Irons v. Smallpiece
106 Eng.Rep.107 (1819)

Trover for two colts. Plea, not guilty. The defendant was the executrix and residuary legatee of the plaintiff's father, and the plaintiff claimed the colts, under a verbal gift made to him by the testator twelve months before his death. The colts, however, continued to remain in possession of the father until his death. It appeared, further, that about six months before the father's death, the son having been [552] to a neighbouring market for the purpose of purchasing hay for the colts, and finding the price of that article very high, mentioned the circumstance to his father; and that the latter agreed to furnish for the colts any hay they might want at a stipulated price, to be paid by the son. None, however, was furnished to them till within three or four days before the testator's death. Upon these facts, Abbott C.J. was of opinion, that the possession of the colts never having been delivered to the plaintiff, the property therein had not vested in him by the gift; but that it continued in the testator at the time of his death, and consequently that it passed to his executrix under the will; and the plaintiff was therefore nonsuited.

Gurney now moved to set aside this nonsuit. By the gift, the property of the colts passed to the son without any actual delivery. In *Wortes* v. *Clifton* (Roll. Rep. 61), it is laid down by Coke C.J., that, by the civil law, a gift of goods is not good without delivery; but, in our law, it is otherwise; and this is recognized in Shepherd's Touchstone, tit. Gift, 226. Here, too, from the time of the contract by the father to furnish hay for the colts at the son's expense, the father became a mere bailee, and his possession was the possession of the son; and an action might now be maintained by the defendant, in her character of executrix, upon that contract, for the price of the hay actually provided.

Abbott C.J. I am of opinion, that by the law of England, in order to transfer property by gift there must either be a deed or instrument of gift, or there must be an actual delivery of the thing to the donee. [553] Here the gift is merely verbal, and differs from a donatio mortis causâ only in this respect, that the latter is subject to a condition, that if the donor live the thing shall be restored to him. Now, it is a well established rule of law, that a donatio mortis causâ does not transfer the property without an actual delivery. The possession must be transferred, in point of fact; and the late case of *Bunn* v. *Markham* (2 Marsh. 532), where all the former authorities were considered, is a very strong authority upon that subject. There Sir G. Clifton had written upon the parcels containing the property the names of the parties for whom they were intended, and had requested his natural son to see the property delivered to the donees. It was therefore manifestly his intention that the property should pass to the donees; yet, as there was no actual delivery, the Court of Common Pleas held that it was not a valid gift. I cannot distinguish that case from the present, and therefore think that this property in the colts did not pass to the son by the verbal gift; and I cannot agree that the son can be charged with the hay which was provided for these colts three or four days before the father's death; for I cannot think that that tardy supply can be referred to the contract which was made so many months before.

Holroyd J. (b). I am also of the same opinion. In order to change the property by a gift of this description, there must be a change of possession: here there has been no change of possession. If, indeed, it could be made out that the son was chargeable for the hay provided for the colts, then the possession of the [554] father might be considered as the possession of the son. Here, however, no hay is delivered during a long interval from the time of the contract, until within a few days of the father's death; and I cannot think that the hay so delivered is to be considered as delivered in execution of that contract made so long before, and consequently the son is not chargeable for the price of it.