HENRY W. RAPHAEL, *ès-qual.* (PLAINTIFF) ..... } APPELLANT;

AND

JAMES McFARLANE (DEFENDANT).....RESPONDENT.

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*Mar. 4.

*Dec. 9.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA, (APPEAL SIDE).

Commercial or Joint Stock company—Shares held "in trust" for minor—Sale of—Tutor—Arts. 297, 298 *and* 299 *C. C.*

Where a father, acting generally in the interests of his minor child, but without having been appointed tutor, and being indebted to the estate of his deceased wife, of whom the minor was sole heir, subscribed for certain shares in a commercial or joint stock company on behalf of the minor and caused the shares to be entered in the books of the company as held "in trust," this created a valid trust in favour of the minor without any acceptance by or on behalf of the minor being necessary.

Such shares could not be sold or disposed of without complying with the requirements of articles 297, 298 and 299 of the Civil Code; and a purchaser of the shares having full knowledge of the trust upon which the shares were held, although paying valuable consideration, was bound to account to the tutor subsequently appointed for the value of such shares.

The fact of the shares being entered in the books of the company and in the transfer as held "in trust" was sufficient of itself to show that the title of the seller was not absolute and to put the purchaser on enquiry as to the right to sell the shares. *Sweeny* v. *The Bank of Montreal* (12 Can. S.C.R. 661; 12 App. Cases 617) referred to and followed. Taschereau J. dessenting.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (Appeal Side) (1) affirming a judgment of the Superior Court dismissing the appellant's action with costs.

This was an action brought by the appellant, as tutor

*PRESENT—Sir W. J. Ritchie, C.J., Fournier, Taschereau, Gwynne and Patterson JJ.

(1) M.L.R. 5 Q.B. 273.

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of the minor child, issue of the marriage of Patrick Thomas Gibb and the late Helen Raphael, to recover certain stock of the Major Manufacturing Company, held by Patrick Thomas Gibb in trust for the minor, and transferred, in breach of his trust, to respondent.

From 1879 to first February, 1884, Patrick Thomas Gibb and Edward J. Major were partners in the firm of Major & Gibb. Gibb married Miss Helen Raphael in January, 1880, after executing a marriage contract, of record, by which he made over to her and her heirs *inter alia*, a gift of ten thousand dollars, household furniture, and all the moneys coming to him as one of the residuary legatees of the Estate of the late Beniah Gibb. Gibb received from this Estate subsequent to his marriage various sums of money at different times. In November, 1880, Helen Raphael died intestate, leaving the minor child Helen Raphael Gibb, her sole heir-at-law. In the books of the firm of Major & Gibb a portion of the money therein invested ($1,315.67) was credited to Estate Gibb, the rest appears to have been included in a different account. This did not include the money that Gibb had received from the Beniah Gibb Estate subsequent to his marriage.

In February, 1884, the business of Major & Gibb was merged into a joint stock company, under the name of the Major Manufacturing Company, the partners in the former Company, for their capital, receiving an equivalent in shares of the Major Manufacturing Company. To effect this, the defendant Gibb subscribed for three allotments of stock:

1st. Thirteen shares in his name "in trust," representing $1,300.00.

2nd. Twenty-four shares in his own name, representing $2,400.00.

3rd. Three shares in his own name, representing $300.00.

The thirteen shares were distinctly subscribed for "in trust." It was not made clear that the additional shares were subscribed for in trust, but subsequent to the subcription the words "in trust" appeared appended to the name.

In the ledger of the Major Manufacturing Company, this stock was credited at the formation of the Company in two accounts: "P. T. Gibb in trust," $2,700.00; and "Estate Gibb." $1,300.00.

Respondent was appointed Managing Director of the Company, which position he held from its formation till after the transfers.

On the 20th February, 1885, Gibb transferred three shares of this stock to respondent, and on the 16th March, 1885, he transferred to respondent the remaining thirty-seven shares, as follows:

"THE MAJOR MANUFACTURING CO., (LIMITED).

"Transfer No. 6.

"For value received from James McFarlane, I, P. T. Gibb, of Montreal, do hereby assign and transfer unto the said James McFarlane, three shares, amounting to the sum of three hundred dollars, in the capital stock of the Major Manufacturing Company (Limited), subject to the rules and regulations of the said Company.

"Witness my hand, at the Company's Office this twentieth day of February, eighteen hundred and eighty-five."

"Witness:" (Signed) "P. THOS. GIBB, in trust."
(Signed) "C. F. BINGHAM."

"I do hereby accept the foregoing transfer, this 20th day of February, 1885.

"Witness:" (Signed) "JAMES MCFARLANE."
(Signed) "C. F. BINGHAM."

"THE MAJOR MANUFACTURING CO. (LIMITED.)

"Transfer No. 7.

"For value received from James McFarlane, I, P. Thos.

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Gibb, of Montreal, do hereby assign and transfer unto the said James McFarlane, thirty-seven shares, amounting to the sum of three thousand seven hundred dollars, in the capital stock of the Major Manufacturing Company (Limited), subject to the rules and regulations of the said Company.

"Witness my hand, at the Company's Office, this 16th day of March, 1885."

"Witness:" (Signed) "P. THOS. GIBB, in trust."
(Signed) "C. F. BINGHAM."

"I do hereby accept the foregoing transfer this 16th day of March, 1885."

"Witness:" (Signed) "JAMES MCFARLANE."
(Signed) "C. F. BINGHAM."

The words "in trust" in the foregoing transfers were added by P. T. Gibb in answer to the following letter written by Mr. Macfarlane to Mr. Gibb. :—

Montreal, March 23rd, 1885.

To Mr. P. T. GIBB,

Care 646 Craig Street.

DEAR SIR,

We beg to call your attention to the fact that your transfers of forty shares of this Company's Capital Stock, recently made to James McFarlane, are slightly irregular, and in your interest it is well that you should call at as early an hour as convenient and make the necessary corrections to same.

Yours truly,

THE MAJOR MANUFACTURING COMPANY,
(Signed). JAMES MCFARLANE,
Man. Dir.

There was evidence given at the trial that the respondent, Vice-President and Manager of the Major Manufacturing Company inspected the books, and that he was aware that P. T. Gibb held the shares in trust for his child, and that the words "in trust" in 2nd

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and 3rd allotments of stock had been added subsequently by Gibb, in order to protect the interest of his minor child.

Davidson, Q. C., *& MacLellan* for the appellants.

Geoffrion Q. C., *and Smith* for the respondents.

SIR W. J. RITCHIE C. J.—It is clear that under art. 297, C.C., a tutor without authorization of the judge or prothonotary, granted on the advice of a family council, is not allowed to alienate or hypothecate the immoveable property of a minor, nor is he allowed to make over or transfer any capital sum belonging to the minor or his share and interest in any financial, commercial or manufacturing joint stock company. See also arts. 298 and 299 C. C.

The sale or transfer in this case was made without any such authorization. This brings the matter down to the simple question: Were the shares or any of them the property of the minor? I think there can be no doubt that the thirteen shares subscribed "in trust" were the property of the minor held by her tutor in trust for her. Although the words "in trust" were not added at the time of the subscription of the 37 shares, they were subsequently added in the books of the company, and stood, at the time of the transfer to defendants in such books, in the name of Patrick Thomas Gibb in trust. The transfer of the 16th of March, appears to have been made to plaintiff by the signature of Gibb without the addition of these words. On the 23rd, the defendant discovering this irregularity and necessarily knowing from the books and his position in the company that the shares were not held by Gibb in his own name, but in trust, addressed the following letter to Gibb:—

MONTREAL, 23rd March, 1885.

To Mr. P. T. GIBB,

Care 646 Graig Street.

DEAR SIR,—We beg to call your attention to the fact that your

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transfers of forty shares of this company's capital stock, recently made to James McFarlane, are slightly irregular, and in your interest, it is well that you should call at as early an hour as convenient and make the necessary corrections to same.

Yours truly,
THE MAJOR MANUFACTURING CO.,
(Signed) JAMES McFARLANE.
Man. Dir.

and the words "in trust" were accordingly added.

I think it is sufficiently clear that the amount of these shares was received by Gibb as part of the property belonging to the minor, and if it was, his adding the words "in trust" in the books of the company was just what he should have done, for it would have been most unjust that the property of the minor should have been taken by him to meet his individual liability.

Inasmuch, then, as I think it was sufficiently shown that this stock represented the property of the minor and was held by Gibb in trust for her and that the defendants took the transfer of it with knowledge that it was not held by Gibb as his own property, but "in trust," therefore the transfer was void, and the defendant must account for the shares to the plaintiff, the present tutor. I cannot distinguish this case from that of *Sweeny* v. *The Bank of Montreal* (1) decided in this court, and subsequently approved by the Privy Council (2).

I therefore think the appeal should be allowed.

FOURNIER J.—The present appellant (plaintiff in the court below) in his capacity of tutor to Helen Raphael Gibb, daughter of Patrick Thomas Gibb, one of the defendants in the court of first instance, brought an action against the respondent and the said Patrick Thomas Gibb for a decree to set aside and annul a transfer, made by the said defendant Patrick Thomas

(1) 12 Can. S. C. R. 661. (2) 12 App. Cas. 617.

Gibb, to said respondent, Macfarlane, of forty shares in the capital stock of the joint stock company known as the "Major Manufacturing Company," and obtain the said shares for the said minor.

In January, 1880, Patrick Thomas Gibb married Helen Raphael, and by his contract of marriage he made over to her and her heirs *inter alia* a gift of ten thousand dollars, household furniture and all moneys coming to him as one of the residuary legatees of the estate of the late Beniah Gibb.

At the time of his marriage he received certain moneys from his wife, which he invested in the partnership firm of Major & Gibb, composed of himself and Edward J. Major. Subsequent to his marriage he received certain other sums from the estate Beniah Gibb, as is evidenced by the receipts signed by him, and to be found in the case at pp. 76, 78 and 80, and which moneys were also invested in the firm of Major & Gibb.

In November, 1880, Helen Raphael died intestate, leaving the minor child, Helen Raphael Gibb, her sole heir-at-law.

In the books of the firm of Major & Gibb, a portion of the money therein invested ($1,315.67) was credited to Estate Gibb. This did not include the money Gibb had received from the Estate Beniah Gibb subsequent to his marriage.

After his wife's death Gibb did not take any steps to have a tutor appointed to his minor child, or to have an inventory made of his late wife's estate.

In February, 1884, the business of Major & Gibb was amalgamated with the business of the respondent, and formed into a joint stock company, under the name of the Major Manufacturing Company, the partners of the old firm receiving an equivalent in stock for their capital. To effect this, Gibb subscribed for three allotments of stock.

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1st. Thirteen shares in his own name "in trust," representing $1,300.

2nd. Twenty-four shares in his own name representing $2,400.

3rd. Three shares in his own name representing $300.

The thirteen shares were subscribed for "in trust." The subscription list and books of the company show that the twenty-four shares were also held "in trust," but whether the words "in trust" were added on subscribing or at a subsequent date is not very clearly proved. The subscription for the three shares never had the words "in trust" appended.

But in the ledger book of the company this stock was credited at the formation of the company in two accounts, "P. T. Gibb, in trust, $2,700," and "Estate Gibb, $1,300."

On the 20th February, 1885, one year after the respondent had commenced to act as Managing Director, Gibb transferred three shares of this stock to respondent, and on the 16th March, 1885, he transferred to respondent the remaining thirty-seven shares. Appellant contends that the shares which he claims by his action are the property of his pupil, and that they were held "in trust" for her by her father, who had no right or authority to sell the said shares, and that the sale of these shares was fraudulent and collusive.

The respondent alone contested the action, alleging in his pleas that the stock was acquired by him in good faith, that no trust attached to the stock, that the words "in trust" were added by Gibb to the subscription list after the allotment of the stock, for the purpose of preventing Gibb's creditors from attaching the stock as private stock, and that Gibb was the sole and absolute owner of the shares.

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The appellant in answer to respondent's pleas said that the stock was always held "in trust" and that the shares were so entered in the Company's books, and in the books of the firm of Major & Gibb ; that it was known to respondent that Gibb was not the owner, and that Gibb had no power or authority to sell the stock. Respondent filed no answer or replication to appellant's answers to pleas.

There is evidence that in her lifetime Mrs. Gibb loaned to her husband the sum of $1,315.67, which sum was credited to her in the books of the firm of Major & Gibb. Upon her death, there being no will, the property in that account belonged to her child, and it was credited in consequence in the books to "Estate Gibb." This same amount, less $15.67, was carried forward into the books of the Major Manufacturing Company. It is clear, therefore, that it was with these moneys that Gibb subscribed for the first thirteen shares, amounting to $1,300, moneys which he had received from his wife and which belonged to his child. The twenty-seven shares were also subscribed for with moneys received from the estate of Beniah Gibb, and these moneys having been transferred to Helen Raphael by Gibb's marriage contract, they became the property of the minor, the sole heir of Mrs. Helen Raphael Gibb. Having no right or property in the moneys, he invested them in this way for the benefit of his child. It is true he was not regularly appointed tutor to his daughter, but his management of the business of the minor assimilates his position to that of a quasi-tutor, or least to that of a *negotiorum gestor* (1). He had sufficient control over these moneys to administer and take charge of them and invest them in such a way as not to mix them with his own private funds. By placing them "in

(1) Art. 1043 C. C.

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trust" without disclosing the name of his *cestui que trust*, he nevertheless gave positive notice to all persons interested that these shares were not his property. He, himself, states in his evidence that he did so in order to protect the interest of his minor child. The statute authorizing "trusts" does not enact any special form in which it should be written in order to create a trust, it is sufficient that the intention of creating a trust is made manifest and clear. Upon this point of the case there can be no doubt, for we have the positive statement made by Gibb that he added the words "in trust" because, knowing he had private debts, he wanted these moneys to be free from seizure, as a portion of them did not belong to him. As to the portion belonging to the minor (and she was the real owner of the greater portion), nobody can reproach Gibb for having done his duty by placing them "in trust," for his object in doing so was both legal and honest. There can be no doubt, therefore, that his intention was clearly to create a trust, for of the three subscriptions he made, there is only one in his name without the addition of the words "in trust," and in the transfer he made, he gave notice that they were all held "in trust." When therefore he added the words "in trust" as he did when he subscribed for the thirteen shares ($1,300), it is clear he wanted to create a "trust," and by doing so, he did not in any way alter his mode of dealing with these moneys which belonged to his child and formed part of his mother's estate; he thereby publicly made known the quality and capacity in which he had always held the shares. He was simply a trustee; that is what is meant by the words "in trust." *Taylor* v. *Benham* (1):

> The ordinary sense of the term "in trust" is descriptive of a fiduciary estate or technical trust; and this sense ought to be retained

(1) 5 How. 233.

until the other sense is clearly established to be that intended by the testator. Every person who receives money to be paid to another, or to be applied to a particular purpose to which he does not apply it, is a trustee.

In *King* v. *Mitchell* (1), Mr. Justice Story said:—

The ordinary sense of the term "in trust" is descriptive of a fiduciary estate or technical trust.

The fact that Gibb represented his child's interests in the Major Manufacturing Company clearly appeared by the entries in the company's books, for it described his interest as follows: "P. T. Gibb in trust" and "Estate Gibb," and by the general knowledge that the directors and officers of the company had that the trust was for his child or his wife's estate, as Mr. Charles Bingham positively swears in his deposition.

Gibb did not contract in his own personal name for these shares with the company, but as representing the minor, and that with the knowledge of the respondent and therefore the contract which was executed was one between the company and the representative of the minor. This investment of the minor's moneys made with notice to the respondent could not be displaced. Gibb had no doubt the power and authority to act on her behalf in getting the stock, but once he had it, he could no longer deal with it as he pleased, but he lost control of it and became immediately subject to the provisions contained in articles 297 and 298 of the Civil Code, which prevent a tutor from making or transferring any shares belonging to minor in any joint stock company without the authority of a judge or prothonotary.

Not only is the transfer null as being in direct contravention with the terms of article 297 of our Code, but also because the respondent knew perfectly well that the shares in question did not belong to

(1) 8 Peters 326.

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Gibb, that they were the absolute property of his minor child, they having been secured with moneys belonging to her mother, and for which moneys Mrs. Raphael Gibb had been credited in the books of the firm of Major & Gibb. As to the shares amounting to $2,700—they also being credited to the minor under the entry of "P. T. Gibb in trust,"—it is clearly and positively proved that respondent had full knowledge of the fact that this entry was made in those books in order to show that they belonged to the minor. Respondent had, prior to the formation of the Major Manufacturing Company, closely examined the accounts of the partnership firm of Major & Gibb. He had also on several occasions looked into the account books and examined the financial standing of the Major Manufacturing Company, of which he was vice-president and managing director. Not only was he in a position to ascertain to whom the shares belonged, but there is abundant evidence that he had personal knowledge of the fact that they belonged to the minor child of P. T. Gibb, and had been subscribed for with her moneys. With the full knowledge of this fact he could not be ignorant of the provisions of the law which prohibit the transfer or alienation of shares belonging to a minor without the previous authorization of a judge, and therefore that the transfer he obtained without complying with this formality was absolutely null and void.

I do not think it is necessary for me to give here extracts from the evidence to show that respondent was well aware of the minor's rights and interests in these shares, for it is uncontroverted and positive. But there is one fact of record which dispels any doubt which might arise on this question, it is that respondent, having got a transfer of these shares signed by Gibb in his own name, without the words

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"in trust," got Gibb, on the 23rd March, 1885, to add the words "in trust" in order to show that it was *trust* property he was alienating. How can he now contend for a moment that these shares were not shares *in trust*? It would be acting in *bad faith* and claiming contrary to his own title.

It is evident that having full knowledge that the shares were the minor's property, he should not have accepted a transfer of them unless Gibb had previously got authority from a judge to sell them. In any event there was sufficient to show by the words "in trust" that Gibb's title was not absolute and it was for respondent to inquire whether he had authority to sell as it was decided by this court in the case of *Sweeny* v. *Bank of Montreal.* (1.)

Notwithstanding the contrary opinion which has been expressed, I think the principles of law applicable to the facts of this case are the principles of law which we thought should be applied in the case *Sweeny* v. *The Bank of Montreal* (1).

It has been attempted to distinguish the two cases by stating that in the Sweeny case the *cestui que trust* had approved of and accepted the investment made of the moneys whilst the minor in this case could not accept the investment. The plea of minority cannot avail the respondent. It is true, that Gibb, the father of the minor child, was not her tutor ; but the evidence clearly establishes the fact that he had assumed the functions of tutor and had during the whole of this transaction acted for and on behalf of his minor child. In such a case the law imposes on the party who assumes the functions of a tutor, the same responsibility as if he were duly appointed. He is what we call a quasi-tutor or protutor. Having acted as such and done an act to which the law imposes the same re-

(1) 12 Can. S.C.R. 661.

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sponsibilities as if it had been done by a tutor, he cannot afterwards act otherwise than as a tutor would, *i. e.*, it is impossible for him to dispose of these shares once acquired otherwise than by conforming to the formalities imposed on a tutor by articles 297-298, Civil Code.

In any case Gibb acted as the *negotiorum gestor* of his minor child, and by Art. 1043 C.C. he is responsible for his administration. It is true that at her majority the child might repudiate the investment and make her father responsible for any loss the investment might cause to her. But until then there is a subsisting contract which must have its whole effect.

These formalities not having been complied with the sale and transfer of these shares is null, and the appellant should be condemned to pay their value to the appellant in his capacity of tutor.

I am of opinion that the appeal should be allowed with costs.

TASCHEREAU J.—I would dismiss this appeal. There is no trust whatever disclosed by the evidence in this case, and I fully agree in the finding of the two courts below on that question of fact. As to the three shares, there is no room for controversy. They were subscribed for, and always remained in Gibb's own name. The twenty-four shares were also only subscribed for in Gibb's own name. Subsequently, however, he added to them the words "in trust." His reason for doing so, he says, was to secure them from his creditors. Now, this fraudulent contrivance cannot have changed the ownership of these shares in favor of his child, or of any one else. The two courts as to these twenty-four shares and the three shares were unanimous in the dismissal of the action. There were, however, dissenting opinions in the Court

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of Appeal as to the other thirteen shares, but I think the majority were right. These shares were subscribed for in trust, it is true, but Gibb was never a trustee. He was simply a debtor of his wife first, and later of his child, and these shares so subscribed for could never be considered as a payment of his indebtedness. They were an offer of payment, a "pollicitation" which could always be withdrawn till acceptance. The company might have became altogether insolvent, and every cent on these shares a dead loss, and yet Gibb would have continued to remain his child's debtor. The loss would have been for him and for him alone. And this is so as to the other twenty-seven shares, as well as for these thirteen.

GWYNNE J.—I concurred with Fournier J.—that the appeal should be allowed.

PATTERSON J.—I am of opinion that we should allow the appeal, not only in respect of the thirteen shares for which the two dissenting judges in the court below thought the plaintiff entitled to succeed, but for the whole forty shares.

Gibb had borrowed from his wife $1,315.67. That I understand to have been in 1880, the year after the firm of Major & Gibb was formed. The money was credited in the books of the firm to Mrs. Gibb. She died in November 1880, and the account afterwards was headed "Estate Helen Gibb," the name being that of the infant daughter who became entitled in succession to her mother.

Gibb had another account in the ledger of his firm in his own name, which showed $2,700, or thereabouts at his credit as capital in the business.

By his marriage contract he convenanted to settle on his wife $10,000. She was to have the interest of

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that sum during her life and at her decease the principal was to belong to her child or children; and he also made over to her whatever amount should be received by him as one of the residuary legatees under the will of the late Beniah Gibb.

He did receive as residuary legatee certain sums, all or part of which he put into the business. Those sums he says were $1,583, and they together with other moneys of his own made up the $2,700. He did not pay over the $10,000 by any direct payment.

That was the position of things in 1884, when the defendant McFarlane united his business with that of Major & Gibb, and the joint stock company called the Major Manufacturing Company was formed.

The capital of the two partners in the firm of Major & Gibb was converted into shares in the capital stock of the new company.

The shares were $100 each.

Gibb subscribed for thirteen shares in the name "Estate Gibb," which represented the $1,315.67, at the credit of the minor, less $15.67, which was paid him in cash to make even money.

He also subscribed in his own name as P. T. Gibb, for two allotments of twenty-four shares and three shares, representing $2,400 and $300. I don't think his reason for separating those two subscriptions is explained.

Soon after the subscribing of these shares, and it would seem within a very few days, Gibb wrote the words "in trust" in the stock book after the $2,400 subscription, but not after that for $300, and he caused the same note "in trust" to be made in the ledger of the company against the whole twenty-seven shares.

His object in doing this is twice spoken of by him in his evidence. When examined on the 21st of October, 1887, he stated to counsel for the defendant

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that when the words "in trust" were added he had many private creditors, but was not afraid at that time that they might attach the stock for his debts, and that the money he owed was not more than he expected to be able to pay; and again on the 23rd of January, 1888, he said the words "in trust" were added in the following way: He was owing some money outside of his business, and he added the words so that in case any one came down on him they could not touch this money as a portion of it did not belong to him. From these references to creditors it seems to have been considered by Mr. Justice Bossé, and I suppose by the other learned judges in the Queen's Bench, that the transaction was fraudulent as against the creditors of Gibb. I think too much effect was given to what was said. No creditor is stated to have been interfered with. It is not at once apparent how the marking the shares in trust would have affected creditors more than selling them to the defendant. But the reason given by Gibb that the fund did not altogether belong to him was quite consistent with what we learn from the evidence. I think, however, that the plaintiff's right may be put on stronger ground, at all events as to the amount beyond the sum of $1,583 which came from the estate of Beniah Gibb.

Gibb was debtor to the minor in the sum just mentioned and in the further sum of $10,000. I do not understand why he was not at liberty to appropriate the twenty-seven shares towards payment of his debt. It is true that he did not express in the books the name of the person interested in the trust, but he tells us that he had the protection of the plaintiff in view. He may have thought in the first place of protecting her in respect of the Beniah Gibb money, if that is the proper understanding of the answers to which I have adverted, but he was her debtor in respect of the

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$10,000 to the same extent. Her claim to the whole stood on the same footing under the marriage contract of her mother.

Nor do I perceive the importance, under all the circumstances of the omission to note in the stock list when the subscription for the twenty-four shares took place, the word "in trust" which were afterwards inserted in the list as well as in the ledger, or the insertion of those words against the three shares in the ledger alone and not in the stock-list.

If the view I have intimated as to the right to designate those twenty-seven shares as held in trust for the minor who was creditor of her father is correct, the time when they were so designated cannot be material so long as it was before the shares were dealt with.

The use of his individual name in the subscription could not disable Gibb from afterwards devoting the shares to the payment of his creditor.

A very important fact in the discussion is of course the fact of notice to the purchaser of the designation of the shares *in trust*. On that point the evidence was regarded as defective in the court of first instance with regard to all the shares, and I think, by all the learned judges who heard the case in the Queen's Bench with regard to the twenty-seven shares.

It is with diffidence that I venture to express a different apprehension of the effect of the evidence, but having regard to the facts that the purchaser was managing director of the company; that the evidence of his acquaintance with the contents of the books is as direct as it well could be, short of actual demonstration, and agrees with what was his duty as managing director; and that he wrote at the suggestion of the book-keeper asking Gibb to come and correct an irregularity in the transfer book of the forty shares, the irregularity being the omission, which Gibb promptly

supplied, of the words " in trust "; the inference of fact that he had full knowledge, seems to me, to be irresistible.

Mr. Justice Cross discussed this question of notice in reference to the thirteen shares, but otherwise it does not seem to have been dealt with in the Court of Queen's Bench, where the opinion of Mr. Justice Tait was probably adopted. The point made in the Queen's Bench was principally that the minor could not become the owner of the shares unless they were accepted in her name by some one authorised to act for her. As expressed by Mr. Justice Bossé:—

> Or cette créance de la fille contre la société Major & Gibb n'a pu par la seule volonté du père, même s'il était à cette date tuteur de son enfant, être convertie en la propriété d'actions dans la nouvelle compagnie par actions. Il fallait quelqu'un d'autorisé pour agir ainsi au nom de la mineure, et disposer ainsi de son bien. Le père ne l'était pas, et si nous prenons ce qu'il nous dit pour vrai et que nous admettions qu'en réalité ces treize actions étaient souscrites pour sa fille, il n'y avait pas là contrat entre lui et elle. Il y avait bien offre de sa part, mais la mineure n'avait pas accepté et personne ne l'avait fait pour elle. C'était tout au plus une simple manifestation de la volonté du débiteur telle qu'elle existait alors, mais qui pouvait être révoquée ou retirée par lui en tout temps avant acceptation par l'enfant. Le contrat ne devenait parfait que si l'enfant devenue majeure, ou son tuteur pour elle durant sa minorité, trouvait la transaction avantageuse et l'acceptait. Dans le cas contraire ils pouvaient la répudier, et avant l'acceptation le *trust* n'était pas complet.

This is said with special reference to the thirteen shares, but applies to all the others.

The proposition seems to me to be fallacious and opposed to the doctrine acted on in this court in *Bank of Montreal* v. *Sweeny* (1).

It may be that the daughter was not bound to accept the shares, and could have insisted, as against her father, on payment of her money, but she was at liberty to adopt the transaction and accept the shares. Gifts

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inter vivos, by article 787 of the Civil Code, do not bind the donor nor produce any effect until after they are accepted, but I do not understand the principles which govern gifts to apply to this transaction. It was not a gift that Gibb was making. His object was to apply the property in satisfaction, *pro tanto*, of a debt. For that purpose he earmarked the shares as the property of his daughter and creditor. That had always been so with regard to the $1,300 and it was so also with regard to the $2,700 from a date earlier than the transaction with the defendant. The defendant took the shares thus earmarked, and if not absolutely the property of the minor, at least designated for her acceptance in case she elected to accept them. I attach much significance in support of this view, to the action of the defendant in requiring the words "in trust" to appear in the transfer to him. That was not the declaration of a new trust on which the defendant was to hold the shares. For that purpose he would not have required the intervention of Gibb. The addition of the words was made because the book-keeper called attention to the fact that the transfer, as first executed, did not recognise the title of Gibb as being merely the limited ownership of a trustee.

On these general grounds and on the authority of *The Bank of Montreal* v. *Sweeny* (1), I concur in allowing the appeal.

Appeal allowed with costs

Solicitors for appellant: *MacMaster & McGibbon.*

Solicitors for respondent: *MacLaren, Leet, Smith & Smith.*

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(1) 12 Can. S. C. R. 661.