

A Reassessment of the Scope of the Gift *Mortis Causa*

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The origin of the law relating to gifts *mortis causa* can be traced back directly to Roman Law. The definition offered by Justinian is generally agreed to represent accurately the law as it operated in the latter stages of Roman Empire: ¹

A donation *mortis causa* is that which is made to meet the case of death, as when anything is given upon condition that, if any fatal accident befalls the donor, the person to whom it is given shall have it as his own; but if the donor should survive, or if he should repent of having made the gift, or if the person to whom it has been given should die before the donor, then the donor shall receive back the thing given. These donations *mortis causa* are now placed, in all respects, exactly on the footing of legacies....

This rather loose definition of the scope of the gift *mortis causa* has been modified by the common law and its boundaries have been construed more strictly. The following statement of Lord Russell of Killowen, C.J. in *Cain v. Moon* ² has been accepted throughout the common law world as the classic definition of the essential elements of a gift *mortis causa*:

It is... conceded that for an effectual *donatio mortis causa* three things must combine; first, the gift or donation must have been made in contemplation, though not necessarily in expectation, of death; secondly, there must have been delivery to the donee of the subject-matter of the gift; and, thirdly, the gift must be made under such circumstances as shew that the thing is to revert to the donor in case he should recover. This last requirement is sometimes put somewhat differently, and it is said that the gift must be made under circumstances shewing that it is to take effect only if the death of the donor follows;...

Despite the fact that the gift *mortis causa* can be traced back over 2,000 years, the common law courts have constantly reiterated their dislike of this law and their wish that it were abolished or its essential elements defined more strictly. As long ago as 1827,

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¹ Institutes, Lib. II, Title VII. The translated version used here comes from, T.C. Sandars, *The Institutes of Justinian*, 6th ed., (London, 1878).

² [1896] 2 Q.B. 283, at 286. These requirements were adapted in *Levashoff v. Block*, [1921] 1 Ch. 343, *Wilkes v. Allington*, [1931] 2 Ch. 104, *Rose v. Cameron* [1901] F. (Ct. of Sess.-Scotland) 337, and *Szczepkowski v. Eppler*, [1946] 3 D.L.R. 641, at 642 (S.C.C.), per Kerwin J.

in the case of *Duffield v. Hicks*, the Earl of Eldon commented in the House of Lords:³

It would be a much better improvement of the law than many of these improvements which have been lately talked of, if the *donatio mortis causa* were struck out altogether; . . .

The rationale behind the judicial dislike of the gift *mortis causa* is that this type of gift lacks all those formalities and safeguards which the law throws around wills and creates a strong temptation to the commission of fraud and perjury.⁴ To date, however, the words of the Earl of Eldon have gone unheeded in the legislative assemblies of England and Canada.

The purpose of this paper is to show that the judiciary, by appropriately defining the meaning of the first and third requirements of a valid gift *mortis causa*, as stated by Lord Russell in *Cain v. Moon*, seems to have laid the ground-work, possibly unwittingly, for a drastic reduction of the operation of this law. This possible reduction would result in the scope of the gift *mortis causa* being limited to only a tiny proportion of all those cases in which it has traditionally been held valid. Two completely different lines of eighteenth and nineteenth century cases, which were ignored but never overruled by the courts in the first half of the twentieth century, have both been revived within the last twenty years. Although these lines of cases are only of minor importance if treated by the courts in isolation, as has happened in the past, their effect on the law, if used in combination, could be dramatic. The significance of these developments seems to have been overlooked.

The first line of cases has developed around the meaning of the words in the first requirement "...in contemplation, though not necessarily in expectation of death." The words "contemplation" and "expectation" are inherently vague and have frequently been the subject of judicial consideration. The Oxford English Dictionary defines "contemplation" as "prospect, expectation;" and is thus

³ (1827), 1 Dow & Cl. 1, at 8; 6 E.R. 425, at 428.

⁴ *Hall v. Hall* (1891), 20 O.R. 684, at 688, *per* Ferguson, J., referring to *Hatch v. Atkinson*, 56 Me. at 326. Cf. the similar stand taken by American courts: for example, in *Parker v. Copland* (1906), 70 N.J.Eq. 685, at 691, 64 A. 129, at 131, the highest court of that State commented:

"Of all legal rules, however, those that have grown up around the doctrine of *donatio causa mortis* should be the least subject to relaxation. Formed as these rules were at a period when personal property consisted for the most part of tangible chattels or private choses in action, they have survived to do duty at a time when fortunes of unprecedented dimensions are evidenced solely by documents that fall within their operation and effect."

clearly unhelpful in this context.⁵ The following propositions effectively summarize the traditional interpretation placed on the meaning of the phrase by the common law courts: firstly, an alleged gift *mortis causa* made by a person not terrified by the apprehension of any present peril, but moved by the general consideration of human mortality, will be held invalid;⁶ secondly, it is essential that the gift be made under apprehension of death from some existing disease or other impending peril;⁷ thirdly, the fact that the donor does not expect to die, although realizing he is in peril of death is irrelevant;⁸ and finally, the donor must die while the original peril is still subsisting, although it is not necessary that he actually die from this original peril.⁹

In 1958, however, this area of law was thrown into confusion by the decision of the Ontario Court of Appeal in *Thompson v. Mechan*,¹⁰ that the donor must be *in extremis* at the time of making the gift. This case was followed four years later by the same court in *Canada Trust Co. v. Labadie*.¹¹ In the former case, Roach, J.A. approved and applied *Cain v. Moon*, but went on to say:

⁵ Shorter Oxford English Dictionary, vol. 1, p. 380.

⁶ "By the term 'in contemplation of death' is meant something more than the general expectancy of death entrusted by all persons and something less than contemplation of imminent death": *In re Eshelman's Estate* (1952), 52 Lanc. Rev. 435, affd., 89 A. 2d 775, 371 Pa. 400.

⁷ "The first essential [requirement for a valid gift *mortis causa*] will not be satisfied by a vague and general impression that death may occur from one of these ordinary risks that attend all human affairs": *Thompson v. Mechan*, [1958] O.R. 357, at 363 — 364, *per* Roach, J.A.

A mere ailing state is insufficient: *Woodbridge v. Spooner* (1819), 3 B. & Ald, 233, 106 E.R. 647.

Mere feebleness due to old age is insufficient, unless it is combined with an illness: *In re Kirkley, Cort v. Watson* (1909), 25 T.L.R. 522.

⁸ *E.g.*, *Braun v. Brown* (1939), 94 P. 2d 348, 14 Cal. 2d 346; *Bergman v. Greenwich Savings Bank* (1947), 74 N.Y.S. 2d 638.

⁹ Despite the decisions in *McDonald v. McDonald* (1903), 33 S.C.R. 145, and *Ward v. Bradley* (1901), 1 O.L.R. 118 (C.A.) to the contrary, it is submitted that the better view is that it is not necessary for the donor to die from the same malady as he contemplated at the time of the alleged gift. Authorities for this proposition are *In Re Richards: Jones v. Rebbeck* [1921] 1 Ch. 513 and *Wilkes v. Allington, supra*, n. 2. The case of *McDonald v. McDonald, supra*, was advanced by counsel for the plaintiff in *Thompson v. Mechan, supra*, n. 7, but was expressly disapproved by MacKay, J.A., at p. 359.

See H.E. Read, "Gifts 'Mortis Causa' — Necessity for Death in Manner Contemplated by Donor" (1931), 9 Can. B. Rev. 663, for a review of the authorities pertaining to this point of law and the rationale behind the decision in *Wilkes v. Allington*.

¹⁰ *Supra*, n. 7.

¹¹ [1962] O.R. 151; 31 D.L.R. (2d) 252 (C.A.).

In English Law, a *donatio mortis causa* is only valid when made in contemplation of death from a cause that is proximate, either an existing or immediately impending peril, placing the donor *in extremis*.¹²

In the latter case, the same judge, without citing *Thompson v. Mechan*, commented:¹³

It is impossible on the evidence to hold that at the various times when he delivered possession to the respondent, he was by reason of his then physical condition, and the surrounding circumstances, *in extremis*. Such a condition is an essential to a valid *donatio mortis causa*.

There is clearly need of an authoritative ruling from the Supreme Court of Canada as to the meaning of the phrase "in contemplation, though not necessarily in expectation of death" now that the validity of the traditional interpretation of the first requirement of *Cain v. Moon* appears to have been cast into doubt by the Ontario Court of Appeal. However, owing to the comparative infrequency of appeals in this area of law, a ruling will not likely come in the near future. In the meantime, we can only speculate as to the present state of the law.

It should be noted that on the facts there were other grounds in both cases for rejecting the alleged gift, with the result that the necessity of the *in extremis* standard can be treated as a mere *obiter dictum*. In *Thompson v. Mechan*, the deceased, who was very apprehensive of flying, delivered the keys of his car and the vehicle permit to the plaintiff shortly before departing on a regular flight to Winnipeg. The deceased arrived safely, but died suddenly from a coronary thrombosis two days later whilst still in Winnipeg. Roach, J.A. observed¹⁴ that air travel is not a sufficient peril for the possible application of the law on gifts *mortis causa*, and that even if it were, the gift would still fail because the deceased did not die from the peril itself or while the original peril was still subsisting.¹⁵

In *Canada Trust Co. v. Labadie*, the donor made three promissory notes payable to the donee with the endorsement "if anything happens causing my death this note is to be paid to [the donee]". Although the donee had possession in the seven month period

¹² *Supra*, n. 7, at 364-5.

¹³ *Supra*, n. 11, at 152; 253.

¹⁴ *Supra*, n. 7, at 364.

¹⁵ It is possible to contend, however, that the original peril was still subsisting in the sense that the deceased still had to take the return flight to Toronto. The result of this argument would depend on whether the round trip is treated as one whole or two separate entities. This point was not raised by counsel.

between the alleged gift and the death of the donor, the latter continued to receive the payments and interest on the notes. Thus the decision can be supported on the ground that the donor retained dominion over the notes.¹⁶

In *Thompson v. Mechan*, the court referred to the old English case of *Hedges v. Hedges*¹⁷ as authority for the adoption of the *in extremis* standard. Megarry, in a critical note on the two Ontario decisions,¹⁸ attempts to remove this "cloak of authority" by showing that the Court of Appeal failed to take notice of the fact that the decision of the court in *Hedges v. Hedges* was later reversed by the House of Lords.¹⁹ Two arguments can be put forward in defence, however. Firstly, it should be noted that the House of Lords did not expressly state that the standard of *in extremis* was wrong, as no reasons were given. Secondly, and perhaps more important, there are several other cases in the eighteenth and nineteenth century upholding the *in extremis* standard to which neither Roach, J.A. nor Megarry referred.²⁰ Although the American courts have consistently rejected the application of the *in extremis* doctrine,²¹ all that can be said on this point as to the English and Canadian law before 1958 is that the weight of authority was against

¹⁶ Cf. *Young v. Derenzy* (1897), 26 Gr. 509; this case can be contrasted with *Charleton v. Brooks* (1903), 6 O.L.R. 87 (H.C.J.).

¹⁷ (1708), Prec. Ch. 269, 24 E.R. 130.

¹⁸ 81 L.Q. Rev. 21, at 22.

¹⁹ (1709), 2 Bro. P.C. 457, 1 E.R. 1062.

²⁰ In *Miller v. Miller* (1735), 2 P. Wms. 356, 24 E.R. 1099, the words "*in extremis*" were not mentioned, but the Master of the Rolls clearly had this strict standard in mind when, referring to an alleged gift *mortis causa*, he commented:

"Neither are gifts of this kind good, unless made by the party in his last sickness."

See also *Walter v. Hodge* (1818), 2 Swans. 92, 36 E.R. 549; *Thorold v. Thorold* (1809), 1 Phill. Ecc. 1, 161 E.R. 894; *Ward v. Turner* (1752), 2 Ves. Sen. 431, 28 E.R. 275; and *Staniland v. Willott* (1850), 3 Mac. & G. 664, 42 E.R. 416.

²¹ See, for example, *Thomas v. First National Bank of Danville* (1936), 166 Va. 497, 186 S.E. 77; *Lawrence v. Hartford National Bank and Trust Co.* (1963), 193 A. 2d 506, 24 Conn. Sup. 419; *Flint v. Varney* (1935), 264 N.W. 277, 220 Iowa 1241; *In re Van Wormer's Estate* (1928), 238 N.W. 210, 255 Mich. 399. The case of *In re Heisler's Estate*, (1913), 85 Misc. 271, 147 N.Y.S. 557, when the Surrogate Court of New York County held that a gift was not one *mortis causa* where the donor was not *in extremis*, or in immediate danger of death, although never expressly overruled, seems to have been ignored.

it: ²² the two Ontario decisions were certainly not without precedent, however.

Even if the observations of Roach, J.A. in *Thompson v. Mechan* and *Canada Trust Co. v. Labadie* are *obiter*, the significance of these decisions for the future of the gift *mortis causa* is dramatic. If the test of *in extremis* is adopted, only a small percentage of alleged gifts *mortis causa* will be declared valid in future compared with the total number that have been upheld in the past under the traditional more relaxed interpretation of the words "in contemplation, though not necessarily in expectation of death."

An examination of the meaning of "*in extremis*" is essential if the precise limits of the operation of the gift *mortis causa* are to be ascertained. Surprisingly, perhaps in view of the number of times the phrase has been used in the law courts, *in extremis* has never been the subject of judicial interpretation. The only definition attempted to date has been by Black's Law Dictionary: ²³

When a person is sick, beyond the hope of recovery and near death, he is said to be *in extremis*.

The only other area of law where the phrase "*in extremis*" comes into consideration is the exception to the rule against hearsay evidence in the case of dying declarations. Although, in this area of law, no definition of "*in extremis*" is given directly, a number of judges have indicated the sort of situations they consider the phrase to include. In *R. v. Woodcock*,²⁴ Eyre, C.B. stated at p. 353:

Now the general principle on which this species of evidence is admitted is, that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone: ...

The requirement was later laid down by Willies in *R. v. Peel*,²⁵ and upheld in several later decisions,²⁶ that the declarant must be under a "settled hopeless expectation of death."

Whether the phrase "settled hopeless expectation of death" will be adopted by the courts as their definition of *in extremis* when

²² The following cases expressly reject the *in extremis* standard: *Hill v. Chapman* (1789), 2 Bro. C.C. 613, 29 E.R. 337; *Blount v. Burrow* (1792), 4 Bro. C.C. 72, 29 E.R. 784; and the Scottish case of *Blyth v. Curle* (1885), 12 R. (Cf. of Sess.) 674.

²³ 4th Ed., p. 701. The same definition is used in the Cyclopaedic Law Dictionary, 3rd Ed., p. 624.

²⁴ (1789), 1 Leach 500, 168 E.R. 352.

²⁵ (1860), 2 F. & F. 21, 175 E.R. 941.

²⁶ See, for example, *Chapdelaine v. R.*, [1935] S.C.R. 53, at 58; *R. v. Buck*, [1941] 1 D.L.R. 302, at 303, [1940] O.R. 444, at 446, 74 C.C.C. 314, at 316; *R. v. Sunfield* (1908), 15 O.L.R. 252 (C.A.), at 256.

considering the validity of an alleged gift *mortis causa* remains to be seen. To date, the judges in those cases which have upheld the validity of the "*in extremis*" test have not had to consider any borderline cases, which would necessarily bring the proper meaning of the phrase into consideration.

One further observation must be made in this context. It appears from *dicta* in some of the cases supporting the *in extremis* standard that in certain limited circumstances the courts may be prepared to make an exception. These *dicta* suggest that a donor may be able to make a valid gift *mortis causa* without necessarily being beyond the hope of recovery, if he has not got the opportunity of making a will.

Roach, J.A. quotes with approval the following *dictum* of Cowper, C. in *Hedges v. Hedges*:

...where a man lies in extremity, or being surprized with sickness, and not having an opportunity of making his will; but lest he should die before he could make it, he gives with his own hands his goods to his friends about him: this, if he dies shall speak as a legacy; but if he recovers, then does the property revert to him.²⁷

There are two possible ways of interpreting the word "opportunity". It could be construed narrowly, simply involving a determination of whether the donor has the time to make a will before his death. If this is the proper interpretation, then the words "opportunity of making his will" would not be a separate condition of validity for a gift *mortis causa* and would simply be explanatory of the first phrase "where a man lies in extremity". Alternatively, however, opportunity could be interpreted broadly, and include consideration of whether the donor has the time to obtain the services of a lawyer to draw up a will. This latter test would lead to a variation in the standard according to the circumstances of each donor: for example, a person living in the wilderness would require far longer to gain the services of a lawyer than would a city-dweller.

A number of *obiter dicta* in American cases seem to indicate that the terms "*in extremis*" and "no opportunity of making his will" are synonymous. For example, Albert, J. in *Flint v. Varney*²⁸ stated:

²⁷ *Supra*, n. 7, at 363, quoting from *Hedges v. Hedges* (1708), Prec. Ch. 269, at 269-270, 24 E.R. 130. This sentence was also cited with approval in the earlier case of *Walter v. Hodge* (1818), 2 Swans. 92, at 107, 36 E.R. 549, at 554.

²⁸ (1935), 264 N.W. 277, at 279. There are similar *dicta* in other American cases.

It is not necessary, however, that the gift be made while the donor is in extremis or moved by apprehension of immediate death when there is no time or opportunity to make a will...²⁹

The fact that American law disapproves of the *in extremis* standard is irrelevant in this context.

The rationale of this area of law would indicate that the narrow interpretation is the more desirable. According to Megarry,³⁰ the lack of an opportunity of making a will was probably one of the reasons for permitting gifts *mortis causa*. However, although it is a reason for permitting gifts of this nature there is no logical reason why it should be interpreted as being a condition of the validity of such a gift. As Denning, L.J. remarked in *Re Wingham*,³¹ in relation to the privileged wills of soldiers: "That would be to confound the reasons for the rule with the rule itself."³²

It is submitted that even apart from the above rationale the narrow interpretation is the more desirable for reasons of consistency. However, it is by no means clear that this is the interpretation that will eventually be assigned to the word "opportunity" by Canadian judges. If Cowper, C. intended to interpret the word narrowly it would seem that he would have done better to rephrase his *dictum* "... where a man lies in extremity, and being surprised with sickness, not having an opportunity of making his will...". By using the word "or" instead of "and" the judge could be construed as implying that the lack of an opportunity of making a will is a completely separate and distinct standard from *in extremis*. This is another area where a ruling from the Supreme Court of Canada would be useful. In the meantime, all that can be said with certainty is that there is a possibility that the judiciary has, in

²⁹ E.g. *Smith v. Clark* (1952), 219 Ark. 751, 244 S.W. 2d 776, per Millwee, J., at p. 780:

"It is not needful that the gift be made *in extremis* when there is no time or opportunity to make a will."

See also *Gray v. Walters* (1952), 243 Iowa 430, 51 N.W. 2d 885, and *In Re Presender's Estate* (1954), 285 App. Div. 109, 135 N.Y.S. 2d 418.

³⁰ *Supra*, n. 18, at p. 22.

³¹ [1949] P. 187, at 196. (C.A.).

³² Note also the following statement by R.E. Megarry in relation to soldiers' privileged wills:

"The reason for granting the privilege is that soldiers on active military service are usually *inops consilii*, but this is no part of the rule that the deceased should in fact have been bereft of competent advice; the motive must not be confused with the rule itself."

(1941), 57 L.Q. Rev. 481, at 482, referred to by the same author in (1965), 81 L.Q. Rev. 21 at 22.

effect, admitted an exception under limited circumstances to the strict standard of "*in extremis*".

It is essential to bear in mind the decisions in *Thompson v. Mechan* and *Canada Trust Co. v. Labadie* when considering the significance of the judicial interpretation of the third requirement of the gift *mortis causa*, as stated in *Cain v. Moon*, in order to be able to assess accurately the scope of this law.

"... Thirdly, the gift must be made under such circumstances as show that the thing is to revert to the donor in case he should recover."

Although the requirement can best be met by proving an oral condition of death expressed by the donor at the time of the alleged gift, the authorities are agreed that in appropriate circumstances the court is prepared to impute this condition when the donor is silent on this issue. Meredith, C.J.O., in *Kendrick v. Dominion Bank and Bownas*,³³ cited with approval the earliest authority on this point, *Gardner v. Parker*,³⁴ where the Vice-Chancellor, Sir John Leach, commented: ³⁵

The doubt here is, that the donor has not expressed that the bond was to be returned if he recovered. This bond was given in the extremity of sickness and in contemplation of death; and it is to be inferred that it was the intention of the donor that it should be held as a gift only in case of his death. If a gift is made in expectation of death, there is an implied condition that it is to be held only in the event of death.³⁶

This presumption is, of course, rebuttable on proof of other circumstances pointing to a different intention on the part of the donor.³⁷ If the donor specifically states, or clearly indicates that despite his serious illness he nevertheless wishes to make an unconditional gift, the courts will treat this as a gift *inter vivos*.

³³ (1920), 48 O.L.R. 539, at 542 (Sup. Ct., App. D.).

³⁴ (1818), 3 Madd. 184, 56 E.R. 478.

³⁵ *Ibid.*, at 185, 478.

³⁶ This comment by the Vice-Chancellor was also cited with approval by Wynn-Parry, J., in *Re Lillingston* [1952] 2 All E.R. 184, at 187 (Ch. D.). The cases of *Lawson v. Lawson* (1718), 1 P. Wms. 441, 24 E.R. 463; *Miller v. Miller* (1735), 3 P. Wms. 356, 24 E.R. 1099; and *Jones v. Selby* (1710), Prec. Ch. 300, 24 E.R. 143 established this rule.

American law is similar on this issue. Cf. *Dietzen v. American Trust and Banking Co.* (1939), 131 S.W. 2d 69, at 71, *per* Dehaven, J.:

"If made in the last sickness of the donor, or while languishing on his deathbed, it will be presumed to have been done in contemplation of death."

³⁷ *Supra*, n. 33, at 543.

This was the point at issue in *Newell v. National Bank of Norwich*,³⁸ where the donor, who was seriously ill with pneumonia and expected to die, delivered a diamond ring to the plaintiff. The circumstances surrounding the case revealed that despite his serious illness the donor had intended to make an irrevocable gift. Cochrane, P.J., of the Appellate Division of the Supreme Court of New York, upheld the validity of this attempted gift and approved the following rule:

The test whether the gift is one *inter vivos* or one *causa mortis* is not the mere fact that the donor is *in extremis*, and expects to die, and does die of that illness, but whether he intended the gift to take effect *in praesenti*, irrevocably and unconditionally, whether he lives or dies.³⁹

Thus far is straightforward. The rationale is that it is very improbable that a man would denude himself absolutely of all he has and leave himself at the mercy even of his brother. Thus it is a logical assumption for the courts to imply the death of the donor as a condition precedent to the validity of the gift if nothing is said to the contrary. However, the matter was thrown into confusion by the decision of a number of judges to extend the logic and hold that if the donor is so ill at the time of the gift that he has no hope of recovery at all then it would be wrong to impute an implied condition of death. What could be more natural than that a man with no hope of recovery should give away his property unconditionally, the argument runs.

The Scottish case of *Lord Advocate v. M'Court*⁴⁰ was the first to hold that after the donor passes a certain extreme degree of illness not only does the presumption in favour of a gift *mortis causa* no longer apply, but in fact an implied presumption that a gift *inter vivos* was intended arises.

The donor in this case, according to the Lord President,⁴¹ was in such a state of health that practically the door of hope of recovery was closed. He was dying of mortification in his leg, and had been worn to a skeleton by the time of the alleged gift. The Lord President did not doubt that the donor, like everybody who saw him, was aware that it was merely a question of time, probably a very short time, before his lease of life would be over.⁴²

In this state of facts, Lord Adam reasoned:

"...the conclusion that a person during his life has divested himself of almost his whole estate is in certain circumstances one which the court

³⁸ (1925), 214 App. Div. 331, 212 N.Y.S. 158.

³⁹ *Ibid.*, at 332, 159. This rule is stated in *Corpus Juris*, Vol. 28, p. 622.

⁴⁰ (1893), 20 R. (Ct. of Sess.) 488.

⁴¹ The Right Hon. J.P.B. Robertson.

⁴² *Supra*, n. 40, at 497.

would have extreme difficulty in reaching. Suppose that a person in the prime of life is said to have made over his estate to somebody else thereby making himself a beggar, it would be very difficult to accept the statement. But it is entirely a question of circumstances, and the presumption arising from the state of man's health may lead to a very opposite conclusion. If a man, as in this case, is on his deathbed, ill of a disease from which there is no hope of recovery, in that case there ceases to be a presumption against his divesting himself, and there arises a presumption that he would do so absolutely, if he transferred his property at all. Therefore, in the particular circumstances of this case, I do not think the presumption is at all against the view that Hugh made an absolute donation of his estate, and I think there is but little to favour the view that the transaction was a donation *mortis causa*."^{42a}

Were it not for the case of *Re Lillingston*,⁴³ it is quite likely that today the decision in *Lord Advocate v. M'Court* would either be ignored or restricted in its application to Scotland. However, in *Re Lillingston*, Wynn-Parry, J. expressed his approval of the decision in the Scottish case despite the fact that he limited its application to only the most exceptional cases of illness and distinguished the facts in the case at bar.⁴⁴

The donor in *Re Lillingston* was a seventy-eight year old lady who at the time of the alleged gift had been in poor health for some months and was confined to her bed by illness. She felt she was "done for", that she was very near her end, and would die without leaving her room again. This was the sort of situation which could conceivably have led to the application of *Lord Advocate v. M'Court*, but the judge held that it was not absolutely certain that the donor would die within a few days, although she thought she was almost certain to die soon: in these circumstances the essential condition of a gift *mortis causa*, that the donor must intend the subject-matter of the gift to revert to him should he recover, was satisfied.

Another case in which the principle in *Lord Advocate v. M'Court* might have been adopted was *Re Mustapha*.⁴⁵ The alleged donor, who was suffering from heart disease, was suddenly taken ill. He was put to bed, and a doctor sent for. After the donor had partially recovered, the doctor left to fetch some medicine, and in his absence the alleged gift was made. The donor sent for the plaintiff and, in the presence of his housekeeper, said: "Lulu, take my purse and keys . . . Put them in your pocket; take the bonds; all is yours. Take care of your brother and sister." When the doctor returned the donor was in a dying state, and expired shortly afterwards.

^{42a} *Ibid.*, at p. 499.

⁴³ [1952] 2 All E.R. 184 (Ch. D.).

⁴⁴ *Ibid.*, at 188-190.

⁴⁵ (1891), 8 T.L.R. 160.

As Wynn-Parry, J. observed,⁴⁶ if the principle in *Lord Advocate v. M'Court* is to be extended beyond its strictest interpretation the decision in *Re Mustapha* should have been the reverse. The words "Take the bonds; all is yours. Take care of your brother and sister," are not the words of a man who thinks he has any chance of recovery.

Thus, the present state of English law appears to be that *Lord Advocate v. M'Court* will only be applied in the most exceptional circumstances. According to Wynn-Parry, J. the correct test to be applied is as follows:

It is not shown by the evidence that [at the time of the alleged gift] Mrs. Lillingston's death was inevitable within the immediate future, and, in my judgment, that must be shown before the reasoning of the Court of Session in *Lord Advocate v. M'Court* can apply.⁴⁷

It is not entirely clear whether the courts will apply a subjective or an objective test as to whether at the time of the gift the death of the donor was "inevitable." It is submitted that a subjective test is preferable, as it is the state of mind of the donor that the courts attempt to ascertain when making a ruling on the validity of the alleged gift in each case. However, the law may well be otherwise if Wynn-Parry is correct in his following comment:

In the present case the evidence does not lead me to the conclusion that [at the time of the alleged gift] it was certain that death would overtake Mrs. Lillingston within a matter of days. No doubt, she felt that she was almost certain to die soon, but that does not appear to me to be sufficient.⁴⁸

Clearly, Wynn-Parry, J. was determined to put the strictest possible interpretation on the reasoning in *Lord Advocate v. M'Court*.

There are a number of vital questions relating to the scope of the gift *mortis causa* that will sooner or later have to be decided by the Supreme Court of Canada. Firstly, there is need of a ruling as to whether Roach, J.A., of the Ontario Court of Appeal, was correct in applying the *in extremis* test to the first requirement for a valid gift *mortis causa*, as stated in *Cain v. Moon*. Secondly, the decision must be faced as to whether the reasoning in *Lord Advocate v. M'Court*, adopted though strictly defined in England in *Re Lillingston*, should be similarly adopted in Canada.

If the answer to these two questions proves to be in the affirmative, then the Supreme Court will be faced with a third, more

⁴⁶ *Supra*, n. 43, at 190.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*, at 189.

difficult, question, — is the “*in extremis*” standard under the first requirement in *Cain v. Moon* co-extensive with the “inevitability of death” standard under the third requirement? The answer to this third question is vital to a proper consideration of the scope of the gift *mortis causa*. If the answer is No, the courts will be faced with the difficult task of distinguishing *in extremis* from inevitability of death. Assuming *in extremis* is defined as a “settled, hopeless expectation of death”⁴⁹ any distinction that is attempted must inevitably be tenuous and unrealistic. If the answer is Yes, the following situation will represent the law. The donor will have to be *in extremis* in order to qualify under the first requirement of *Cain v. Moon*, but if he is, and no words to the contrary are expressed by the donor, he will automatically fall foul of the third requirement, as interpreted by *Lord Advocate v. M'Court* and *Re Lillingston*, as by being *in extremis* he will be deemed to have intended a gift *inter vivos*. Thus, in all situations except those where the donor is *in extremis* yet specifically states that the gift is conditional on his death, and except possibly those cases where the donor has no opportunity of making a will,⁵⁰ the alleged gift *mortis causa* will be declared invalid.

Thus, the demise of the gift *mortis causa*, longed for as far back as 1827 by the Earl of Eldon in *Duffield v. Hicks*,⁵¹ will have been all but achieved.

Possibly the only chance of survival for the gift *mortis causa* would be appropriate legislative action. As mentioned earlier, judicial dislike of the gift *mortis causa* is based primarily on the strong possibility of fraud and perjury. If this source of worry were removed, there would seem to be no logical reason for the courts to interpret the rules relating to gifts *mortis causa* as strictly as occurred in *Lord Advocate v. M'Court*, *Thompson v. Mechan*, and the *Canada Trust Co. v. Labadie*.

To date, however, the only piece of legislation affecting this area of law is s. 14 of The Evidence Act:⁵²

“In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment or decision on his own evidence in respect

⁴⁹ See *supra*, n. 26, for some Canadian cases on this point.

⁵⁰ See *supra*, for a discussion of the authorities on this point.

⁵¹ *Supra*, n. 3.

⁵² R.S.O. 1960, c. 125, as amended by Stats. Ont. 1960-61, c. 24; 1966, c. 51; 1968, c. 36; 1968-69 c. 34.

of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence."⁵³

This section is certainly not effective enough in itself to allay judicial fears. It is submitted that two possible statutory reforms might be considered in this context: firstly, the necessity of corroboration could be strengthened by making a certain number of disinterested witnesses essential;⁵⁴ or a second, and possibly more practical, proposal would be to limit such gifts to articles of small value.⁵⁵

If a case occurred whereby the Supreme Court of Canada is given the opportunity of making a ruling on the scope of the gift *mortis causa* before appropriate legislation is considered, it is quite likely that the court would consider this type of gift so potentially hazardous that it would adopt the strict interpretation of the first and third requirements. By so doing, the court would effectively bring about the demise of the gift *mortis causa*. The onus would thus appear to be on the appropriate legislative assemblies to take immediate action if they consider the gift *mortis causa* worth preserving.

⁵³ Other provinces and territories have enacted similar legislation: Nfld.: The Evidence Act, R.S.N. 1952, c. 120, s. 14; N.S.: The Evidence Act, R.S.N.S. 1967, c. 94, s. 42; P.E.I.: The Evidence Act, R.S.P.E.I. 1951, c. 52, s. 11; Alta.: The Evidence Act, R.S.A. 1970, c. 127, s. 13; B.C.: The Evidence Act, R.S.B.C. 1960, c. 134, s. 11; N.W.T.: The Evidence Ordinance, R.O.N.W.T. 1956, c. 31, s. 15; Y.T.: The Evidence Ordinance, R.O.Y.T. 1958, c. 37, s. 15.

⁵⁴ Justinian was so apprehensive of fraud with respect to gifts *mortis causa* that he required them to be made in the presence of five witnesses.

⁵⁵ Both these proposals were suggested by Ferguson, J., in *Hall v. Hall*, *supra*, n. 4, at 688-689.