Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Richer v. *Voyer and others, from Canada; delivered 21st May*, 1874.

Present:

Sir James W. Colvile.
Sir Barnes Peacock.
Sir Montague Smith.
Sir Robert P. Collier.

THIS is an action brought by the heirs of Madame Voyer against M. Richer, the Appellant, to recover a sum of 2,000 dollars, deposited on behalf of Madame Voyer in the Banque du Peuple of Montreal, upon a Certificate of Deposit payable to her order, and which sum the bank paid to the Appellant after Madame Voyer's death.

The defence was that Madame Voyer had transferred the certificate, which was said to be a negotiable instrument, to the Appellant, by indorsing and delivering it to him as a gift. And whether there was a valid gift of this certificate and of the deposited money is the principal question in the appeal.

The Judge of the Superior Court decided this question in favour of the Appellant, and dismissed the suit, but his judgment was reversed by the unanimous decision of three Judges in the Court of Revision, which was affirmed on appeal by the unanimous judgment of the Court of Queen's Bench.

The Appellant was a grandson of Madame Voyer. He was an advocate, and had managed the property of his grandfather M. Voyer, and, after his death, continued to manage it as the agent of Madame Voyer. It is said the management of this property, which produced a yearly income of 700*l.* or 800*l.*,

took up much of his time, and there is no reason to doubt that he conducted it to the satisfaction of both his grandfather and grandmother. By her will, dated 30th November, 1859, Madame Voyer bequeathed to him a piece of building land at Montreal, declaring it to be to recompense him for the services he had rendered to her and her late husband, and to mark her gratitude for them. Some time afterwards she anticipated this bequest by making a gift of the land to the Appellant by a deed in due notarial form. This deed bears date the 19th February, 1863, and contains a similar declaration to that in the will, that the gift was made to recompense the Appellant for his services.

It is material to state that, soon after her husband's death, Madame Voyer, by a deed of procuration, dated 19th January, 1859, appointed the Appellant, whom she describes as "avocat" to be her "procureur général et spécial," with full power, for her, and in her name, to manage her affairs and receive monies due to her.

The 2,000 dollars were deposited in the bank by the Appellant, as the agent of Madame Voyer, on the 7th September, 1863. The account was opened in her name, and so remained up to the time of her death.

The Certificate of Deposit is as follows :—

(Incorporée par Acte du Parlement.)

$\$2000\frac{00}{100}$

LA BANQUE DU PEUPLE.

No. 249.

Montréal, 7 Septembre, 1863.

O. A. Richer, Ecr., a déposé dans cette banque à intérêt à quatre pour cent par an, la somme de deux mille dollars payable à l'ordre Dame Marie Anne Ste. Marie, lors de la remise du présent certificat. Cette somme pour porter intérêt devra rester au moins trois mois dans cette banque, et le porteur de ce certificat ne pourra la retirer qu'après quinze jours d'avis, l'intérêt cessant du jour de cet avis.

(Signé) G. PELTIER,
Act. pour la Caissier.

(Signé) M. TROTTIER,
Receveur.

It appears from indorsements on the document that four payments were made on account of interest in Madame Voyer's lifetime.

This certificate has the signature of Madame Voyer indorsed on it, and it is not disputed that it was handed by her to the Appellant so indorsed. The time when this was done does not appear; but there is a reasonable presumption that it was before the time when interest was first received, viz., 9th March, 1864, since it was the custom of the bank to require the indorsement before paying it.

It is stated by the Appellant, in his answers to interrogatories, that he never accounted to Madame Voyer for the interest on the deposit, and there is no evidence that he did; but he makes a statement, strongly relied on by the Respondents as inconsistent with his assertion of an absolute gift, to the effect that, when the first interest was received, he offered it to Madame Voyer with the view of giving her pleasure, and she answered, "Garde-les, ils sont à toi."

It appears that the Appellant built houses upon the land given to him, and required money to pay the builder; and that he borrowed a sum of 1,200 dollars, for which he paid interest at the rate of 8 per cent., whilst the deposit of 2,000 dollars, which he alleges to have been his own money by his grandmother's gift, was lying in the bank at 4 per cent. only.

Madame Voyer died on the 17th April, 1867, and the Appellant, on the 7th June following, obtained payment of the 2,000 dollars and interest from the bank.

There is an entire absence of evidence to prove what took place when Madame Voyer endorsed the certificate.

Before referring to the questions of law which have been argued, it is right to point out that the title of the Appellant must rest on donation only. His services may supply motives for a gift, but were rendered in such a way that no contract to pay for them can be implied.

The 776th Article of the Code relates to the form of gifts *inter vivos*:—

"Deeds containing gifts *inter vivos* must, under pain of nullity, be executed in notarial form, and the original thereof be kept of record. The acceptance must be made in the same form. Gifts of moveable property accompanied by delivery may, however, be made and accepted by private writings or verbal agreements."

There being no notarial instrument of gift, the Appellant, to establish his defence, must prove two things—(1) a delivery of the property, and (2) an agreement of gift.

On the first point, his case is, that the certificate is a negotiable instrument, capable of being the subject of "don manuel," and that his possession of it, endorsed by Madame Voyer, satisfies the requirement of the law as to delivery.

Much discussion took place at the Bar on the true nature of this document. On the one side, it was said that it had all the attributes of a promissory note; on the other, that it was an acknowledgment only of the deposit, and that the indorsement was no more than an authority to the holder to receive the money, which, unless coupled with an interest, would be revocable. It appears that certificates of this kind are in common use among bankers in Canada and the United States, and considerable discussion has taken place in those countries as to their legal character. The American and Canadian law does not apparently differ from that of England with respect to the essential qualities of a promissory note. Article 2,344 of the Canada Code thus defines it:—

"A promissory note is a written promise for the payment of money at all events, and without any condition. It must contain the signature or name of the maker, and be for the payment of a specific sum of money only. It may be in any form of words consistent with the foregoing rules."

The word "payable" in the certificate in question unquestionably imports a promise to pay the sum deposited, and interest at 4 per cent., and "à l'ordre" are the apt words to constitute a negotiable instrument, transferable by indorsement (see Art. 2286). So far the essential attributes of a negotiable promissory note are obtained; but it was said that the provisions that the money should not carry interest unless it remained at least three months in the bank, and that the holder of the certificate should not withdraw the money until after fifteen days' notice, the interest ceasing from the day of the notice, imported conditions and contingencies incompatible with the certainty required in such an instrument. The answer given to this objection was, that the provision as to interest only prescribed the time when

it was to commence and cease; and that the stipulation for fifteen days' notice introduced no more uncertainty into the promise than occurs in a bill payable so many days after sight.

With regard to authority, the Respondent's Counsel relied on a decision in Pennsylvania, in which the Court held that certificates of this nature are not negotiable (Patterson *v.* Poindexter, 6 Watts and Sargent, 227). On the other hand, the Appellant's Counsel referred to an American text writer of high authority, Mr. Parsons, who in his "Treatise on Promissory Notes and Bills of Exchange," after stating that certificates of this nature were in common use, and had given occasion to much discussion, and after referring to numerous cases containing conflicting decisions, and among them Patterson *v.* Poindexter, says:—"We think this instrument (of which he gives the form) possesses all the qualities of a negotiable promissory note, and that seems to be the prevailing opinion" (vol. i, p. 26). It is to be observed, however, that the form given by Mr. Parsons omits the provisions as to interest and notice which appear in the present certificate.

From the evidence given by bankers and others who were called in this case to prove a custom, it certainly appears that these certificates have been commonly treated as transferable by indorsement, but whether with recourse to the indorser does not appear.

If it were essential to the decision of this Appeal to determine the vexed question of the nature of this certificate, it would, of course, be their Lordships' duty to do so; but in the view they take of the second branch of this case they are relieved from this necessity. It is enough, therefore, for them to say of a document not in use in England, and which has been the subject of conflicting decisions in America, that there is high authority in favour of the Appellant's construction of it, and they will assume, in dealing with the rest of the case, that his contention on this point is well founded.

It was further contended for the Respondent that the delivery was ineffectual in point of law, on the ground that it was made some time before the alleged gift, and with another object. The point was fully and ably discussed at the Bar, with the result that it appears to be the law of Canada that

anterior possession of property which can be the subject of "don manuel" is equivalent to delivery at the time of the gift, although the former possession was for another purpose. (See Richard, "Traité des Donations, chap. 4, sec. 2, dist. 1).

Demolombe is very clear upon this point. He says:—

"La donation manuelle pourrait même s'opérer sans tradition, ('etiam sine traditione,' disait Justinien), si celui auquel le propriétaire de certains objets mobiliers veut les donner se trouvait déja en possession de ces objets à un autre titre; la seule déclaration du donateur qu'il entend les lui donner, suffirait sans qu'il fût besoin d'en dresser un acte; la tradition, en effet, n'est que le moyen de transférer la possession; et ce moyen est parfaitement suppléé par la déclaration du propriétaire qui change la cause de la possession antérieure; la donation s'accomplit donc alors sans tradition mais non pas certes sans possession." ("Traité de Donations," vol. iii, livre iii, titre 2, chap. 4, sec. 73.)

Assuming then there was a sufficient delivery of the certificate to satisfy the requirement of the law, the next question to be considered is, whether the agreement of gift is proved. On this point the indorsement and delivery are equivocal facts, consistent by themselves with the position of the Appellant either as agent or donee. It was, indeed, contended that as he held a power of attorney, the indorsement was not required to enable him to receive the interest, but the bank, notwithstanding this was so, may have desired to have Madame Voyer's own signature.

Mr. Justice Caron, in his reasons, has tersely stated the Appellant's position:—

"Il a déposé comme procureur, c'est à lui à établir le changement dans son titre et sa position. L'endossement seul et dénué d'explication n'a pas cet effet."

The Appellant attempted to prove that the certificate was the only document of Madame Voyer he had in his possession, and that she kept all others in her own custody. The evidence of this fact is weak; but, assuming it to be proved, it would not conclusively negative the presumption that he held it as her agent. It is plain the Bank required the production of the certificate whenever interest was paid, to enable an indorsement of the payment to be made upon it. Under these circumstances the maxim of the French law "la possession vaut titre" cannot be invoked with effect.

The evidence of the gift thus becomes reduced to the testimony of witnesses who speak to conversations with Madame Voyer.

Exception was taken by the Respondents in the Courts below to the admissibility of this evidence, and it seems to have been rejected; but whether on the ground that it was wholly inadmissible, or was deemed to be, when examined, irrelevant as affording no proof of a present gift, does not appear.

It seems to their Lordships that the parol testimony of witnesses is, of necessity, admissible to prove the agreement in certain cases coming within the class of "dons manuels," since it would be incompatible with the law, which allows such gifts to be made by verbal agreement, to exclude the only evidence by which such an agreement can be established.

But assuming the testimony given in this case to be fully admissible, their Lordships have come to the conclusion that it is insufficient to prove with reasonable certainty that an absolute gift of this property was ever made by Madame Voyer to the Appellant. The witnesses who speak to the conversations do not profess to prove words of present gift. The utmost that can be contended for is, that they give evidence of statements of Madame Voyer, which, it is said, amount to an acknowledgment that she had made it; but these statements are in themselves so vague, and the occasions on which they were made are so indistinctly described, that they cannot be safely relied on for proof of the gift, especially when they are not supported by the presumptions which arise from other facts appearing in the case.

In the first place, the manner of the deposit is opposed to the presumption that a gift of it was made at that time. The money was deposited in the name of Madame Voyer, and the account opened with her. It is not clear, from the Appellant's statements, at what subsequent time he asserts the gift to have been made; but he certainly means to allege it was before the first interest was received by him; if this be so, his offer to pay over that interest to Madame Voyer is unaccountable, and entirely opposed to his pretension that an absolute gift had before that time been made and accepted. It is said by him that he never accounted to Madame Voyer for the subsequent interest, but the manner of his accounting with her is not shown.

All that appears is, that on two occasions after the deposit, she declared herself satisfied with the administration of her affairs, and gave him formal discharges before a notary.

Again, it does not seem probable that the gift of a large sum of money should have been made to the Appellant in recompense, as it is said, of his services so soon after Madame Voyer had given him a valuable piece of land to reward him for them, or that, if it were intended, the Appellant, who knew the law, should be content to rely on the mere indorsement of the certificate as the sole proof of the new gift.

It could not be suggested that the motive of the gift was to assist the Appellant in his building operations, for the fact is beyond dispute that he borrowed money at 8 per cent. for this purpose, whilst this money remained on deposit at 4 per cent. only.

Further, he neither drew out the money, nor changed the account to his own name, nor gave notice to the bank of the transfer in Madame Voyer's lifetime. It is difficult to suppose that he was not aware of the importance of being able to point to some overt act to mark a change of possession, especially having regard to his double position of agent and donee; or that he would have neglected to take some step with that object if he had obtained an absolute and perfect gift of the money.

Their Lordships, whilst holding that the evidence fails to establish a valid gift, do not wish to exclude the supposition that something may have passed between Madame Voyer and the Appellant which led him to take a sanguine view of her intention to benefit him. But, be that as it may, it is obvious that in cases where formal authentication by notarial act is dispensed with, it would be dangerous for the Courts to support gifts except upon plain and conclusive evidence of the agreement; and it would be especially unsafe to do so where an agent sets up a gift from his principal and mainly relies for proof of it upon the possession of a document which was, or at least may have been, originally entrusted to him for the purposes of his agency.

An objection has been raised to the maintenance of the action on the ground that all the heirs of Madame Voyer are not made parties to it; and it was pointed out that Madame Richer and Madame

Beaudry, two of her daughters, have not been joined. The answer was that they had accepted the legacies given to them by Madame Voyer's will, and had therefore renounced all claims as heirs to her general estate. It was not denied that this would be so under Articles 712 and 713 of the Code, unless the legacies had been expressly given to them by preference and beyond their share. There is clearly no direct declaration to that effect in this will, but Mr. Westlake endeavoured to show by the authority of some French decisions collected by Merlin in his work "Questions du droit," that such a direction might be inferred from the words of the will under the circumstances of this succession. Their Lordships would be most reluctant to dismiss the suit for want of parties at this final stage, unless it was clearly demonstrated that they ought to do so. It is enough to say that they are far from being satisfied that the decisions referred to have the effect contended for, or that their authority can control the plain words of the Code. There is nothing in either of the three Judgments of the Courts in Canada which lends any support to the objection; and if the point was really argued in those Courts, the learned Judges must have considered either that there was no substance in the exception, or that it ought to have been taken *in limine* by a dilatory plea.

Their Lordships think it right to notice that it was stated, during the argument, by the Respondents' Counsel that the agents who instructed him had obtained from one of the Judges of the Court of Queen's Bench notes purporting to be the reasons for his judgment. The Counsel for the Appellant loudly complained of this preference, and if the statement thus made be accurate, the complaint was justified. It was stated that the cause assigned for the notes not having been sent to the Registrar as required by the Rule of 1845, was that they had been destroyed in a fire. Whatever may be the case, whether the notes were recovered or re-written, it is obvious that the omission to send them to the Registrar, and allowing one only of the parties to have them, was calculated to give to that party an undue advantage. From the notes actually sent over by the Court of Queen's Bench it would appear that the learned Judge referred to had

merely expressed his concurrence in the reasons of Mr. Justice Caron. The Rule requires the reasons given by the Judges to be communicated to the Registrar, and the observations made by Lord Kingdown in delivering the Judgment of the Committee in Brown *v.* Gugy, 2 Moore, N. S., 365, show that these reasons ought to be stated publicly at the hearing below, and should not be reserved to influence the decision of the Court of Appeal. In the present case their Lordships felt constrained to refuse to look at notes so irregularly communicated.

In the result their Lordships think they ought to uphold the judgment of the Court of Queen's Bench, and they will humbly advise Her Majesty to affirm it, and to dismiss this Appeal with costs.

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