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Gift by Check--Hale v. Hale

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GIFT BY CHECK – HALE v HALE

In the recent case of *Hale* v *Hale*,[1] a deposit was made by Hale in a savings account[2] to his own credit in the amount of $3,500. On the day before his death, he drew a check payable to his daughter for $1,000 against this deposit in the bank and handed it to her. This was for the stated purpose of paying his funeral expenses, hospital and doctor's bills and, according to the testimony of his daughter, the donee, the remainder was to go to her. She deposited this check to her credit after the death of her father. The bank, upon ascertaining that Hale had died before the presentation of the check, promptly credited the amount to the account of Hale, thus restoring the deposit to the original sum of $3,500. Evidence in the case showed that the donee had actually paid out $726 for the above expenses as her father had directed, in reliance on the check he had given for that purpose. The court allowed a recovery by the daughter for the entire amount of the check, holding that the amount in excess of the bills and expenses paid was a valid gift.[3]

The *Hale* case involves two interesting legal problems: the first is the application of the tentative trust doctrine for the first time in Kentucky and the second pertains to the validity of the gift to the daughter. The former question has been recently discussed in the KENTUCKY LAW JOURNAL,[4] and it is the purpose of this comment to examine the gift problem.

It is generally accepted that where one intends to make a gift of a sum of money and gives the donee a check drawn against the donor's bank account, the gift will be upheld if the check is paid by the bank before the death of the donor.[5] However, if the check is not paid during the lifetime of the donor, it does not constitute a valid gift even though it may have been presented for payment prior to his death.[6] Most jurisdictions hold that mere delivery of a check to the donee does not constitute a delivery of the sum represented by the check so as to place the gift beyond the donor's power of revocation, and that a check as such is not the subject of a valid gift either inter

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[1] 313 Ky. 344, 231 S.W 2d 2 (1950).

Ordinarily a savings account cannot be checked upon without presentation of the pass book. However, the court recognized this fact and the bank honored the check when presented.

[3] "What these expenses would be was uncertain when he gave the check and there is proof to sustain her contention that he gave her the remainder of the $1,000 for her to keep as her own." Hale v. Hale, 313 Ky. 344, 353, 231 S.W 2d 2, 7 (1950).

[4] Note, 39 KY. L.J. 233 (1951).

[5] 24 AM. JUR. 780.

[6] *Ibid.*

vivos or causa mortis.[7] It is said that a check of this nature is simply evidence of the donor's promise to make a gift which, being without consideration,[8] cannot be enforced against the donor nor against his personal representative.[9]

A negotiable instrument, like any other contract, requires a consideration in order to make the promise to pay binding on the promisor and enforceable against his estate.[10]

There is some authority however that where the donee of a promise makes expenditures or changes his position in reliance upon that promise, the donor is estopped from denying a consideration where injustice can be avoided only by enforcement of the promise.[11] Under such authority the maker of a check or his estate might be estopped from setting up want of consideration where the payee has incurred other obligations or suffered some loss or disadvantage in reliance upon the promise to pay.[12]

Some jurisdictions have held that a check presented after the donor's death is enforceable on the theory that it operates as an assignment of the sum. They qualify this view by stating that a check of itself does not operate as an assignment unless there are other corroborating circumstances manifesting an intention to assign. This intention must be gathered from the language used in the instrument and from the surrounding circumstances.[13] The surrounding circumstances in such case could be an oral agreement made between the parties that the check at the time of delivery was evidence of an assignment of the complete sum.

In the light of previous Kentucky decisions it is very difficult to see how the amount of the check in excess of the expenses could be upheld as a valid gift. In the case of *Throgmorton* v *Grigsby's*

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[7] BRITTON, BILLS AND NOTES, 840 (1943).

[8] KY. REV. STAT. sec. 356.024 provides that every negotiable instrument is deemed prima facie to have been issued for a valuable consideration, and every person whose signature appears thereon to have become a party thereto for value. However, the rule followed is that "ordinarily, in the absence of proof to the contrary, the presumption will be indulged that a paid check was executed in satisfaction of a debt of the payor." Hatfield's Adm'r v. Hatfield, 166 Ky. 761, 179 S.W. 832 (1915); NEGOTIABLE INSTRUMENTS LAW, sec. 24.

[9] Note, 12 WIS. L. REV. 409 (1937).

[10] 7 AM. JUR. 943.

[11] BROWN, PERSONAL PROPERTY 172 (1936).

[12] Cox's Ex'r. v. Walker, 140 Ky. 172, 130 S.W. 984 (1910). RESTATEMENT, CONTRACTS, sec. 90, provides: "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."

[13] Note, 12 WIS. L. REV. 412 (1937); sec. 189 of NEGOTIABLE INSTRUMENTS LAW provides that a check does not constitute an assignment of funds; 20 A.L.R. 174, 182 (1922).

Adm'r,[14] the court stated the basic rule saying, "'It seems clear to us that until the check was either paid or accepted the gift was incomplete; and that, in the absence of such payment or acceptance, the death of the drawer operated as a revocation of the check."[15] When the court in the Hale case said, "We think the proof establishes her right to this balance as a gift .,"[16] it simply overlooked the well recognized rule described above. In the case of *Pikeville National Bank and Trust Company* v *Shirley*,[17] a cashier's check for $2,000 was upheld as a valid gift inter vivos even though presented for payment after the donor had committed suicide. The court in that case recognized that generally an ordinary check is merely a promise to pay and must be paid or accepted before there is a gift of the money, but a cashier's check is like money and a delivery of it has the same effect as a delivery of the money itself.

It is submitted that the court had a rational basis for allowing a recovery to the amount of $726, since the donee actually furnished consideration for this part of the check. However, the balance could not have been supported by any consideration since Hale's expenses amounted to only $726 and he stated that whatever remained was his daughter's. His intention must have been that consideration would be furnished for a part of the check and the remainder would be a gift.

In the application of the estoppel theory, if it could apply to this case, it would be necessary to show that the daughter made expenditures and changed her position in reliance upon the check given to her before Hale's death and that in order to avoid injustice she must be allowed to enforce payment of the check. The evidence does not show that the daughter incurred any obligations or made any expenditures in excess of the $726, therefore estoppel should not apply to the amount of the check in excess of the expenses actually paid.

From the evidence presented in the instant case, there is nothing to suggest an intention on the part of Hale to assign the complete sum to his daughter rather than to make a gift of the balance to her. In fact, the daughter's testimony (that her father told her she was to have what remained after paying the expenses) supports the contention that there was no assignment. Therefore, it would seem rather clear that Hale did not intend to assign the entire sum at that instant, otherwise he would have told her to take the whole amount and keep it from that instant on. An assignment of the fund by check could

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[14] 124 Ky. 512, 99 S.W. 650 (1907).
[15] *Id.* at 515, 99 S.W. at 651.
[16] *Supra* note 1, at 353, 231 S.W. 2d at 7.
[17] 281 Ky. 150, 135 S.W. 2d 426 (1940).

not have been contemplated by Hale at the time because he only signed a check with no manifestation that this check represented an assignment of a specific fund or sum of money There was nothing on the check which marked it as an assignment. Undoubtedly Hale had the intention to give the balance, but had he lived he would have been able at any time to revoke the gift until it was accepted by the bank. Of course any assignment explanation of this transfer is largely academic in view of the Negotiable Instruments Law and previous Kentucky decisions.[18]

In conclusion, it is submitted that the balance of the check in this case should not have been upheld as a valid gift. If Hale had actually withdrawn the money from the account and delivered it to the daughter or had given a certified check to her with the instruction to keep what was left over, there would have been a complete surrendering of control of the money, resulting in a valid gift. This was not done. All Hale did was draw a check on a savings account of which he was trustee. Although his check may have operated as a revocation of the tentative trust created by the savings deposit to the amount of the check, the balance of the check was properly a part of his estate upon his death and should have gone to his next of kin.

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[18] KY. STAT. sec. 356.127; 209 Ky. 212, 272 S.W 384 (1925).