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Case No.:

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
(Mr. Justice Mummery)

Royal Courts of Justice
28th February 1991

B e f o r e :

LORD JUSTICE PURCHAS
LORD JUSTICE NOURSE
and
LORD JUSTICE LEGGATT

MARGARET QUEENIE SEN — Appellant (Plaintiff)
and

JOHN TANFIELD HEADLEY — Respondent (Defendant)

(Transcript of the Shorthand Notes of The Association of Official Shorthandwriters Limited, Room 392, Royal Courts of Justice, and 2 New Square, Lincoln's Inn, London WC2).

MR. DAVID HODGE (instructed by Messrs Bernard Oberman & Co.) appeared on behalf of the Appellant (Plaintiff).
MR. IAN LEEMING Q.C. and MR. NIGEL THOMAS (instructed by Messrs Edwin Coe) appeared on behalf of the Respondent (Defendant).

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JUDGMENT OF THE COURT

LORD JUSTICE NOURSE: Donationes mortis causa may be said to have been an anomaly in our law, both for their immunity to the Statute of Frauds 1677 and the Wills Act 1837 and as exceptions to the rule that there is no equity to perfect an imperfect gift. But both Lord Hardwicke and Lord Eldon, while making to regret the doctrine, established extensions of it beyond a simple gift of a chattel by its delivery; the former to a gift of money secured by a bond, by delivery of the bond; the latter to a gift of money secured by a mortgage of land, by delivery of the mortgage deed. Later decisions have included gifts of other choses in action by delivery of the essential indicia of title. What has never before been directly decided in England is whether the doctrine applies to a gift of land by delivery of the title deeds. Lord Eldon undoubtedly thought that it did not, a view which has generally been assumed to be correct. Now Mr. Justice Mummery has given a decision in line with that assumption and we have to say whether we agree with him or not.

The facts of the case are set out in the judgment of the learned judge [1990] Ch. 728 and need not be repeated at length. Their essentials, which can be stated mainly in the judge's own words, are these. At his death aged 80 on 7th December 1986 the late Mr. Vivian "Bob" Hewett was the owner of an unregistered freehold house, 56 Gordon Road, Ealing, London W5, a substantial, detached, suburban property in a dilapidated condition. He had bought the house in 1936 for £1,100. Before the judge it was estimated to be worth several hundred thousand pounds, being the principal asset of an estate which was sworn for probate purposes at just under £315,000. Mr.Hewett had been married, but had had no children. After many years of separation, he and his wife were divorced in 1977. For over 30 years Mr. Hewett had enjoyed a close friendship with the plaintiff, Mrs. Margaret Sen. For about 10 years from the end of 1954 they lived together as man and wife. Although from about 1964 onwards Mrs. Sen saw less of Mr. Hewett, the judge accepted her evidence that their relationship continued to be a close one and that it could not have been closer if they had actually been husband and wife.

Early in November 1986 Mr. Hewett was admitted to the Hammersmith Hospital suffering from an inoperable cancer of the pancreas. He was informed that his condition would inexorably deteriorate. While he was there Mrs. Sen visited him every day. She also looked after his house, to which she had always had her own set of keys. Amongst the things which he asked her to bring to the hospital was a bunch of keys kept in a drawer of the sideboard. Mr. Hewett wanted to go home to die and on 26th November he left the Hammersmith Hospital. On 2nd December he collapsed on the floor of his bedroom and was admitted to the Ealing Hospital, where Mrs. Sen continued to visit him every day in a room of his own. Mr. Hewett knew that he did not have long to live.

On 4th December, three days before his death and when they were alone together, Mrs. Sen asked Mr. Hewett what she should do about the house if anything should happen to him. Mr. Hewett replied: "The house is yours, Margaret. You have the keys. They are in your bag. The deeds are in the steel box". When she asked about the contents of the house, he said: "Do what you like. It's all yours." Nothing more was said between them about the subject of the house or its contents.

After Mr. Hewett's death Mrs. Sen found in her handbag the bunch of keys which she had brought to the Hammersmith Hospital at his request. She did not know how they came to be there, but believed that Mr. Hewett must have slipped them into the handbag, without her noticing, on one of her many visits to the hospital. In any event, the judge, who accepted Mrs. Sen's evidence throughout, found that Mr. Hewett had delivered the bunch of keys to Mrs. Sen, being the keys referred to by him on 4th December. One of them was what appears to have been the only key to the locked steel box in which the title deeds to the house were kept. Another was the key to a cupboard in the house in which Mrs. Sen found the box a day or two after Mr. Hewett's death. She was not sure whether the cupboard was locked or unlocked. But when she unlocked the box the deeds were inside.

Mr. Hewett died intestate. His next of kin are a sister who lives in South Africa, a nephew who lives in Vancouver and a niece who lives in Brighton. The writ was issued on 13th October 1987. Letters of administration to the estate have since been freshly granted to the nephew, who is now the defendant in the action. Mrs. Sen claims that Mr. Hewett made her a donatio mortis causa of the house by constructive delivery of the title deeds, the only key of the steel box in which they were kept having been delivered to her before Mr. Hewett uttered the words of gift on 4th December. Mr. Hewett having at all times retained his own set of keys to the house, no claim has been made in respect of the contents. For reasons which will appear incidentally in due course, it could not have been argued that there was any delivery of the contents.

There have been several judicial statements of what, in general terms, is necessary to constitute a donatio mortis causa: Cain v. Moon (1896), 2 QB 283, 285 (Lord Russell of Killowen C.J.); re Craven's Estate (1937) Ch. 423, 426 (Farwell J.); and Delqoffe v. Fader (1939) Ch. 922, 927 (Luxmoore L.J.). Regard must also be had to what was said by this court in Birch v. Treasury Solicitor (1951) Ch. 298, the most authoritative of the modern decisions. If the question whether the subject matter is capable of passing by way of donatio mortis causa is put on one side, the three general requirements for such a gift may be stated very much as they are stated in Snell's Equity, 29th ed., 380-383. First, the gift must be made in contemplation, although not necessarily in expectation, of impending death. Secondly, the gift must be made upon the condition that it is to be absolute and perfected only on the donor's death, being revocable until that event occurs and ineffective if it does not. Thirdly, there must be a delivery of the subject matter of the gift, or the essential indicia of title thereto, which amounts to a parting with dominion and not mere physical possession over the subject matter of the gift.

The trial extended over three days in November 1989, with judgment being reserved. Mr. Justice Mummery gave a very careful judgment. He found no difficulty in holding that the

first and second requirements were satisfied on the evidence and that part of his decision has not been questioned. At page 736 B-C he said:

"The real difficulty in this case is caused by the third requirement which raises acutely the question whether it can ever be complied with in the case of real property when all that has occurred is an informal delivery of title deeds, or the means of access to the title deeds, accompanied by oral words of gift."

It was largely because the judge, after a conscientious review of English and Commonwealth authorities and texts, was of the opinion that that difficulty had not been overcome that he dismissed the action. He also regarded it as an area where judicial caution and certainty of precedent were appropriate and as one where the policy of the law in regard to the formalities for the creation and transmission of interests in land should be upheld. Against the judge's decision Mrs. Sen has now appealed to this court.

Although donationes mortis causa were taken from the Roman law, it is only the first two requirements which now bear evidence of that ancestry. They are embodied in the definition given in the Institutes, Book II, Title VII, sc: "Mortis causa donatio est, quae propter mortis fit suspicionem etc. ...", which was adopted by Lord Loughborough L.C. in Tate v. Hilbert (1793) 2 Ves. 111, 119. With regard to the third requirement, the judgment of Lord Hardwicke L.C. in the leading case of Ward v. Turner (1752) 2 Ves Sen. 431 shows that the necessity for a delivery in every case and the acts sufficient for that purpose are developments of English law. Moreover, while Roman law allowed every form of property which could be bequeathed by will as a legacy to be the subject of a donatio mortis causa, including, it would seem, land whether free from mortgage or not (see the argument of Mr. Longley in Duffield v. Elwes (1827), 1 Bli. (N.S.) 497, 514), Mr. Hodge, in his excellent argument on behalf of Mrs. Sen, correctly as we think, has not suggested that that is a reliable guide to the species of property which are capable of passing by way of such a gift in English law. We can therefore turn away from the Roman law and give our whole attention to the English authorities.

In Snellgrove v. Baily (1744) 3 Atk. 213 a bond for £100 was given by one Spackman to Sarah Baily, who delivered it to the defendant, saying: "In case I die, it is yours, and then you have something." Sarah Baily having died, the administrator of her estate sued unsuccessfully to have the bond delivered up. Lord Hardwicke L.C. said:

"I am satisfied upon the reason of the thing, and the cases which have been cited, that this is a sufficient donatio causa mortis to pass the equitable interest of this bond on the intestate's death ... . You cannot sue at law without the bond; for though you may give evidence of a deed at law that is lost, yet you cannot of a bond, because you must make a profert of it."

In Ward v. Turner, at page 442, Lord Hardwicke, in expressing the opinion that that decision was correct, enlarged on his reasoning in the case of a bond. He held, however, that there could not be a donatio mortis causa of South Sea annuities by delivery of receipts for the purchase money. There had to be a transfer "or something amounting to that." His decision was evidently influenced by the consideration that, had it been otherwise, "all the anxious

provisions" of the Statute of Frauds (sections 19 to 22 laying down strict formalities for a nuncupative will of personalty) "would signify nothing"; see p. 444.

In Gardner v. Parker (1818) 3 Madd. 184 Leach V-C. made a declaration that the donee of a bond by way of donatio mortis causa, on indemnifying the donor's executors, was at liberty to sue on the bond in their names. He said that Snellqrove v. Baily had established:

"that there may be a donatio mortis causa of a bond, though not of a simple contract debt, nor by the delivery of a mere symbol."

Although it would have been more accurate to say that that proposition had been established by Snellgrove v. Baily and Ward v. Turner together, that was the state of the authorities on bonds when Duffield v. Elwes (1823) 1 Sim. & St. 239 came for decision at first instance, again before Leach V-C.

In Duffield v. Elwes the donor was entitled to principal sums of £2,927 and £30,000 and interest thereon respectively, secured as to the first by a bond and a mortgage of freehold property and as to the second by a mortgage of freehold property alone. On the day before his death the donor, with the intention of giving the bond and the mortgages and the money secured by them to his only daughter, Mrs. Duffield, the other requirements for a donatio mortis causa being satisfied, delivered the bond and the mortgage deeds into her hands. Leach V-C., being of opinion that a mortgage security could not by law be given by way of donatio mortis causa, held that Mrs. Duffield was not entitled to the mortgage moneys, even in the case where the mortgage was accompanied by a bond. He considered the case of a bond to be an exception and not a rule.

Mrs. Duffield appealed to the House of Lords (1827) 1 Bli. (N.S.) 497. The argument was heard on 6th and 10th April and judgment was delivered on 29th June, by which time Lord Eldon had finally surrendered the great seal (1st May 1827). The judgment of the House was embodied in a single lengthy and at times repetitive speech of Lord Eldon. The appeal was allowed and the Vice-chancellor's declaration discharged.

The speech of Lord Eldon must be examined with care. At page 528 he referred to a conversation he had had with the Vice-chancellor at the time of the hearing below, in which he had expressed very great doubt whether a mortgage could be made the subject of a donatio mortis causa. He then proceeded to criticise the premise of the Vice-Chancellor's decision and stated what he thought was the question which had to be decided. This he did more than once and in somewhat differing terms. Thus at p.530, he stated it to be:

"... whether after the death of the individual who had made that gift, the executor is not to be considered a trustee for the donee, and whether on the other hand, if it be a gift affecting the real interest, - and I distinguish now between a security upon land and the land itself, whether if it be a gift of such an interest in law, the heir-at-law of the testator is not by virtue of the operation of the trust, which is created not by indenture but a bequest arising from operation of law, a trustee for that donee."

At pp. 534 to 535, having referred to Gardner v. Parker and

Snellgrove v. Baily, Lord Eldon continued:

"The real question in this case is - not whether this was good as a donatio causa mortis, if the subject of delivery had been a bond alone, but whether the subject of delivery being mortgages, that is, estates in land in one sense of the word, such interests in land as those are can or cannot be made the subject of a donatio causa mortis?"

Between pp. 536 and 540 he considered two other decisions of Lord Hardwicke: Richards v. Syms (1740) Barn. Ch. 90 and Hassel v. Tynte (1756) Antb. 318, in the first of which it had been held that if a mortgagee, with the intention of forgiving the mortgage debt, made a gift of the mortgage deed to the mortgagor, there was a valid gift of the mortgage moneys which was not within the Statute of Frauds. A careful reading of the report suggests that although the mortgagee had died and the action for the recovery of the mortgage moneys was brought by his son and heir, it had in fact been a gift inter vivos. However, in Hassel v. Tynte Lord Hardwicke appears to have treated it as a donatio mortis causa, although he thought the case was "but a very slight precedent;" see (1756) Amb., 319-320. Lord Eldon, on the other hand, considered Richards v. Syms as a precedent of very considerable authority in a case such as Duffield v. Elwes; see (1827) 1 Bli.(N.S.), 538.

In Richards v. Syms, at pp.92-93, Lord Hardwicke said:

"The Statute [of Frauds] indeed lays down a very strict but proper rule, relating to real estates, that no interest, any longer than for three years, shall pass in them without writing, nor any trust in them for a longer time, unless the trust arises by operation of law. The same rule, by that statute, relates to the devising of real estates. But in all these cases there is a difference, both in law and equity, between absolute estates in fee or for a term of years, and conditional estates for securing the payment of a sum of money. In the case of absolute estates it cannot be admitted of, that parol evidence of the gift of deeds shall convey the land itself. But where a mortgage is made of an estate, that is only considered as a security for money due, the land is the accident attending upon the other; and when the debt is discharged, the interest in the land follows of course. In law the interest in the land is thereby defeated, and in equity a trust arises for the benefit of the mortgagor."

In Duffield v. Elwes, at pp. 539-540, this passage, other than the first two sentences, was cited by Lord Eldon, who interpolated that a trust of the land arose by operation of law when the debt was discharged and likewise when a deed was given. At (1827) 1 Bli. (N.S.) 541, Lord Eldon cited with approval the judgment of Lord Mansfield C.J. in Martin v. Mowlin (1760) 2 Burr. 969, where it was held that a specific legacy of a mortgage entitled the legatee both to the mortgage debt and to the mortgaged property. At p.979, Lord Mansfield said:

"A mortgage is a charge upon the land, and whatever would pass the money will carry the estate in the land along with it to every purpose. The estate in the land is the same thing as the money due upon it - it will be liable to debts - it will go to executors - it will pass by a will not

made and executed with the solemnities required by the Statute of Frauds. The assignment of the debt or forgiving it, will draw the land after it as a consequence: nay, it would do it, though the debt were forgiven only by parol for the right to the land would follow notwithstanding the Statute of Frauds."

Finally, at pp.542-543, Lord Eldon reverted to Lord Hardwicke's reasoning in the case of a bond. He observed that notwithstanding intermediate decisions which had brought about a change in the doctrine of profert, it was admitted that there could be a donatio mortis causa of the money secured by a bond by delivery of the bond. Having then said that in both cases, whether with or without the bond, the deeds had been delivered in such a way that the donor could never have got them back again, he concluded:

"Then the question is, whether, regard being had to what is the nature of a mortgage, contradistinguishing it from an estate in land, those circumstances do not as effectually give the property in the debt as if the debt was secured by a bond only?
The opinion which I have formed is, that this is a good donatio mortis causa, raising by operation of law a trust; a trust which being raised by operation of law, is not within the Statute of Frauds, but a trust which a court of equity will execute; and therefore, in my humble judgment, this declaration must be altered by stating that this lady, the daughter, is entitled to the benefit of these securities ...".

The essentials of Lord Eldon's reasoning in Duffield v. Elwes may be stated as follows. Accepting that money secured by a bond was capable of passing by way of a donatio mortis causa, he explained equity's insistence that the donor's executors should permit their names to be used by the donee in order to recover the money at law as a consequence of a trust to perfect the gift which arose by operation of law on the death of the donor. In reliance on Richards v. Syms and Martin v. Mowlin, he extended that principle to a donatio mortis causa of money secured by a mortgage, holding that a like trust bound the mortgagee's conditional estate in the land in the hands of the heir at law, a trust which, because it arose by operation of law, was not within the Statute of Frauds. In reaching that position, he emphasised the ancillary status of the mortgagee's conditional estate, the mortgage being, in Lord Hardwicke's words, "only considered as a security for money due, the land is the accident attending upon the other", so that the discharge of the debt, in Lord Mansfield's words, "will draw the land after it as a consequence."

Lord Eldon's emphasis of the distinction between the absolute estate of the mortgagor and the conditional estate of the mortgagee necessarily presupposed an opinion, in which the arguments of counsel for Mrs. Duffield had throughout concurred, that the absolute estate could not have passed by delivery of the title deeds. That opinion was based on the provisions of the Statute of Frauds, to which Lord Hardwicke had drawn attention in the clearest possible terms in Richards v. Syms. But those provisions apart, it was not suggested that delivery of the title deeds would not have been a sufficient transfer of the underlying property, any the less than in the case of a bond or a mortgage.

Duffield v. Elwes was followed without comment in Wilkes v. Allington (1931) 2 Ch.104. Although no other decision in England throws any real light on the question whether there can

be a donatio mortis causa of land, there have been important developments of the doctrine in regard to choses in action. Thus in Moore v. Darton (1851) 4 DeG. & Sm. 517 Knight-Bruce V-C, having expressed the opinion, never since doubted, that the Wills Act 1837 did not avoid such gifts, held that there had been a valid donatio mortis causa of a debt of C500 by delivery of a receipt signed by the debtor stating that the debt was to bear interest at a specified rate. A similar decision was given by this court in regard to a banker's deposit note in Re Dillon (1890) 44 Ch.D.76, where the judgments of Cotton and Lindley L.JJ. contain useful statements of the effect of Duffield v. Elwes.

The sufficiency of delivery in the case of a chose in action was considered at length in the judgment of this court (Evershed M.R., Asquith and Jenkins L.JJ.) in Birch v. Treasury Solicitor (1951) Ch.298, where it was held that there had been donationes mortis causa of the money standing in four accounts, by the delivery of a Post Office Savings Bank book and three other bank books of various descriptions. Three questions arose for decision, of which the first has no bearing on the present enquiry. The second (pp.304-306) was whether the delivery of the books had amounted to a parting with dominion over the money in the accounts. The third (pp.306-311) was whether the money in the accounts was capable of passing by way of a donatio mortis causa by delivery of the books.

The second question arose in this way. Three weeks after the delivery of the bank books and four days before her death the donor put her mark on a document requesting one of the banks to make a payment in settlement of an outstanding builder's bill and to debit it to her deposit account with that bank. The arrangements for the transaction were made by one of the joint donees after the donor had said to her: "I would like you to pay this ...". The transaction was relied on as showing that the donor had not parted with dominion over the money in the accounts. But it was held that there had been no antecedent reservation by the donor of a right to deal with the money and that the precatory nature of the request which she had made to the joint donee to pay the bill was consistent with her having parted with dominion. At most there might have been a partial revocation, an effective donatio of the rest being either made or reaffirmed in an interview which took place later in the day on which the request for payment was signed.

The discussion of the third question was largely directed to dispelling the notion that it was necessary for the document delivered to express the terms on which the subject matter of the chose in action was held. This court held, following the opinion of Lord Hardwicke in Ward v. Turner that there had to be a transfer "or something amounting to that", that delivery must be made of "the essential indicia ... of title, possession or production of which entitles the possessor to the money or property purported to be given;" see pp.308 and 311.

It cannot be doubted that title deeds are the essential indicia of title to unregistered land. Moreover, on the facts found by the judge, there was here a constructive delivery of the title deeds of 56, Gordon Road equivalent to an actual handing of them by Mr. Hewett to Mrs. Sen. And it could not be suggested that Mr. Hewett did not part with dominion over the deeds. The two questions which remain to be decided are, first, whether Mr. Hewett parted with dominion over the house; secondly, if he did, whether land is capable of passing by way of a donatio mortis causa.

We have traced the need for there to be a parting with dominion over the subject matter of the gift, i.e. with the ability to control it, to the judgment of Lord Kenyon C.J. in Hawkins v. Blewitt (1798) 2 Esp. 663, where he said:

"In the case of a donatio mortis causa, possession must be immediately given. That has been done here; a delivery has taken place; but it is also necessary that by parting with the possession, the deceased should also part with the dominion over it. That has not been done here."

A similar view was taken in Reddel v. Dobree (1839) 10 Sim. 244 and Re Johnson (1905) 92 L.T. 356. In each of those three cases the alleged donor delivered a locked box to the alleged donee and either retained or took back the key to it; in Reddel v. Dobree he also reserved and exercised a right to take back the box. In each of them it was held that the alleged donor had retained dominion over the box and that there had been no donatio mortis causa.

It appears therefore that the need for there to be a parting with dominion was first identified in cases where the subject matter of the gift was a locked box and its contents. In Birch v. Treasury Solicitor, as we have seen, a similar need was recognised where the subject matter of the gift was a chose in action. Without in any way questioning that need, we think it appropriate to observe that a parting with dominion over an intangible thing such as a chose in action is necessarily different from a parting with dominion over a tangible thing such as a locked box and its contents. We think that in the former case a parting with dominion over the essential indicia of title will ex hypothesi usually be enough.

Mr. Justice Mummery found great difficulty in seeing how the delivery of the title deeds could ever amount to a parting with dominion over the land to the extent that the donor "has put it out of his power to alter the subject matter of the gift between the date of the gift and the date of his death." We respectfully think that that test, which was taken from the judgment of Farwell J. in Re Craven's Estate (1937) Ch. 423, 427, was misunderstood by the judge. Having pointed out that Mr. Hewett retained until his death the entire legal and equitable interest in the house, he continued (1990) Ch. 742H:

"Without taking any action against Mrs. Sen to recover the title deeds from her, he was fully empowered as absolute owner to make a declaration of trust in respect of the house in favour of another person or to enter into a binding contract with another person for the sale of the house. The beneficiary under such a declaration of trust and the purchaser under such a contract would be entitled to an equitable interest in the house which would take priority over any claim that Mrs. Sen would have by way of donatio mortis causa on Mr. Hewett's death."

To that it must be answered that the same objection could be taken in the case of a chose in action. A donor of money secured by a bond or a mortgage who had delivered the bond or the mortgage deed to the donee could in like manner constitute himself a trustee of the benefit of his security for some third party or he could assign it for value. But it has never been suggested that the donor's continuing ability to take either of those steps amounts to a

retention of dominion over the chose in action. We therefore respectfully disagree with the judge's view, if such it was, that a delivery of title deeds can never amount to a parting with dominion over the land. As appears from Birch v. Treasury Solicitor, the question is one to be decided on the facts of the individual case.

We do not suggest that there might never be a state of facts where there was a parting with dominion over the essential indicia of title to a chose in action but nevertheless a retention of dominion over the chose itself. And it is just possible to conceive of someone, who, in contemplation of impending death, had parted with dominion over the title deeds of his house to an alleged donee, nevertheless granting a tenancy of it to a third party; for which purpose proof of the title to the freehold by production of the deeds is not usually necessary. On facts such as those there might be a case for saying that the alleged donor had not parted with dominion over the house. But nothing comparable happened here. It is true that in the eyes of the law Mr. Hewett, by keeping his own set of keys to the house, retained possession of it. But the benefits which thereby accrued to him were wholly theoretical. He uttered the words of gift, without reservation, two days after his readmission to hospital, when he knew that he did not have long to live and when there could have been no practical possibility of his ever returning home. He had parted with dominion over the title deeds. Mrs. Sen had her own set of keys to the house and was in effective control of it. In all the circumstances of the case, we do not believe that the law requires us to hold that Mr. Hewett did not part with dominion over the house. We hold that he did.

Having now decided that the third of the general requirements for a donatio mortis causa was satisfied in this case, we come to the more general question whether land is capable of passing by way of such a gift. For this purpose we must return to Duffield v. Elwes. While that decision was supported by pronouncements from both Lord Hardwicke and Lord Mansfield, we believe that it was for its times creative, if not quite revolutionary. However much he might seek to depreciate the status of the mortgagee's conditional estate, Lord Eldon recognised that a decision in favour of Mrs. Duffield postulated its informal transmission from the heir at law, a transmission which could only be allowed if it gave no offence to the Statute of Frauds and one which he himself, so it seems, had started by thinking was on that ground impossible. The creativity consisted not so much in the articulation of the trust arising on the donor's death, a concept inherent in Lord Hardwicke's judgment in Snellgrove v. Baily, as in its designation as one arising by operation of law; an exception to the statute which was not as well developed then as it has since become. However hard it would have been for him to contemplate the prospect, Lord Eldon had pushed ajar a door which others at another time might open wider.

Section 7 of the Statute of Frauds provided that a declaration of trust of land should be void unless "manifested and proved by some writing signed by the party who is by law enabled to declare such trust or by his last will in writing". Section 8 was in these terms:

"Provided always, that where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law, then and in every such case such trust or confidence shall be of the like force and effect as the same would have been

if this statute had not been made; anything herein before contained to the contrary notwithstanding."

Lord Eldon referred to a donatio mortis causa "raising by operation of law a trust". If he had followed the particular wording of section 8, he would have described it as a trust arising by the implication or construction of law. Sections 7 and 8 were replaced by section 53(1)(b) and (2) respectively of the Law of Property Act 1925. Section 53(2) is in these terms:

"This section does not affect the creation or operation of resulting, implied or constructive trusts."

We have said that the exception now embodied in section 53(2) was not as well developed in Lord Eldon's time as it has since become. Two particular developments may be mentioned. Mr. Hodge referred to the doctrine of proprietary estoppel, whose evolution in the form in which we now know it cannot be dated before Dillwyn v. Llewellyn (1862) 4 De.G.F. & J. 517. Where an application of that doctrine gives the promisee a right to call for a conveyance of the land no doubt it could be said, perhaps it has been said, that that right is the consequence of an implied or constructive trust which arises once all the requirements of the doctrine have been satisfied. Another modern development, one of much wider application, is the constructive trust which arises under the principles of Gissing v. Gissing (1971) AC 886. In general it may be said that the constructive trust has been a ready means of developing our property law in modern times and that the process is a continuing one.

Let it be agreed that the doctrine is anomalous. Anomalies do not justify anomalous exceptions. If due account is taken of the present state of the law in regard to mortgages and choses in action, it is apparent that to make a distinction in the case of land would be to make just such an exception. A donatio mortis causa of land is neither more nor less anomalous than any other. Every such gift is a circumvention of the Wills Act. Why should the additional statutory formalities for the creation and transmission of interests in land be regarded as some larger obstacle? The only step which has to be taken is to extend the application of the implied or constructive trust arising on the donor's death from the conditional to the absolute estate. Admittedly that is a step which the House of Lords would not have taken in Duffield v. Elwes and, if the point had been a subject of decision, we would have loyally followed it in this court. But we cannot decide a case in 1991 as the House of Lords would have decided it, but did not decide it, in 1827. We must decide it according to the law as it stands today.

Has any sound reason been advanced for not making the necessary extension? Having carefully considered the reasons put forward by Mr. Justice Mummery as elaborated in the argument of Mr. Learning Q.C. for the defendant, we do not think that there has. While we fully understand the judge's view that there was a special need for judicial caution at his level of decision, it is notable that the two previous authorities in this court, Re Dillon and Birch v. Treasury Solicitor, have extended rather than restricted the application of the doctrine. Indeed we think that the latter decision may have put others of the earlier authorities on choses in action in some doubt. Moreover, certainty of precedent, while in general most desirable, is not of as great an importance in relation to a doctrine which is as infrequently invoked as this. Finally, while we certainly agree that the policy of the law in regard to the formalities for the

creation and transmission of interests in land should be upheld, we have to acknowledge that that policy has been substantially modified by the developments to which we have referred.

Mr. Justice Mummery also considered the Commonwealth authorities and the views expressed in the texts which have dealt with the question. We agree with him that the two Canadian cases do not really assist us. As for the two Australian decisions at first instance, Watts v. Public Trustee (1949) 50 S.R.(N.S.W.) 130 and Bayliss v. Public Trustee (1988) 12 N.S.W.L.R. 540, we observe that in neither of them does it appear that the arguments covered the full extent of the ground which has been covered in the present case. In particular, it seems that in neither was the inner significance of Lord Eldon's speech in Duffield v. Elwes brought to the court's attention. Moreover, of the views expressed in the texts, none is based on anything more than the briefest discussion of the question. Most, although not quite all, subscribe to the assumption which has generally been made since Lord Eldon's time. There used to be, no doubt there still is, a maxim "communis error facit jus". But the error referred to is one of decision, not of assumption. Here we would say "communis sumptio non facit jus".

We hold that land is capable of passing by way of a donatio mortis causa and that the three general requirements for such a gift were satisfied in this case. We therefore allow Mrs. Sen's appeal.

Appeal allowed with costs here and below. Legal aid taxation of defendants' costs. Application for leave to appeal to the House of Lords refused. Liberty to apply.

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