

WILLIAM McDONALD, EXECU- }
 TOR OF MICHAEL McDONALD, } APPELLANT ;
 DECEASED (DEFENDANT)..... }

1902
 ~~~~~  
 \*Dec. 15.

AND

DANIEL McDONALD AND }  
 OTHERS (PLAINTIFFS)..... } RESPONDENTS.

1903  
 ~~~~~  
 *Feb. 17.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Donatio mortis causâ—Deposit receipts—Cheques and orders—Delivery for beneficiaries—Corroboration—Construction of statute.

McD., being ill and not expecting to recover, requested his wife, his brother being present at the time, to get from his trunk a bank deposit receipt for \$6,000 which he then handed to his brother telling him that he wanted the money equally divided among his wife, brother and a sister. The brother then, on his own suggestion or that of McD., drew out three cheques or orders for \$2,000 each payable out of the deposit receipt to the respective beneficiaries which McD. signed and returned to his brother who handed to McD's wife the one payable to her and the receipt and she placed them in the trunk from which she had taken the receipt. McD. died eight days afterwards.

Held, affirming the judgment appealed against (35 N. S. Rep. 205) Sedgewick and Armour J.J. dissenting, that this was a valid *donatio mortis causâ* of the deposit receipt and the sum it referred to notwithstanding there was a small amount for interest not specified in the gift.

By R. S. N. S. [1900] ch. 163, sec. 35, an interested party in an action against the estate of a deceased person cannot succeed on the evidence of himself or his wife or both unless it is corroborated by other material evidence.

Held, that such evidence may be corroborated by circumstances or fair inferences from facts proved. The evidence of an additional witness is not essential.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) reversing the judgment at the trial in favour of the defendant.

*PRESENT :—Sir Elzéar Taschereau C.J. and Sedgewick, Davies, Mills and Armour J.J.

1902
McDONALD
v.
McDONALD.

The trial was on an interpleader issue settled under an order of McDonald C.J. as follows:

“Whereas the plaintiffs affirm and the defendant denies:

“1. That on or about the 13th day of October, A.D. 1900, during the lifetime of the late Michael McDonald, deceased, the said Michael A. McDonald gave, transferred and assigned to the plaintiffs a certain deposit receipt number 2793 for the sum of \$6,000 deposited in the Union Bank of Halifax, and the amount due upon and secured by said receipt, and thereupon gave to the plaintiffs three orders in writing requiring said bank to pay to the plaintiffs the amount due upon and secured by said receipt.

“2. That the said deposit receipt and the amount due upon and secured by said deposit were so given, transferred and assigned to the plaintiffs and said orders were so drawn and given to the plaintiffs by the said Michael A. McDonald in expectation of death, and in his last illness as *donatio causâ mortis* and that the said Michael A. McDonald died on or about the 21st day of October, A.D. 1900, without having repossessed himself of said deposit receipt or of the amount due upon and secured by said deposit (or of the said orders), and that the said deposit receipt and the amount due upon and secured by said deposit receipt became and are the property of the plaintiffs, and it has been ordered by His Lordship the Chief Justice that the said question shall be tried at Sydney, in the County of Cape Breton, or at Halifax, in the County of Halifax, as the judge may direct; therefore let the same be tried accordingly.”

Mr. Justice Ritchie, who tried the issue at Sydney, held that there was not a *donatio mortis causâ* and that the money belonged to the estate. This judgment was reversed by the full court and the executor appealed.

W. B. A. Ritchie K.C. for the appellant. We rely upon the reasons given by Mr. Justice Ritchie at the trial and in which the Chief Justice concurred on the appeal. There is a marked contrast between this case and *Walker v. Foster* (1). In *Bryson v. Brownrigg* (2) the language of the Master of the Rolls is very much in point. We refer also to *Reddel v. Dobree* (3) at page 251; *Ward v. Turner* (4) at page 437; *Hawkins v. Blewitt* (5); and 14 Am. & Eng. Ency. of Law (2 ed.) p. 1056.

As to corroboration and the evidence generally we refer to *In re Mead*; *Austin v. Mead* (6); *Cosnahan v. Grice* (7); notes to *Ward v. Turner* (4); *McGonnell v. Murray* (8); *Finch v. Finch* (9); *Hall v. Hall* (10); *Hill v. Wilson* (11); *Whittaker v. Whittaker* (12).

The delivery of the cheques did not constitute a valid *donatio mortis causâ*; *Hewitt v. Kaye* (13); *Ward v. Turner* (4); Byles on Bills (16 ed.) p. 206; *Tate v. Hilbert* (14); *In re Beaumont*; *Beaumont v. Ewbank* (15). The evidence negatives any intention to make a gift *mortis causâ*. See also *Edwards v. Jones* (16) at page 234; *Bunn v. Markham* (17); *Duckworth v. Lee* (18); *McGrath v. Reynolds* (19).

Russell K.C. and *Harris K.C.* for the respondents. It is certain that if the deposit receipt alone had been dealt with in the way it was, and these so-called cheques had not been drawn, there would have been a

(1) 30 Can. S. C. R. 299.

(2) 9 Ves. 1.

(3) 10 Sim. 244.

(4) 2 Ves. Sr. 431.

(5) 2 Esp. 662.

(6) 15 Ch. D. 651.

(7) 15 Moo. P. C. 215.

(8) 3 Ir. R. Eq. 465.

(9) 23 Ch. D. 267.

(10) 20 O. R. 684; 19 Ont. App.

R. 292.

(11) 8 Ch. App. 888.

(12) 21 Ch. D. 657.

(13) L. R. 6 Eq. 198.

(14) 2 Ves. 112.

(15) [1902] 1 Ch. 889.

(16) 1 My. & Cr. 226

(17) 7 Taunt. 224.

(18) [1899] 1 Ir. 405.

(19) 116 Mass. 566.

1902
 McDONALD
 v.
 McDONALD.

good *donatio mortis causâ* of the deposit receipt to the three donees. *Amis v. Witt* (1); *Moore v. Moore* (2); *Cassidy v. Belfast Banking Co.* (3); *In re Dillon, Duffin v. Duffin* (4); *Westerlo v. DeWitt* (5). It cannot make any difference that these orders were drawn up by way of dividing the amount named in the deposit receipt. Reference may usefully be made to *Rolls v. Pearce* (6), at pages 733 and 734; *Lawson v. Lawson* (7); *Gardner v. Parker* (8); Byles on Bills, p. 201, *note*; Story Eq. Jur., p. 396, *note*; *Walker v. Foster* (9); *Boutts v. Ellis* (10); *Lawson v. Lawson* (7); *Bromley v. Brunton* (11); *Corle v. Monkhouse* (12).

The so-called cheques are not really cheques but only orders; Bills of Exch. Act, sec. 72; sec. 3, subsection 3; McLaren on Bills, pp. 46, 380. An order to pay out of a particular fund is not unconditional within the meaning of this section; *Ockerman v. Blacklock* (13). These orders would be equitable assignments of the fund; *Bank of British North America v. Gibson* (14), at page 614 per Falconbridge J., and at page 617 per McMahon J.; Chalmers on Bills, 12, 13; *Munger v. Shannon* (15). They were irrevocable in equity as soon as delivered to holder, and at law as soon as assented to by defendant; Story's Eq. Jur. sec. 1044.

The Act, R. S. N. S. (1900) ch. 163, is similar to R. S. O. (1897), ch. 73, and it has been held by the Court of Appeal in Ontario that the "material evidence" in corroboration required under the Ontario

(1) 33 Beav. 619.

(2) L. R. 18 Eq. 474.

(3) 22 L. R. Ir. 68.

(4) 44 Ch. D. 76.

(5) 36 N. Y. 340.

(6) 5 Ch. D. 730.

(7) 1 P. Wm. 441.

(8) 3 Madd. 102.

(9) 30 Can. S. C. R. 299.

(10) 4 Deg. M. & G. 249.

(11) L. R. 6 Eq. 275.

(12) 25 Atlantic Rep. 157.

(13) 12 U. C. C. P. 362.

(14) 21 O. R. 613.

(15) 61 N. Y. 251 at p. 258.

Act may be direct or may consist of inferences or probabilities arising from other facts and circumstances tending to support the truth of the witness's statement. *Green v. McLeod* (1). See also *Cole v. Manning* (2); *Willcox v. Gotfrey* (3); *Grant v. Grant* (4); all decided under similar statutes in England. The evidence of Daniel McDonald is amply corroborated within the rule laid down in these cases.

The delivery was sufficient. The fact that Mrs. McDonald, after receiving the deposit receipt, put it back in the trunk from which it was taken, is immaterial. It kept company with her own cheque. The donor was helpless and bedridden, expecting to die, having disposed finally of every earthly concern and exercising no control over his trunk or anything else that belonged to him. At Cape Breton, after the funeral, the deposit receipt was with Mrs. McDonald's cheque and a deed of the house in which she lived which her solicitor had drawn up for her. See *Westerlo v. DeWitt* (5). The replacing of the receipt in the trunk of the deceased was the act of Mrs. McDonald, not the act of the deceased. See *In re Taylor* (6); 14 Am. & Eng. Enc., 1058, 1059; *Ellis v. Secor* (7).

THE CHIEF JUSTICE.—I] agree with Mr. Justice Davies that this appeal should be dismissed, and I fully concur with the reasoning upon which he reached that conclusion.

In France and the Province of Quebec, the *donationes causâ mortis* of the Roman law are illegal and no other dispositions of property by gratuitous titles are allowed than by will or irrevocable gifts *inter vivos*. A gift,

(1) 23 Ont. App. R. 676.

(4) 34 Beav. 623.

(2) 2 Q. B. D. 611.

(5) 36 N. Y. 340.

(3) 26 L. T. N. S. 328.

(6) 56 L. J. Ch. 597.

(7) 31 Mich. 185, 18 Am. Rep. 178.

1903
 McDONALD
 v.
 McDONALD.

The Chief
 Justice.

under that law, as a general rule, is presumed to have been made in contemplation of death and, therefore, void, when made during the mortal illness of the donor.

Here, however, under the law that rules this case, the gift to the respondents *propter suspicionem mortis*, of the deposit receipt in question, was, in my opinion, a valid one, and they, at Dr. McDonald's death, became the sole owners of it. It cannot be doubted that the deceased handed it over to Daniel McDonald with the intention and for the sole purpose of giving it to him and his co-donees. It is not the cheques or orders that he gave. Those were merely given, upon Daniel's suggestion, to ensure the execution of the gift of the deposit receipt and as evidence of the way in which the donor intended the division of the proceeds thereof to take place amongst the three donees. The gift of the receipt and the delivery of it to Daniel, and his acceptance, were complete before these cheques or orders were made out. Had the doctor died immediately after handing it to Daniel, before signing the cheques or orders, the gift would have been just as valid. Now, the cheques cannot have operated as a revocation of that gift, nor have been intended by the deceased as a substitution for it as the appellant would contend. He never intended to give anything else but the receipt.

It is upon the alleged want of the required *traditio*, however, that the appellant seemed to rely principally at bar. But, upon that point also, his contentions are unfounded. It being conceded, as I think it must be, that the deceased intended to give this deposit receipt to the respondents, *causâ mortis*, everything that he did on the occasion must be presumed to have been done by him in furtherance of his intention to give the receipt, and everything that the donees did must, like-

wise, be presumed to have been done by them in furtherance of their intention to accept that gift. When the deceased handed the receipt to Daniel, he did all he could then to divest himself of the control and dominion over it and to vest the donees with that control and dominion. And, by receiving it from the hands of the deceased and taking possession of it, Daniel did all that he could do then and there to accept the gift for himself and his co-donees and take it under his control.

1903
 MCDONALD
 v.
 MCDONALD.
 —
 The Chief
 Justice.
 —

Now, it cannot be assumed that, by subsequently handing this receipt to Eunice McDonald, he intended to repudiate the gift. Common sense would not countenance such a proposition. And, when Eunice McDonald put it back in the trunk, she, likewise, never intended thereby to refuse the gift and return it to the deceased. She put it there because she knew that, under the circumstances, it was as much under her control as if it had been put in her pocket or in her own trunk. It would have been in her power next day to take it out of that trunk and to put it anywhere else without, in the least, exposing herself to any accusation of dishonesty. There is no evidence that the deceased ever knew that Daniel had handed it over to her and that she had put it back into the same trunk. And I cannot see any room for doubting that, if he had seen Daniel put it into his pocket, or had seen Eunice put it into her own trunk, he would not have objected to it.

Had he intended to retain the possession of it, and desired that it should be returned to his trunk, as still his own, it is to his wife who was in charge of that trunk and had taken it out of it at his request, and not to Daniel, that he would have handed it back.

On the point of corroboration I have had more doubts. The Nova Scotia statute (ch. 163 R. S. N. S.,

1903 1900, sec. 35), (corresponding to the Ontario statute, ch. 73, sec. 10, R. S. O., 1897), enacts that
 McDONALD v. McDONALD. provided that in any action or proceeding in any court by or against the heirs, executors, administrators or assigns of a deceased person, an opposite or interested party to the action shall not obtain a verdict, judgment, award or decision therein on his testimony, or that of his wife, or of both of them, in respect to any dealing, transaction or agreement with the deceased, or in respect to any act, statement, acknowledgement or admission of the deceased, unless such testimony is corroborated by other material evidence.

The Chief Justice.

However, I do not feel justified in holding that the court appealed from was clearly wrong in determining that Daniel McDonald's evidence was sufficiently corroborated. The statute does not necessarily require another witness who swears to the same thing. Circumstantial evidence and fair inferences of fact arising from other facts proved, that render it improbable that the fact sworn to be not true and reasonably tend to give certainty to the contention which it supports and are consistent with the truth of the fact deposed to, are, in law, corroborative evidence.

I refer on the question to the following cases in England under the statute providing that in actions for breach of promise of marriage the plaintiff cannot recover upon his own testimony unless it is corroborated by some other material evidence. *Bessela v. Stern* (1); *Weidmann v. Walpole* (2); *Hickey v. Champion* (3).

I agree with the court below on this point as on the others.

SEDGEWICK J., dissented from the judgment of the majority of the court but delivered no written reasons.

DAVIES J.—There is really very little dispute between the parties as to the law governing a *donatio mortis*

(1) 2 C. P. D. 265.

(2) [1891] 2 Q. B. 534.

(3) 20 W. R. 752.

causâ. The difficulty lies in its application to the facts of this case. The trial judge, though as he says with some doubt, thought the evidence insufficient to prove an actual delivery of the deposit receipt itself and that the intention of the sick man was merely to give the three parties, objects of his bounty, his wife, his brother and his sister, \$2,000 each out of the amount he held on special deposit and that this appeared from the orders he had signed.

The total amount of the deposit receipt was \$6,000 and the orders signed by the sick man amounted to just that amount. But it was contended that, as there was an amount of \$17, by way of interest, due upon this \$6,000, and as the signed orders made no reference to interest, the case came within *In re Mead* (1) as a gift of only a portion of the moneys for which a deposit note had been given by the bank and that there was not a valid *donatio mortis causâ*.

The learned judge further held that there was not such corroborative evidence of the plaintiff's statement with regard to the gift as satisfied the statute.

I am unable to accept either of these conclusions. I agree with the majority judgment of the Supreme Court of Nova Scotia and generally with the reasons for that judgment given by Mr. Justice Graham.

There is no doubt that the evidence to establish a *donatio mortis causâ* should be clear and satisfactory and the statute is explicit that, if the plaintiff relies upon his own testimony or that of his wife or both of them, to obtain a verdict, such testimony must be corroborated by some other material evidence. The argument at bar turned almost entirely upon the question whether or not there had been a gift of the special deposit receipt itself, or only of the amount of that receipt minus the interest, represented by the

1903
 McDONALD
 v.
 McDONALD.
 —
 Davies J.
 —

(1) 15 Ch. D. 651.

1903
 McDONALD
 v.
 McDONALD.
 Davies J.

orders signed by the deceased. If there was a gift of the deposit receipt itself, and not of only a portion of it, then I think it is hardly doubted that, under the later and best authorities; *re Dillon* (1); *In re Beaumont* (2); it was under the circumstances a good *donatio mortis causá*.

I have had no difficulty in reaching the conclusion that it was the deposit receipt itself and all it represented or stood for that the dying man intended to dispose of and did give, and that the orders or cheques related simply to the division of the moneys he had given and were signed by him at Daniel McDonald's request and as indicating the proportions in which he desired the division to be made. The facts are simple. Dr. McDonald being ill had gone from his residence in Sydney, Cape Breton, to Halifax for medical treatment. He was suffering from heart disease accompanied by dropsy and, on the fifth of October, wrote to his wife telling her he was going to the infirmary and instructing her to close up the house and join him in Halifax and, amongst other things, to "bring his bank-book and that cheque for \$6,000." She did so and was with him at the infirmary during his last illness. On the 13th of October, she and her husband's brother, Daniel, being in the room together with the doctor, the alleged gift took place. The only witnesses present were the wife and the brother of the sick man, two of the beneficiaries. It is alleged that there are material differences between the evidence of these witnesses, but, while the evidence of one is somewhat fuller than that of the other, I do not find any contradiction between them. They both concur in the statement that the sick man asked his wife to get him the deposit receipt out of the trunk, that she did so and that, having obtained it, he handed it to his brother Daniel.

(1) 44 Ch. D. 76.

(2) [1902] 1 Ch. 889.

According to the latter's evidence, the deceased told him when he handed it to him

to divide it equally between his wife, his sister Jane and the witness as he didn't wish the deposit receipt to have anything to do with his will.

The wife says that, after she gave her husband the deposit receipt

he handed it to his brother and asked him to make out three orders or cheques, one for his sister, one for Daniel and one for the witness and that he told his brother to get the money as he did not wish it to have anything to do with his will.

The orders for \$2,000 each, payable on their face, "out of deposit receipt No. 2793, Sydney" were then signed and the deposit receipt handed to the wife by Daniel who says she "took charge of it" and replaced it in the trunk. According to Daniel's testimony the orders were signed at his suggestion after delivery of the deposit receipt to him so "as to show how much each was to get".

There is really no material conflict between the witnesses, but such differences in repeating the history of the transaction as might naturally be expected. Reading them both together I think they show the presence of every essential necessary to effect a valid *donatio mortis causâ*. The gift was made in view of the donor's death and, from the circumstances under which it was made, and what was said about his desire not to put it in his will, it may fairly be implied that it was only to take effect on the donor's then expected death. It was a conditional gift to take effect only upon the death of the donor who, in the meantime, had the power of revocation and might at any time resume the property and annul the gift. The main dispute, as I have said, was as to delivery. I think that was complete. The deposit receipt was brought from its place of safe-keeping by the wife, at her husband's request,

1903
 McDONALD
 v.
 McDONALD.
 Davies J.

1903
 McDONALD
 v.
 McDONALD.
 >—
 Davies J.
 —

placed in his hands and, by him, handed over to his brother with the concurrent request to "divide it equally" between the wife, sister and brother as the latter says, or "to draw three orders or cheques, one for the sister, one for the wife and one for the brother", as expressed in the wife's evidence. The receipt was then handed by Daniel to the wife who "took charge of it" and placed it in the trunk again. There was no attempt or intention to resume possession and dominion by the donor, Dr. McDonald, and no attempt or intention to revoke the gift. As to the place in which the wife placed the receipt, after she took charge of it, there was no evidence to show that her husband knew what became of it after he had handed it to his brother Daniel. It was the most natural place, under the circumstances, for her to have deposited it for safe-keeping. She was living with her husband at the infirmary and I gather in the same room, acting as his nurse. The trunk in which she placed it was open to her and, practically, looking at the then enfeebled condition of her husband, under her control.

On this special point the case of *In re Taylor* (1) is instructive. There the donee had by the directions of her father, the donor, placed the gift, a deposit receipt or note, for safe-keeping in his cash box, of which she had the key for the purpose of obtaining money for household purposes from time to time, and deposited the cash box in a drawer in the bed-room in which they both slept, she being, at the time, his nurse. Sterling J., in delivering judgment, says ;

It was a valuable piece of property and her father simply directed her to keep it where the other valuables were kept but I do not think that that amounted to a resumption of possession by the father.

Here, the deposit receipt was not, in my opinion, in the actual or constructive possession of Dr. McDonald

(1) 56 L. J. Ch. 597

after he had parted with it to his brother Daniel, though, doubtless, he could, at any time before his death, have revoked the gift and resumed possession of and dominion over the document. That right is necessarily incident to gifts of this nature. But he died a few days afterwards without having done so and, on his death, the gift became complete. In my opinion the gift was of the special deposit receipt and carried with it the \$17 of accrued interest. The omission of Daniel to insert the word "interest" in the orders he drew when making the division, does not and cannot in any way affect the question. The interest passed along with the gift of the deposit receipt as much as the principal. *Harcourt v. Morgan* (1).

1903

MCDONALD

v.

MCDONALD.

—
Davies J.
—

Of course, if the conclusion can be reached that it was only the cheques or orders for \$2,000 each that the sick man was disposing of, there could be no question of any interest. But I have reached a different conclusion. I agree with the court below that it was the deposit receipt and all that it represented that he was making a gift of and that Daniel was as much a trustee to divide the interest as he was to divide the principal. If his attempted division was incomplete, that neither defeated the gift nor released him from his duty of making it complete. If the use of the name of the executors of the will is necessary to enable him to obtain the money from the bank, I think he is entitled to have that use.

As to the corroborative evidence, I think once a *donatio mortis causá* of the deposit receipt is found, there is ample "corroboration by material evidence" of the testimony of the plaintiffs in the three orders signed by Dr. McDonald just after he made the gift.

The appeal should be dismissed with costs.

(1) 2 Keene 274.

1903

McDONALDv.
McDONALD.Mills J.

MILLS J.—McDonald, the deceased, was a physician who resided in the town of Sydney, Nova Scotia, and there practised his profession. He became ill of enlargement of the heart and dropsy and went to the infirmary at Halifax for treatment. He had made a will dealing with his property, but he desired that \$6,000 which he had in the Union Bank at Halifax should be disposed of by himself in contemplation of death, and should not be a part of his estate which passed into the hands of his executors.

Shortly before his death he wrote to his wife at Sydney, requesting her to come to Halifax, directing her to make certain arrangements before leaving and to bring with her certain articles and papers, which she did. After his wife reached Halifax Dr. McDonald's brother came to the infirmary, where both he and his wife were to see him, and the doctor asked his wife to take from his trunk the deposit receipt for \$6,000, which he said he wished to divide equally between his wife, his brother Daniel and his sister Jane, as he did not expect to recover, and did not wish that the money for which this deposit receipt was held should appear in his will as part of his estate. To carry out this purpose, he directed his brother Daniel to make out three orders for the division of the sum for which the deposit receipt was held between the three parties named, and these orders were signed by him, and were handed with the deposit receipt to his brother, who placed it in the hands of Dr. McDonald's wife, as custodian for the donees, for I think it is clear that the doctor intended, at that time, to part with the custody of the deposit receipt and did in fact do so and had no intention of regaining possession of it thereafter. The orders for the division of the sum represented by the deposit receipt are, to my mind, very strong corroborative evidence of the gift, and were made for the

purpose of showing the amount that each of the donees was to receive. They testify to this intention under his own hand. It is admitted that if he gave the deposit receipt to the three persons mentioned and so as to divide the sum which it represented between them upon his death, that a good *donatio mortis causá* was made, and this, I think, he did. But it was argued for the appellants that the deposit receipt was taken from the trunk of the deceased, by his direction, that it was returned to the trunk again, and, having been by that act restored to his possession, no matter what may have been his intention, the gift, if one was made, was thereby cancelled, and the possession of the deposit receipt remained in Dr. McDonald. *In re Beak's Estate* (1); *Hewitt v. Kaye* (2); and *In re Beaumont* (3). I do not agree with this view. I do not regard it as consistent with the facts. I think that it was his declared intention to give the money represented by the deposit receipt to the beneficiaries named and to that end he gave the deposit receipt; that it went out of his possession into the possession of his brother who handed it to Dr. McDonald's wife, as one of the donees, to hold it for herself and the other two beneficiaries. Dr. McDonald intended this deposit receipt to be, and it was after the orders were given, in their possession and not in his, and to become their property absolutely upon his death.

1903
 MCDONALD
 v.
 MCDONALD.
 Mills J.

Let us for a moment consider the facts. There can be no dispute of this, that he signed three orders for \$2,000 each, to be paid to the parties out of the deposit receipt. Does this not disclose clearly an intention to divide the sum for which the deposit receipt was held equally between the three donees? Why should he then retain the deposit receipt? Was it not what one

(1) L. R. 13 Eq. 489.

(2) L. R. 6 Eq. 198.

(3) [1902] 1 Ch. D. 889.

1903
 MCDONALD
 v.
 MCDONALD.
 Mills J.

might expect would be done? Is it not a disclosure of an intention to give the money for which the receipt was held and to give the orders to shew how that money was to be divided? He had, under the strictest construction of what he said and did, given orders to the total amount of the principal sum. Can it be supposed that the interest, which amounted to less than \$18, was withheld by the donor, when it is so clear that he intended that each of the donees should receive one-third of the amount of the deposit receipt? It would require but little evidence to shew that he handed over the receipt itself to the beneficiaries. Looking at what he did over his own signature, I think it is more reasonable to hold that he gave to the parties named the whole sum for which the deposit was held, and that the orders which were given were intended to shew simply how the sum was to be divided. It is true that the anxiety which he expressed—that the money should be drawn and divided without delay—might seem to point to a gift *inter vivos*, but, after considering all that was said and done at the time, I have no doubt that a gift *mortis causâ* was intended, and I think that such a gift was effectually made. *Gardner v. Parker* (1).

It is important to look at the surrounding circumstances and to note what passed between the donor, his brother and his wife, and to see whether after the receipt of the deposit was handed to the deceased's brother with the orders, shewing the disposition he had made of it, in the event of his death, he did anything to show that he regarded it as still in his possession, and I think that what was done shows that it was handed by the brother to the sick man's wife, not to return it to the custody of the donor, and so defeat the object which he had expressed, but for safe-keeping

(1) 3 Madd. 102.

for herself and the other donees, and if she put it in his trunk, it was not for the purpose of restoring it to his possession again, but because she thought it was the safest and most convenient place which she had under her control.

The cases which hold that the dying man had not completed his gift but retained possession of his property were cases in which the property was put into some trunk or box by his direction the key of which was brought to him and of which he retained in his possession while he lived. Here the receipt of deposit was in the possession of the wife for herself and the two other beneficiaries and this is confirmed by the orders given upon it.

It is well to consider the nature of the gifts of this class; how they are created, and by what acts they may be destroyed.

A *donatio mortis causa* is (says Story,) a sort of amphibious gift, between a gift *inter vivos* and a legacy; it is not properly cognizable by the ecclesiastical courts; neither does it fall regularly within an administration; nor does it require any act of the executor to constitute a title in the donee. It is properly a gift of personal property by a party who is in peril of death upon condition that it shall presently belong to the donee, in case the donor shall die, but not otherwise.

This, I think, is a good description of this kind of a gift. To be a valid donation the gift must be made with a view to the donor's death; it must be conditioned to take effect only on his death from the existing disorder; and there must be a delivery of the subject of the donation by the donor, or by his direction, to the donee, or to some one for his use; so that the possession of the thing will have passed from the donor to the donee to vest, upon the death of the donor, absolutely in the donee. In my opinion, these conditions were complied with here.

1903
 McDONALD
 v.
 McDONALD.
 Mills J.

1903

MCDONALD

v.
MCDONALD.

Mills J.

In the case of *Lawson v. Lawson* (1) it was held that where a husband on his death bed delivered to his wife a hundred guineas and bade her apply it to her own use, that was a good *donatio mortis causâ*, and should not go to the executors or administrators of the husband if there was sufficient without it to pay his debts.

The Master of the Rolls was of opinion that the purse of gold was a good *donatio mortis causâ*. It was also said, in that case, that if the husband, being ill, draws a bill on his goldsmith to pay his wife a hundred pounds for a mourning outfit, it was but an authority and it was determined by the death of the husband. But the counsel for his wife replied that it was an authority coupled with an interest and, being given for mourning, it could not take effect but upon the testator's death, and, therefore, his death could not be a revocation. The Master of the Rolls doubted whether there could be a *donatio causâ mortis* without an actual delivery to such donee; at least it was a point not settled, and he reserved it for further consideration. Subsequently he delivered his opinion on both these points. He held a delivery of a purse could and must operate as a *donatio mortis causâ ut res magis valeat quam pereat*; because otherwise, one could not give to his own wife, and there being a delivery by a testator in his last illness and when he was so near his end and bidding his wife apply it to no other use than her own, made this part of the case plain; and he cited Swinburne, 18, where it appears there are three sorts of gifts *causâ mortis*, and said this was in the nature of a legacy to the wife.

2dly. As to the bill of one hundred pounds drawn upon his goldsmith, payable to his wife, to buy her mourning, and to maintain her until her life rent (viz. jointure), should come in, this the Master of the Rolls

(1) 1 P. Wms. 441.

held good, and to operate as an appointment; that, if the wife had received the bill in the husband's lifetime it would have been liable to some dispute, but that he apprehended this amounted to a direction to his executors that the one hundred pounds should be appropriated to his wife's use. It might operate like a direction given by a testator touching his funeral, which ought to be observed though not in his will; though the court ought to go as far as it could to assist the meaning of the party in this case. This case illustrates the doctrine as it prevails at present.

In the case of *Miller v. Miller et al.* (1), Miller had a wife and a son, an only child. Two days before his death, he made a will giving his wife one hundred and fifty pounds per annum during her widowhood, in long exchequer annuities. Later, during the same day, he made a codicil by which he gave his wife a further exchequer annuity, and five hundred pounds in money to be paid to her immediately after his death. Subsequently to this, and about an hour before his death, the testator having called his servant to reach his pocket-book, took thereout two bank notes for three hundred pounds each and another note for one hundred pounds (not being a cash note or payable to bearer), all of which notes he ordered his servant to deliver to his wife, who was present, adding that he had not done enough for her. The wife for some time declined to take these, having, as she said, enough already, and that it would injure her son, who was the residuary legatee of the will. Nevertheless, she was at length prevailed upon by her husband to accept of the three bank notes and also the other note, after which the testator, by word of mouth, gave her his coach and a pair of coach horses, bidding three witnesses who were present to take notice of it, and

1903

MCDONALD

v.

MCDONALD.

Mills J.

(1) 3 P. Wms. 356.

1903
 MCDONALD
 v.
 MCDONALD.
 Mills J.

that he was in his senses, who accordingly made a memorandum thereof in writing. A bill was brought in the name of the infant son, by his *prochien amy* against the widow and the executors for an account of the testator's personal estate. The Master of the Rolls held that the gift of the six hundred pounds contained in the bank notes was a *donatio causâ mortis*, which operates as such though made to a wife, for it is in the nature of a legacy, but need not be proved in the spiritual court as a part of the testator's will. Neither are gifts of this kind good unless made by the party in his last sickness. And though in the principal case the sum be the same with the six hundred pounds given by the codicil, yet the manner of giving these notes, together with the expression then made use of by the husband, declaring that he had not sufficiently provided for his wife, manifestly showed them to be designed as additional. On the other hand the wife, declining at first to accept them, appears to have been no craving woman, but then, as to the note for one hundred pounds which was merely a chose in action, and must still be sued in the name of the executors, that cannot take effect as a *donatio mortis causâ*, inasmuch as no property therein could pass by delivery, much less can the widow be entitled to the coach and horses of which there was no delivery in the testator's lifetime. But the doctrine is now well established that not only negotiable notes and bills of exchange, but bills payable to bearer, or indorsed in blank, exchequer notes, and bank bills may be the subject of a *donatio mortis causâ*, because they may and do, in the ordinary course of business, pass by delivery.

In *Bouts v. Ellis* (1), a testator, upon his death bed, gave a cheque of one thousand pounds to his wife, and at his request, she changed it for a cheque of

(1) 21 Eng. Law & Eq. 337; 22 L. J. Ch. 716.

another person for the same amount. The testator's cheque was paid in his lifetime, and after his decease the widow obtained the one thousand pounds upon another cheque given to her in exchange for that which she had received from her husband. It was held by the Master of the Rolls, and affirmed by the Lords Justices on the appeal, that the gift to the wife was complete and that the one thousand pounds did not form part of the husband's estate. The Master of the Rolls said:

My opinion is that this was a trust executed by the testator in his lifetime for the benefit of his wife.

In the case of *Moore v. Darton* (1), Miss Darton lent Moore five hundred pounds for which he gave a signed memorandum, saying it was to bear interest at four per cent, but not to be withdrawn at less than six months notice. In October, 1843, this acknowledgement was given. On the same day a second receipt was given:

Received by Miss Darton, for the use of Ann Dye, one hundred pounds, to be paid to her at Miss Darton's decease, but the interest at four per cent to be paid to Miss Darton. (Signed) William Moore.

Underneath these receipts was written, "I approve of the above. Betty Darton." In June, 1845, Miss Darton fell into a declining state of health, and on the 18th of June she was confined to her bed. She had a conversation at the time with Ann Dye as to the money she had lent to Mr. Moore. The evidence given by Ann Dye was:

I assisted Miss Darton from her bed, and she took from a drawer the two receipts, and placed them in my hands, and at the same time requested me to take care of them, and be sure and not let Mr. Thomas Harley Darton (who was her nephew and the executor named in her will), see them, and not let either of them go out of my possession until after her death, and she then directed me that immediately upon her death I was to give the two receipts or memorandums to William Moore. Her object or purpose in giving me such

1903
 McDONALD
 v.
 McDONALD.
 Mills J.

1903
 McDONALD
 v.
 McDONALD.
 Mills J.

directions as [aforesaid, as she told me, and as I believe, was that she wished that, at her death, the debt or sum of six hundred pounds, so due to her from the said William Moore, should be cancelled.

This case came before Knight Bruce V.C. He said the consequence is that Mr. Moore, having received this money (to the extent of one hundred pounds) became trustee of it for the use of Miss Darton for life, and subject to a life interest for the use of Ann Dye, whom he thought entitled accordingly.

The document now before me, the delivery of which is said to have operated as a *donatio causâ mortis*, delivered with the intention with which it is said to have been delivered, was placed in the hands, not of Mr. Moore, but of Ann Dye. I think, however, upon the evidence, that it was placed in the hands of Ann Dye sufficiently in the character of agent for Mr. Moore, to make it equivalent to a delivery to Mr. Moore; and I think that the intention was that which was sufficient to create a gift *mortis causâ*; and if, therefore, by law, an interest of this description is capable of being made the subject of a *donatio mortis causâ*, this was so.

The authorities have not gone so far as to recognise the donor's unpaid cheque as a valid gift *mortis causâ*, in the hands of his banker; *Hewitt v. Kaye* (1); nor the gift of a bank book as a gift *causa mortis*. In *Beak's Estate* (2).

In *Duffield v. Elwes* (3), it was held that the court of equity, when it carries into effect the interest that the donee has, assumes that the interest is completely vested by the gift, and that the donee has the right to ask for the aid of the court to compel the executor or administrator to carry into effect the donor's intention.

In *Ward v. Turner* (4) the court held that delivery is necessary to make a good *donatio mortis causâ*; that the delivery of certain receipts for stock did not effectuate the gift of the stock; that they might be of some avail to indentify the person coming to receive

(1) L. R. 6 Eq. 198.

(2) L. R. 13 Eq. 489.

(3) 1 Bligh N. R. 497 at p. 530.

(4) 2 Ves. Sr. 431.

the stock, but after that is over, they are nothing but waste paper.

In July, 1859, the question of how far an unindorsed promissory note, payable to the donor or order, may be the subject of a gift *causâ mortis* came before Sir John Romilly, M.R. in the case of *Veal v. Veal* (1) and he held that, according to the latest determination of English courts, such a gift is valid.

In *Reddell v. Dobre*, (2) the deceased being in declining health delivered to Charlotte Redell a locked cash box and told her to go at his death to his son for the key; that the box contained money for herself, and was entirely at her disposal after he was gone, but that he should want it every three months while he lived. The box was twice delivered to the deceased by his desire and he delivered it again to Charlotte Redell and it was in her possession at his death; the box was afterwards broken open and contained a cheque for five hundred pounds drawn by a third party in favour of the deceased and enclosed in a cover indorsed with the name of Charlotte Redell and the key which the son of the deceased had refused to deliver to her had a piece of bone attached to it with her name witten on it. Shadwell V. C. held that there was no *donatio mortis causâ*, for that there was nothing more than that to a certain extent the deceased had put Charlotte Redell in possession of the box but had retained to himself the absolute power over its contents.

All these cases make it clear that the possession of the property must pass to the donee or to some one who holds it for him. The possession cannot continue in the donor and here in the case before us, in my opinion, it did not. *Hawkins v. Blewitt* (3); *Bunn v.*

(1) L. R. 4 Eq. 115; 6 Jur NS 537 (2) 10 Sim. 244.

(3) 2 Esp. 662.

1903
 McDONALD
 v.
 McDONALD.
 Mills J.

1903 *Markham*, (1); *Hassell v. Tynte* (2); *Duffield v. Elwes*,
 McDONALD (3); *Ward v. Turner*, (4).

McDONALD v. Mills J. In re *Mead*; *Austin v. Mead*, (5) a testator who held a banker's deposit note for two thousand seven hundred pounds, two days before his death, proposed to give five hundred pounds of this amount to his wife. At his request a friend filled up a seven day's notice to the bank to withdraw the deposit which the testator signed. The friend took the notice to the bank. The testator afterwards signed a form of cheque, which was on the back of the note, "Pay self or bearer £500"; the note was then handed to his wife. The testator died before the expiration of the seven days' notice. The practice of the bank was, when the customer withdrew a part of the sum which he had placed on deposit, to give him a fresh note for the balance. Upon these facts Lord Justice Fry said :

A gift of a banker's deposit note with a view of giving to the donee the whole of the sum secured by it has been held to be a good *donatio mortis causâ*. A gift of a cheque upon a banker, the cheque not being payable during the donor's life, has been held to be not a good *donatio mortis causâ*.

And this gift was held to be a cheque, for the deposit note was for a very much larger sum than the donation.

With regard to the bills of exchange which were given at the same time, that had not been indorsed, but which were payable to the donor or order, they were held to have been a valid *donatio mortis causâ*. In this respect, *Veal v. Veal* (6) was followed.

In *Clement v. Cheesman* (7) a cheque payable to the donor or order and without having been indorsed by the donor was given during his last illness to his son, and was held to stand upon the same footing as a pro-

(1) 7 Taunt. 224.

(2) Amb. 318.

(3) 1 Bligh N. R. 497.

(4) 2 Ves. Sr. 431.

(5) 15 Ch. D. 651.

(6) 27 Beav. 303.

(7) 27 Ch. D. 631.

missory note or bill of exchange. Chitty J. followed *Veal v. Veal* (1), and held it passed to the son by way of *donatio mortis causâ*. Here Mr. Justice Chitty pointed out that a cheque drawn by a donor upon his own banker cannot be the subject of a *donatio mortis causâ* because the death of the donor is a revocation of the banker's authority to pay. But, when the donor is dealing with the cheque of another man, it stands upon entirely the same footing as a bill of exchange or promissory note, and so it was held that the son held these cheques of third parties as a *donatio mortis causa*.

In *Re Dillon; Duffin v. Duffin* (2), a testator held a banker's depository note for five hundred and eighty pounds. Shortly before his death he filled out upon a stamp a form of cheque indorsed on the note, "Pay self or bearer £580." He handed the document to a relation who was attending him in his last illness, telling her that she was to give it back to him if he recovered, and, if not, she would be all right. It was held that there was a valid *donatio mortis causâ*, and that the gift was not defeated by the giving of the cheque along with the note. No more do I think did the giving of the orders against the deposit receipt in any way invalidate the gift. They merely show how the sum mentioned in the deposit receipt was to be divided between the parties. I therefore hold that a valid *donatio mortis causâ* was made of this deposit receipt for \$6,000 with the accumulated interest.

I think that the testimony of Daniel McDonald and that of Eunice McDonald are in substantial accord; that the deposit receipt was given to them; that Daniel McDonald testifies truly when he says:

I told him he had better give orders to show how much each of us was to get. He then told me to write such orders and he would sign them. I wrote the orders on Union Bank cheques and he signed them.

(1) 27 Beav. 303.

(2) 44 Ch. D. 76.

1903
 McDONALD
 v.
 McDONALD.
 Mills J.

1903

MCDONALD

v.

MCDONALD.

Mills J.

I kept two of them, my own and my sister's, and handed the other to his wife with the deposit receipt.

The deposit receipt remained from that time until his death in the possession of Mrs. McDonald, his wife.

Eunice McDonald testified that the doctor asked her to take a deposit receipt out of his trunk, which she did and handed it to him. He handed it to his brother Daniel and asked him to make out three orders or cheques, one for his sister, one for himself and one for her. She thinks he told his brother to get the money as he did not wish it to have anything to do with his will. Daniel then gave the deposit receipt to her. She took charge of it and put it back in her trunk. She took charge of it, which means that it was, thereafter, in her custody. On cross-examination, she said that she did not understand that the money was to be got at once, but she understood that it was to be got and divided by means of cheques.

I hold that the deposit receipt was given to the respondents by the late Dr. McDonald and was a good *donatio mortis causâ*.

ARMOUR J. (dissenting.)—All the authorities are rightly to the effect that the donor's own cheque given and not acted upon by payment either actually or constructively made, will not constitute a valid *donatio mortis causâ*. Per Buckley J. *In re Beaumont* (1); citing *Hewitt v. Kaye* (2), and *In re Beak's Estate* (3), to which may be added *In re Mead* (4).

And the reason of this is that

speaking broadly the subjects of *donationes mortis causâ* must be things the title to which or the evidence of title to which passes by delivery. *Re Hughes* (5).

(1) 86 L. T. N. S. 410; [1902] 1 Ch. 889.

(2) L. R. 6 Eq. 198.

(3) L. R. 13 Eq. 489.

(4) 15 Ch. D. 651.

(5) 59 L. T. N. S. 586.

The authorities also shew that a cheque is not an equitable assignment of money in the hands of a banker. *Hopkinson v. Forster* (1); *Schroeder v. Central Bank of London* (2); *Shand v. Du Buisson* (3); *Re Beaumont* (4).

1903
 McDONALD
 v.
 McDONALD.
 ———
 Armour J.
 ———

The cheques or orders, therefore, claimed in this suit are invalid either as *donationes mortis causâ* or as equitable assignments and the respondents must fail in their claim so far as they are concerned.

The authorities shew, however, that a deposit receipt such as that claimed by the respondents is the subject of a *donatio mortis causâ*.

The onus of proving such a *donatio mortis causâ* is upon the donee and "cases of this kind demand the strictest scrutiny," and

no case of this description ought to prevail unless it is supported by evidence of the clearest and most unequivocal character. *Cosmahan v. Grice* (5)

and

sound policy requires that the laws regulating gifts *causâ mortis* should not be extended and that the range of such gifts should not be enlarged. *Ridden v. Thrall* (6); *Duckworth v. Lee* (7).

There were only two witnesses who gave evidence in support of the *donatio* of the deposit receipt; Daniel McDonald, the brother of the deceased, and Eunice McDonald, the widow of the deceased, and their evidence, so far as material, was as follows :

Daniel McDonald said :

On the 13th October he asked his wife to take from his trunk, which was in the room at the time, a deposit receipt. She did so and handed it to him. It was a deposit receipt from the Union Bank. He then handed it to me and told me to divide it equally between his wife, his sister Jane and myself, as he did not wish this deposit

(1) L. R. 19 Eq. 74.

(4) 86 L. T. N. S. 410.

(2) 34 L. T. N. S. 735.

(5) 15 Moo. P. C. 215.

(3) L. R. 18 Eq. 283.

(6) 125 N. Y. 572.

(7) [1899] 1 Ir. Rep. 405.

1903
 ~~~~~  
 McDONALD  
 v.  
 McDONALD.  
 ———  
 Armour J.

receipt to have anything to do with his will. \* \* \* \* I told him he had better give orders to shew how much each of us was to get. He told me to write such orders and he would sign them. I wrote the orders on Union Bank cheques and he signed them. I kept two of them, my own and my sister's, and handed the other to his wife with the deposit receipt. \* \* \* \* I do not know where Mrs. McDonald put the deposit receipt when I gave it to her. I thought she put it back into the trunk.

Eunice McDonald said :

The doctor (her husband) asked me to take a deposit receipt out of his trunk, which I did and handed it to him. He handed it to his brother Daniel, and asked him to make out three checks or orders, one for his sister, one for himself and one for me. I think he told his brother to get the money as he did not wish it to have anything to do with his will. Daniel then gave the deposit receipt to me. I took charge of it and put it back into the trunk. \* \* A couple of days after my husband told his brother again to get the money out of the bank and divide it as he did not wish it to have anything to do with his will. I took the deposit receipt in the doctor's trunk to Sydney—(This was after the doctor's death.) \* \* I had another trunk \* \* I did not understand that the money was to be got at once, but I understood it was to be got and divided by means of the cheques \* \* I brought two trunks with me from Sydney, mine and the doctor's.

These witnesses differ materially in their accounts of the transaction, Daniel McDonald saying that his brother handed him the deposit receipt telling him to divide it equally between his wife, his sister Jane and himself, and Mrs. McDonald making no mention of this important fact ; and Daniel McDonald saying, it was at his suggestion that the cheques were made out, and Mrs. McDonald saying that it was by her husband's direction.

The learned trial judge, who saw these witnesses and heard their evidence given, was of the opinion that the evidence of Mrs. McDonald was the correct version of what took place, and his opinion, in this respect, is of great weight.

I am unable to see anything in the evidence of Mrs. McDonald which would warrant the finding of a

1903

MCDONALD

v.  
MCDONALD.

Armour J.

*donatio* of the deposit receipt; her husband used no words of gift with regard to it; he handed it to Daniel McDonald obviously for the purpose of enabling him to make out the orders or cheques, and asked him to make out three orders or cheques, one for his sister, one for himself and one for her, and she understood the money was to be got and divided by means of the cheques; all of which evidence points to the gift of the cheques or orders, but not to the gift of the deposit receipt.

Turning then to the evidence of Daniel McDonald, and assuming that when the deceased handed him the deposit receipt and told him to divide it equally between his wife, his sister Jane, and himself he intended to make a gift of the deposit receipt, that intention was abandoned by his accepting the suggestion of Daniel McDonald and giving the cheques or orders in substitution for it, and that they were given in substitution for it is manifest from the fact that, upon their being given, the deposit receipt was returned; and that they were accepted in substitution of the intended gift of the deposit receipt is also manifest from the fact that Daniel McDonald, to whom the gift was intended to be made, instead of keeping it, as he did his own and his sister's cheques, returned it.

This evidence also points to a gift of the cheques or orders but not to a gift of the deposit receipt.

I asked the respondents' counsel, in the course of the argument, to whom they contended the gift had been made and they answered, to Daniel McDonald, and the question therefore is: Was there a gift made by the deceased to Daniel McDonald of the deposit receipt? It is essential to such a gift that there should be an acceptance by the donee of the thing given, that there should be an actual delivery and a change of possession of the thing given from the donor to the donee, and

1903 that such change of possession should continue until  
 McDONALD the death of the donor.

v.  
 McDONALD. The proposition is not—that the one party has agreed or promised  
 to give, and that the other party has agreed or promised to accept.  
 Armour J. In that case, it is not doubted that the ownership is not changed until  
 a subsequent actual delivery. The proposition before the court on  
 a question of gift or not is—that the one gave and the other accepted.  
 The transaction described in the proposition is a transaction begun  
 and completed at once. It is a transaction consisting of two contem-  
 poraneous acts, which, at once, complete the transaction, so that there  
 is nothing more to be done by either party. The act done by the one  
 is that he gives; the act done by the other is that he accepts. These  
 contemporaneous acts being done, neither party has anything more to  
 do. The one cannot give, according to the ordinary meaning of the  
 word, without giving; the other cannot accept, then and there, such  
 a giving without then and there receiving the thing given. Per Lord  
 Esher M.R., in *Cochrane v. Moore* (1).

The delivery in a *donatio mortis causa* must be such a delivery as to  
 pass the thing out of the dominion of the dying person and put it  
 into the dominion of the person to whom it was given. *Cant v.*  
*Gregory* (2).

And there must be a continuing possession of the donee after the  
 delivery to the time of the donor's death. *Bunn v. Markham* (3).

But it (the common law) does require clear and unmistakable proof  
 not only of an intention to give but of an actual gift, perfected by as  
 complete a delivery as the nature of the property will admit of. It  
 not only requires the delivery to be actual and complete, such as  
 deprives the donor of all further control and dominion, but it requires  
 the donee to take and retain possession till the donor's death.  
 Although the delivery may have been at the one time complete, yet  
 this will not be sufficient, unless the possession be constantly main-  
 tained by the donee. If the donor again has possession the gift  
 becomes nugatory. *Hatch v. Atkinson* (4); *Dunbar v. Dunbar* (5);  
*Basket v. Hassell* (6).

The alleged gift to Daniel McDonald was deficient  
 in all these essentials. There was no acceptance by  
 Daniel McDonald of a gift of the deposit receipt, for  
 when the cheques were drawn and signed by the

(1) 25 Q. B. D. 57.

(2) 10 P. L. R. 564.

(3) 7 Taunt. 224.

(4) 56 Me. 324.

(5) 80 Me. 152.

(6) 107 U. S. R. 602.

deceased he returned it. If he had accepted it he would have taken it and kept it as he did his own and his sister's cheques and would not have returned it as he did.

1903

MCDONALD

v.  
MCDONALD.

Armour J.

There was no actual delivery and change of possession of the deposit receipt from the deceased to Daniel McDonald. There is no ground in the evidence for any contention that Daniel McDonald when, after the cheques were drawn, and signed, he handed the deposit receipt to Mrs. McDonald, he handed it to her in order that she might keep it for him, for nothing was said by him when he handed it to her. She, by her husband's directions, and as his agent, took the deposit receipt out of his trunk, and handed it to him and he handed it to Daniel McDonald and, after the cheques were drawn and signed, Daniel McDonald handed the deposit receipt to Mrs. McDonald who replaced it in her husband's trunk. The proper inference from this is, nothing having been said, that Daniel McDonald handed the deposit receipt to her and she received it in the same capacity in which she had taken it out of her husband's trunk, that is to say, as his agent, and her replacing it in her husband's trunk is consistent with this view and with no other. What was done was precisely the same, in effect, and if the deceased had himself taken the deposit receipt out of the trunk and handed it to Daniel McDonald and the latter had, after the cheques were drawn and signed, handed it to the deceased who replaced it in his trunk. The possession of the deposit receipt by Daniel McDonald did not continue until the death of the deceased, for the deposit receipt was replaced by Mrs. McDonald in the deceased's trunk, and remained there until his death.

It was said in the court appealed from that the donor was not shewn to have been aware that it was

1903  
 McDONALD  
 v.  
 McDONALD.  
 ———  
 Armour J.  
 ———

put back in his trunk, if that would make any difference, which I do not think. But it was shewn that he was present during the whole transaction, and the fair inference is that he was aware of all that took place and nothing to the contrary was shewn. There was, therefore, no gift made by the deceased to Daniel McDonald of the deposit receipt as contended for by the respondents' counsel.

*Re Taylor* (1) does not help the respondent. In that case the donee kept the key of the box in which the subject of the gift was placed and Sterling J. said:

She kept the key and had access to the box and from that it appears that there was a delivery of the note to her in one sense at all events.

But it was contended, in that case, that as the box was the donor's and where he kept his valuables, that his direction to the donee to place the subject of the gift in the box was a resumption of possession of such subject by the donor, although the donee kept the key, but it was held that it was not. If, however, the donor had obtained the key of the box from the donee after such subject was placed in the box, his doing so would doubtless have been held to have been a resumption by him of the possession of the subject of the gift. And that case belongs to a class of cases in which it has been held that the delivery and possession of the key of the depository in which the subject matter of the gift has been placed is an actual delivery and possession of the subject matter. I refer to *Jones v. Selby* (2), and to the comments thereon by Lord Hardwicke, as reported in *Ward v. Turner* (3), at page 443, and as reported in 1 Dickens, 170, at page 172. *In Re Mustapha* (4); *Walker v. Foster* (5); Pollock on Possession, 62.

(1) 56 L. J. Ch. 597.

(2) Finch Prec. Ch. 300.

(3) 2 Ves. Sr. 431 at p. 400.

(4) 8 Times L. R. 160.

(5) 30 Can. S. C. R. 299.

Two American cases were relied upon by the counsel for the respondents; *Corle v. Monkhouse* (1); and *Westerle v. Dewitt* (2). But the former was the case of a gift *inter vivos*, and is not pertinent to this case, and the latter was a decision of the Supreme Court reversing the decision of the Court of Appeal, in neither of which courts was there unanimity. And the decision is not in accord with the English authority nor with the weight of American authority, and the case was not, in its circumstances, like this case, and we should have to go much further than was gone in that case to find a gift of the deposit receipt in this.

I am unable in this case to find any evidence of a gift of the deposit receipt made by the deceased and, if there be any such evidence, having regard to the different accounts of the transaction given by the two witnesses and the finding by the learned trial judge that the account given by Mrs. McDonald was the correct one, I do not see how it can be held to be of the clearest and most unequivocal character.

The two witnesses Daniel McDonald and Eunice McDonald are, however, opposite and interested parties to this action within the meaning of the proviso in section 35 of chapter 163 of the Revised Statutes of Nova Scotia, 1900, to be read in accordance with sections 22 and 23 and subsection 33 of section 23 of the Revised Statutes of Nova Scotia, 1900, and cannot obtain judgment herein on their own testimony unless such testimony is corroborated by other material evidence. *Taylor v. Regis* (3).

Now, the claim, in this case, is of a gift made by the deceased of the deposit receipt, and it is the testimony, if any, of these two witnesses that such gift was made that must be corroborated by other material evidence,

(1) 50 N. J. Eq. 537.

(2) 36 N. Y. 340.

(3) 26 O. R. 483.

1903  
 McDONALD  
 v.  
 McDONALD.  
 Armour J.

1903  
 McDONALD  
 v.  
 McDONALD.

and such other material evidence must be evidence tending to prove that such gift was made by the deceased.

—  
 Armour J. In *Re Finch* (1), Sir George Jessel said :

As I understand, corroboration is some testimony proving a material point in the testimony which is to be corroborated. It must not be testimony corroborating something else—something not material.

And Lindley J. said :

Evidence which is consistent with two views does not seem to me to be corroborative of either. *Re Laws* (2); *Re Ross* (3); *Tucker v. McMahon* (4).

It is said in the court appealed from that the letter sending for the deposit receipt, the illness and absence of hope of recovery on the part of the donor and the orders signed by the donor during this period constitute material evidence.

Evidence of the fact that the deceased wrote from Halifax to his wife at Sydney on the fifth of October telling her, among other things, to come to Halifax, and saying "bring bank-book and that cheque for \$6,000," does not tend to prove that on the fifteenth of October he made a gift either of the bank-book or of the cheque.

Evidence of the fact of the illness and of the absence of hope of recovery on the part of the donor does not tend to prove that during that period he made a gift of the deposit receipt, nor does his signing the orders during that period tend to prove it.

Nor do the orders, nor anything contained in them, tend to prove it. The orders were made payable "out of deposit receipt No. 2793, Sydney," and these words tend rather to negative a gift of the deposit receipt than to prove it, indicating as they do a retention of the deposit receipt and not a donation of it and the deposit receipt shows that these orders did not exhaust the

(1) 23 Ch. D. 267.

(2) 28 Gr. 382.

(3) 29 Gr. 385.

(4) 11 O. R. 718.

amount payable under it. *Re Mead* (1). If the claim had been that the deceased owed the payees named in the cheques or orders or intended to give them the amounts mentioned therein, the cheques or orders would have been corroborative evidence of such a claim, but they are not in any way corroborative of a gift of the deposit receipt.

1903  
 McDONALD  
 v.  
 McDONALD,  
 ———  
 Armour J.  
 ———

The evidence referred to as corroborative of the testimony of these witnesses is the only suggested evidence as being corroborative of it, and it is clearly not so in the sense of the law, and after carefully examining all the evidence, I am unable to find in it any other material evidence such as the law requires, corroborating the testimony, if any, of these witnesses that a gift of the deposit receipt was made by the deceased.

There is nothing said in *Green v. McLeod* (2) which would at all justify a finding that such testimony was corroborated.

In my opinion, the respondents have failed to establish their claim of a gift by the deceased of the deposit receipt, and the appeal should be allowed with costs in this court and in the court appealed from and the judgment of the trial judge should be restored.

*Appeal dismissed with costs.*

Solicitor for the appellant: *J. A. Gillies.*

Solicitor for the respondents Daniel, Jane and Eunice  
 McDonald: *W. A. Henry.*

Solicitor for the respondent, Margaret Mooney: *F. W.  
 Russell.*

(1) 15 Ch. D. 651.

(2) 23 Ont. App. R. 676.