1892
AUG. 3.
—
APPELLATE CRIMINAL.
—
17 B. 485.

APPEAL against the conviction and sentences passed by Rao Saheb Venkatrao R. Inamdar, Joint Sessions Judge of Bijapur, in the case of *Queen-Empress* v. *Bhimabin Hanmapa*.

The accused was charged under s. 457 of the Indian Penal Code with house-breaking by night with intent to commit rape, and under s. 354 with assaulting the complainant with intent to outrage her modesty.

At the trial the prosecution tendered in evidence a confession made by the accused to the police patel in the presence of the *panch*.

The Sessions Judge admitted this confession on the ground that the police patel was not a police officer within the meaning of ss. 25 and 26 of the Indian Evidence Act.

On this confession as well as on other evidence in the case the accused was convicted under ss. 457 and 354 of the Indian Penal Code respectively, and sentenced to rigorous imprisonment for one year for the first offence, and for six months for the second.

[486] Against this conviction and sentences the accused appealed to the High Court.

There was no appearance for the Crown or for the accused.

JUDGMENT.

JARDINE, J.—The joint Sessions Judge admitted evidence of a confession made by the prisoner to a police patel, holding that a police patel is not a police officer within the meaning of ss. 25 and 26 of the Indian Evidence Act. He thought this novel view of the law is supported by the cases, of *Queen-Empress* v. *Sama Papi* (1) and *The Empress* v. *Ramanjiyya* (2) on Village Munsifs in the Presidency of Madras. But these cases are decided on the view that those Munsifs are Magistrates and not police officers, which cannot be said of police patels in this Presidency. *Vide* the Bombay Village Police Act, 1867. We follow *Queen* v. *Hurribole Chunder Ghose* (3), in which it was held that the term "police officer" in these sections should be read not in any strict technical sense, but according to its more comprehensive and popular meaning, and we are of opinion that the evidence of the confession was inadmissible. But as the conviction can be sustained on the remaining evidence, we dismiss the appeal.

Appeal dismissed.

---

17 B. 486.

APPELLATE CIVIL.

Before Mr. Justice Bayley, Chief Justice (Acting), and Mr. Justice Candy.

BHASKAR PURSHOTAM AND OTHERS (*Original Plaintiffs*), *Appellants v.* SARASVATIBAI (*Original Defendant*), *Respondent.**
[11th August, 1892.]

Hindu law—Verbal gift of immoveable property—Death of the donor—Possession given to the donee by the son of the donor.

One Ganesh Vithal, being possessed of certain lands which were his self-acquired property, died in 1878. On his death-bed he told his son, Purshotam Ganesh, (the plaintiff's father), to give these lands to his (Ganesh Vithal's) daughter,

* Second Appeal No. 337 of 1891.

(1) 7 M. 287. (2) 2 M. 5. (3) 1 C. 207.

the defendant. In the following year (1879) Purshotam by a registered deed of gift gave the lands to the defendant. The deed contained the following recital:—"Our vadil (father) Ganesh Vithal has made a gift to you of his self-acquired lands Nos. 101 and 102 of Mauze Vadgaon for your own and your [487] children's maintenance, and has directed me (Purshotam Ganesh) to execute an instrument according to law. I (Purshotam Ganesh) hereby execute a deed of gift to you." Shortly after the execution of this document, the defendant was put into possession of the lands, and she admittedly continued in possession down to the commencement of this suit in 1888. The plaintiffs, who were the minor children of Purshotam Ganesh, now sought to recover these lands from the defendant, alleging that on the death of their grandfather, Ganesh Vithal, the lands had devolved by inheritance upon his son Purshotam (their father), and contending that the latter had no power to make a gift of them to the defendant. The lower Court found that the question of Purshotam's competency to give the lands did not arise, as they had already been given to the defendant by his father, Ganesh Vithal, and that Purshotam was simply an instrument in carrying out the wishes of his father, and in executing the deed of gift to the defendant. On appeal, the District Judge considered that the point for determination was whether the gift by Ganesh Vithal to the defendant was valid by Hindu law, not having been accompanied by possession. He held the gift to be valid. On special appeal to the High Court,

Held, dismissing the appeal, that whether the gift by Ganesh Vithal to the defendant was to be regarded as a gift, possession being afterwards given to the defendant, or whether Ganesh Vithal was to be regarded as having constituted himself a trustee and having made Purshotam a trustee to carry out his wishes, the defendant was in lawful possession of the lands, and that the plaintiffs had neither by Hindu law nor otherwise, any legal or equitable claim to have the deed of gift to the defendant cancelled.

[R., 21 M. 10 (17); 21 P.L.R. 1901.]

SECOND appeal from the decision of T. Hart-Davies, Acting District Judge of Poona.

Suit to recover land and to set aside an alleged gift. The plaintiffs alleged that the lands in question were the self-acquired property of their grandfather Ganesh Vithal Gharpure, and that after his death his son (the plaintiffs' father), on whom the lands devolved by right of succession and inheritance, made a gift of them to his sister, the defendant, under a registered instrument of gift. The plaintiffs contended that the property being ancestral in the hands of their father, he had no authority to make a gift of it under the Hindu law; they, therefore, sought to set aside the gift and to recover possession of the property from the defendant.

The defendant contended that the gift to her was a valid gift. She stated that owing to her father's death he had not delivered possession of the land, but that after his death she had been put into possession by his (the donor's) son.

[488] The Subordinate Judge held that though the gift to the defendant was not accompanied with the delivery of possession at the time it was made, nevertheless as possession was subsequently delivered, the gift was valid under Hindu law. He rejected the plaintiffs' claim.

The plaintiffs appealed, and the decree being confirmed by the District Judge the plaintiffs then preferred this second appeal.

(Facts in addition to those stated above appear in the judgment).

Purushottam Parashuram Khare, for the appellants (plaintiffs).—Delivery of possession by a donor and the acceptance by the donee are essential to constitute a valid gift under the Hindu law—*Vasudev* v. *Narayan* (1); *Harjivan Anandram* v. *Naran Haribhai* (2); *Lalubhai Surchand* v. *Bai Amrit* (3); Mayne's Hindu Law, paras. 351, 352. In this case the

(1) 7 B. 131. (2) 4 B.H.C.R.A.C.J. 31. (3) 2 B. 299.

1892
AUG. 11.
APPELLATE CIVIL.
17 B. 486.

donor Ganesh did not deliver possession. The gift is, therefore, invalid. Moreover, on the death of Ganesh the lands in question devolved on his son (the plaintiff's father) and were ancestral property in his hands. He could not, therefore, alienate it by way of gift to his sister (the defendant).

The case of *Kali Das* v. *Kanhya Lal* (1) is distinguishable. There the object of the gift was not in the possession of the donor and the dispute was between the donor and a stranger. But in this case the donor Ganesh was in possession of the property and could have given possession to the donee. Further, the dispute here is between the donor's representatives and the donee. Ganesh no doubt directed his son Purshotam to execute a deed of gift. Purshotam, however, could not legally do so, for as soon as the property came to him, it became ancestral in his hands. Ganesh died without effectually completing the gift, and the subsequent delivery of possession by Purshotam could not validate his father's incomplete gift.

Vishnu Krishna Bhatavdekar, for the respondent.—We rely on the case of *Kali Das* v. *Kanhya Lal* (1). At the time of making the gift the donor was on his death-bed at Poona and the property **[489]** was 30 miles distant from that place. Under the circumstances the donor did all in his power to complete the gift. By directing Purshotam to execute a deed of gift to the defendant, Ganesh made him a trustee for her. Purshotam carried out the trust, and after his father's death he was in possession of the property on behalf of the donee and not as his father's heir. The following cases were cited:—*Meherali* v. *Tajudin* (2); *Dharmodas* v. *Nistarini Dasi* (3); *Mahomed Buksh Khan* v. *Hoseini Bibi* (4).

Cur. adv. vult.

JUDGMENT.

11*th August* 1892. BAYLEY, C. J. (Acting).—This suit was instituted by the plaintiffs, who are minors, through their mother and next friend Luxmibai against the defendant, who is sister of the plaintiff's father, Purshotam Ganesh, to recover possession of two pieces of land, measuring, respectively, 21 acres 16 gunthas and 25 acres, 36 gunthas, at Vadgaon, in the Maval Taluka of the district of Poona, which they state in their plaint was the self-acquired property of their grandfather Ganesh Vithal, and which on his death devolved upon their father Purshotam in right of succession and inheritance, and of which he made a gift to his sister, the defendant, under a registered instrument of gift, which by Hindu law he was incompetent to do. They pray for a declaration that their father had no authority to transfer the land in dispute by deed of gift, and for a cancellation of the deed, and for recovery of possession of the property in dispute. They also ask for mesne profits and the costs of the suit.

The defendant by her written statement said that the lands in dispute, which were the self-acquired property of Ganesh Vithal were given to her as a gift; that plaintiffs' father with the consent of their mother setting aside Ganesh's act and receiving Rs. 1,800 got the defendant to have the instrument executed in her favour in the form of a deed of gift; that the reason of the instrument being executed in that form was that there were disputes going on between defendant and her husband in regard to her maintenance, and that, in order that the

(1) 11 I.A. 218=11 C. 121.
(2) 13 B. 156.
(3) 14 C. 446.
(4) 15 C. 684.

amount of her *stridhan* might be secured, she paid a part of the amount [490] of her *stridhan* and got the instrument executed, which was not really a deed of gift, though the plaintiffs have described it to be so, and that, in the event of its being decided that the present suit will lie, the plaintiffs are not entitled to possession of the lands unless the sum of Rs. 1,800 and the costs of suit are paid.

Amongst other issues the following were framed by the Subordinate Judge:—

4. Whether the minor plaintiffs' father had authority to make the alleged *gift*, and whether the lands, the subject of the alleged *gift*, were the self-acquired property or the ancestral property of the plaintiffs' grandfather, and whether he had made a gift of the same?

5. Whether the alleged deed of gift is proved?

The Subordinate Judge found on the 4th issue that the lands, the subject of the gift, were the self-acquired property of the plaintiffs' grandfather, who had made a gift of the same; on the 5th issue he found that the deed of gift was proved, and rejected the plaintiffs' claim with costs.

The plaintiffs appealed on the ground that it was wrong to hold that the grandfather had made a gift of the lands; that the gift, if made, was not legal, as it was not accompanied by possession; and that the evidence was wrongly weighed.

The District Judge considered that the point for determination appeared to be, was the lower Court correct in holding that the *gift* by the grandfather, which was without possession, was valid under Hindu law? No further issue was suggested.

The District Judge held that the actual delivery and acceptance was made after Ganesh's death, so that it was doubtful whether his gift was a valid one or not; that on the general principle of Hindu law that a father's promises are looked upon as binding, and that his dying directions should be obeyed, this gift by his son must be held to be valid. He was inclined to think that the rule that possession must be given during the donor's lifetime is not of universally binding application, and that if the gift is sufficiently proved in other ways it would be valid. Accordingly he thought that the gift by the grandfather [491] was valid, and as to the fact of the gift, there was, he thought, no doubt on the evidence which was believed by the Subordinate Judge, supported as it was by the recital in the deed of gift by the grandfather's son Purshotam. He did not think that the transaction as to Rs. 1,800 rendered the gift by the grandfather invalid, and he dismissed the appeal with costs. The plaintiffs specially appealed to the High Court, and on the argument before us it was contended on their behalf that the gift by Ganesh Vithal not having been accompanied by possession must fail.

The lower Courts have found that the plaintiffs' grandfather Ganesh Vithal on his death-bed told his son Purshotam (the plaintiffs' father) to give the lands in dispute to the defendant (daughter of Ganesh and sister of Purshotam). Ganesh died a few days afterwards in 1878. Purshotam in 1879 by registered deed of gift, as to the execution of which there was no dispute, gave the property to defendant. The deed contained this recital: "Our vadil (father) Ganesh Vithal has made a gift to you of his self-acquired lands Nos. 101 and 102 of mauje Vadgaon for your own and your children's maintenance, and has directed me (Purshotam Ganesh) to execute an instrument according to law. I (Purshotam Ganesh) hereby execute a deed of gift to you."

1892
AUG. 11.
APPEL-
LATE
CIVIL.
17 B. 486.

The Subordinate Judge states that Purshotam in his evidence alleged that the deed of gift was executed by him without any direction from his father so to do; but the Subordinate Judge has held that such allegation was false, as besides the recital in the deed of gift above quoted, the plaintiffs' witness No. 15, Hari Dhonddev, the writer of it, deposed that he wrote the words "that the lands were given to defendant by defendant's father" at the instance of defendant, and that Purshotam gave his assent to the insertion of those words. The writer also stated (says the Subordinate Judge) that the clause restricting the alienation of the lands was inserted in the deed of gift at the instance of Purshotam. The Subordinate Judge said that defendant's witnesses, Hari Ganesh Joshi, maternal uncle of defendant and Purshotam, Hari bin Govinda, tenant of the lands in dispute, and Doorgabai, who lived in defendant's house and [492] who said she used to go and see Ganesh Vithal during his last illness, all deposed that Ganesh Vithal made a gift of the lands to his daughter, and that he did not see any reason for disbelieving such witnesses on this point, especially because they fully corroborated the recital in the deed of gift that the lands had been given to defendant by her father Ganesh Vithal.

The District Judge, as to the fact of the gift by Ganesh Vithal, concurred in the view of the evidence taken on that point by the Subordinate Judge.

The Subordinate Judge towards the conclusion of his judgment said, and we think correctly said, that the question of the competency or otherwise of Purshotam in making a gift of the lands to defendant did not arise, since they were already given by Ganesh Vithal, and Purshotam was simply an instrument in carrying out the wishes of his father and in executing the deed of gift to defendant accordingly.

The Subordinate Judge found that it was proved by Purshotam that on or shortly after the execution of the deed of gift in 1879 defendant was put into possession of the lands in dispute, and that she admittedly continued in possession down to the commencement of this suit in 1888, a period of nine years.

The Transfer of Property Act (No. IV of 1882) is not yet in force in the Bombay Presidency, and the fact that the gift by Ganesh Vithal was a verbal one is no objection to its validity, if such gift was in other respects in accordance with Hindu law. In *Balaram* v. *Appa* (1) Sir M. Westropp, C. J., in delivering the judgment of the Court says: "We must re-collect that by the law of Hindus, who constitute the great majority of the population and landholders of this country, a deed or writing is not necessary to effect the transfer of land. That transfer may be fully effected by verbal contract or gift, if accompanied by possession—6 Moore's I. A. 267, 1 Mad. H. C. Rep. 100." Is, then, the circumstance that in the present case the defendant was not put into possession of the lands in dispute during her father's lifetime, but only in the year after his death, fatal to her right to retain them as against the plaintiffs? There are [493] decisions in this Court that according to Hindu law, in order to give complete validity to a gift of lands as between donor and donee, the donee must be put into possession. It will be sufficient to quote a recent decision in 1882 on this point. In *Vasudev* v. *Narayan* (2), Sir Charles Sargent, C.J., says: "We think the language of the texts set out *in extenso* in *Hargovan* v. *Narran* (3) and at pp. 327 and 328 of Mr. Justice West's

(1) 9 B.H.C.R. 121. (2) 7 B. 131 (132, 133.) (3) 4 B.H.C.R.A.C.J. 31.

1892
AUG. 11.
APPELLATE CIVIL.
17 B. 486.

judgment (1) is too clear and express in requiring delivery and acceptance of the subject of the gift to be effected in the case of land by putting the donee into possession in order to give complete validity to a gift as between donor and donee, and their authority in their literal terms has been too frequently and too long recognized by judicial decisions to allow of that ceremoney (in some form or other) being dispensed with otherwise than by legislative enactment." The case of *Dharmodas Das* v. *Nistarini Dasi* (2), which came before the High Court at Calcutta in 1887, was decided on s. 123 of the Transfer of Property Act, IV of 1882. There a man shortly before his death had in 1883 executed a deed of gift of certain land in favour of his daughter, but it was not shown that possession of the property was delivered to her during her father's lifetime. In a suit by the daughter to recover possession, the District Judge, upholding the decision of the Munsif, held that s. 123 of the Act was applicable to Hindus, and that delivery of possession was no longer, if it ever was, necessary to make valid a gift of immoveable property among Hindus. The High Court, consisting of Mitter and Beverley, JJ., supported the view taken by the District Judge and said (p. 488): "We may, however, state here that it is by no means clear under the Hindu law that, to make a gift of immoveable property valid and complete, delivery of possession is essentially necessary. What is laid down in the Hindu law is this, that to constitute a valid gift there must be acceptance by the donee, and one of the modes of acceptance in gifts of immoveable property is delivery of possession on the part of the donor and receipt of possession by the donee." In *Maharaja Moheshur Buksh Singh* v. *Mussamut* [494] *Gunoon Koonwar* (3) decided by Kemp and Markby, JJ., in 1866, it was held that the absence of seisin is no objection to the validity of a gift by a Hindu.

Mr. Mayne in his valuable Treatise on Hindu law, s. 351, says that few propositions have been laid down with more confidence than the doctrine that under Hindu law a gift is invalid without possession. Yet Hindu law, properly so called, appears to lay little stress on any such rule as specially applicable to gifts. Gifts, he says, have always been favoured by the Brahmin lawyers, for the obvious reason that they were generally made to Brahmins. The early sages, says Mr. Mayne, discuss the Law of Gifts with special reference to their liability to resumption. That depends on the purpose of the gift or the special circumstances of the giver, and he then proceeds to quote the various dicta of the sages on the point.

During the argument before us, Mr. Khare, pleader for the plaintiffs, called our attention to the evidence of Hari bin Govinda, the tenant of the lands in dispute, who had been present when Ganesh Vithal had made the gift to the defendant, a witness whose statement the lower Courts saw no reason to disbelieve, who stated in cross-examination that Ganesh Vithal said that he bought the property to give to his daughter, that if he recovered he would execute a document to her, if not "you (Purshotam) and my own wife are to execute a deed in favour of the daughter." Clearly, therefore, Ganesh Vithal had no intention of resuming his gift. Mr. Mayne in s. 351 quotes Harita as laying it down broadly that "a promise legally made in words but not performed in deed, is a debt of conscience both in this world and the next." That text is given in Colebrooke's Digest, Vol. I, p. 447. At p. 444 of that Digest

(1) 2 B. 299. (2) 14 C. 446. (3) 6 W.R.C.R. 245.

1892
AUG. 11.
APPELLATE CIVIL.
17 B. 486.

another text of Harita is quoted: "He who gives not what he has promised, and he who takes back what he has given, sinks to various regions of torment, and springs again to birth from the womb of some brute animal."

It is stated by the District Judge that the gift was made by Ganesh Vithal when on his death-bed. His daughter, we were [495] told, was living with him at that time, and the District Judge stated that the lands in question, the object of the gift, were about 30 miles distant from the residence of the donor and donee.

A *donatio mortis causa* of moveable property is recognized in Hindu law—1 West and Bühler, 219 (3rd ed.). At Vol. II of that work, p. 747 (Note (*a*)), it is stated that "a father's promises are looked on as binding, unless the performance of them would prevent the fulfilment of some still more sacred duty. But that the Courts will not enforce such obligations except subject to the conditions of the Statute law where that is in force."

In 1878, when this gift was made, there was not, nor is there yet in the Mofussil of this Presidency any legislative enactment applicable to a gift such as the one now in question. We may here notice the case of *Kumara Upendra* v. *Nabin Krishna Bose* (1). There a Hindu, when on his death-bed, caused certain Government papers for the sum of Rs. 30,500 to be given to his son in his presence, saying: "Bring out the papers and give them to my son," but he did not make or direct any endorsement thereof. Subsequently being asked to endorse them he said: "I am very weak, how can I sign so many papers: when I get a little strength I will sign them, what cause have you for being anxious." Phear, J., decided that it was a good *donatio mortis causa*, which had not the same signification in India as in England. The decree was affirmed on appeal, Sir Barnes Peacock, C. J., holding that the gift was not governed by the strict principles of English law, but by the Hindu law. That by English law there was a valid *donatio mortis causa*, but assuming it to be a gift *inter vivos* it was a valid gift by Hindu law. Sir Barnes Peacock said (p. 122): "If the gift were to be governed by the English law, and treated as a voluntary gift without condition, and not as a *donatio mortis causa*, I think the relation of trustee and *cestui que trust* was created between the donor and the donee." See, too, his remarks at p. 123, to the effect that the donor, if he had lived, or his representatives after his death, could not at law have compelled the donee to have returned the Government papers.

[496] We think it cannot be denied that the decisions in this Court as to the necessity for a donee to be put into possession in order to give complete validity to a gift of land according to Hindu law have been more or less affected by the case of *Kali Das Mullick* v. *Kanhya Lal Pundit* (2) decided by the Judicial Committee of the Privy Council in 1884. Three of the Bombay decisions reported in 4 Bom. H. C. Rep., A. C. J., 31; 7 Bom. H. C. Rep., A. C. J., 4; 10 Bom. H. C. Rep., 491, were criticised and explained in the judgment in that case. It was strenuously argued before the Judicial Committee by Mr. Doyne and Mr. Mayne that the deed of gift, which was the basis of the plaintiff's title, was wholly invalid, as the donor was out of possession at the time, and no possession was ever given to the donee, and that a gift by a Hindu is invalid, without delivery of possession and acceptance. Their Lordships, however, held that by Hindu law a gift of property, whether moveable or immoveable,

(1) 3 B.L.R.O.C.J. 113. (2) 11 I. A. 218.

may operate, where no question of resumption arises, to give to the donee a right to obtain possession, and is not invalid by reason of its not being immediately followed by possession; and therefore that where a donor had done all she could to complete the gift, was a party to the suit to set it aside brought by a plaintiff claiming adversely to both parties thereto, and admitted the gift to be complete, it was held that such a gift could not be set aside as utterly invalid because the donor was out of possession, and no possession was ever given to the donee.

In a case that came before the Judicial Committee of the Privy Council in 1888—*Mahomed Buksh Khan* v. *Hosseini Bibi* (1)—where the question was, whether a gift, assuming one to have been made, was good by Mahomedan law, their Lordships say (p. 95): "The other point was, that the gift was invalid because possession was not given. That subject was considered in a case which came before this Board in 1884—*Kali Das Mullick* v. *Kanhya Lal Pundit*, L. R., 11 I. A., 218. There it is stated that the principle on which the rule rests has nothing to do with feudal rules, and that the European analogy is rather to be found in the cases relating to voluntary contracts or transfers [497] where, if the donor has not done all he could to perfect his contemplated gift, he cannot be compelled to do more. In this case it appears to their Lordships that the lady did all she could to perfect the contemplated gift, and that nothing more was required from her. The gift was attended with the utmost publicity, the *hibbanama* itself authorizes the donees to take possession, and it appears that in fact they did take possession. Their Lordships hold, under these circumstances, that there can be no objection to the gift on the ground that *Shahzadi* had not possession, and that she herself did not give possession at the time."

The question as to the right of the defendant in the present case to retain, as against the plaintiffs, the lands, possession of which in fulfilment of his father's directions was given to her by her brother Purshotam in 1879, the year following that in which Ganesh Vithal died, may, we think, be regarded from another point of view. The Subordinate Judge, it will be remembered, considered that the plaintiffs' father Purshotam was simply an instrument in carrying out the wishes of his deceased father Ganesh Vithal.

During the argument of the appeal before us, the Court asked the learned pleaders whether Ganesh Vithal might not be taken to have constituted Purshotam a trustee to carry out his (Ganesh's) intention? As pointed out to us by the pleader for the plaintiffs, Hari bin Govinda, the tenant of the lands in dispute, whose evidence was considered trustworthy by both the lower Courts, had stated that Ganesh Vithal, after saying that if he recovered he would execute a document, added, but if not, Purshotam and his own wife were to execute a deed in favour of the defendant.

The difficulty which arose in some of the transactions, which in previous cases became the subject of judicial decision, owing to their incomplete or imperfect character, does not arise here where everything that was intended by Ganesh Vithal to be done has been done. In the year after his father's death, Purshotam carried out his father's instruction thus far, *viz.*, he executed the document to the defendant, and she was put in possession of the property. Whether in framing that document [498] Purshotam had any power to insert in it the clause prohibiting the

(1) 15 I. A. 81=15 C. 684.

1892
AUG. 11.
APPELLATE CIVIL.
17 B. 486.

defendant from mortgaging, selling or otherwise alienating the lands to any one else, a clause which the Subordinate Judge says Purshotam admits was written by him of his own will and was not inserted at the instance of the defendant, need not now be considered. It is clear that Purshotam executed the document for the purpose of carrying out his father's wishes. It became necessary for him to execute such deed of gift, since owing to his death his father had been unable to execute a formal deed of gift in his lifetime, and which, had he recovered, he intended to have done.

It must be borne in mind that the gift and directions regarding it by Ganesh Vithal were, as found by the lower appellate Court, made and given when he was on his death-bed.

The case of *Duffield* v. *Elwes* (1) (decided by the House of Lords), where a mortgage was held a good subject of *donatio mortis causa*, shows that there may in England be a good *donatio mortis causa* of an instrument which does not pass by delivery, and that the executors of the donor are trustees for the donee for the purpose of giving effect to the gift. In *In re Dillon* (2), which came before the Court of Appeal in 1890, where it was held that a banker's deposit note was a good subject of a *donatio mortis causa*, Cotton, L. J., and Lindley, L. J., in commenting on *Duffield* v. *Elwes* say that in the case of an incomplete voluntary gift *inter vivos* the Court would not interfere to compel either the donor or his executors to perfect it, but that the House of Lords in *Duffield* v. *Elwes* held, and it was established by that decision, that the principle of not assisting a volunteer to perfect an incomplete gift does not apply to a *donatio mortis causa*.

In *In re Richards* (3) decided by Mr. Justice North in 1887, a testatrix by her will, made in 1873, bequeathed a legacy of £150 to her servant, Elien Harris. In 1877 she handed to Cottrell, her solicitor, a promissory note for £200 signed by herself and payable on demand to Ellen Harris, telling Cottrell not to mention the note to any one but Ellen Harris, but on the [499] death of the testatrix to give it to Ellen Harris if she should remain in the service of the testatrix until her death. The testatrix died in 1881 and had never revoked the direction which she had given to Cottrell about the note. It was held that Cottrell was constituted a trustee of the note that he might after the death of the testatrix hand it over to Ellen Harris, if she fulfilled the prescribed condition, and that Ellen Harris was entitled to prove for the amount of the note in the administration of the estate of the testatrix. It was argued on behalf of Ellen Harris that there was a complete gift of the note to her or a declaration of trust of it in her favour, subject only to the condition that she should remain in the service of the testatrix until the death of the latter, and that such condition was fulfilled. On the other side it was contended that the gift of the note was voluntary and was incomplete; it was only intended to be made, not actually made, and that the Court will not aid in perfecting an imperfect voluntary gift. North, J., said (p. 544): "It is sufficient if there was either a complete transfer of the property in the note, or a declaration of trust of it. The testatrix might have made a declaration of trust making herself trustee. It was equally competent to her to make a third person a trustee for the purpose. It appears to me that the note was handed to Mr. Cottrell for the purpose and

(1) 1 Bligh. N. S. 497. (2) 44 Ch. Div. 76. (3) 36 Ch. Div. 541.

1892
AUG. 11.
APPELLATE CIVIL.
17 B. 486.

with the intention expressed by the testatrix at the time when it was given, which intention was never altered down to the time of her death, and that enough was done to constitute him a trustee of the note for Mrs. Brock (*i.e.*, Ellen Harris) in case she should fulfil the prescribed condition. . . . It appears to me that the note was placed by the testatrix in his hands as a trustee in order that he might hand it over to Mrs. Brock upon the happening of the particular event mentioned by the testatrix. It is not necessary to consider what the power of the testatrix might have been in the meantime, if she had changed her mind because she did not do so."

The question whether a person who purchased a Government Promissory Note of the nominal value of Rs. 5,000 in his own name had constituted himself a trustee of it for his daughter, arose in the case of *Hirbai* v. *Jan Mahomed Khalakdina* (1), [500] came before Mr. Justice West, and afterwards before the Court of Appeal consisting of Sir Charles Sargent, C. J., and Bayley, J. Both Courts held that the alleged trust was not established by the evidence, and the suit by Hirbai, the daughter, was dismissed, but without costs, the father's intention that his daughter should have the benefit of the Rs. 5,000, to which, however, he failed to give effect being clear. The law on such subject was very clearly stated by Sir Charles Sargent, C. J., in delivering the judgment of the Court of Appeal. He said (p. 250): "Now the plaintiff's case is that, although there was no complete transfer of the legal ownership in the note, Khalphanbhoy constituted himself a trustee of the note, for the benefit of Hirbai, and that the Court will enforce the trust, although a voluntary one. A long series of authorities in the Courts of Equity in England have established that, although the Court will not assist an incomplete gift, it will give effect to a declaration of trust by the donor when clearly and satisfactorily established. The application of this doctrine to particular cases has, doubtless, given rise to much divergence of opinion; but we think that, having regard to the weight of authority, the law may now be taken to be as stated by Sir G. Jessel in *Richards* v. *Delbridge* (2). "The principle is a very simple one. A man may transfer his property, without valuable consideration, in one of two ways: he may either do such acts as amount in law to a conveyance or assignment of the property, and thus completely divest himself of the legal ownership, in which case the person who by those acts acquires the property takes it beneficially, or on trust, as the case may be; or the legal owner of the property may, by one or other of the modes recognized as amounting to a valid declaration of trust, constitute himself a trustee, and, without an actual transfer of the legal title, may so deal with the property as to deprive himself of its beneficial ownership, and declare that he will hold it from that time forward on trust for the other person. It is true he need not use the words, 'I declare myself a trustee,' but he must do something which is equivalent to it, and use expressions which have that meaning; for, however anxious the Court may be to [501] carry out a man's intention, it is not at liberty to construe words otherwise than according to their proper meaning."

At p. 251 the Chief Justice says: "The equitable doctrine of the transfer of ownership by acknowledgment of trust when it is sought to establish it by oral evidence, requires to be applied in this country with the greatest caution; and we cannot doubt that to allow an acknowledgment of trust to be established by the evidence of interested parties speaking

(1) 7 B. 229.

(2) L. R. 18 Eq. 14.

1892
AUG. 11.
APPELLATE CIVIL.
17 B. 486.

as to conversations which took place seventeen years ago, without the corroboration derived from other evidence pointing irresistibly in the same direction, would be to introduce a most dangerous mode of appreciating evidence in this country and would offer a direct encouragement to perjury."

In the present case no such difficulty or danger exists. From the oral and documentary evidence produced before the Subordinate Judge, both he and the Judge of the lower appellate Court have arrived at the clear conclusion that the lands in question were given by Ganesh Vithal to the defendant, and that as his death a day or two afterwards prevented his carrying out his intention of executing a formal instrument of gift, his son Purshotam executed the deed of gift in obedience to and for the purposes of carrying out the wishes of his father, and possession of the lands mentioned in it was, therefore, given to the defendant. We think that Ganesh Vithal, considering the dying condition he was in, must be taken to have done all or nearly all he could to carry out his intention, but at all events that he must be considered as having constituted himself a trustee and also his son Purshotam a trustee to execute a formal deed of gift of the lands in question to the defendant, although by law no formal deed was necessary. Why Purshotam delayed executing the document for several months, does not clearly appear. When it was at length executed, it had as much binding effect as if it had been executed the day after Ganesh Vithal's death. In executing it, Purshotam was carrying out the trust expressly imposed on him by his father. The property was admittedly the self-acquired property of Ganesh Vithal, and he was at perfect liberty to dispose of it as he thought proper.

[502] The plaintiffs in their ninth ground of appeal presented to this Court object that the lower Court should have construed Ex. 16 (the deed of gift by Purshotam to defendant) and determined the rights of the parties under it. No arguments were addressed to us as to whether or not the defendant, in the events which have happened, took more than a life-interest in the lands in dispute, nor is it necessary for the determination of this appeal for us to consider the extent of the interest which she now has in the property. We cannot gather from the findings on the issues raised in the lower Courts or from the judgments of the Subordinate Judge or of the District Judge that the quality or extent of the defendant's interest in the lands in dispute was either argued or determined.

Upon the whole case, therefore, we are of opinion, whether the gift of the lands in dispute by Ganesh Vithal be regarded as a gift, possession thereof being afterwards given to and taken by the defendant, Ganesh Vithal having, as it appears, bought the property to give to his daughter, or whether Ganesh Vithal be considered as having constituted himself a trustee, and as having also made Purshotam a trustee to carry out his wishes, that the defendant ever since 1879 has been and still is in lawful possession of the lands in dispute, and that the plaintiffs have neither by Hindu law nor otherwise any legal or equitable claim to have the deed of gift (Ex. 16) cancelled or to deprive the defendant of her possession of the property. Consequently the decree of the lower appellate Court must be confirmed and the appeal dismissed with costs on the appellants.

Decree confirmed.