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Bills and Notes: Power of Donor-Drawer of Check to Stop Payment

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Bills and Notes—Power of Donor-Drawer of Check to Stop Payment. —Plaintiff, a Minnesota corporation, conducts a school for the education and training of subnormal persons. Defendant mailed a check payable to plaintiff's order as a gift, but stopped payment on the check before it was presented to the drawee bank. Defendant appealed from a judgment on the pleadings. *Held*: Reversed. There was no valid gift inter vivos since there was no absolute disposition of the subject matter of the intended transfer. *Laura Baker School v. Pflaum, 30 N.W. (2d) 290, (Minn., 1947).*

The decision rests on well-settled principles of personal property law. Since a check is not money but an order to pay money, there was no disposition of the intended subject of the gift. The donor exercised her power of revocation before the check was presented to the bank for payment; and since a check does not operate as an assignment of the funds in the bank, its mere delivery does not place the gift beyond the donor's power of revocation.[1]

The reasoning of the case, together with the resulting decision, has ample support in the decided cases—as a matter of fact, it has been cited as the general rule.[2] It is not the purpose of this note to criticize either the decision or its rationale. However, it might be worth while to suggest that another approach, more consistent with the framework of negotiable instruments, would have accomplished the same result. Most of the analagous cases in the books are concerned with the revocation of a gift of a check resulting from death of the drawer and are supported by the reasoning pursued in the *Pflaum* case. The New Jersey Court, in an oft-cited case, said:

> "It is well settled that a gift cannot be affected by the delivery of a check upon an ordinary bank account of deposit where the drawer's account is good for the amount. The reason is that until the check is cashed the drawer may stop payment. . . . The fundamental principle of the law of gifts is that the gift, to be effective must place the thing donated beyond the control of the donor."[3]

It is submitted that the "reason" offered in the quotation is nothing more than a restatement of the conclusion it is offered to support. Similarly, in *Straut v. Hollinger*[4] it was held that gifts by checks are not completed until the checks are presented to the drawee bank and paid during the drawer's lifetime, since, until the checks are paid, the drawer may stop payment; and in *Smythe v. Sanders*[5] the court decided

[1] Laura Baker School v. Pflaum, 30 N.W. (2d) 290 (Minn., 1947).
[2] Pikeville National Bank and Trust Co. v. Shirley, 281 Ky. 150, 135 S.W. (2d) 426, 126 A.L.R. 919 (1939).
[3] Provident Institute for Savings v. Sisters of the Poor of St. Francis, 87 N.J. Eq. 424, 100 Atl. 894 (1917).
[4] Straut v. Hollinger, 139 N.J. Eq. 206, 50 Atl. (2d) 478 (1947).
[5] Smythe v. Sanders, 136 Miss. 382, 101 So. 435 (1924).

that there is no delivery in case of a gift of a bank check, unless and until it is cashed during the lifetime of the donor, as the attempted gift is one of money. There are ample decisions on this point, of which the foregoing are but examples. The decision of the Minnesota Court in the *Pflaum* case obviously is not without authority, but is does appear that most of the supporting cases deal with situations where the revocation was brought about by death rather than by the drawer's stopping payment before the check was presented for payment.

It may not be amiss to suggest a different road to the same end which might be slightly more consistent with the law of negotiable instruments as it has developed. If a drawer is liable on his check at all, he is liable by virtue of his *promise* to pay in the event the drawee bank does not.[6] A promise donated is a promise without consideration, to describe it in more legally conventional language, and is not usually enforceable. Therefore it appears that the legal but unexpressed defense in the *Pflaum* case was absence of consideration, nothing appearing in the opinion to disclose legal consideration for the defendant's negotiable promise. Nor is this rationale without expression in the cases. In *Guild v. Eastern Trust and Banking Co.* the court dealt with the question, in part, as follows:

> "If the check is a gift, the drawer's engagement that the bank will pay is without consideration. . ."[7], and (quoting *Whitehouse v. Whitehouse*[8]), ". . .a man may not donate what is merely his own naked promise."

The Supreme Court of Iowa, after pointing out that the great weight of authority holds that a voluntary promise of a donor to pay money constitutes a gift which is not complete, continued in these words:

> "The giving of a check without consideration is not the immediate voluntary transfer of money, but simply a promise to pay the money, and being a promise without consideration it cannot be enforced."[9]

Moreover, the question takes on further significance when the rights of a holder in due course (against whom the defense of "no consideration" is not available[10]) are considered. The court in the *Guild*

[6] Uniform Negotiable Instruments Law, Art. V, Sec. 61: "The drawer by drawing the instrument admits the existence of the payee and his then capacity to indorse; and engages that on due presentment the instrument will be accepted or paid, or both, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder . . ."

[7] Guild v. Eastern Trust and Banking Co., 122 Me. 514, 121 Atl. 13 (1923).

[8] Whitehouse v. Whitehouse, 90 Me. 477, 38 Atl. 374 (1897).

[9] In re Knapp's Estate, 197 Iowa 166, 197 N.W. 22 (1924).

[10] Uniform Negotiable Instruments Law, Art. IV, Sec. 57: "A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon." See also N.I.L., Art. II, Sec. 28.

case went on to say that while such a check is not good as to the original payee, it is good in the hands of an innocent indorsee for value. The rationale of the *Pflaum* case might not be extended without conceptual difficulty to a situation where such a check has been transferred to a good faith purchaser for value. If the payee of the check gets nothing, then his transferee takes nothing (applying the law of gifts), and the rights of the holder in due course, embedded in the law-merchant and preserved in the Uniform Negotiable Instruments Law, might be forgotten and made a part of the "law-historic". After all, the donated promise is in negotiable form, and properly should be handled within the conceptual framework provided in Sections 28 and 57 of the Negotiable Instruments Law.

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