. Hight, 17 Me. 289.

¹⁶ Dig. 39, 6, sec. 3, 4, 5, 6; 2 Kent's Com., 444.

That delivery of the gift is essential, is a principle established by a long line of decisions, and disputed by none.¹⁷ But it is not necessary that the delivery should be to the donee personally, it may be made to a third person in his behalf.¹⁸ And instead of delivering the gift to the donee or to a third person in trust for him, the donor may create himself a trustee for the donee. As where money is deposited in bank in the name of the donor as trustee for the donee, and a pass book is received containing an entry that the funds are in trust. In such case there may be a valid gift, although the *cestui que trust* possesses no knowledge of the trust, and although the pass book is in the donor's possession until death.¹⁹ The acceptance of the gift by the donee is also essential in order to make a gift complete or perfect.²⁰ But acceptance may be presumed in cases where it would be beneficial to the donee.²¹ And in general any gift by deed, will, or otherwise, is supposed *prima facie*, unless the contrary appears to be beneficial to the donee.²² Not only must there be a delivery of the gift, a change of possession, but this change of possession must be continued in the donee, or in

¹⁷ Ward v. Turner, 2 Vesey, 431; Tate v. Hilbert, 2 Vesey, Jr. 111; Bunn v. Markham, 7 Taunton, 224; Powell v. Hellicar, 26 Beavan, 261; Gough v. Tindon, 8 E. L. & Eq. 507; Drury v. Smith, 1 P. W. 404; Resch v. Senn, 28 Wis. 286; Carpenter v. Dodge, 20 Vt. 595; Frost v. Frost, 33 Vt. 639; Turner v. Brown, 6 Hun, 333; Cox v. Sprigg, 6 Md. 274; Powell v. Leonard, 9 Fla. 359; Case v. Dennison, 9 R. I. 88; Egerton v. Egerton, 2 C. E. Green, 419; Dow v. Gould, etc. Man. Co., 31 Cal. 629; Smith v. Wiggins, 3 Stew. (Ala.) 221; Singleton v. Cotton, 23 Ga. 261; McKenzie v. Downing, 25 Ga. 669; Hatch v. Atkinson, 56 Me. 324; Young v. Young, 80 N. Y. 422; Brown v. Brown, 18 Conn. 414, 417; Phipps v. Hope, 16 Ohio St. 586; Craig v. Craig, 3 Barb. Ch. 76; Champlin v. Seeber, 56 How. Pr. 46; Waring v. Edmonds, 11 Md. 424; People v. Johnson, 14 Ill. 342; Withers v. Weaver, 10 Barr, 391.

¹⁸ Drury v. Smith, 1 P. W. 404; Caldwell v. Renfrew, 33 Vt. 213; Jones v. Deyer, 16 Ala. 221; McGillicuddy v. Cook, 5 Blackf. 178; Michener v. Dale, 23 Pa. St. 59; Gourley v. Linsenbigler, 51 Pa. St. 345; Wells v. Tucker, 5 Binney, 366; Grymes v. Hone, 49 N. Y. 17; Borneman v. Sidlinger, 15 Me. 429, 431; Dole v. Lincoln, 31 Me. 422; Waring v. Edmonds, 11 Md. 424; Gass v. Simpson, 4 Coldw. (Tenn.) 288.

¹⁹ Martin v. Funk, 75 N. Y. 134, and the cases there cited.

²⁰ Delmotte v. Taylor, 1 Redf. 417; Dow v. Gould, etc. Manuf. Co., 31 Cal. 629; DeLevellain v. Evans, 39 Cal. 120; Armitage v. Widoe, 36 Mich. 124.

²¹ Goss v. Singleton, 2 Head (Tenn.), 67; DeLevellain v. Evans, 39 Cal. 120; Higman v. Stewart, 38 Mich. 513, 524; Darland v. Taylor, 52 Iowa, 503.

²² Gos sv. Singleton, 2 Head (Tenn.), 67.

a third person for him, until the donor's death.²³

Although a difference of opinion at one time existed as to what could be the subject of a gift *causa mortis*, the principles determining the question are now well settled. A *donatio causa mortis* extends only to personalty, and a gift of real estate can not be sustained as such a gift.²⁴ In Pennsylvania the courts have held that the gift of all a person's property to take effect after death, was not a valid *donatio causa mortis*, that a gift *causa mortis* could not thus be made to operate as a will,²⁵ though the same court, in a subsequent case, has held that the rule is otherwise as to a particular chattel, although such chattel may have constituted the principal part of the donor's property.²⁶ But it has been held in Vermont that there is no principle of limitation as to the amount of property which may be transferred by a *donatio causa mortis*, and it was held a valid gift where the donor, on his death bed, executed a deed of all his personal property to his wife.²⁷ It was formerly held that a mere chose in action did not pass by delivery, and could not take effect as a gift *causa mortis*.²⁸ But such is no longer the rule, and it is well settled that a promissory note made by a third person, and payable to the order of the donor, or a bill of exchange may be a valid gift *causa mortis*.²⁹ But the donor's own promissory note is not the subject of such a gift.³⁰ Such a note is

a mere promise of the donor, and can no more be recovered upon as a gift, than could a recovery be had upon the unwritten promise of the donor. Such notes "are of no more value than blank paper," for a mere intention or naked promise to give is not a gift, and a court of equity will not interfere and give effect to a gift left inchoate and imperfect.³¹ And if the promissory note of a third person be given *causa mortis*, and be secured by a mortgage, the mortgage will enure solely to the benefit of the donee, although the mortgage deed was not delivered with the note, or even alluded to at the time of the delivery of the note, but continued to remain in the donor's possession until his death.³² It is also settled that it is entirely unnecessary that the note should be indorsed in order to pass the title.³³ So a bond may be given without any written assignment.³⁴ And the delivery of a certificate of deposit on a life insurance company has been held to be effectual, without a written assignment, to transfer the deposit itself to the donee, as a gift *causa mortis*.³⁵ A deposit in a savings bank may be the subject of a valid gift *causa mortis*, and such gift may be proved by the delivery of the bank or pass book to the donee, accompanied by an assignment; ³⁶ or it may be proved by the simple delivery of the pass book, without any assignment.³⁷ It has been held that the delivery of a banker's deposit note may be a good gift *causa mortis*.³⁸ In *Curry v. Powers*, recently decided in the New York Court of Appeals, it was held that the delivery of a check upon a savings bank, payable four days after the death of the drawer, together with the pass book of the depositor, did not

²³ *Hatch v. Atkinson*, 56 Me. 324; *Jones v. Deyer*, 16 Ala. 221.

²⁴ *Meach v. Meach*, 24 Vt. 591; *Gilmore v. Whitesides*, *Dudley* (S. C.), 13.

²⁵ *Headley v. Kirby*, 18 Pa. St. 326.

²⁶ *Michener v. Dale*, 23 Pa. St. 59.

²⁷ *Meach v. Meach*, 24 Vt. 591.

²⁸ *Miller v. Miller*, 3 P. W. 358; *Bradley v. Hunt*, 5 Gill & J. 54.

²⁹ *Austin v. Mead*, 15 L. R. Ch. Div. 651; *Veal v. Veal*, 27 Beavan, 303; *Rankin v. Weguelin*, Id. 309; *Caldwell v. Renfrew*, 33 Vt. 213; *McConnell v. McConnell*, 11 Vt. 290; *Turpin v. Thompson*, 2 Mete. (Ky.) 421; *Brown v. Brown*, 18 Conn. 414, 417; *Borne-man v. Sidlinger*, 15 Me. 429; *Wing v. Merchant*, 57 Me. 383; *Grover v. Grover*, 24 Pick. 261; *Bates v. Kempton*, 7 Gray, 382; *Parker v. Marston*, 27 Me. 196; *Contant v. Schuyler*, 1 Paige, 316; *Harris v. Clark*, 2 Barb. 94; s. c., 3 N. Y. 93; *Champney v. Blanchard*, 39 N. Y. 111.

³⁰ *Blanchard v. Williams*, 70 Ill. 647, 652; *Parish v. Stone*, 14 Pick. 198; *Priester v. Priester*, Rich. Eq. Cas. 26; *Brown v. Moore*, 3 Head (Tenn.), 671; *Raymond v. Sellick*, 10 Conn. 484; *Smith v. Kittidge*, 21 Vt. 238; *Voorhees v. Woodhull*, 33 N. J. Law, 494, 498; *Smith v. Smith*, 30 N. J. Eq. 562; *Haymore v. Moore*, S. Ohio St. 239; *Starr v. Starr*, 9 Ohio St. 74; *Craig*

v. Craig, 3 Barb. Ch. 76; *Harris v. Clark*, 3 N. Y. 93; *Dodge v. Pond*, 23 N. Y. 69; s. c., 28 Barb. 121.

³¹ 2 Kent's Com., 338; *Antrobus v. Smith*, 12 Ves. 39; *Pennington v. Gittings*, 2 Gill & J. 208.

³² *Brown v. Brown*, 18 Conn. 414, 417.

³³ See the cases cited in note 29.

³⁴ *Waring v. Edwards*, 11 Md. 424; *Walsh v. Sexton*, 55 Barb. 251; *Duffield v. Elwes*, 27 Beavan, 309.

³⁵ *Waterloo v. DeWitt*, 36 N. Y. 340.

³⁶ *Kingman v. Perkins*, 105 Mass. 111; *Foss v. Lowell Five Cents Savings Bank*, 111 Mass. 285. *Sheedy v. Roach*, 124 Mass. 472; *Davis v. Ney*, 125 Mass. 590.

³⁷ *Pierce v. Boston Five Cents Savings Bank*, 129 Mass. 425; *Turner v. Boston, etc. Savings Bank*, Id. 425; *Hill v. Stevenson*, 63 Me. 364; *Tillinghast v. Wheaton*, 8 R. I. 536; *Camp's Appeal*, 36 Conn. 88; *Penfield v. Thayer*, 2 E. D. Smith, 305.

³⁸ *Amis v. Witt*, 33 Beavan, 619; *Moore v. Moore*, L. R. 18 Eq. 474; *Brooks v. Brooks*, 12 S. C. (N. S.) 424.

amount to a valid gift *causa mortis*.³⁹ And in the English case of *Hewitt v. Kaye*,⁴⁰ where a check given by the drawer was not presented for payment until after the death of the donor, it was held not to amount to a good *donatio mortis causa*. But in *Rolls v. Pearce*, where a check was drawn by a donor payable to his wife or her order, and was given to him by her shortly before his death, was indorsed by her and paid into a foreign bank against the amount of which she drew, the court held it to be a good *donatio mortis causa*, although the check was not presented for payment at the bank on which it was drawn till after the death of the donor.⁴¹ The delivery of a bill of exchange payable to the donor or order, and which did not fall due until after he died, has been held a gift *causa mortis*.⁴²

A distinction, therefore, exists as to checks, and the principle is, that although the drawer of the check may deliver it to the payer, intending thereby to give to the donee the fund on which the check was drawn, that, nevertheless, until the check has been paid or accepted the gift is incomplete, and that, in the absence of either payment or acceptance, the death of the drawer operates as a revocation of the gift.⁴³ The rule then, is, that personal chattels, bonds or choses in action, may be the subject of disposal as gifts, either *inter vivos* or *causa mortis*,⁴⁴ but that a donor's own promissory note can not be so disposed of, and that a check which he has drawn and given to the payee, must be either paid or accepted before the donor's death, to make the gift valid and complete. While personal property is thus the subject of gifts *causa mortis*, as above stated, yet the rule is that the only property which can thus be disposed of, is the balance left after the payment of all debts. Or, in other words, the donee takes the property, subject to the right of the administrator to reclaim it, if required for the payment of the debts of the donor,⁴⁵ but not to the claims of lega-

tees.⁴⁶ So, by the civil law, such gifts were liable to debts. If the donor was insolvent at the time of his death, this was considered an implied revocation of the gift.⁴⁷

We have stated that delivery is essential to complete a gift *causa mortis*. It remains, however, to direct attention to what is a sufficient delivery of the property, which is the subject of the gift, to satisfy the requirements of the law upon this branch of the subject. For while the maxim "*donatio perficitur possessione accipientis*" is an ancient one in the law, it has not always been easy to determine what is a sufficient possession of the property to perfect the title of the donee. This question of delivery was elaborately considered and learnedly discussed by Lord Chancellor Hardwicke in *Ward v. Turner*,⁴⁸ in the year 1752. In the course of the opinion announced by the chancellor, he said: "It is argued that, though some delivery is necessary, yet delivery of the thing is not necessary, but delivery of any thing by way of symbol is sufficient; but I can not agree to that; nor do I find any authority for that in the civil law, which required delivery to some gifts, or in the law of England which required delivery throughout. Where the civil law requires it, they require actual tradition, delivery over of the thing. So in all the cases in this court delivery of the thing given is relied on, and not in the name of the thing." While thus holding that delivery should be actual and not symbolical, he adds that "delivery of the key of bulky goods, where wines, etc., are, has been allowed as delivery of the possession, because it is the way of coming at the possession, or to make use of the thing; and, therefore, the key is not a symbol, which would not do." The point actually decided was, that the delivery of receipts for certain South Sea annuities did not amount to a delivery of the annuities. Subsequently this subject was discussed, and with marked learning, in *Tate v. Hilbert*,⁴⁹ when Lord Loughborough again urged the necessity of actual delivery to the efficacy of gifts

³⁹ 70 N. Y., 212.

⁴⁰ L. R., 6 Eq., 198.

⁴¹ L. R. 5 Ch. Div. 730.

⁴² *Austin v. Mead*, L. R. 15 Ch. Div. 651.

⁴³ *Second National Bank v. Williams*, 13 Mich. 282; *Simmons v. Savings Society*, 31 Ohio St. 457.

⁴⁴ *Blanchard v. Williams*, 70 Ill. 647, 652.

⁴⁵ *Pierce v. Boston Savings Bank*, 129 Mass. 425, 433; *Mitchell v. Pease*, 7 Cush 350; *Chase v. Redding*,

13 Gray, 418; *McLean v. Weeks*, 67 Me. 277; s. c., 65 Me. 411; *Gaunt v. Tucker*, 18 Ala. 27; *Borneman v. Sidlinger*, 15 Me. 429, 431; *House v. Grant*, 4 Lans. 296.

⁴⁶ *Gaunt v. Tucker*, 88 Ala. 27.

⁴⁷ *Sandars' Justinian* (Hammond's ed.) 219.

⁴⁸ 2 Vesey, 431, 443.

⁴⁹ 2 Vesey Jr. 111.

of this nature, unless the transfer was perfected by means of a deed or written instrument. He decided that where a person, in his last sickness, gave his check on his banker for a sum of money, and died before the check was paid, it was not a good gift *causa mortis*, and that where the same person, at the same time, gave his own promissory note for a sum of money to another donee, that it was not good as such a gift, inasmuch as it was no transfer of property. It is settled that there must be such a delivery as comports with the nature of the subject matter.⁵⁰ The delivery should be *secundum subjectam materiam*. It should "be the true and effectual way of obtaining the command and dominion of the subject."⁵¹ The rule is well stated in a case decided in Virginia, where it is said: "A delivery is indispensable to the validity of a *donatio mortis causa*. It must be an actual delivery of the thing itself, as of a watch or a ring; or of the means of getting the possession and enjoyment of the thing, as of the key of a trunk or a warehouse in which the subject of the gift is deposited; or if the thing be in action of the instrument by using which, the chose is to be reduced into possession, as a bond, or a receipt, or the like."⁵² The fact that the property is out of reach of the would-be donor, so that delivery is impossible, is entirely immaterial, the gift can not be sustained in the absence of a delivery, whether delivery is possible or not.⁵³ In illustration of the principles discussed, a reference to a few of the cases may not be out of place. In *Hatch v. Atkinson*,⁵⁴ the court held that the delivery of a key of a trunk containing money and government bonds, was not a valid delivery of the money and bonds. "Although delivery of the key of a warehouse, or other place or deposit," said the court, "where cumbrous articles are kept, may constitute a sufficient constructive or symbolical delivery of such articles, it is well settled that delivery of the key of a trunk,

chest or box, in which valuable articles are kept, which are capable of being taken into the hand, and may be delivered by being passed from hand to hand, is not a valid delivery of such articles. The rule is that the delivery must be as perfect and complete as the nature of the articles will admit of. While a constructive delivery may be sufficient for large or cumbrous articles, it will not be sufficient for small articles, capable of a more perfect and complete delivery." In *Bunn v. Markham*,⁵⁵ the would-be donor had certain bonds and notes brought out of his chest and laid on his bed. He then caused them to be sealed up in packages, the amount of the contents written on them, with a statement "for Mrs. C," "for Miss C." This being done, he directed that they should be returned to the chest, that the chest should be locked, the keys sealed up, and the keys to be delivered to one J after his decease. The gift was invalid for want of delivery. In *Powell v. Hellicar*,⁵⁶ the donor told one A to take the keys of his dressing case and box, containing her watch and trinkets, and immediately on her death to deliver the watch and trinkets to the plaintiff. A acted accordingly, but it was held that the gift was incomplete for want of delivery. But in *Smith v. Smith*,⁵⁷ it was ruled that the delivery of the key of a room containing furniture was such a delivery of possession of the furniture as to render a gift *causa mortis* valid. Other cases may be referred to,⁵⁸ but those cited plainly illustrate the necessity of delivering the thing itself in all cases when the nature of the thing admits of such a delivery. Upon this question of delivery, and of delivery as distinguished from possession, we quote as follows: "It is not the possession of the donee, but the delivery to him by the donor, which is material in a *donatio mortis causa*; the delivery stands in the place of nuncupation, and must accompany and form a part of the gift; an after acquired possession of the donee is nothing; and a previous and continuing possession, though by the authority of the donor, is no better. The donee, by being the debtor or

⁵⁰ *Turner v. Brown*, 6 Hun, (N. Y.) 333; *Hitch v. Davis*, 3 Md. Ch. 266; *Brown v. Brown*, 18 Conn. 414; *Pope v. Randolph*, 13 Ala. 214; *Carridine v. Collins*, 7 S. & M. 428; *Blakey v. Blakey*, 9 Ala. 391; *Hillebrant v. Brewer*, 6 Tex. 45; *Powell v. Leonard*, 9 Fla. 359.

⁵¹ 2 Kent's Com., 439.

⁵² *Miller v. Jeffress*, 4 Gratt. 479.

⁵³ *Case v. Dennison*, 9 R. I. 88.

⁵⁴ 56 Me. 324.

⁵⁵ 7 Taunton, 223.

⁵⁶ 26 Beavan, 261.

⁵⁷ Str. 955.

⁵⁸ *Jones v. Shelby*, Chan. Prec. 300; *Faryuharson v. Cave*, 2 Colby, 356; *Cooper v. Burr*, 45 Barb. 9; *Reddel v. Dobree*, 10 Sim. 246.

bailee or trustee of the donor, in regard to the subject of the gift, stands upon no better footing than if the debt or duty were owing from a third person. A debt or duty can not be released by mere parol, without consideration; and where there is nothing to surrender by delivery, the only result is, that in such a case, there can not be a *donatio mortis causa*; and a release, without valuable consideration therefor, must be by testament, or by some instrument of writing which would be effectual for the purpose *inter vivos*."⁵⁹

It remains for us to notice that it has been that until death the title to the subject of the gift remains in the donor, and vests in donee only at time of donor's death, having relation back to the time of delivery.⁶⁰ Is it not more correct to say that the title passes to the donee at the time of delivery, and that the title thus obtained is defeasible only on the recovery of the donor, or on his express revocation? While a gift *inter vivos*, having been perfected by delivery is irrevocable,⁶¹ a gift *causa mortis* may be revoked at any time before the donor's death.⁶²

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⁵⁹ Miller v. Jeffress, 4 Gratt. (Va.) 480; and see French v. Raymond, 39 Vt. 624.

⁶⁰ Gass v. Simpson, 4 Coldw. (Tenn.) 288.

⁶¹ 2 Kent's Com., 440.

⁶² *Ib.*, 447.

PRESUMPTIONS OF LIFE, DEATH, AND SURVIVORSHIP.

V.

We have been egregiously taken aback by a discovery, made too late, indeed, but fortunately while yet there was an opportunity for manifesting regret; so that, at all events, we are better circumstanced than the good people of Devon, who, in days when it was difficult for even ill news to travel fast, only learned the death of Queen Elizabeth after the period of court mourning, too, had expired. It happens that, so resolved were we to investigate the subject in hand with entire independence (a characteristic of our papers in general, that the mere cursory reader may fail to realize), we announced, at the outset, a determination not to consult the "elaborate note" to Nepean v. Doe, in Smith's Leading

Cases—something, forsooth, we might find to say that was not there forestalled—yet were we diffident, and apprised the reader that there he would acquire every additional information to supplement our shortcomings. Who, indeed, but would have expected to find there an exhaustive annotation on the subject? Well, having now concluded our own researches and discussion as to presumptions of life and death (as to which, *cf.*, also, the New York Code), we have ventured, at last, not without trepidation, to try and discover our deficiencies by exploring the "elaborate note." Nepean v. Doe begins at page 584 of the last edition, and from page to page we proceeded till we arrived at 703. So climbs the traveler the imposing stone stairways at Persepolis—they lead to nothing; and alike illusory was our exploration. In fact, as we regretted to discover, the "elaborate note" devotes to the subject only a few lines of a single page; and the feast of logic and the flow of law, so confidently anticipated, proved as vain as the viands of Eon, the Sorcerer of Britany. If, then, our discussion of presumptions of life and death has been somewhat protracted, the result is a monograph that may be found of practical utility in reference to a subject so often arising, as to which we have mentioned no less than four Irish cases (two of them before the Land Commission) occurring within the last month; and there is the less reason to apologize for not terminating before, but rather, as we do, like the miller, shutting the gates when the grist is out. The remaining clause of our theme relates to presumptions of survivorship; and here, too, we shall have to note in other systems of jurisprudence some suggestive differences from our own, while curious and interesting indeed have been many of the cases in which the question was involved. But this is a branch of the matter that has elsewhere received considerable attention, so that there is less reason for treatment so extensive as its wide scope would allow; and we shall but say, with Montesquieu, when he begins to treat of commerce, "the subject which follows would require to be discussed more at large, but the nature of this work does not permit it. I wish to glide on a tranquil stream, but I am hurried along by a torrent."

Last December, we learned that a case was about to come before a Marseilles tribunal