

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of Symes
and another v. Cuvillier and another from the
Court of Queen's Bench for Lower Canada,
Province of Quebec, delivered 25th February
1880.*

Present :

SIR JAMES W. COLVILLE.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

The action which gives occasion to this appeal was brought in the Superior Court of Lower Canada by the Respondents, Marie Angélique Cuvillier, and her husband, Mr. Delisle, against the Appellants, Marie Anne Claire Symes, and her husband, Le Marquis de Bassano, to recover two instalments of an annual income of 150*l.*, representing a capital sum of 2,500*l.*, in virtue of a donation contained in a notarial deed executed by La Marquise before her marriage. The defence was, that by the law of Lower Canada existing at the date of the deed (29th May 1866), the gift was revoked by the subsequent birth of children of the donor.

The Court of Queen's Bench reversed the judgment of a Judge of the Superior Court, dismissing the action, and, by a majority of three Judges to two, gave judgment for the Respondents, against which the present appeal has been brought.

By the deed in question, the Appellant, Marie, gave to each of her two aunts, Mrs. Delisle (the

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Respondent) and Miss Luce Cuvillier, an annuity of 150*l.* (currency), representing for each a capital of 2,500*l.* The gift to her aunt Luce was for her own use; that to Mrs. Delisle was in trust for her five daughters, "pour partie de leurs frais de toilette, et autres petits besoins personnels." The capital (2,500*l.*) was settled upon the daughters after their mother's death.

The following are the material facts. The Appellant Marie, who was the only child of Mr. Symes by his wife, a sister of the Respondent, Mrs. Delisle, was born in 1845. Her mother died in 1861, and her father some time before 1866; the exact date does not appear. Upon the death of her father she became possessed of a large fortune, viz., about one million dollars. The greater part of this large property she inherited from her father, but a part (the sum spoken of is 50,000*l.*) from her mother. From the time of her mother's death in 1861, until she went to England in 1869, she lived with her aunt Luce Cuvillier, and during that time constantly associated with her cousins Delisle.

The gift now in question was made soon after the Appellant came of age. She at the same time executed other deeds containing donations of an income of 600*l.* a year to each of her uncles, Austin and Maurice Cuvillier, representing a capital sum of 10,000*l.*, to each. In all these transactions the Appellant consulted Sir George Cartier, who was her ordinary legal adviser.

It is suggested that one motive for these gifts was the wish expressed by the Appellant's mother, that if her husband did not marry again, and the Appellant succeeded to the whole of his large fortune, her (the mother's) property should go to her own relatives. It appears from the Appellant's evidence that, though she had not

herself heard her mother mention this wish, her aunts had told her, and no doubt correctly, that she had expressed it. There is no evidence whatever that the Appellant was in any way imposed upon in making the gifts.

In August 1872, the Appellant, Marie, whilst resident in England, married Le Marquis de Bassano, a French subject. After their marriage the Appellants resided either in France or England. A child of this marriage was born in November 1873, and a second in November 1874.

In letters written by La Marquise, whilst resident in Europe, to her uncle, Maurice Cuvillier, before and after her marriage, one being after the birth of her first child, she spoke of and recognized the donations. In a letter of the 9th November, she says:—

“I also want to arrange so that the capital of the donations made by me at my coming of age to you, uncle Austin, aunt Luce, and aunt Delisle, should be paid down and given to each of you respectively, so that if I marry my husband cannot interfere, or know anything about it.”

The instalments of the income of the donation in question in this action were duly paid down to November 1875.

In January 1876 the Appellants went to Canada, and La Marquise, as she states, and no doubt truthfully, then learned for the first time that, according to the law of Canada (as she was advised) her donations were revoked by the birth of her children. She thereupon resolved to repudiate them, and made no further payments.

It appears that on an investigation of accounts it was found that Mr. Maurice Cuvillier, the guardian of the Appellant Marie during her minority, and who had managed her property after she came of age, had mismanaged it, by which some losses were incurred.

The two uncles of the Appellant and her aunt Luce have renounced the gifts made in their

favour, thus leaving as alone in question the donation to Mrs. Delisle, in trust for her five daughters.

To ascertain the law of Canada on this subject at the time the donation was made, it has been necessary to inquire into the law as it existed prior to the coming into force of the Civil Code of Lower Canada, which contains the following Article :—

“ 812. In gifts, the subsequent birth of children to the donor does not constitute a resolute condition, unless it is so stipulated.”

If the Code governed the question, this Article would be decisive in favour of the Respondents ; but the Code did not come into force until the 1st of August 1866, about two months after the date of the donation. It was, indeed, contended by the Counsel for the Respondents that its provisions on this subject became the law of the Province upon the passing of the Act 29 Vict., c. 41, which sanctioned them ; but their Lordships are clearly of opinion, for the reasons given by them during the argument, that this is not so, and that these provisions had not the force of law until the time fixed for the coming into operation of the Code.

The discussion at the bar, which took a wide range, and was ably conducted on both sides, was directed, in the first place, to the consideration of the law of France. It appears that the question of the revocation of gifts by the birth of children was for several centuries a fertile subject of discussion and controversy amongst French jurists. This controversy was complicated by the varying jurisprudence of different Parliaments. The law which is to be principally regarded in deciding this case is that of the Parliament of Paris ; the Edict of Louis XIV. (1663), which created the “ Conseil Supérieur,” and established courts of justice for Lower

Canada, having directed that the "Coutûmes de Paris" should be the general law of the Province.

The law of France was drawn from a rule in the Justinian code, usually cited as the law "Si unquam," which is in the following terms:—

"Si unquam libertis patronus filios non habens bona omnia vel partem aliquam facultatum fuerit donatione largitus et postea susceperit liberos, totum quidquid largitus fuerit revertatur in ejusdem donatoris arbitrio ac ditioe mansurum."

The first question is to what extent, and under what modifications, this law was adopted and prevailed in France. It was plainly enlarged as to the persons to be affected by it, and was not confined to the case of patron and freedman, or of persons in an analogous relation; whilst, on the other hand, it is evident that, at least in some parts of France, it was limited and modified as to the things given, in the direction of excluding from the operation of the rule such donations as were not of large value relatively to the estate of the donor. What this proportion was, how it was to be measured, and under what circumstances generally the rule was excluded, has been the subject of much diversity of opinion amongst French lawyers, and the jurisprudence of the Parliaments has undoubtedly not been uniform.

It was argued by the learned Counsel for the Appellants that the text of the Roman law must be taken to have been the common law of France, where custom did not conflict with it. This may have been so in those parts of the south of France where the Roman law was held to govern as "loi écrite," but in other parts of the kingdom this would not seem to have been so, and, though in them the Roman law was resorted to by the Courts, and its principles were largely borrowed, yet these principles were not

regarded as binding written law, and were capable of being, and in many cases were, modified by les Coutumes as expounded by the jurisprudence of the Parliaments.

Numerous French jurists have discussed with much ingenuity the question,—what part of a man's estate might be given without being subject to the condition of revocation on the birth of children. Some early writers argued that the words "partem aliquam" should be construed to mean an *aliquot* part. Traces of this fanciful rendering are found in subsequent writers, becoming however very faint in later times. Indeed this construction does not seem to have been persisted in, though it may have had some influence in moulding the law as it ultimately prevailed in the northern Parliaments of France before the Ordinance of Louis XV. in 1731.

It is to be collected from the passages cited from Cujas, an author of great authority, who wrote in the sixteenth century, that a donation was not revoked by the law of France unless it were "immensa" or "immodica." He puts the case of a man who, when childless, gave a sixth of his property to his brother, and afterwards had a son, and then in answer to the proposition that by the law "Si unquam" the son could revoke the gift, says:—

"Fallacia est in propositione; nec enim est absolute hoc verum donationem filium postea susceptum revocare; sed ita distinguendum est; aut immensa est donatio, aut non, et aut mera est donatio, aut non; immensam donationem liberi postea suscepti revocant; hic non fuit immensa, sed sextantem tantum donavit."—Cujacius, Opera Postuma, 9 vol., 316 (cited at the Bar from an edition published in Naples 1759).

Cujas, therefore, was of opinion that the gift of a sixth part of the donor's property would not be "immensa." It was argued that the authority of Cujas is weakened because he confused the

law "Si unquam" with the Lex Falcidia. It is true that he refers to the Lex Falcidia in other passages, as bearing on his view of the law "Si unquam," but it is not at all likely that so great a lawyer would have been in any confusion of mind with regard to these laws.

In Merlin Rep. vo. Donation, sec. 7, the state of the old law is adverted to as follows:—

"Avant la promulgation de l'ordonnance de 1731, on disputait beaucoup sur la question de savoir jusqu'où devait s'étendre une donation pour qu'elle fût sujette à être révoquée par survenance d'enfants. Les uns voulaient qu'elle fût au moins de la moitié des biens du donateur, les autres soutenaient qu'il suffisait qu'elle fût de quelque partie, même au-dessous de la moitié. La jurisprudence n'était pas moins incertaine à cet égard."

Despiesses, whose work was first published in 1658, in treating of Donations (Part I., Tit. 14, sect. 4, sub-sect. 11, Edit. 1750) has a passage to the same effect:—

"Nono. Cette révocation a lieu non seulement lorsqu'il s'agit d'une donation de tous les biens du donateur, ou de la plus grande partie, mais même d'une partie des biens beaucoup moindre que la moitié."—(Referring to Tiruqueau, Papon, and other authorities).

In the "d'Arrêts de Papon," a collection of arrêts published about 1559. Tit. Donations, Livre XI, Art. XIX. it is said:—

"La disposition de la loi 'Si unquam' est aujourd'hui en France, à sçavoir, que donations faites de tous biens, ou de moitié, quart, ou tiers, en faveur de mariage ou autrement (si la coutume locale n'y repugne) sont revoquées de loi sans autre mystere," by the birth of children.

He adds that it has been so determined by many "Arrests de Paris" during the last twenty-five years. In a note by the editor, Chenu, a commentary on the law by Du Moulin is referred to in which it is maintained that revocation would not take place unless the donation was "de majore parte bonorum," and an arrêt pronounced "en robes rouges" by the Parliament of Bordeaux in 1602, is cited in support of this opinion.

The question was often raised, and the controversy regarding it is referred to in a book by Damours, intituled "Conférence de l'Ordonnance concernant les donations avec le Droit Romain, &c. (p. 324); whether "donations particulières" were revoked, or only those "d'une quotité, comme d'un tiers, d'un quart, d'un sixième, dans l'universalité des biens." It appears from Damours that the Parliament of Toulouse had decided that "donations particulières" were revoked, but that the Parliament of Paris had decided the contrary. An arrêt of the latter Parliament (1656) reported by Sæfve, tom. 2, c. 18, is cited. From this report it appears that the gift was of a house and some land, and was not large in proportion to the property of the donor.

It would not be useful to refer further to arrêts upon the question of what should be the value of a gift in relation to the donor's property to prevent the operation of the law of revocation. Sallé, writing on the Ordinance of 1731, thus refers to the old arrêts on the subject:—

"En considérant la jurisprudence des arrêts, on ne trouve point non plus stabilité, ni d'uniformité. Dans ceux qui ont prononcé la révocation des donations pour survenance d'enfans, il y a des donations qui étaient de la moitié, d'un tiers, et d'autres, d'une chose particulière."

Whenever relative value has been discussed, it has not been shown that a donation of less than the sixth part, mentioned by Cujas, was ever regarded as "immensa."

The difficulty of defining, as a rule for all cases, the precise proportion the gift should bear to the whole property of the donor, shown in the diversity of opinions and decisions upon the subject, no doubt led to the growth of the law which left the revocability of the gift to depend upon the circumstances of each case, and especially upon consideration of the question

whether it would have been made if the donor, at the time of making it, had contemplated the birth of children.

The ground of decision just adverted to is found in an arrêt of the Parliament of Bordeaux, of the 2nd June 1570, cited by Despiesses, holding that a gift from a lady of 10,000 livres was revocable "moyennant qu'y ait apparence que le donateur n'eut pas fait telle donation s'il eut pensé avoir des enfans" (*ubi ante*).

The principle of this arrêt appears to have been sanctioned by jurists and adopted by the Courts. Writers, who are acknowledged to be of high authority, seem to be agreed that it supplied the true rule on the subject.

De Ferrière, in his work on "La Coutume de Paris," treating of revocation says:—

"Cette question à mon avis, ne se peut décider que sur les circonstances qui se tirent des biens du donateur, des choses données, et de leur valeur, et de la personne du donataire; il faut examiner si le donateur n'auroit pas donnée, s'il avoit sçu avoir des enfans."

Ricard, *Traité des Donations*, Part 3, c. 5, sec. 4, after discussing the diversity of opinion which had existed, lays down the same rule as De Ferrière, but with greater fulness:—

"Je dis donc qu'il ne faut pas considérer si la donation est de la moitié, du tiers, du quart, ou de la sixième partie de tous les biens du donateur, ou même d'une chose singulière, mais que le point décisif consiste dans cette discussion qui s'emprunte des particularités des espèces qui sont à juger (cette matière étant entièrement dans les présomptions) de voir et examiner si vraisemblablement le donateur eut fait la donation, s'il eut eu des enfans au temps qu'elle a été passée; si elle est considérable pour les biens qu'il possédoit, et si regardant le donateur comme une personne prudente, on doit juger qu'il ait dû raisonnablement faire la donation dont il s'agit, en examinant dans le particulier si c'étoit un proche parent ou un domestique dont la considération, ait pu porter le donateur à exercer cette libéralité; ou bien si la chose donnée, est de petite considération, en égard à ses biens et à ses facultés, pour discerner s'il y a apparence qu'il eût fait cette donation supposé qu'il se fût vu chargé d'enfants, pour déterminer en ce cas qu'elle n'est pas revocable, ou bien que la loi y doit avoir lieu, si la présomption se trouve au contraire. Et de fait dans

les arrêts qui ont été rapportés ci-dessus, et par lesquels les donations ont été déclarées révoquées par survenance d'enfants les unes étoient de la moitié, les autres du tiers, et les autres d'une chose particulière."

Fourgole, in his *Treatise on the Ordinance of 1731*, in discussing the law as it stood before that Ordinance, considers that the soundest view of it was taken by Papon, Ricard, De Ferrière, and the other writers who maintained the principle of decision found in the passages last above cited; and after giving the effect of the passage just cited from Ricard, he adds:—

"C'étoit à notre avis la meilleure règle qu'on pût suivre dans cette matière, qui n'étant pas fondée sur la disposition expresse de la loi, mais seulement sur l'équité appuyée sur son esprit, étoit purement conjecturale, cependant elle avoit cet inconvénient, qu'elle rendoit la décision arbitraire, mais pour faire cesser cet inconvénient M. le Président de Lamoignon dans ses arrêtés au titre des donations, Article 50, avoit cru que la donation d'une quote ou d'une chose particulière dont la valeur n'alloit pas au quart des biens du donateur au temps de la donation, ne devoit pas être révoquée."

It is to be remarked that Fourgole in this passage states distinctly that the rule in France was not founded on the express disposition of the law, but on an equity resting upon its spirit, and their Lordships consider this to be the correct view.

The arrêté (Art. 50) of President Lamoignon referred to by Fourgole is in these terms:—

"Donation de chose singulière, ou par quotité au-dessous du quart des biens qu'avait le donateur au jour de la donation, n'est point révoquée par survenance des enfants, mais si elle est du quart ou au-dessus, ou d'une chose singulière valant le quart des biens ou au-dessus, elle sera révoquée pour le tout."

Great reliance was placed by the learned Counsel for the Respondents on this arrêté, as a declaration of the law settled by the jurisprudence of the Parliament of Paris. The great authority of De Lamoignon, who was first President of that Parliament, was fully acknowledged, but it was denied that the arrêtés were statements of the actual law; they were said to be determinations of what the law should be.

Assuming this to be so, there is some reason to suppose, from Lamoignon's preliminary inquiries and proceedings before publishing his arrêtés, that he evolved the principle of Arrêté 50 from decisions of the Parliament of Paris. The jurisprudence having taken a direction which left the question to be determined in each case by the Court on the view of its circumstances, had produced uncertainty, and this inconvenience he wished to prevent by a definite rule.

Whatever may have been the diversity of opinions and decisions on the subject, the general effect of them points irresistibly to the conclusion that before the Ordinance of 1731, the Roman law, "Si unquam," had not been introduced in all its fullness into France, at least into that part of it within the jurisdiction of the Parliament of Paris. It seems to their Lordships that, before that Ordinance, the law had, in effect, become this, that donations were not revoked by the birth of children, when the property given was not of large value in relation to the entire estate of the donor, and it could be presumed, from the circumstances of the particular case, that the gift would have been made if the donor had contemplated the birth of children. These questions in case of dispute would, necessarily, be decided by the Courts.

It was urged that a rule which required the decision of a Court on these questions could not be the true one, as being inconsistent with the principle which implies the existence of a resolute condition in the gift itself; but this is really not so, for if the rule be as above supposed, the legal effect of it would be, that in a given state of facts the law did not attach the resolute condition to the gift, but when that state of facts did not exist it did attach it. The determination by the Courts of the question of fact in no way changes the legal nature of the condition (if there

be one) as a resolute condition. When the facts are found in one way, the law implies that the gift was always unconditional, whilst, if found in the other, it implies that the condition was always inherent in the gift.

In 1731, the Ordinance of Louis XV., entitled "Ordonnance sur les donations," which adopted to its full extent the law "Si unquam," settled the law of France upon the subject. By Art. 39 it was enacted that all gifts made by persons who had not children at the time of the donation "du quelque valeur que les dites donations puissent être, et à quelque titre qu'elles aient été faites, . . . demeureront révoquées de plein droit par le survenance d'un enfant légitime du donateur."

This Ordinance, which was framed after careful inquiry into the existing jurisprudence of France by Chancellor D'Agessseau, contains a complete code on the subject of donations, and it was contended, on the part of the Appellants, that it ought to be regarded as declaratory of the existing law. It appears that D'Agessseau formulated certain questions, and sent them, with explanatory letters, to all the Parliaments. Extracts were read from these letters to show that the Chancellor's object was to reform the discordant jurisprudence of the Courts, so that the law throughout France should be uniform. But the jurisprudence of each Parliament had taken root within its limits, forming the law administered there, and their Lordships do not gather from these letters that the Chancellor supposed that the contemplated Ordinance could be a mere declaration of existing law. He, selected from the jurisprudence of each Parliament what he considered to be good, and fit to be incorporated into the general law he proposed to frame.

It appears that the Chancellor contemplated

the formation of a general code of law, and commenced with the subject of donations as being, in his view, one of the most simple, and the least difficult. (See his letter of 3rd May 1730, to M. de Machault, Conseiller d'Etat, who was charged with making a *résumé* of the observations of the Parliaments and others upon the questions which had been put to them.) In this letter the Chancellor, after stating that all the Parliaments and "Conseils Supérieurs" had sent answers to his questions, says, "Il s'agit à présent de se servir de tant de bons matériaux pour en former une loi," which should be of a nature to stimulate further exertion in the same direction; and in the same letter he says the object was "à établir des règles certaines et uniformes sur ce qui fait le sujet d'une diversité de jurisprudence."

But, whatever may be the inference to be derived from these letters, the Ordinance contains within itself abundant evidence that it was not intended to be a mere declaration of existing law. It contains some provisions which are undoubtedly new. Thus Art. 45 enacts that the period of prescription shall be thirty years after the day of the birth of the last child of the donor. And Art. 39 itself is more stringent in its details than the law "Si unquam." But Art. 47 is decisive on this question. It repeals "toutes ordonnances, lois, coutumes, statuts, et usages" contrary to the provisions contained in the Ordinance, and provides that donations made before its publication were not to be attacked under pretext that they were not in conformity with its rules; "notre intention étant qu'elles soient exécutées ainsi qu'elles auroient pu et du l'être auparavant, et que les contestations nées et à naître sur leur exécution soient décidées suivant les lois et la jurisprudence qui

“ ont eu lieu jusqu'à présent dans nos cours a
 “ cet égard.”

Considering, then, that this Ordinance enacts a new law on the point in question, it would not be of force in Canada unless it had been registered there. The Appellants' Counsel relied on the injunction of the Ordinance requiring it to be obeyed “ dans tout notre royaume terres et pays “ de notre obeissance,” but a royal Ordinance, published after the establishment of “ Le Conseil Supérieur ” in Canada by the Edict of 1663, did not take effect in that province, *proprio vigore*, until it was registered (*Hutchinson v. Gillespie*, 4 Moore, P. C. 378, *Les Sœurs Hospitalières de St. Joseph v. Middlemiss*, L. R. 3, Appeal Cases, 118).

This Ordinance not having been registered, it was incumbent upon the Appellants to show that the French law introduced into Canada in 1663, and which presumably continued to be the law there, became altered and modified in consequence of the jurisprudence of the province having adopted the rules contained in it. The learned Counsel for the Appellants was unable, after great research, to produce any evidence that the law had been thus changed or modified, and, in its absence, their Lordships think that such a change cannot be presumed.

The only authority which the learned Counsel could invoke is that of the Commissioners charged with the preparation of the Canadian Civil Code, who in their Report (Vol. 2, p. 333) state the law very nearly in the terms of the Ordinance of 1731, to which, indeed, they refer. This authority is no doubt entitled to respect; but the opinion of the Commissioners has not the weight of a judicial opinion, pronounced after discussion and argument; and it is to be observed that the Commissioners, having decided to

introduce a new law (opposed to the law "Si unquam)," and not the old whatever it was, into the Code, were the less concerned to ascertain with precision what the old law was. Whatever respect, therefore, may be due to the opinion of the Commissioners, their Lordships think, for the reasons already given, that it cannot of itself be regarded as sufficient evidence that the law of the Ordinance of 1731 had found its way into the jurisprudence of Canada.

Regarding, then, the law of Canada to be that which existed in the jurisprudence of the Parliament of Paris before the Ordinance, the question remains whether the gift in question was revocable upon the birth of children. In deciding it, two matters of fact require to be considered, one, the largeness of the gift, the other, whether the donor would have made it if she had contemplated children. On the first point, their Lordships have no difficulty in coming to the conclusion that the gift was not excessive in relation to the property of the donor. It was about the hundredth part of it. Wherever a gift of a part of a donor's property has been discussed and tested with reference to its amount, a proportion so small as this has never been regarded as excessive. It was contended that, in considering this question, the value of the gifts made to the other relations should be estimated; but, though the fact of these other gifts cannot be excluded, and for some purposes it might be very material to consider them, each gift, in the end, must be decided on its own merits. All these gifts, however, if taken together, amount only to about one tenth of the donor's wealth, a proportion less than any share which French writers have regarded as excessive. As already stated, one sixth is the lowest mentioned by them. Mr. Justice Ramsay, in his judgment, says that he had found no case, where the amount

was in question, in which a donation of less than one sixth was set aside.

Then it is to be considered whether this donation would have been made if the donor had contemplated the birth of children. This question naturally opens an inquiry into the circumstances attending the gift. Ricard, in the passage cited above, alludes to those deemed to be material. The value is of course material; so also are the motives of the gift, and the relation of the donees to the donor. The circumstances in this case are, that for many years after her mother's death La Marquise lived with her Aunt Luce, and in the society of her cousins. It was natural that she should have become attached to them, and, when on her father's death, she succeeded to his large wealth, and to her mother's not inconsiderable property, that she should desire to make some present to them. Her gift is for personal objects, being described to be "pour partie de leurs frais de toilette et autres petits besoins personnels," and therefore is of a kind which might well spring from her own wish to gratify her cousins. It is evident that she believed that her mother had expressed a desire that some part, at least, of her property should go to her own relatives. Respect for her mother's wishes and her own affection for her cousins supply ample motives for the gift in question. Considering then the value and nature of the gift, the relationship of the parties, and the motives which might naturally have actuated the donor, there seems to be good reason for presuming that if she had contemplated children she would still have made it. Her letters to her uncle Maurice, directing the arrangements to be made preparatory to her marriage, strongly support this presumption. (*See Record, pp. 20-26.*) But it is said she did not in fact contemplate having children when she made the gift. The true question however would seem to be, not

whether she thought of having children, but whether it can be presumed that if she had thought of them, she would still have made the gift. Even if this be not so, it is difficult to suppose that this lady, possessed of great attractions, and of great wealth, and whose letters display much intelligence and forethought, did not contemplate the probability of marriage. Questions of this kind can only be decided upon presumptions, and their Lordships agree with those which have been arrived at by the majority of the Judges in the Court below on this point.

Their Lordships will, for the reasons they have given, humbly advise Her Majesty to affirm the judgment appealed from, and with costs.

