WALTER WALKER (DEFENDANT).....APPELLANT; 1900

AND *Feb. 22, 23. *April 2.

SARAH A FOSTER AND OBEDIAH M. TAYLOR (PLAINTIFFS)..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Donatio mortis causâ—Delivery to third person—Delivery of key.

To affect a *donatio mortis causâ* delivery to a third person for the use of the donee is sufficient provided that such third person is not a mere trustee, agent or servant of the donor. The assent of the donee or even his knowledge of the delivery is not requisite.

Delivery of the keys of the desk containing the property to be donated constitutes an actual delivery of such property and transfers the possession of and dominion over the same.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) affirming the judgment for the plaintiffs at the trial.

The action in this case was brought by the respondents as administrators of the estate of the late Archi-

* PRESENT :—Sir Henry Strong C.J. and Gwynne, Sedgewick, King and Girouard JJ.

(1) 32 N. S. Rep. 156.

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bald Walker to recover damages for the conversion and detention by defendant of certain promissory notes and other property alleged to belong to the estate.

The deceased Archibald Walker was endeavouring to dispose of his property after his death without making a will. To accomplish this he placed certain promissory notes in envelopes addressed to each of his five children. These envelopes with their contents he kept in a desk at his bedside for some years locked up and under his control. Shortly before his death, when he believed he would die, he had the envelopes in which the notes were, taken from the desk and handed to one Dodge, who was directed by him to seal up the envelopes and replace them in the desk and lock it. Then he delivered the keys to Dodge to retain until after his death when he instructed him to deliver to each of his children one of the envelopes so addressed. These envelopes in Dodge's presence as well as in deceased's presence were sealed up some time before his death, and afterwards Dodge delivered them to the respective donees as directed. The sole question is whether this was a *donatio causâ mortis* good in law.

The court below and the trial judge held that Dodge was a mere agent of the deceased and that there was therefore no delivery of the property for defendant's benefit. Defendant then appealed to this court.

Roscoe Q.C. for the appellant. The judgments below were wrong in holding that Dodge was the servant of deceased in accepting delivery of the donation. See *Drury* v. *Smith* (1); *Moore* v. *Darton* (2); *Sessions* v *Moseley* (3).

(1) 1 P. Wm. 404.

(2) 4 DeG. & S. 517.

(3) 4 Cush. (Mass.) 88.

Dodge could be made the agent of the donee without the latter's assent and even without his knowledge. *Drury* v. *Smith* (1).

As a matter of fact the property itself was delivered to Dodge but it would have been sufficient if only the key of the desk containing it had been delivered. *Jones* v. *Selby* (2); *Murtapha* v. *Westlake* (3); *Trimmer* v. *Danby* (4); *Hall* v. *Hall* (5).

J. J. Ritchie Q.C. for the respondents. The findings of fact by the trial judge will not be disturbed unless clearly wrong; *Colonial Securities Trust Co.* v. *Massey* (6); and they are entirely supported by the evidence.

Delivering is essential to gifts of this class; *Irons* v. *Smallpiece* (7); *Cochrane* v. *Moore* (8); and there was no sufficient delivery to Dodge; *Powell* v. *Hellicar* (9).

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—The sole question in this case is as to the sufficiency of the delivery of the notes in question by Archibald Walker to James S. Dodge, to constitute a good *donatio mortis causâ*. All the other requisites of such a gift are proved.

It is well established by authority that a delivery to a third person for the use of the beneficiary is sufficient. If, however, the third person is a mere trustee, agent or servant of the donor the delivery to him is insufficient.

Such a gift is always revocable by the donor and of course entirely fails if he recovers from the illness from which he is suffering at the time he makes the donation

(1) 1 P. Wm. 404.
(2) Prec. in Ch. 300.
(3) 8 Times L. R. 160.
(4) 25 L. J. Ch. 424.
(5) 20 O. R. 684.
(6) [1896] 1 Q. B. 38.
(7) 2 B. & Ald. 551.
(8) 25 Q. B. D. 57.
(9) 26 Beav. 261.

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It is inaccurate to say that the delivery must be to an agent or trustee for the donee. No one can be an agent or trustee for another without that person's assent. Then the cases show that the delivery to the third person is sufficient without the assent or even the knowledge of the donee provided it is for the use of the donee. Indeed the very sense and object of a delivery to a third person is in some cases because the donee is not at hand to give his assent. Therefore the assent of the donee or even his knowledge of a delivery to a third person for his behoof is not an essential requisite provided the donor parts with both the possession and dominion over the subject of the gift in order that the depositee may hold it for the use of the donee. Chief Justice Shaw in *Sessions* v. *Moseley* (1) in his definition of a *donatio mortis causâ* is careful to avoid the loose and inaccurate language sometimes used by text writers and even in reported cases which requires that the third person must be an agent or trustee for the donee though the latter may know nothing of him. In the case referred to it is said "there was an actual delivery to a person for the use of the donee" thus treating such a delivery as sufficient in law without any requirement of agency or trusteeship for the donee at the time of delivery.

Then the evidence here being not contradicted the question is entirely one of its sufficiency to show that the donor, Archibald Walker, transferred the possession of and dominion over the notes in question to Dodge. The delivery of possession does not depend on the handing over of the keys of the bureau or desk alone, for the notes were previously taken out of the box and replaced there by Dodge himself after the sealing of the envelopes. However had there been no delivery except that of the keys, that would by itself have

(1) 4 Cush. 88.

constituted an actual and not a mere symbolical delivery and the possession and dominion over the securities contained in the desk would have been thus acquired by Dodge. A great number of cases may be cited in support of this view; it is sufficient however to refer to one or two. *Sessions* v. *Moseley* (1) already referred to, is exactly in point; *Marshall* v. *Berry* (2) is to the like effect. Indeed there is no dispute as to the delivery being sufficient if (to put in negatively) it is to the third person not as an agent or trustee for the donor but for the use of the donee. *Moore* v. *Darton* (3) is an English authority the principle of which applied to the undisputed facts in evidence here is conclusive against the judgment of the court below. Many other cases might be quoted but they do not affect the rule of law, but are only instances of the application of that rule to varying states of fact.

Moreover, as in the case before us as the donee happened to be present and assented to the gift an actual trust in his favour was constituted.

It is out of the question to say that there was here any proof of agency or trusteeship for the donor, or of anything short of an actual delivery of the notes and a parting with the dominion over them to Dodge for the use of the donees after the testator's death.

The case in Beavan much relied on for the respondent, *Powell* v. *Hellicar* (4) as reported is so much at variance with other authorities that we must decline to follow it. Possibly it is not fully reported. We need not say more as Mr. Justice Townshend has written a very full and able judgment in which the case is discussed as regards both the facts and the law and with which we all agree.

(1) 4 Cush. 88.
(2) 13 Allen, (Mass.) 43.
(3) 4 DeG. & S. 517.
(4) 26 Beav. 261.

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The appeal is allowed with costs and the action dismissed with costs.

Appeal allowed with costs.

Solicitor for the appellant: *W. E. Roscoe.*

Solicitor for the respondents: *E. Ruggles.*