

"Toronto, March 1st, 1909.

"The Dominion Bank.

"Pay Mrs. Margaret Frawley, or order, on demand, one thousand dollars.

"\$1,000.

Matilda Bernard."

This cheque the testatrix caused to be placed in her cash box along with a memorandum in her own handwriting and signed by her, which is in the following words and figures: "March 1st, 1909. This note to be presented one month after my death. Matilda Bernard."

The testatrix delivered the key of the box to her niece, Lillian Gray, with instructions to hand it to her solicitor, Mr. Roach, on her death, at the same time observing that he would know what to do in the matter. A few days afterwards Lillian Gray placed the box in the bank for safe-keeping, and there it remained unopened until after the testatrix's death, when the cheque and memorandum were found in it, and Mrs. Frawley's claim is for the \$1,000 covered by this cheque.

The authorities are quite clear that a cheque not paid, either actually or constructively, during the lifetime of the drawer, is not capable of being the subject of *donatio mortis causa*: *Hewitt v. Kay*, L.R. 6 Eq. 198; *In re Beak's Estate*, L.R. 13 Eq. 489; *In re Beaumont*, [1902] 1 Ch. 889.

A cheque is not a chose in action, but merely a direction to some one, who may or may not have in his possession funds of the drawer, authorising him to pay to the payee a certain sum of money. Death of the drawer before presentation revokes such authority. Thus in this case the claimant is met with two difficulties, each fatal to her claim: one being that the cheque, not having been acted upon by acceptance or payment, never lost its primary character of a mere cheque, which is not a chose in action, and is not the subject of *donatio mortis causa*; and the other being that the testatrix's death revoked the banker's authority to pay the cheque.

It is not necessary to deal with the further question, whether there ever was any active or constructive delivery of the cheque.

The appeal should be dismissed; costs of all parties out of the estate.

SUTHERLAND, J.:—I agree.

BRITTON, J.:—Upon the argument it was frankly conceded by Mr. Ferguson, counsel for Mrs. Frawley, that he could not hope