Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Cosnahan v. Grice, from the Isle of Man; delivered 14th July, 1862.

Present:

LORD CHELMSFORD.
LORD KINGSDOWN.
SIR JOHN TAYLOR COLERIDGE.

NO question arises in this case as to the law upon the subject of donations *mortis causa*. It is agreed that in order to constitute a good gift to the Respondent of the money in question, it must have been given in contemplation of death by Mrs. Evans (of which the fact of her being at the time upon her death-bed must be taken to be sufficient proof), and that there must have been a delivery of the subject of the gift to the Respondent. Whether such a gift was, in fact, made, is the question to be decided upon the evidence.

Cases of this kind demand the strictest scrutiny. So many opportunities and such strong temptations present themselves to unscrupulous persons to pretend these death-bed donations that there is always danger of having an entirely fabricated case set up. And without any imputation of fraudulent contrivance, it is so easy to mistake the meaning of persons languishing in a mortal illness, and by a slight change of words to convert their expressions of intended benefit into an actual gift of property, that no case of this description ought to prevail unless it is supported by evidence of the clearest and most unequivocal character. Is the case of the Respondent established by evidence of this nature? The suit commenced by a proceeding peculiar to the island, by which a personal representative having reason to believe that property of the deceased is in the possession of a third person, may cite such person before the Ecclesiastical Court, in order to discover the truth by oral examination.

Upon this first step in the proceedings it appeared by the evidence of two witnesses, who were friends of the Respondent, that she had admitted to them the possession of money, and also of a watch and some rings, which had belonged to the deceased, and that to one of them she had stated the exact amount of the money, though he remembered only that it was 400*l.* and upwards. Upon this evidence the Vicar-General made an order that the Respondent should pay to the Appellant the sum of 400*l.*, and should render an account on oath of all rings, watches, bank notes, cash, and other property and effects which belonged to the deceased to her knowledge, or had come into her possession.

This order having been pronounced, the Respondent presented a petition for rehearing, upon which witnesses on both sides were examined, and the whole case was brought before the Court. It appeared that the Respondent was the first cousin of the deceased, and that for about a fortnight of her last illness, during which the deceased was confined to her bed, the Respondent was in the habit of attending and visiting her daily, and sometimes two or three times a day. It was proved that the deceased often expressed her gratitude to the Respondent, but her expressions applied equally to a Miss Dickson, whose attendance on the deceased was similar, both in kind and in degree, to that of the Respondent. The language of the deceased, as stated by a witness, Mrs. Alsop, was "that she often expressed herself grateful to Miss Grice and to Miss Dickson for their kind attention to her, and said, within nine or ten days of her death, It shall not be a little that would repay them for their attention to her."

Mrs. Evans died on the 12th August, 1860. Shortly afterwards the Respondent took the keys which had always been kept by the deceased down to the time of her death, and opened her boxes and drawers, removed from them a watch and some trinkets to which she laid no claim, but which she might have intended to retain for safe custody. She also ripped open the stays in which the money in question was contained, consisting of two bundles of bank notes stitched up in a little bag connected with the stays, and took possession of it. The actual amount of money found in the stays

nowhere appears upon the evidence. To Robert Cochrane, the witness examined at the commencement of the proceedings, the Respondent stated that "she got 100*l.* in the stays, and more money which she had not counted, in several packages." Richard Tuton, another witness examined at the same period of the inquiry, stated that she told him "she had got above 400*l.* in the stays." As the Respondent claims no other money than that which was in the stays, it is not a circumstance favourable to her case that she is unable to furnish any evidence as to the actual amount of the alleged gift. But whatever may have been the money contained in the stays, she undertakes to prove that the whole of it was given to her by the deceased. The only two witnesses who can establish her case are Mrs. Alsop and her daughter, Ada, who were in the service of the deceased down to the time of her death. Their evidence is not satisfactory, as they leave us in great doubt as to the language actually employed by the deceased in making the alleged gift. It appears to be clear that the key of the box in which the stays were deposited by the Respondent, was one of a bunch of keys which was always kept by the deceased in her own possession. This fact would be of no importance if it could be clearly proved that there was a gift and delivery to the Respondent.

But unfortunately the last words used by the deceased when she desired the Respondent to take possession of the stays, upon which, of course, everything depends, are left in the greatest uncertainty. Ada Alsop, in the account of the transaction which she gave to Mr. Adams, stated it thus:—"Mrs. Evans said to the Respondent, 'I want to see you to give you these.' 'What are they?' said Miss Grice. 'My stays.' Miss Grice laid them at the foot of the bed. Mrs. Evans said, 'Oh, no; don't put them there; take them, and take care of them.'" In her examination in the Ecclesiastical Court, she represented the words to have been, "Take them, keep them, and take care of them."

The Respondent herself stated to Mr. Tuton "that Mrs. Evans had given the stays into her hands, and requested that she would take them away and take care of them, that they were for her." It is also doubtful whether the statement of Mrs. Alsop that on the Thursday before Mrs. Evans's death, she

missed the stays, and asked her daughter what had become of them, when she replied, "She has given them to Miss Grice," and Mrs. Evans acquiesced saying, "I gave them to her," can be correct; the last important words not being mentioned by the daughter, who relates the same conversation, and whose attention must have been called to their importance if they occurred, as she adds, "This was in the hearing of the deceased, who was quite able to speak at the time."

This summary of the different accounts which have been given from time to time is not offered with any view of disparaging the witnesses, or of imputing to them any intentional misrepresentation, but merely to show the uncertainty which prevails over a transaction in which clearness and precision are essentially requisite.

It must be observed that all the statements of what was said by Mrs. Evans, with the exception of the Respondent's own account to Mr. Tuton, and Mrs. Alsop's addition of the words of Mrs. Evans on the Thursday before her death, are quite consistent with an intention that the Respondent should take care of the stays in order that they might be forthcoming after her death; the strongest words, "Take them—keep them," being obviously susceptible of this interpretation.

In this difference of statement it is not unimportant to look to other parts of the case, in order to form a judgment of the probability of the story. It may fairly be assumed that the money of which the Respondent possessed herself constituted the bulk of the deceased's personal property. The alleged gift of it was made by a few loose and casual words uttered by the deceased shortly before her death. Now at this time she certainly entertained a serious intention of making a will. The Rev. Mr. Gray proves that, about a week before her death, he recommended her to make her will, as she was not likely to live many days; and she requested him to get Mr. Adams to call upon her for that purpose. It is proved by Mrs. Alsop that the deceased sent for Mr. Adams to make her will but a week before her death; that he came again twice on the Friday, and the second time brought two papers, which are the same as those produced as Exhibits in the cause, the date on one of them being

the 10th August, which would be on the Friday. Now it certainly is most unaccountable that the deceased, who was thus contemplating the disposition of her property by will, should, at the very moment when she must actually have given instructions for it, have been making a loose and informal gift of almost the whole of her personal estate. It appears to be much more probable that, intending to benefit the Respondent by her will, she was anxious to commit to her safe keeping this portion of her property, which it is not unlikely she meant to include in her residuary estate mentioned in the draft will, and to leave to the Respondent, and possibly to Miss Dickson also, to whom she had expressed herself equally indebted for attention during her last illness.

The uncertainty in the terms of the alleged gift, and the apparent improbability of its having been made under the circumstances suggested, renders the conduct of the Respondent, upon the death of Mrs. Evans, most material. There is much justness in the remark made in the course of the argument, that we ought not to lay too much stress upon the conduct of parties with respect to the assertion of their rights, because it is impossible to say how any person will behave under a given state of things. But in a question of doubtful right it is impossible not to take into account the conduct of a party at the time when the right becomes first capable of assertion, and not to allow it its due influence in raising a presumption in favour of or against the claim. If upon the death of Mrs. Evans the Respondent had immediately asserted her right to the money as a gift from the deceased, it would certainly have placed her in a more favourable position, as it would at least have shown her own conviction of the justice of her claim. And it cannot be unfair or unjust to use her conduct as a proof that she had at that time no reliance upon the case which she now endeavours to establish.

Her conduct at this critical period fails entirely to supply the deficiency of her proof, and to explain the uncertainty of her case. Immediately after the death of Mrs. Evans the stays were ripped open and the bundles of notes taken out, and retained by the Respondent, and the stays were replaced in the box. Of course nothing ought to have been dis-

turbed in the house, but if the money was removed, there seems to have been no reason why the stays, which were probably nearly valueless, should have been returned so carefully to the box, and left there till after the funeral. It seems almost as if the Respondent had placed them there to prepare for the orders which she gave to Mrs. Alsop on the night of the funeral, in the presence of the Appellant, to take the stays to her house, to which he is said to have made no objection. The most remarkable part of the case, undoubtedly, is the omission to tell the Appellant that the stays contained money until the Thursday week after the funeral. It does not appear that she informed the Appellant at that or at any other time what was the actual amount of money found in the stays. Mrs. Alsop says that the Appellant stated to her that the Respondent told her it was 100*l.*,—and this seems extremely probable, because this was the exact sum which she said to the witness Robert Cochrane "she got in the stays," and that amount she also told him she had offered to give up to the Appellant. This last fact suggests some remarks extremely prejudicial to the Respondent's case. Was the 100*l.* the real sum contained in the stays? If so, according to her case, it was hers by gift. Why then did she offer to give it up to the Appellant? But if 400*l.* and upwards, and not 100*l.*, was the amount which she found in the stays, why did she conceal the truth and endeavour to stop all further inquiry by offering to give up less than a quarter of the sum of which she had possessed herself? The offer to surrender any part being equally inconsistent with her case with the offer to give up the whole.

The examination of the leading circumstances of the case has shown that the Respondent is very far from satisfying what must be required of her in order to establish such a gift as that which she alleges. She has left her evidence defective in most material particulars; and whatever may be the real merits of her case, she is wholly without the means of establishing it upon a satisfactory foundation. Their Lordships will therefore recommend to Her Majesty to reverse the Judgment of the Staff of Government, and to restore the Order of the Vicar-General.

There will be no costs on either side.