

CANADA / JUDGMENT

Royal Trust Co. v. Tucker

[1982] 1 SCR 250

COURT

Supreme Court of Canada

DECIDED

9 February 1982

Source: decisions.scc-csc.ca · Research copy typeset by Esheria. Not court-issued or certified.

Royal Trust Co. v. Tucker

Collection

Supreme Court Judgments

Date

1982-02-09

Report

[1982] 1 SCR 250

Case number

15949

Judges

Laskin, Bora; Martland, Ronald; Ritchie, Roland Almon; Dickson, Robert George Brian; Beetz, Jean; Estey, Willard Zebedee; Chouinard, Julien

On appeal from

Quebec

Subjects

Trust

Decision Content

Supreme Court of Canada

Royal Trust Co. v. Tucker, [1982] 1 S.C.R. 250

Date: 1982-02-09

Royal Trust Company Appellant;

and

Dame Barbara Tucker Respondent;

and

Judith Mae Buller, Catherine Martha Buller, Patricia Doreen Buller, Pamela Christine Buller, Diane Harding Tucker, Daphney Millicent Tucker and the Registrar of the Registration Division of Montreal Mis en cause;

and

H. Clark Holden Intervener.

File No.: 15949.

1981: February 12; 1982: February 9.

Present: Laskin C.J. and Martland, Ritchie, Dickson, Beetz, Estey and Chouinard JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Trusts and trustees—Deed of donation and trust in favour of primary beneficiaries who did not exist when deed of donation and trust was made—Quebec trust of English inspiration—Acceptance of the trust—Ownership of the trust property—Deed of donation and trust in favour of secondary beneficiaries not a gift in contemplation of death—Civil Code, arts. 754, 758, 760, 782, 981a, 981b, 981l.

In 1953 respondent concluded a deed of donation and trust with appellant pursuant to arts. 981a et seq. of the Civil Code. In 1974 respondent challenged the validity of this contract on the grounds that the gift made in favour of the unborn children of the donor (primary beneficiaries) and in favour of the sisters of the donor (secondary beneficiaries) was void: the former because the beneficiaries did not exist when the deed of donation and trust was made; the latter because it is incidental to the former and is a gift in contemplation of death. The Superior Court dismissed the action but respondent's appeal to the Court of Appeal was allowed.

Held: The appeal should be allowed.

The deed of donation and trust made for the benefit of the unborn children of the donor is valid. The property conveyed in trust is taken out of the grantor's estate and it is the trustee, whose acceptance sufficed to make the trust irrevocable, who becomes owner of the property for the duration of the trust. There is thus no further impediment to the validity of the trust, since it is not necessary that there be beneficiaries in whom ownership of the property conveyed is vested. When art. 981a refers to the provisions relating to gifts and legacies, it does so subject to the special characteristics of the trust, and not as if the trust did not exist and this was an ordinary gift or an ordinary legacy. Articles 981a et seq. must be given a wide and liberal interpretation, favouring an extension of the contractual and testamentary freedom of the parties and in keeping with the purpose of the legislation, which is to enable individuals to do by gift *inter vivos*

what it was already possible to do in part by will, including the creation of a benefit intended for a non-existent person. Public order and the law do not prohibit it.

The deed of donation and trust in favour of the donor's sisters is also valid. This gift, distinct from the first, is not a gift in contemplation of death because in the case at bar the condition accompanying the deed of donation and trust is not the donor's death, but the absence of any issue of the donor at the time fixed by her for the trust to terminate. As the donor has irrevocably divested herself of the trust property, she has conferred on her sisters a suspensive right which she can no longer take back.

Curran v. Davis, [1933] S.C.R. 283; Harwood v. Moncel (1923), 61 C.S. 497; Estate of the late Thomas Fyshe v. Fyshe, [1977] C.S. 165; Reford v. National Trust Company, [1968] Que. Q.B. 689; Masson v. Masson (1912), 47 S.C.R. 42; O'Meara v. Bennett, [1922] 1 A.C. 80; Laliberté v. Larue, [1931] S.C.R. 7; Laverdure v. Du Tremblay, [1937] A.C. 666; Green-shields et al. v. The Queen, [1958] S.C.R. 216; Crown Trust Co. v. Higher et al., [1977] 1 S.C.R. 418; Abbot v. Fraser, (1874) L.R. 6 P.C. 96; Guaranty Trust Co. of New York v. The King, [1948] S.C.R. 183; No. 199 v. Minister of National Revenue, 54 D.T.C. 488; Taylor v. Royal Trust Company (1936), 74 C.S. 180; Pesant v. Pesant, [1934] S.C.R. 249, referred to.

APPEAL from a judgment of the Court of Appeal of Quebec, [1979] C.A. 308, reversing a judgment of the Superior Court, [1976] C.S. 895. Appeal allowed.

William E. Stavert and James P. Thomson, for the appellant.

Georges Audet and Jean-Pierre Bréard, for the respondent. English version of the judgment of the Court delivered by

BEETZ J.—This Court has to decide, inter alia, as to the validity of a deed of donation and trust made otherwise than by a marriage contract, the primary beneficiaries of which are the unborn children of the donor.

I—Facts and proceedings

The facts are not in dispute.

On March 13, 1953, in Montreal, respondent concluded a deed of donation and trust with appellant pursuant to arts. 981a et seq. of the Civil Code. The chief provisions of this contract are as follows:

The Donor doth hereby transfer, convey and make over by way of gift inter vivos and irrevocable to the Trustee thereof accepting in trust for the purposes and on behalf of the beneficiaries hereinafter set out the stocks, bonds and securities set out in the schedule hereto annexed marked "A" identified by the signature of the parties hereto and the undersigned Notary, which will hereinafter be called "the Trust Property".

The present Donation has been thus made subject to the following conditions, namely:

- (1) During the lifetime of the Donor, the Trustee shall pay to or use for her the net revenues from the Trust Property and in addition such parts of the capital of the Trust Property as the Trustee in its sole discretion may deem advisable to pay to or use for her from time to time to provide for illness, accidents, emergencies, or other needs of a serious nature.
- (2) Upon the death of the Donor to divide the Trust Property as then composed among the Donor's lawful children in the first degree and the Donor's grandchildren in the first degree, or any one or more of such children or grandchildren in accordance with the terms of the Donor's Will, and failing such Will or in so far as the said Will may not apply to the Trust Property, to pay the same to the Donor's lawful children in the first degree in equal parts upon their respectively attaining the age of twenty-five years. Should any child in the first degree of the Donor have predeceased the Donor leaving lawful issue such issue will take the share that would have devolved to their deceased parent and failing issue the same will accrue to the remaining children in the first degree of the Donor and the issue of her predeceased children in the first degree in equal parts by roots. Should any child in the first degree of the Donor survive her but die before reaching the age of twenty-five years leaving lawful issue, such issue shall take the share of their deceased parent and failing issue the same will accrue to the other children in the first degree of the Donor and the issue of predeceased children in the first degree equally by roots. The shares of all such issue of the Donor's children in the first degree shall be paid over to them as they respectively reach the age of twenty-five years. During the minority of all children and their issue herein referred to the Trustee shall use for their welfare the revenues from their respective shares, in such amounts and through such channels as the Trustee in its sole discretion may decide, and after reaching majority each beneficiary shall be paid his or her share of revenues direct. In addition such parts of the capital of their respective shares as the Trustee in its sole discretion may deem advisable may be paid to or used for such beneficiary from time to time to provide for illness, accidents, emergencies or other needs of a serious nature.

In the event of any beneficiary under this clause (2) dying without issue before attaining twenty-five years of age the share of such beneficiary shall accrue to his or her brothers and sisters or their children representing them.

...

- (5) Upon the death of the Donor, should there be no lawful descendants of hers then living, or should all her lawful descendants who survive her die before reaching the age of twenty-five years, the Trustee shall pay over one-half of the Trust Property to LESLIE A. TUCKER, the Donor's Father, and shall pay the remaining half to the other children in the first degree of the said Leslie A. Tucker, the lawful issue of such children to take the share of any of them who may have predeceased, by representation: the children and issue who are to share hereunder to be determined at the death of the Donor or of the last of her descendants whichever event is the later: but should all such children and their issue have predeceased the said Leslie A. Tucker, and latter shall receive the whole of the Trust Property. Should the said Leslie A. Tucker have predeceased the Donor, and the Donor's descendants and his own

other children in such event the Trustee shall divide the whole of the Trust Property among the other children of the said Leslie A. Tucker or their issue aforesaid. Should the said Leslie A. Tucker and all his other children and their lawful descendants be dead as well as the Donor and her lawful descendants in such event the Trustee shall divide the Trust Property among the abintestate legal heirs of the Donor, such heirs to be determined as at the death of the Donor or the last descendant of the Donor whichever is the latest.

The contract confers on the trustee the most extensive powers of administration and alienation, in addition to those which he is given by law.

When she signed this agreement, respondent was domiciled in the Province of Quebec, was unmarried and had no children. She now has four minor daughters, Judith Mae, Catherine Martha, Patricia Doreen and Pamela Christine Buller, represented by the intervener, their tutor ad litem.

The *mis en cause* Diane Harding and Daphney Millicent Tucker, who are both unmarried, of legal age and without issue, are the only other children of the late Leslie A. Tucker, respondent's father. It is not in dispute that they existed on March 13, 1953.

Appellant trust company continues to be in possession of all the property included in the trust, a portfolio of securities and mortgage loans which it has managed since 1953.

By her action brought against appellant in 1974, respondent asked the Superior Court to void the 1953 deed of donation and trust *ab initio*, to declare respondent the sole owner of the property conveyed in trust, which she valued at \$154,432, to direct appellant to transfer this property to her and to order appellant to pay her the sum of \$154,432 if it failed to transfer the trust property to her within sixty days of the judgment.

The grounds of nullity relied upon by respondent include *inter alia* the following, the only ones that were argued as far as this Court: (a) the gift made in favour of the primary beneficiaries is void because these beneficiaries did not exist when the deed of donation and trust was made; (b) the gift made in favour of the secondary beneficiaries is void because it is incidental to the foregoing and is a gift in contemplation of death.

Appellant submitted its rights to the Court but contended that the deed of donation and trust was valid. In his capacity as tutor of respondent's daughters, the intervener submitted their rights to the Court.

The other two *mis en cause*, the respondent's sisters, did not appear.

II—The judgments of the Superior Court and of the Court of Appeal

The Superior Court judgment has been published: *Tucker v. Royal Trust Co.*, [1976] C.S. 895. Mackay J. dismissed the action of the respondent. He refused to follow two judgments given by the Superior Court in *Harwood v. Moncel* (1923), 61 C.S. 497; C.S. Mtl. No. 1150, June 29, 1921, in which deeds of donation and trust were voided because the primary beneficiaries did not exist;

the gift has been made, as in the case at bar, to the donor's unborn children. In Mackay J.'s view, the decision of this Court in *Curran v. Davis*, [1933] S.C.R. 283, overturned the limiting view taken of trusts in the *Harwood v. Moncel* decisions. Thus, it was held that acceptance by the trustee only suffices to make the deed of donation and trust perfect and irrevocable, and acceptance by the beneficiary is not necessary so long as he does not intend to make use of the benefits conferred on him by the trust. The trustees were also recognized to have a limited right of ownership in the property conveyed to them in trust. It accordingly becomes possible to give the Quebec law on trusts a more liberal interpretation, one which is more in keeping with its English sources. The trial judge referred to Halsbury's Laws of England, 3rd ed., vol. 38, at p. 817, which recognizes that trusts created for the benefit of persons who do not yet exist are valid.

However, the trial judge did not rule on the validity of the stipulation made for the secondary beneficiaries, the donor's sisters: it is unlikely that they will survive the primary beneficiaries, and in Mackay J.'s opinion, that situation can be dealt with if and when it arises. Nonetheless, the trial judge held that even if the stipulation for the benefit of the donor's sisters was void, this would not in any way affect the validity of the gift made for the benefit of the unborn children. In a similar case, Meyer J. of the Superior Court subsequently held as did Mackay J.: *Estate of the late Thomas Fyshe v. Fyshe*, [1977] C.S. 165. His judgment is now on appeal.

The majority judgment of the Court of Appeal, [1979] C.A. 308, was based on the reasons of Paré J.A. and of Lamer J.A., as he then was.

In Paré J.A.'s opinion, the English origins of trusts and the judgment in *Curran v. Davis* are not controlling and do not affect the theory accepted in *Harwood v. Moncel*: the question for decision was different, since primary beneficiaries existed in *Curran v. Davis*; the only question was as to whether acceptance by the trustee only sufficed. As to the limited right of ownership of the trustees in the property conveyed to them in trust, it does not alter the situation [at p. 311]:

[TRANSLATION] ... art. 981a) is not concerned with the nature of the trustee's right over the property conveyed to him, but it limits the persons for whose benefit property can be conveyed by a trust to those who can be the subject of a gift.

Article 754, the article which introduces the chapter on gifts and which is referred to in art. 981a, provides:

A person cannot dispose of his property by gratuitous title, otherwise than by gift *inter vivos* or by will.

As any other type of gift is prohibited, a gift accordingly cannot be made by way of trust to benefit unborn and as yet unconceived children.

Paré J.A. considered that the gift made to benefit the secondary beneficiaries is not void as a gift made in contemplation of death, in light of the decision by this Court in *Curran v. Davis*.

However, it is void because it is dependent on the principal stipulation made for the benefit of the unborn children, and falls along with it.

Lamer J.A. expressed no opinion on the origins of trusts, on the limited ownership of trustees in the trust property, or on gifts made to benefit the secondary beneficiaries. He based his decision essentially on arts. 754 and 981a of the Civil Code, concurring in the conclusions of Paré J.A.

Owen J.A., dissenting, did not rule on the validity of the gift made to benefit the unborn children as primary beneficiaries. In his opinion, the stipulation made for the secondary beneficiaries is not incidental to the first stipulation. Even if the first is void, this does not have the effect of voiding the stipulation for the benefit of persons living at the time the trust gift is concluded. Owen J.A. would have dismissed the appeal.

The Court of Appeal accordingly allowed the appeal, reversed the judgment of the Superior Court and allowed respondent's action in accordance with its conclusions.

III—The deed of donation and trust made for the benefit of the donor's unborn children

1. Unborn children, whether ranked first or later

It is important to distinguish between a deed of donation and trust, in which the primary beneficiaries do not exist, and those made for unborn children when the latter are secondary or tertiary beneficiaries and there are primary beneficiaries in existence. In these latter cases, the stipulations made in favour of unborn children are valid and effective provided that the children are conceived at the time the benefit stipulated in their favour takes effect, and are subsequently born viable.

In *Curran v. Davis* this Court did not have to decide the point, but on p. 303 it took for granted that such deeds of donation and trust are valid. A similar ruling was made by the Court of Appeal of Quebec in *Reford v. National Trust Company* [1968] Que. Q.B. 689, at p. 697. See also *Masson v. Masson* (1912), 47 S.C.R. 42, which concerned a testamentary trust made before the Civil Code was adopted in 1866: the testator left his property in trust for the benefit of his eight children and their lawful issue, for an indefinite period of time or as long as the law allowed; at pp. 73, 74, 78 and 90 Sir Charles Fitzpatrick C.J. and Anglin J. expressed the view that the limitations regarding substitution should be extended by analogy to this trust, which can thus benefit two ranks of successive beneficiaries as to the income, and the ultimate beneficiaries, who will receive the capital.

Text writers also recognize the validity of deeds of donation and trust for the benefit of unborn children when the latter do not rank first but after other living beneficiaries: Marcel Faribault, *Traité théorique et pratique de la fiducie ou trust du droit civil dans la province de Québec*, Montreal, Wilson and Lafleur, 1936, p. 190, No. 173; Madeleine Cantin Cumyn, *Les droits des bénéficiaires d'un usufruit, d'une substitution et d'une fiducie*, Wilson and Lafleur, 1980, p. 19, No. 29.

When, however, the question is as to the validity of a deed of donation and trust made primarily for the benefit of unborn children, as in the case at bar, opinions differ both in the cases and among text writers.

With respect to cases, apart from the case at bar, I have already referred to: *Harwood v. Moncel* and the *Estate of the late Thomas Fyshe v. Fyshe*.

Billette (*Donations et testaments*, Montreal, 1933, at p. 187), Faribault (*supra*, p. 190, No. 172) and Cantin Cumyn (*supra*, p. 22, No. 32) conclude that such gifts are invalid. In an unpublished thesis for the Faculty of Law of McGill University, *The Law of Trusts in the Province of Quebec*, 1935, Lionel Rubin concludes at p. 52 that they are valid. In 1935, Mignault made a presentation to the Faculty of Law of Paris on “*La fiducie dans la province de Québec*” [Trusts in the Province of Quebec]. The text was published in the *Bulletin trimestriel de la Société de législation comparée*, January-March 1936 issue, at p. 119. At page 130 we find the following:

[TRANSLATION] I do not think there is any need to give a detailed description of how trusts operate. Their advantage is that they allow an owner of property to make intermediaries responsible for administering property which he hesitates to give directly to individuals about whose character he knows nothing at the time, for example, for children who are under age or, even more so, for unborn children. The tool which it provides is a very flexible one. The profession of trustee has been organized through the establishment of very large companies with unquestioned solvency.

This passage is so general that it can apply to trusts like the one under consideration, but it is not absolutely clear.

Louis Baudouin appears to be of the opinion that trusts established for the benefit of unborn children are all valid; as Mignault, he does not distinguish between primary beneficiaries and those who rank after them: *Le Droit civil de la province de Québec*, 1953, at pp. 1245-46.

D.W.R. Waters raised the question in *Law of Trusts in Canada*, Carswell, 1974, c. 28: “The Trust in Quebec”, at pp. 948, 949 and 951, but he offered no solution.

Finally, such authors as Germain Brière and Roger Comtois do not specifically deal with the point, but the principles which they support appear to be more in keeping with the validity of a deed of donation and trust made primarily to benefit unborn children: Germain Brière, *Les Libéralités*, Editions Thémis, 7th ed., 1977, at p. 55; Roger Comtois, *Les Libéralités*, Répertoire de droit, Doctrine, Document 1, 1979, No. 688, at p. 238.

2. The introduction of trusts into the civil law

The applicable legislation is to be found in the chapter titled “Of Trusts”, chapter IV(A) of the Title “Of gifts ‘inter vivos’ and by will”. The provisions in question are arts. 981a et seq. of the Civil Code. The chief provisions are as follows:

981a. All persons capable of disposing freely of their property may convey property, moveable or immovable, to trustees by gift or by will, for the benefit of any persons in whose favor they can validly make gifts or legacies.

981b. Trustees, for the purposes of their trust, are seized as depositaries and administrators for the benefit of the donees or legatees of the property, moveable or immovable, conveyed to them in trust, and may claim possession of it, even against the donees or legatees for whose benefit the trust was created. This seizin lasts only for the time stipulated for the duration of the trust; and while it lasts, the trustees may sue and be sued and take all judicial proceedings for the affairs of the trust.

...

981l. At the termination of the trust, the trustees must render an account, and deliver over all moneys and securities in their hands to the parties entitled thereto under the provisions of the document creating the trust, or entitled thereto by law.

They may also execute all transfers, conveyances, or other deeds necessary to vest the property held for the trust in the parties entitled thereto.

These provisions were not in the 1866 Civil Code, which only provided for a kind of testamentary trust in arts. 869 and 964:

869. A testator may name legatees who shall be merely fiduciary or simply trustees for charitable or other lawful purposes within the limits permitted by law; he may also deliver over his property for the same objects to his testamentary executors, or effect such purposes by means of charges imposed upon his heirs or legatees.

...

964. The legatee who is charged as a mere trustee, to administer the property and to employ it or deliver it over in accordance with the will, even though the terms used appear really to give him the quality of a proprietor subject to deliver over, rather than that of a mere executor or administrator, does not retain the property in the event of the lapse of the ulterior disposition, or of the impossibility of applying such property to the purposes intended, unless the testator has manifested his intention to that effect. The property in such cases passes to the heir or the legatee who receives the succession.

It was at that time impossible to create a trust by way of an inter vivos gift.

The provisions which were to become arts. 981a et seq of the Civil Code were enacted in 1879, in the Act respecting Trusts, 1879 (Que.), c. 29. With minor changes, they were incorporated into the Civil Code in the 1888 statutory revision.

It has been said that this 1879 statute owed little or nothing to English law: see, for example, J.-Emile Billette, "Etudes de jurisprudence", A propos de fiducie, (1932) 11 R. du D. 38; Daniel N. Mettarlin, "The Quebec Trust and the Civil Law", (1975) 21 McGill L.J. 175.

That is an exaggeration. The trust was known in the old French law, but Faribault (*supra*, at pp. 45-50 and at p. 393) showed that the Quebec trust is of English inspiration, as appears from the English terminology of art. 981a and which is explained by the earlier cases and legal practice in the drafting of wills: see also Armand Lavallée, “Donation fiduciaire”, (1932) 11 R. du D. 227.

It is therefore legitimate to refer to English law, as this Court did in *Curran v. Davis*. And, as was indicated above, English law regards the deed of donation and trust now under consideration as valid. See also *D.W.R. Waters*, *supra*, at p. 96. However, the argument is not conclusive, because the entire English law of trusts was not incorporated into the civil law. Thus, for example, under arts. 981a et seq., it is not possible to make oneself a trustee by means of a “declaration of trust”: *O’Meara v. Bennett*, [1922] 1 A.C. 80. Additionally, the enactment of arts. 981a et seq. did not have the effect of introducing in Quebec the English distinction between legal title and beneficial ownership, a sort of dual ownership, and a concept foreign to Quebec law under which ownership is indivisible and vested in a single individual: *Laliberté v. Larue*, [1931] S.C.R. 7 at p. 16. See also *Laverdure v. Du Tremblay*, [1937] A.C. 666 at p. 682, *Greenshields et al v. The Queen*, [1958] S.C.R. 216 at p. 217, and *Crown Trust Co. v. Higher et al.*, [1977] 1 S.C.R. 418 at pp. 424-26. English law is relevant only in so far as it is compatible with arts. 981a et seq. of the Civil Code.

These articles refer to the provisions regarding gifts *inter vivos* and by will, the following of which are the most significant for the purposes of the case at bar, and were still in effect at the time the trust at issue was created:

608. In order to inherit it is necessary to be civilly in existence at the moment when the succession devolves; thus, the following are incapable of inheriting; 1. Persons who are not yet conceived;
2. Infants who are not viable when born.
- ...
754. A person cannot dispose of his property by gratuitous title, otherwise than by gift *inter vivos* or by will.
755. Gift *inter vivos* is an act by which the donor divests himself, by gratuitous title, of the ownership of a thing, in favor of the donee, whose acceptance is requisite and renders the contract perfect. This acceptance makes it irrevocable, saving the cases provided for by law, or a valid resolute condition.
- ...
765. All persons capable of succeeding and of acquiring may receive by gifts *inter vivos*, saving any exception established by law, and subject to the necessity of legal acceptance by the donee, or by a person qualified to accept for him.
766. Corporations may acquire by gifts *inter vivos*, as by other contracts, such property as they are allowed to possess.

767. Minors become of age, and persons who have been under the control of others, cannot give inter vivos to their former tutors or curators, so long as their administration actually continues and they have not rendered their account; [they may however give to their own ascendants who have exercised these offices.]

768. Gifts inter vivos made in favor of the person with whom the donor has lived in concubinage, or of the incestuous or adulterine children of such donor, are limited to maintenance.

This restriction does not apply to gifts made in a contract of marriage entered into between the concubinaries.

Other illegitimate children may receive by gift inter vivos like all other persons.[1]

...

771. The capacity to give or to receive inter vivos is to be considered relatively to the time of the gifts. It must exist at each period, with the donor and with the donee, when the gift and the acceptance are effected by different acts.

It suffices that the donee be conceived at the time of the gift or when it takes effect in his favor, provided he be afterwards born viable.

772. The favor given to contracts of marriage renders valid the gifts therein made to the children to be born of the intended marriage. It is not necessary that the substitute should be in existence at the time of the gift by which the substitution is created.

...

929. Substitutions may be created by gifts inter vivos, made in contracts of marriage or otherwise, by gifts in contemplation of death made in contracts of marriage, or by will.

The capacity of the persons is governed in each case by the nature of the act.

The disposition which creates the substitution may be conditional like any other gift or legacy.

Substitutions may be appended to dispositions that are either universal, or by general title, or by particular title.

The substitute need not be present at the gift inter vivos which creates the substitution in his favor; he need not even have been born nor conceived at the time of the act.

Not only are these provisions older than the chapter on trusts, but for the most part they are derived from the most characteristic rules of a secular law. The introduction of the trust into such a closely-knit system of civil law was bound to present difficult problems, such as that before the Court, and to give rise to the most lively controversies, some of which still continue.

3. Acceptance of the trust

One of these controversies, which affects the outcome of the case at bar, concerns the acceptance of the trust. Does acceptance by the trustee suffice to render the creation of the trust irrevocable or must the beneficiary accept?

Article 981a provides that the trust can be made by gift, and art. 981b refers to the beneficiary as to a donee. Article 755 provides that acceptance by the donee is necessary and makes the contract perfect and irrevocable. It has thus been argued that acceptance by the beneficiary of the trust is necessary: Billette, *Donations et testaments*, Montreal, 1933, at p. 341; Mignault held the contrary view, relying primarily on English law: *Le droit civil canadien*, vol. 5, at pp. 157-58. This Court upheld the view of Mignault in *Curran v. Davis*.

For the purposes of the case at bar, that case has a negative determining effect: if indeed the opposite conclusion had been reached in *Curran v. Davis*, the question which the Court has to answer would no longer arise, since a contract cannot be made with non-existent persons whose acceptance is necessary to make the contract perfect and irrevocable.

It is therefore not possible to conclude from *Curran v. Davis* that the deed of donation and trust at issue is valid, but it removes one obstacle to its validity, since it establishes that acceptance by the trustee suffices to make the creation of the trust irrevocable.

4. The ownership of the trust property

Another controversy resulting from the introduction of the trust into Quebec civil law concerns ownership of the property while the trust lasts.

Since the courts have rejected the English concept of dual ownership in favour of sole ownership vested in a single person, the question has arisen as to who is owner of the property while the trust lasts. This difficult question has been answered by the writers with various theories, some of which are ingenious and indeed attractive, but none of which may be entirely satisfactory. A description of most of these theories is to be found in a posthumous article by Yves Caron, completed by J.E.C. Brierley, "The Trust in Quebec", (1980) 25 McGill L.J. 421.

According to the first theory, it is the beneficiary of the trust who owns the property conveyed to him in trust. This was the view of Mignault initially, in his *Treatise Le droit civil canadien*, vol. 5, at p. 155. It is also the view of Billette, "Etudes de jurisprudence", "A propos de fiducie", (1932) R. du D. 38. See also René-H. Mankiewicz, "La fiducie québécoise et le trust de common law", (1952) 12 R. du B. 16.

If this theory were to prevail, the trust at issue in the case at bar would be void, since for a certain period of time ownership of the property in the trust would have been vested in no one.

Mignault changed his mind following the decision in *Curran v. Davis*, and espoused another theory: the trust property is owned by the trustee; Mignault, “A propos de fiducie”, (1933) 12 R. du D. 73; “La fiducie dans la province de Québec”, *Travaux de la semaine internationale de droit*, vol. 5, Paris, Sirey, 1937, at pp. 35-55. See also, to the same effect, Peter E. Graham, “Some Peculiarities of Trusts in Quebec”, (1962) 22 R. du B. 137; Lionel Rubin, *supra*, at pp. 32-45; Roger Comtois, *supra*, at pp. 240 and 243.

If this theory is the correct one, there is no further impediment to the validity of the trust at issue, since, while it lasts, it is not necessary that there be beneficiaries in whom ownership of the property conveyed in trust be vested.

The other theories are somewhat more innovative.

According to Faribault’s theory, *supra*, there is a quasi-personification of the trust, which becomes an authentic institution, and the property conveyed in trust is owned by this institution. See also C.H. Lalonde, *Traité de Droit civil du Québec*, vol. 6, Montreal, Wilson and Lafleur, 1958, at pp. 449 et seq.; Louis Baudouin, *supra*, at pp. 1249 et seq.; *No. 199 v. Minister of National Revenue*, 54 D.T.C. 488.

Faribault’s theory is somewhat analogous to that of the French jurist P. LePauille (*Traité théorique et pratique des trusts*, Paris, Rousseau et Cie, 1932) who contends that the trust is a patrimony not vested in a person or a patrimony of assignment to a purpose. This is the position which Cantin Cumyn seems to approve: *supra*, No. 101, at pp. 71-72.

Finally, the most recent theory is an attempt to give a complete explanation of the trust purely in terms of the civil law: the powers of the trustee over the trust property are said to constitute a dismemberment of the ownership; the ultimate beneficiaries of the trust are the owners under a suspensive condition, and the grantor of the trust or his estate are owners under a resolute condition: Mettarlin, *supra*, at pp. 218-23.

The only one of all these theories which can be said to have received judicial support is Mignault’s second theory, namely that while the trust lasts the trustee is owner of the property conveyed to him in trust. It must also be said that this support has only been given with hesitation and reservations.

Paradoxically, this theory seems to have been taken for granted at the outset, with regard to the testamentary trust authorized by art. 869 of the Civil Code, prior to the enactment of the Act respecting Trusts.

In *Abbot v. Fraser*, (1874) L.R. 6 P.C. 96, the issue was the validity of a will by which the testator bequeathed the greater part of his fortune to trustees who were required to obtain the incorporation of an institution which would become a public library and museum known as the “Fraser Institute”, and then to convey all the property so bequeathed to this corporation. The Judicial Committee reversed the majority decision of the Court of Appeal of Quebec and restored the judgment of the Superior Court, which had found this will valid. At pages 122 and 123, there are the following passages of the decision of the Judicial Committee, given by Sir Montague

Smith:

The devise is, in the first instance, to the trustees, and under it they are empowered, at least for a time, to hold and administer the property for the purpose of the trust, and until, in further execution of the trust, a corporation is created with authority to administer it.

...

It appears to [their Lordships] that the devise to the trustees was meant to be limited and transitory, the property remaining in them only until they could execute the ultimate purpose of the devise.

One of the arguments made against the validity of this will was that it bequeathed property to a corporation which did not exist at the time the succession devolved. The Judicial Committee dismissed this objection as follows, at pp. 124-25: The third and remaining objection is that the gift failed, being a gift to a society not in existence at the testator's death.

If the devise had been to a society or a corporation to be afterwards called into existence or created without the interposition of fiduciary legatees or trustees, this objection might have given occasion to difficulties of great weight.

It was said by the Court of first instance in *Des Rivières v. Richardson* [Stuart's Rep. 218]:—

"It may be admitted that, if by a will an immediate devise is made to a corporation not in existence, it will be void, as there is no such corporate body to receive, and it would be equally void even if the corporation were afterwards created without some special and express law to take the case out of the general principle."

But it was also said in the same case in the Court of Appeal:—

"The second ground of objection is also untenable, for although it is admitted that a legacy is lapsed (i.e., 'caduque') when left to an individual, or to a body politic and corporate, not in esse; yet the principle does not apply to this case, inasmuch as the trustees were all alive when the testator made his will, and they received the bequest for the benefit of the Royal Institution, as soon as it should please the Provincial Government to give to airy nothing 'a local habitation and a name.'"

That case no doubt differed in some of its facts from the present, as the Royal Institution had been, in some sense, incorporated before the date of the will; but the principle is asserted in it that the intervention of trustees will, in some cases at least, prevent a lapse.

Their Lordships on this point, having regard to Art. 869, which permits the appointment of fiduciary legatees for charitable and other lawful purposes, and to Art. 838, which, in the case of legacies suspended after the testator's death in consequence of a condition or substitution, declares that the capacity to receive is to be considered relatively to the time when the right comes into effect, are of opinion that there has been no lapse in this case, and that the trustees

may carry the purpose of the testator into effect if and when the corporation of the Fraser Institute is duly incorporated. The transfer of the property to the corporation is directed to be made by conveyance from the trustees, who, in then making it, will execute the lawful purpose for which the property was entrusted to them.

Similarly, in *Masson v. Masson*, speaking of a testamentary trust made before the 1866 Civil Code, Sir Charles Fitzpatrick C.J. considered, at pp. 73, 74, 75 and 76, that property bequeathed in trust is vested in the trustees. Duff J., as he then was, expressed his agreement. Anglin J., as he then was, gave a similar opinion at pp. 83, 84, 87 and 89.

In the case of the trust in arts. 981a et seq., however, the situation at first appears to have been different. The first time that this Court discussed these provisions was in *Laliberté v. Larue*, and it stated at pp. 16 and 20 that art. 981a does not have the effect of transferring ownership to the trustees. However, this was an obiter dictum which has become incompatible with subsequent decisions.

In theoretical terms, there is no reason why the solution should differ, with regard to the ownership of trust property, depending on whether there is a testamentary trust covered by art. 869 of the Civil Code or a trust covered by arts. 981a et seq. The difficulty arose, however, from the ambiguity of these new provisions. Thus, art. 981a provided that trust property is conveyed to trustees, whom art. 981b describes as depositaries and administrators, whereas the same section refers to the beneficiaries as donees or legatees. On the other hand, art. 981l provides that at the termination of the trust, the trustees must do whatever is necessary to vest the property held for the trust in the parties entitled thereto.

This Court dealt with these problems in *Curran v. Davis*. That case concerned a deed of donation and trust. The grantor reserved a life interest in the income from the trust. The beneficiaries were the grantor's wife and his adoptive son, who received life annuities, and the grantor's son, who was given the capital. However, it was stipulated that the trustees would continue to hold the trust property for fifty years after the grantor's death. The grantor subsequently purported to revoke the benefit conferred on his adoptive son, before the latter had accepted it; as I mentioned above, it was held that this revocation was void because the acceptance by the trustees sufficed to make the trust perfect and irrevocable. This court was a unanimous judgment of the Court in which reasons were delivered by Rinfret J., as he then was. After noting, at pp. 304-05, that the gift or legacy mentioned in art. 981a is not a gift or legacy as it had been understood in the Code up to that time, and still less a gift or legacy to which the ordinary rules of the Civil Code can be applied, he went on, at p. 305:

[TRANSLATION] Similarly, when Art. 981a C.C. refers to the trustees as “depositaries and administrators”, and to the beneficiaries as “donees or legatees”, it is impossible to take these words in the full sense which they have in the other chapters of the Code. It is clear that trustees are something different from ordinary depositaries or administrators. In fact, they have nearly all the rights of the owner without having title; and it is hardly necessary to show that the title “Of deposit” in the Civil Code has only a very remote connection with the situation created for

trustees by the chapter “Of trusts”.

So far as the beneficiaries are concerned, they clearly are not donees or legatees as these are usually understood. They are in all respects third parties for the benefit of whom the creator of the trust has made a stipulation.

According to this passage, all the trustees really lack is the title of owner. At p. 294, Rinfret J. writes that the *de facto* owner is the son of the donor, the eventual beneficiary of the capital; [TRANSLATION] “but he is only a nominal owner”. However, at p. 293, Rinfret J. wrote:

[TRANSLATION] This gift to the trustees, or if one prefers, this conveyance (to use the word in Art. 981a C.C.), is in the words of the deed itself declared to be “irrevocable” by the donor himself. The terms on which this gift is made are that the “thing given”, described as the “trust property”, will be held in trust by the trustees for the purposes and for the benefit of the persons in whose favour the trust has been created. The trustees will however not be owners in the absolute sense. Although they are sole apparent owners with regard to third parties, the trustees will not have the *usus*, nor the *fructus* or the *abusus* of the trust property. This property however is in their names, and in the particular case now before the Court, it will never be in the name of Philippe Meyer Davis. The latter has no right of ownership over the thing given. At the time the trust was created, he simply acquired a claim against this trust. At page 294, he also stated:

[TRANSLATION] Throughout this period of time, the trustees actually have all the rights of an owner over the thing given, except that they can derive no personal advantage from it, and with, in addition, the special requirement that they have a duty to administer the property for the benefit of the beneficiaries; this means that they cannot allow the property to deteriorate without running the risk of being dismissed by the Court. They have a duty to perform the functions which they have accepted and to make the property conveyed to them productive. Under the contract submitted to the Court, the trustees have the *seizin* of the trust property, and the beneficiaries cannot claim as against them either possession of the property or even, while the trust lasts, any other right than that payment shall be made to them, or rights which may result from the dissipation or wastage of the trust property. In the latter case, however, the trust would not terminate, and the trustees would be replaced by others. In the meantime, they can sell, exchange, replace, borrow and hypothecate as they see fit, without intervention by the beneficiaries, and in their most absolute discretion.

The result of this is to give the trustees a kind of [TRANSLATION] “right of ownership, temporary and limited as to its effects”, as Mignault observes in his article cited above: “A propos de fiducie”, at p. 78, where he comments on *Curran v. Davis*. At p. 79, he also bases his argument on *Masson v. Masson*. Mignault returns to this argument in his address referred to above, “La fiducie dans la province de Québec”. He did so before Rinfret J., who intervened to give his approval in the following terms, to be found at pp. 144-45 of *La fiducie en droit moderne*, fifth volume of the *Travaux de la semaine internationale de droit*, Paris, Sirey, 1937:

[TRANSLATION] The great difficulty we have found in attempting to reconcile the system of the English trust with French law, which is our own system, and formulating a unified approach on the question of the trust, was of course this fundamental principle that ownership is always vested in someone. As, however, it had to be concluded that the beneficiary was not yet the owner, and that under the wording of our Code, the trustee was not completely the owner, or at least was not an owner in the full sense, we attempted to find some means of reconciling the two legal concepts. We arrived at the conclusion, or if you will the solution, suggested by Mr. Mignault [...] that under the Canadian system, the trustee should be regarded as owner.

In *Guaranty Trust Co. of New York v. The King*, [1948] S.C.R. 183, an estate tax case, Taschereau J., as he then was, speaking for himself and for Rinfret C.J., at pp. 204, 205 and 206, quotes lengthy passages from *Masson v. Masson*, *Curran v. Davis* and Mignault's article "A propos de fiducie"; without formally taking any position on the ownership of property bequeathed in trust, he concluded that in that case the trustees had seizin of the moveable and immoveable property. Though he dissented, he agreed with the majority that the beneficiaries of the income are only creditors of the trustees and have no right of ownership in the trust property.

Greenshields et al. v. The Queen is another estate tax case. Taschereau J., as he then was, speaking for the majority, refers to arts. 981a et seq., to *Laverdure v. Du Tremblay*, to *Curran v. Davis* and to a [TRANSLATION] "remarkable article" by Mignault, titled "A propos de fiducie". On p. 218 he writes:

[TRANSLATION] ... appellants are in fact the trust administrators of the property bequeathed. They exercise over the latter a right of ownership limited by the enactments and the cases quoted above; they are accountable to the legatees for the income allocated to them.

Finally, in *Reford v. National Trust Company*, supra, Salvais J.A., writing the unanimous reasons of the Court of Appeal, refers to *Curran v. Davis* and to Mignault's article, "A propos de fiducie", and expressed the following views at pp. 697-98:

[TRANSLATION] Under the law (arts. 981a et seq. C.C.) and the contract, ownership of the said fund was conveyed to the trustees, but it was not ownership as defined in Art. 406. As long as the trust continued to exist, the trustees had the widest powers to sell, exchange or otherwise dispose by onerous title of the property comprised in the trust fund (art. 981j C.C.), but at the termination of the trust, they were required to render an account and hand over to the beneficiaries "all moneys and securities in their hands ..." and "... also execute all transfers, conveyances, or other deeds necessary to vest the property held for the trust in the parties entitled thereto" (art. 981l C.C.).

While the trust lasts, the beneficiaries do not have ownership of the property conveyed to the trustees. It may even happen that as a result of the exercise by the trustees of their power to dispose, the property which they must return to the beneficiaries is, to a greater or lesser degree, not the same as they received from the grantor. However, the ownership is not in suspense during this time; it is necessarily limited by the effect of the trust and it is vested in the trustees. The latter undoubtedly only have a limited right of ownership, although they have the power to

confer a complete ownership title on purchasers of property subject to the trust. This is a departure from the general principles of our civil law, but is a departure intended by the legislator.

These cases show the preference of the courts for Mignault's theory as to the ownership of the trust property, and I know of no decision which supports any other theory, apart from *No. 199 v. Minister of National Revenue*, a decision of the Tax Appeal Board in which Faribault's theory is mentioned.

It must be said that it is difficult to escape the logic of Mignault's reasoning, if we assume that ownership cannot remain in suspense. This reasoning may be summarized as follows. The grantor is no longer the owner of property conveyed in trust: if it is a testamentary trust, he is dead, and if it is a trust created by way of gift *inter vivos*, it is essential to its validity that the grantor has actually and irrevocably divested himself of the property conveyed in trust. Property cannot be both given and retained. Ownership is not vested in the beneficiary of the income, who is only a creditor of the trustee. It also is not vested during the trust in the beneficiary of the capital: in a great many cases he ranks second or third and has not even been born or conceived. When the property held in trust is finally conveyed to him, as art. 981l expressly provides, the trust has terminated. That leaves only the trustee in whom ownership of the trust property can be vested. Clearly the right of ownership is not the traditional one, since, for example, it is temporary and includes no *fructus*. It is a *sui generis* property right, which the legislator implicitly but necessarily intended to create when he introduced the trust into the civil law.

In my view, Mignault's theory is the correct one. Although it contains the innovation of a *sui generis* property right, it is still the one with which practising lawyers are most familiar and feel most secure, in view of its support in the decided cases.

As with *Curran v. Davis*, acceptance of this theory has a negative determining effect for the purposes of the case at bar: it too has the effect of removing one of the possible obstacles to the validity of the trust which is at issue here. It is no longer necessary that there be beneficiaries in whom the ownership of property conveyed in trust be vested.

It thus remains to consider the question in positive terms.

5. Interpretation of the legislation

Article 981a provides that a trust may be created by gift or by will "for the benefit of any persons in whose favor" the grantor "can validly make gifts or legacies".

If, as art. 981a invites us to do, we refer to the provisions relating to gifts *inter vivos* and by will, we find that some of these make gifts impossible in specific cases, depending on the beneficiary. However, it can be seen that they are of two kinds.

Some of these provisions constitute actual prohibitions prompted by considerations of public order and good morals. Thus, as art. 766 provides, a corporation cannot receive a gift beyond the limit of the property which it may possess. The prohibition on making gifts to a former tutor or

curator, imposed by art. 767, is probably of the same type, although it is expressed as a disability. Similarly, the prohibition on giving anything more than maintenance to a concubine and to adulterine or incestuous children, contained in art. 768, now repealed, was undoubtedly prompted by the prevailing ideas on public order and good morals. Certain prohibitions of the same type can also be found in other parts of the Civil Code. Thus, before the abolition of civil death by 1906 (Que.), c. 38, art. 36 of the Civil Code provided that a person who had died civilly can neither dispose of nor acquire property, whether inter vivos or by will, and whether by gratuitous or onerous title; he can neither contract nor possess property, but he may receive maintenance.

Similarly, art. 1265 prohibited husband and wife from conferring benefits on each other inter vivos, and this prohibition, which was intended to ensure that the then immutable nature of matrimonial regimes was preserved, was regarded as being of public order and resulted in the absolute nullity of any agreement contravening it.

Other provisions of a different type make certain gifts impossible. Thus, under arts. 608, 755, 765 and 772 of the Civil Code, property cannot be given directly inter vivos to someone who has not yet been conceived, except by contract of marriage. However, this impediment is inherent in a gift made directly inter vivos. It is a contract which must be accepted by the donee and it is essential for its validity that the donor should actually and irrevocably divest himself of the thing given. A person cannot contract with someone who does not yet exist, or give to him property the ownership of which would then be vested in no one.

By providing in art. 981a that the grantor of a trust can convey property to trustees, by gift or by will, for the benefit of any persons in whose favour he can validly make gifts or legacies, the legislator undoubtedly intended to prohibit the grantor from avoiding the prohibitions of public order by interposing a trust. In such a case, the technique gives way to public order. The courts have therefore correctly invalidated a deed of donation and trust made between husband and wife contrary to the former art. 1265: *Taylor v. Royal Trust Company* (1936), 74 C.S. 180; *Reford v. National Trust Company*, *supra*, at pp. 701 et seq. Did the legislator also intend to transfer to the trust the inherent constraints barring gifts inter vivos from being made directly in cases such as that before this Court? I do not think so. On the contrary, it seems to me that the purpose of introducing gifts and legacies by way of trust into the law of Quebec was precisely to remove these constraints, by taking away their justification.

Public order and the law do not prohibit the conferring of benefits on an unborn child. It can be done by will. It can be done by contract of marriage, under art. 772 of the Civil Code. It can be done by substitution, under art. 929.

One of the primary purposes of the introduction of trusts into Quebec law was to enable individuals to do by gift inter vivos what it was already possible to do in part by will, including in my opinion the creation of a benefit intended for a non-existent person as in *Abbot v. Fraser*.

Another purpose of the trust was to provide the parties with a means to replace substitution, one which was more flexible.

In these circumstances, it seems to me that arts. 981a et seq. must be given a wide and liberal interpretation, favouring an extension of the contractual and testamentary freedom of the parties and in keeping with the purpose of the legislation. When article 981a refers to the provisions relating to gifts and legacies, it does so subject to the special characteristics of the trust, and not as if the trust did not exist and this was an ordinary gift or an ordinary legacy. Professor Louis Baudouin, *supra*, quite properly observes regarding the trust (at p. 1246):

[TRANSLATION] The gift or the will are technical procedures which make possible this operation, the purpose of which is not to make an ordinary gift or an ordinary will.

It was objected that there cannot be a trust without a beneficiary that actually exists: Faribault, *supra*, No. 171, at p. 188; Cantin Cumyn, *supra*, No. 32, at p. 22. It seems to me, and I say so with respect, that this is to confuse a cause of invalidity of the trust and a possible cause of its lapse. It is essential for a trust to have actual or eventual beneficiaries. If it becomes certain that all the beneficiaries whom the grantor seeks to benefit will never exist, the trust then lapses, with retroactive effect.

This retroactivity also provides an answer to another objection raised by counsel for the respondent: if the property conveyed in trust is taken out of the grantor's estate and vested in the trustee, and if in addition it becomes clear that none of the beneficiaries intended by the grantor will exist, then they maintain that in a great many cases the trustee will remain perpetually seized of the trust property.

This cannot be the case here, since the donor provided that her intestate heirs should rank as tertiary beneficiaries. However, she only stipulated what the law provides. Mignault foresaw the difficulty, and in "La fiducie dans la province de Québec", *Travaux de la semaine internationale de droit*, vol. 5, Paris, Sirey, 1937, he wrote at pp. 36-37:

[TRANSLATION] ... the lapse resulting from the person of the beneficiary does not operate to the advantage of the trustee: the property returns to the grantor or his heirs.

If there are no heirs, the provisions relating to vacant successions would be applied, so that in no case would the property remain with the trustee.

I conclude that the deed of donation and trust made for the benefit of unborn children of the donor is valid.

IV—The deed of donation and trust made for the benefit of the donor's sisters, the secondary beneficiaries

In my opinion this Court should rule on the validity of this gift. The parties have argued the point from the outset, and have an interest in seeing it resolved, because it is not inconceivable that it may arise, though this is unlikely. It was not resolved by the trial judge, and the judges of the Court of Appeal differed in their opinions.

The first argument advanced by counsel for the respondent, and accepted by the Court of Appeal, was that this deed of donation and trust is void because it depends on the “primary” gift, made for the benefit of unborn children.

This argument falls to the ground when it is decided, as in the case at bar, that the “primary” gift is valid.

I would however add that in my opinion these are two distinct and independent gifts. The validity or invalidity of the one does not necessarily entail the validity or invalidity of the other. I say this with respect for the opposite view, but I feel that the deed of donation and trust made for the benefit of the donor’s sisters is not incidental to the primary gift. It is an alternative disposition, and on this point I concur in the view of Owen J.A., dissenting in the Court of Appeal.

To demonstrate that the two gifts are interrelated, counsel for the respondent argued that, if the first gift was void, the respondent’s sisters could not be preferred over her descendants without directly contravening her wishes. This I do not deny. But there remains one case in which her wishes could be given effect: this is where the donor’s sisters survive her descendants. I know of no principle by which secondary beneficiaries should be deprived of this benefit which the donor irrevocably sought to confer on them on the conditions which she stipulated, if these conditions are met. In the case of these beneficiaries, they did exist at the time of the deed of donation and trust.

The other argument raised by counsel for the respondent against the validity of the gift made to benefit the donor’s sisters is that it is prohibited by art. 758 of the Civil Code:

Every 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.

They apply this provision to the case at bar as follows:

[TRANSLATION] According to the wording of the article itself, a gift in contemplation of death is a gift which only takes effect on the death of the grantor. In the case at bar, the gift is conditional on the donor dying without issue; the donor’s sisters will not be able to determine until she dies whether they are entitled to the property included in the trust. The existence of the gift in their favour is thus uncertain and will only be determined when the donor dies. This position is supported by the decision of this Court, *Curran v. Davis*, cited above. The validity of a gift creating an annuity payable on the donor’s death had been challenged. The Court stated (p. 291):

“The existence of this debt was certain; only the time of payment was made subject to a certain future event.”

This argument is groundless.

To begin with, it is not strictly true to say that the existence of the debt at issue in *Curran v. Davis* was certain. It was dependent on a condition, namely that the beneficiary, the grantor's adoptive son, and his widow and children, if any, survived the grantor. This is a condition based upon the possible lapse of the trust. However, it is true to say that the adoptive son of the grantor irrevocably received, on the date the trust was executed, a suspended right which the grantor could no longer take back, because he had in fact made it over to him through the trustees.

Essentially, the reason why it was held in *Curran v. Davis* that there was no gift mortis causa is that, as in the case at bar, there was an actual and irrevocable disseizin of the grantor, although some of its effects were postponed until the grantor died. See also *Taylor v. Royal Trust Company* and *Reford v. National Trust Company*.

It is true, however, that the deed of donation and trust for the benefit of the donor's father and sisters contains a provision that is not found in *Curran v. Davis*. In order to benefit from the trust, the donor's father and sisters must not only survive her, as was the case with the adoptive son in *Curran v. Davis*, it is also necessary that, on the donor's death, she should leave no issue, or if she leaves any, that they should die without issue before reaching age twenty-five.

This provision is in the nature of a suspensive condition. Suspensive or resolute conditions can validly be attached to gifts inter vivos. Articles 760 and 782 of the Civil Code expressly provide this:

760. Gift inter vivos or by will may be conditional.

An impossible condition, or one contrary to good morals, to law, or to public order, upon which a gift inter vivos depends, is void, and renders void the disposition itself, as in other contracts.

In a will such a condition is considered as not written, and does not annul the disposition.

...

782. It may be stipulated that a gift inter vivos shall be suspended, revoked, or reduced, under conditions which do not depend solely upon the will of the donor.

If the donor reserve to himself the right to dispose of or to take back at pleasure some object included in the gift, or a sum of money out of the property given, the gift holds good for the remainder, but is void as to the part reserved, which continues to belong to the donor, except in gifts by contract of marriage.

However, for gifts inter vivos not to be invalidated as made in contemplation of death, the death of the donor must not be the essential condition.

After citing art. 758 of the Civil Code, Rinfret J., as he then was, said the following in *Pesant v. Pesant*, [1934] S.C.R. 249, at p. 261:

[TRANSLATION] In short, this article contains a definition: the gift which is declared to be void is one which is “made so as to take effect only after death”. If this definition is analysed in terms of the historical concept of the *donatio mortis causa*, it has to be recognized that the gift which is prohibited by the article is precisely any gift which is made subject to the donor’s death, and is not effective until that death, and under which the donee acquires no rights before the death.

In his *Essai sur les donations par contrat de mariage*, Montreal, 1968, Roger Comtois wrote at p. 132:

[TRANSLATION] Merely mentioning death in a gift is not sufficient for it to be regarded as a gift in contemplation of death, if it does not clearly appear that the death affects the substance of the disposition. If death is mentioned only for purposes of demonstration (*demonstrationis causa*) and to indicate the time at which the gift should be implemented, this does not prevent it from taking effect as a gift *inter vivos*.

If, on the other hand, the death is given as a condition of the gift, this then is a gift in contemplation of death and not a gift *inter vivos*.

In the case at bar, the condition accompanying the deed of donation and trust is not the donor’s death, but the absence of any issue of the donor at the time fixed by her for the trust to terminate. In addition, as in *Curran v. Davis*, the donor has actually and irrevocably divested herself of the trust property, which she has conveyed to the trustees during her lifetime, thereby conferring on her father and sisters a suspensive right which she can no longer take back.

I am of the opinion that the deed of donation and trust made to benefit the donor’s sisters, the secondary beneficiaries, is valid.

V—Conclusions

The appeal should be allowed, the judgment of the Court of Appeal reversed and the judgment of the Superior Court restored.

The Superior Court ordered that costs, including those of the respondent, the interveners and the appointment of a tutor for respondent’s children, be paid out of the trust property.

The Court of Appeal allowed the appeal, but without costs.

In my opinion, it would be better to adopt the ruling of the trial judge as to costs in all courts.

Appeal allowed.

Solicitors for the appellant: McMaster, Meighnen, Montreal.

Solicitors for the respondent: Heenan, Blaikie, Jolin, Potvin, Trépanier, Cobbett, Montreal.

[1] This article was repealed by 1980 (Que.), c. 39, s. 35.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/5454/index.do>

CASE PAGE <https://chat.esheria.ai/case-law/canada/royal-trust-co-v-tucker-1982>

Prepared on 29 October 2026 · Esheria