JOHN M. GARLAND, SON AND COMPANY ON BEHALF OF THEMSELVES AND ALL OTHER CREDITORS OF EDWARD O'REILLY, DECEASED (DEFENDANTS) ..... APPELLANTS;

AND

ELIZA O'REILLY (OR PETRIE) (PLAINTIFF), AND JOSEPH O'REILLY AND WILLIAM O'REILLY, EXECUTORS OF THE ESTATE OF THE SAID EDWARD O'REILLY, DECEASED (DEFENDANTS) RESPONDENTS.

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*Nov. 30; Dec. 1.
1911
*Feb. 21.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Donatio inter vivos—Ante-nuptial contract—Gift to wife—Payment at death of husband—Institution contractuelle—Onerous gift.

An ante-nuptial contract provided that "in the future view of the said intended marriage he, the said Edward O'Reilly, for and in consideration of the love and affection and esteem which he hath for and beareth to the said Miss Eliza Petrie, hath given, granted and confirmed and by these presents doth give, grant and confirm unto the said Miss Eliza Petrie, accepting hereof * * * the sum of twenty-five thousand dollars, currency of Canada, payable unto the said Miss Eliza Petrie by the heirs, executors, administrators or assigns of him the said Edward O'Reilly, the payment whereof shall become due and demandable after the death of him the said Edward O'Reilly." The parties were married and on the death of the said O'Reilly his wife claimed the right to rank on his estate as a creditor for the said sum of $25,000 which claim was contested by the general body of creditors who had all become such after said contract was made.

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Girouard, Davies, Idington and Duff JJ.

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Held, affirming the judgment of the Court of Appeal (21 Ont. L.R. 201) that this clause in the contract must be construed as a *donatio inter vivos* creating a present debt in favour of the future wife, payment of which was deferred; that, in the absence of proof of fraud, such a contract could not be attacked by subsequent creditors; and that the wife was entitled to rank on the estate for the amount of said gift.

Held, per Girouard J., that the donation was one "*a titre onéreux.*"

APPEAL from a decision of the Court of Appeal for Ontario(1), affirming the judgment of a Divisional Court which sustained the verdict for the plaintiff at the trial.

The only question to be decided on this appeal was the construction of the clause of Edward O'Reilly's will which is set out in the above head-note. The plaintiff, Mrs. O'Reilly, had judgment in her favour in all the courts below.

Casgrain K.C. for the appellants.

Lafleur K.C. and *Chrysler K.C.* for the respondents.

THE CHIEF JUSTICE.—This is a claim for $25,000 filed by a wife on the estate of her deceased husband to whom she was married at Aylmer, in the Province of Quebec, on the 26th of June, 1889. The marriage contract produced in support of the claim was made at the same place on the twenty-second of the same month. The husband died on the 30th of December, 1907, leaving children issue of the marriage. The widow's claim to rank *pari passû* with them is contested by the appellants on behalf of themselves and all other creditors of the deceased. The claims of all these contesting creditors arose after the marriage

(1) 21 Ont. L.R. 201, *sub nom. O'Reilly* v. *O'Reilly.*

contract was made and registered in the proper registry office. It was found by the trial judge: First, that O'Reilly, the husband, was insolvent at the time of his marriage and at his death; secondly, that when the contract was made there existed no intent to defraud either existing or future creditors.

On these facts two questions have been argued before us; one of law depending upon the construction of that clause in the marriage contract upon which the claimant relies; the other a mixed question of law and fact which involves the status of the contesting parties to impugn the validity of the gift made by the deceased to his wife. The clause in the marriage contract runs as follows:

Fourthly.—And in the future view of the said intended marriage, he, the said Edward O'Reilly, for and in consideration of the love and affection and esteem which he hath for and beareth to the said Miss Eliza Petrie, hath given, granted and confirmed, and by these presents doth give, grant and confirm unto the said Miss Eliza Petrie, accepting thereof: 1st, the household furniture now owned by the said Edward O'Reilly and that which may be hereafter acquired by him by any title whatsoever, to be, the said household furniture, held, used and enjoyed by the said Miss Eliza Petrie as her own absolute property for ever. 2ndly, the sum of twenty-five thousand dollars, currency of Canada, payable unto the said Miss Eliza Petrie by the heirs, executors, administrators or assigns of him, the said Edward O'Reilly, the payment whereof shall become due and demandable after the death of him, the said Edward O'Reilly; and, in the event of the said Miss Eliza Petrie departing this life before the said Edward O'Reilly, but there being children issue of the said intended marriage at the death of the said Miss Eliza Petrie, the said sum of money shall be held in trust by the said Edward O'Reilly, or his heirs, executors, administrators or assigns for the sole benefit of all the children issue of the said intended marriage and shall be paid unto them share and share alike as they shall attain the age of majority; it being expressly understood that should she, the said Miss Eliza Petrie, depart this life before him, the said Edward O'Reilly, and should there be no children issue of the said intended marriage at the death of the said Miss Eliza Petrie, then the said gift shall become null and void as if it had not been made; and provided further, that the said sum of money (said gift), or any portion thereof shall not be liable for the debts of the said Miss Eliza Petrie, nor in any way liable to seizure therefor.

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The effect of such a clause in a marriage contract made under the civil law of the Province of Quebec is the first question to be determined. The widow contends that it is to be construed as a gift of present property (*donatio inter vivos*), and that as a result of her subsequent marriage she became forthwith her husband's creditor for the sum of $25,000, the payment of the debt only being deferred to the date of his death, if he should predecease her. (It is not necessary to consider the rights of the children.) The creditors contesting say, on the other hand, that in terms this clause purports to be merely a gift of future property—a gift made in contemplation of death, or, as it is sometimes called in the civil law, an *institution contractuelle,* translated by Mr. Justice Anglin in the court below, very happily, I think, as "a contractual institution of heirship." If this latter construction of the clause prevails, then all further consideration of the second question is unnecessary for the very obvious reason that a gift of future property carries with it, in the absence of any stipulation, the obligation on the part of the donee to pay the debts due by the donor at the time of his death; and, as the deceased was then insolvent, the claim of the widow to rank *pari passû* with the other creditors must be dismissed. Rambaud, Code Civil (9 ed.), vol. 2, page 270, says:

> Dans la donation des biens à venir le donateur ne fait que disposer des biens qu'il laissera à son déces, dans l'état où ils se trouveront; et par suite il ne se dessaisit pas actuellement et irrévocablement des biens donnés. Il reste, au contraire, propriétaire de ces biens; il peut les grever de servitudes et d'hypothèques; les aliéner a titre onéreux; il peut aussi contracter de nouvelles dettes qui, si elles n'ont pas été acquittées par lui, resteront à la charge du donataire. Mais il ne peut pas faire de nouvelles dispositions à titre gratuit, qui puisse préjudicier aux droits de celui-ci. La loi ne lui permet que des dons ou legs de sommes modiques, à titre rémuneratoire.
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> Il en résulte que le donataire ne devient pas propriétaire des biens

donnés, ni même créancier sous une condition suspensive; sa situation est celle d'un héritier futur.

The question was very ably argued for the appellants and is most interesting; but, in the last analysis, our obvious duty is to ascertain the common intention of the parties to the contract, giving to the particular words they used for the purpose of expressing that intention their natural meaning. Rambaud, vol. 2, pages 269 and 270, defines a gift of present property and a gift made in contemplation of death in these words:

> La donation des biens présents est celle qui se rapproche le plus des donations ordinaires. Ainsi le donateur se dessaisit actuellement et irrévocablement des biens donnés au profit du donataire; il ne peut plus les grever de servitudes et d'hypothèques, les aliéner à titre onéreux ou à titre gratuit; en un mot, le donataire en acquiert la propriété actuel et irrévocable, d'où le nom de donation de *biens présents* qui lui a été donnée.
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> La donation de biens à venir est celle par laquelle la donateur s'oblige à transmettre au donataire tout ou partie des biens qu'il laissera à son déces, en se depouillant du droit d'en disposer pour l'avenir à titre gratuit, en faveur d'autres personnes.
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> La donation de biens à venir est aussi appelée *institution contractuelle. Institution,* parce qu'elle se rapproche du testament, en conferant au donataire un droit sur la succession; *contractuelle,* parce qu'elle se rapproche du contrat, par le concours de volonté qu'elle suppose chez les deux parties.

Applying to the clause under consideration these definitions which set out very accurately and plainly the distinctive character and legal effect of each of these two dispositions in a marriage contract, we are, in my opinion, driven irresistibly to the conclusion that it must be construed in favour of the claimant. The terms used express as clearly as possible the intention on the part of the donor to create a present obligation. The future husband declares that in view of the intended marriage he *hath given, granted and confirmed and*

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by these presents doth give, grant and confirm unto his future wife, who accepts: 1. The household furniture; 2. The sum of $25,000. Language could not be found to express more clearly the intention to create a *debitum in presenti,* and that intention is not in any way qualified by the following words which fix the death of the donor as the time when the payment of the sum given is to become due and demandable. Taken altogether the words used clearly create an unconditional obligation to pay at a determinable future time fixed by the occurring of an event which is certain to happen. Rambaud, vol. 2, at page 158, says, after enumerating the essential elements of a donation *inter vivos*:

> Peu importe, sous ce rapport, que la donation soit pure et simple, ou que l'exécution en aît été reculée jusqu'à une epoque déterminee, et même, à la mort du donateur. En effet, le terme ne met obstacle ni à la translation immédiate de la propriété, ni à la naissance immédiate de l'obligation; il ne fait que retarder l'exécution du droit.

If I have given to this provision of the marriage contract its proper legal construction the widow by reason of the marriage contract and her subsequent marriage became a creditor of her late husband and is entitled *primâ facie* to be collocated *pari passû* with the other creditors on his estate. The validity of the gift as against the contesting creditors now remains to be considered. The nature of the contract with respect to its gratuitous or onerous character was much discussed here and in the courts below where there has been on this point some difference of judicial opinion. There is much to be said on both sides. It might be argued, possibly, that, on a true construction of all the provisions of the marriage contract, the gift of $25,000 should be held to constitute a conventional dower which is not in law deemed gra-

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tuitous; but it is not necessary for me to decide this difficult question now as, in my opinion, the appellants have no status on the facts to impugn the validity of the gift. They are subsequent creditors and the trial judge found that, although the deceased O'Reilly was insolvent at the time of his marriage and at the time of his death, no intention to defraud existed when the marriage contract was entered into. Under such circumstances on what ground can the appellants ask that the contract be set aside? If we take the measure of the claimants' rights as fixed by the Quebec Code, we find that the avoidance of a contract may be asked for when it is made by the debtor with intent to defraud his creditors and that actual injury results to that creditor. (Art. 1033, C.C.) There must be the *animus* and the *eventus* as in the revocatory action (*action Paulienne*) of the Roman law. The right to attack such a contract is limited, however, by the Code to those creditors whose claims arose previous to the transaction impugned, art. 1039, C.C., and the reason for the limitation is obvious. Whoever incurs an obligation renders all his property, present and future, liable for its fulfilment (art. 1980, C.C.), and the property of a debtor is the common pledge of his creditors. The common pledge of the creditors is the property which their debtor has at the time he incurs his obligations towards them, and that which he acquires during their currency. If, having contracted with his creditor on the faith of his possessions, the debtor subsequently diminishes that creditor's security by fraudulently dealing with his estate, the creditor is injured and to that extent can complain. Subsequent creditors are not in the same position. The estate of their debtor was when the claim arose dimin-

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ished to the extent of all the obligations lawfully contracted by him before that time. Rambaud, *ibidem*, page 336; Langelier, vol. III., page 436; and Mignault, vol. V., page 294.

It must be remembered that there is no article in the French Code which corresponds with our article 1039. As Planiol says, commenting upon article 1167 C.N., in vol. II. (5 ed.), at page 109:

> Cet article, qui est un des plus importants et des plus pratiques du Code, équivaut à une simple mention de l'action; la loi nous avertit que l'action Paulienne existe toujours; elle ne nous en donne point la réglementation. Pour toutes les questions que cette action soulève, nous en sommes donc réduits à la tradition, c'est-à-dire presque uniquement aux textes romains.

It was to supply this omission in the French Code and to provide rules for the protection of the rights of creditors that articles 1033-1034 of the Quebec Code were originally enacted. (First Report of Codifiers, page 14.) The Commissioners say:

> These rules are of obvious necessity; for imputed fraud against third persons is a fruitful source of litigation and there is no class of rights upon which well defined rules are more required.

And they add:

> There are but three of the articles in which a deviation has been made from the acknowledged law.

And article 1039, C.C., is not one of the three. That article expressly declares that no contract can be avoided by reason of anything contained in section VI. of the Civil Code at the suit of a subsequent creditor.

I have carefully examined the cases to which we have been referred, and *Ivers* v. *Lemieux*(1) is the only one in which the effect of article 1039 of the Civil Code was considered. In that case the deed

(1) 5 Q.L.R. 128.

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was set aside not because the effect of it would be to prejudice subsequent creditors generally, but because the object of the parties at the time they made their contract was to defraud the particular creditor who attacked the deed. Casault J., speaking for the court of review, composed of Meredith C.J., Stuart J., and himself, a very strong court, says, at page 131:

> La preuve établit que l'acte attaqué par le demandeur *avait précisement pour objet de dépouiller le défendeur* de ses biens afin d'empêcher le demandeur d'exercer un recours contre eux, ou, pour employer le langage de la mère de l'opposant, pour permettre au défendeur de plaider et de soutenir un procès *sans gaspiller son butin.*

The same observation applies to *Perreault* v. *La Parroise de la Malbaie*(1), which is referred to by Langelier. I do not wish, of course, to be understood as holding that if an intent to defraud the particular creditors attacking the deed is proved that the principle *fraus omnia corrumpit* would not apply. In any event the positive finding of the trial judge, concurred in by the provincial courts of appeal, that, on the facts, there was no intent to defraud rebuts the presumption created by article 1034, C.C.

On the whole I would dismiss with costs.

For the rule laid down by the French commentators, I refer to Beaudry, vol. I., "Obligations," no. 689; Planiol, vol. II., nos. 312 and 313; Dalloz, '91, 1, 331; Dalloz, '93, 2, 470; Dalloz, Code Annoté, art. 1167, nos. 131 *et seq.*, and specially no. 138.

GIROUARD J.—On the 22nd day of June, 1889, in the Village of Aylmer, in the Province of Quebec, before Dumouchel, notary, the respondent, Eliza Petrie, and Edward O'Reilly, both domiciled in Aylmer, made

(1) 14 R.L. 338.

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a marriage contract, which was followed by the celebration of their marriage; and, in that marriage contract the parties stipulated separation as to property, and the future wife renounced to the community of property and also all dower; and, finally, the future husband made a gift to his intended wife in the following terms:

> Fourthly. And in the future view of the said intended marriage, he, the said Edward O'Reilly, for and in consideration of the love and affection and esteem which he hath for and beareth to the said Miss Eliza Petrie, hath given, granted and confirmed and by these presents doth give, grant and confirm unto the said Miss Eliza Petrie, accepting hereof: First, the household furniture now owned by the said Edward O'Reilly and that which may be hereafter acquired by him by any title whatsoever, to be, the said household furniture, held, used and enjoyed by the said Miss Eliza Petrie as her own absolute property forever. Secondly, the sum of twenty-five thousand dollars, currency of Canada, payable unto the said Miss Eliza Petrie by the heirs, executors, administrators or assigns of him, the said Edward O'Reilly, the payment whereof shall become due and demandable after the death of him, the said Edward O'Reilly.

It is contended that this stipulation constitutes only an *institution d'héritier* to take effect after the payment of the debts of the donor, if any, and only after his death, and, also, subject to the condition that the wife survived him.

In this case the wife has survived the husband; but he has not left sufficient property to pay his debts in full and the above mentioned sum of twenty-five thousand dollars. Therefore she claims the right to rank on his estate as a creditor.

It is difficult to understand how this agreement can be considered otherwise than as a donation. The marriage contract calls it a "gift"; and, should the wife die before her husband, he agrees to keep the said sum of money "in trust" for their children, to be paid unto them as they shall attain the age of majority.

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It seems to me that this stipulation is not only a donation, but a donation *à titre onéreux*. The deed must be read as a whole, each clause being duly weighed, to carry out the intention of the parties. The gift is made not only "in consideration of the love and affection and esteem," but also "in the future view of the said intended marriage" which is to be celebrated after the wife has renounced the advantages of community of property and of dower (art. 1038, C.C.); and for that reason article 1034 of the Civil Code does not apply. Finally, the creditors contesting the claim of Mrs. O'Reilly are all creditors posterior to the said marriage contract and, therefore, are not in a position to contest the validity of her claim; art. 1039, C.C.

During the lifetime of the husband no claim could be made; but, after his death, it becomes exigible, "due and demandable," as expressed in the said marriage contract.

I am, therefore, of opinion that the appeal should be dismissed with costs.

DAVIES, IDINGTON and DUFF JJ. concurred in the opinion of the Chief Justice.

Appeal dismissed with costs.

Solicitors for the appellants: *MacCraken, Henderson, McDougall & Greene.*

Solicitors for the respondent Eliza O'Reilly: *Christie, Greene & Hill.*

Solicitor for the respondents, Executors: *M. J. Gorman.*