Privy Council Appeal No. 117 of 1919.

Dame Gertrude M. O'Meara and another - - - - *Appellants*

v.

Dame Constance Edith Bennett and others - - - *Respondents*

FROM

THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC (APPEAL SIDE).

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 20TH OCTOBER, 1921.

Present at the Hearing:

VISCOUNT HALDANE.
LORD BUCKMASTER.
LORD CARSON.
SIR LOUIS DAVIES.

[*Delivered by* LORD BUCKMASTER.]

The question in this appeal relates to the ownership of 130 preferred shares and 33 ordinary shares of the capital stock of the Corby Distillery Company, Limited, who are the second respondents. The shares are claimed by the appellant Mrs. O'Meara (hereinafter called the appellant), by virtue of a gift alleged to have been made in her favour by Mrs. Mary M. Thomas, who was the rightful holder of the shares; this claim is disputed by the first respondent, Mrs. Constance Edith Bennett, who claims as a beneficiary under the Will of Mrs. Thomas, the remaining respondents, the Royal Trust Company, being the executors of the Will.

The shares in question were originally held by Mrs. Thomas in her own right, and at the end of 1912 she formed the intention of disposing of them in favour of the appellant, who states—and her

statement is not contradicted—that this intention was mentioned to her by her mother at an interview which took place some time before January, 1913. To use the appellant's own language, what took place was this :—

> " The terms she used—as well as I can remember them—were that she had decided to give these shares to me as a gift and that she did not want them to form any part of her estate at death, or to be affected by her Will, but that she intended to reserve to herself the dividends on the shares during her own lifetime. She mentioned at the time that she had once intended this investment for her son Arthur, my brother, but as he was dead, she decided to give these shares to me. My mother also said either that she had, or that she would have, my father attend to having these shares transferred into my name. I accepted the gift from my mother and both my husband and I thanked her for it."

In order to carry out this intention, Mrs. Thomas communicated through her husband with the Company, informing them of her desire that the shares should be regarded as held by her in trust for the appellant, but that the dividends should be forwarded to her as usual, and in accordance with their directions the certificates were sent to the Company with an endorsed transfer on the back in these words :—

> " For value received I hereby sell, assign and transfer unto Mary M. Thomas in trust for Gertrude Mary O'Meara shares of the capital stock represented by the within certificate, and do hereby irrevocably constitute and appoint
> attorney to transfer the said stock on the books of the within-named Company with full powers of substitution in the premises."

and this was duly signed by Mrs. Thomas and also by her husband. The original certificates were cancelled and in their place two new certificates were issued, dated January 15, 1913. The one as to the ordinary shares was in this form :—" This certifies that Mrs. Mary M. Thomas, in trust for Mrs. Gertrude M. O'Meara, is the registered holder of 33 common shares ; " and the one for the preference shares was in similar terms. These certificates again contained transfers in blank upon their back, but neither of these transfers was ever executed. The certificates were handed to Mrs. O'Meara some time afterwards and have remained in her custody ever since, but the dividends were received by Mrs. Thomas during her life. The question is whether in these circumstances a valid gift of the shares was made in favour of the appellant.

This question falls to be determined exclusively by the consideration of the Quebec law, and this is contained in the Code, the construction of which is the real question in the action. By Articles 383 and 387 the shares in question are, by determination of law, regarded as moveable property. By Article 754 it is provided that a person cannot dispose of his property by gratuitous title otherwise than by a gift *inter vivos* or by Will. Article 755 defines a gift *inter vivos* as an act by which the donor divests himself by gratuitous title of the ownership of a thing in favour of the donee, whose acceptance is requisite and renders the contract perfect. In this case there seems no doubt that

acceptance was given. Article 758 declares that a gift made so as to take effect only after death, which is not valid as a Will, or as permitted in a contract of marriage, is void; and Article 760 enables a gift to be conditional. The Code then proceeds to contemplate the different forms by which gifts may be made, and they may either be by deed, or, in the case of moveable property accompanied by delivery, may be made by private writing. This is regulated by Article 776 which provides that "gifts of moveable property accompanied by delivery may, however, be made and accepted by private writings or verbal agreements." There was no deed in the present case as between the donor and the donee. Apart, therefore, from the question as to the effect of the trust, the gift in this case can only be established if it were made by delivery. Now the share certificates were not negotiable documents. Whatever might have been their commercial quality, if the transfer had been executed, in the form in which they stood, they were not capable of passing the property by delivery, nor of effecting any change in ownership. "Gifts of moveable property accompanied by delivery" in Article 776, must, in their Lordships' opinion, be read as relating solely to gifts of such movable property as is capable of passing by delivery, for delivery has no value, apart from being evidence, unless it can effect a change of ownership, and it is not to evidence that the provisions of the section as to delivery relates, for this is provided by "the private writings or verbal agreements." This explanation of the meaning of Section 776 becomes plain, when the French version of the code is examined, for the words used to describe the class of property are "choses mobilières," and this phrase is distinct from the word "biens" the interpretation of which includes shares in a Company. This distinction has been pointed out by Pelletier, J., to whose close analysis of the argument their Lordships have nothing further to add. It is true that this view appears to differ from that of Mr. Justice Cross, who considers that a "gift of shares in a trading company's stock can be made verbally." But this fails to give any affect to the difference between share certificates that are negotiable, and those that are not, for if the gift in the present case were effected by the delivery and the verbal statement, the alteration in the books of the Company would not add to the essentials of the gift, and the form of the certificates would be equally immaterial unless indeed they were in the name of the donee, with the result that no difference would exist between the delivery of a negotiable and a non-negotiable instrument. In fact, in this case, there was no transfer of ownership. What was attempted was to impose upon the ownership of Mrs. Thomas a trust which would operate in favour of the appellant, and, but for the law permitting the creation of trusts, the alteration upon the certificates and in the books of the Company would not have effected any change at all. The extent to which trusts can now be created varies the position. It is true that if the shares had been shares in a Bank the liability might have been cast in a case of insolvency upon the appellant

by virtue of Section 53 of the Banks Act, but the same thing is not true of the Companies Act, which merely provides that the estate and funds shall be liable; no liability is cast upon the beneficiary. If the gift by delivery of the shares were in itself good, the change of name in the register of the books of the Company would not have added to its effect; it would only have afforded evidence of the gift; and if, as their Lordships think, the delivery of the certificates, though accompanied by words of gift, did not alone create a gift *inter vivos*, there remains only the consideration of the effect of the attempted verbal creation of the trust.

In considering this it is essential to remember that the law of trusts is not innate in the law of Quebec, and that an examination of the question of how far the transaction would have been valid under English law is misleading until it is ascertained to what extent the English law applies. The article in the Code that is applicable is 981 (*a*), which provides that persons capable of disposing of their property may convey property, moveable or immoveable, to trustees by gift or by Will for the benefit of the persons in whose favour they can validly make gifts or legacies. It is urged here that the word "convey" (a translation of the French word "transporter") covers a transaction well known to English law effected by means of a declaration of trust. But their Lordships find it impossible to impose such a meaning on the word A declaration of trust is the exact opposite of any conveyance or transfer of the property. It imposes the trust without any conveyance upon the person who holds it, and, in their Lordships' opinion, Article 981 (*a*) does not include such a transaction. They are strongly confirmed in this view by the comment that is to be found in the well-known book by Mr. Mignault on the Canadian Code. At page 157 of the 5th volume there is a discussion upon the creation of a trust by a gift, and in this connection he considers how far the acceptance of the beneficiary is necessary to complete the transaction: as trusts had their origin in the English law he considers this matter in connection with those principles and continues in these words :—

> "Or, il est certain que, dans le droit anglais, l'acceptation du bénéficiaire n'est nullement nécessaire pour lier le donateur. Ce dernier peut même se constituer le fiduciaire de sa propre libéralité, sans l'intervention de personne, et le bénéficiaire peut acquérir en vertu d'une disposition dont il n'aurait pas eu connaissance."

The phrase: "Ce dernier peut même se constituer le fiduciaire de sa propre libéralité, sans l'intervention de personne," appears to their Lordships to show the contrast which the learned author himself felt between the English and the Quebec principles of law, for if it had been possible according to the Quebec Code for a person holding property to create himself a trustee, there would have been no need for his emphasis on this peculiarity of the English law for the purpose of proving that acceptance was unnecessary. There can be no conveyance by a person to himself,

and as the declaration of trust is a method of creating a fiduciary relationship which, in their Lordships' opinion, is unknown to the law of Quebec, the appellant's argument upon this point must also fail.

There is only one further point which needs to be mentioned. That is to be found in the judgment of Mr. Justice Cross, who says that the appellant's title can be justified on the further ground that, even though the conveyance to her was in reality a gift, it was nevertheless put into the form of a transfer for value received. But there never was in fact any conveyance to her. The statement of the value received occurs in the transfer which was found upon the share certificates as they were originally held by Mrs. Thomas, and is in fact nothing but a transfer to herself in trust for her daughter. This was in accordance with the direction of the Company, who requested that it should be done in order that they might make the necessary entries and issue the new certificates, and who may have been under a misapprehension as to the legal effect of this change. There has been no gift by delivery, for the property was incapable of being so transferred. There has been no transfer by deed, for no deed was executed in favour of the appellant; and the attempted creation of the trust fails for the reasons which their Lordships have pointed out.

They, therefore, think that the judgment of the Court of King's Bench for Quebec was correct, and that this appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

In the Privy Council.

DAME GERTRUDE M. O'MEARA AND ANOTHER

v.

DAME CONSTANCE EDITH BENNETT AND OTHERS.

DELIVERED BY LORD BUCKMASTER.

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