Privy Council Appeal No. 8 *of* 1926.

William Henry Pope Jarvis - - - - - *Appellant*

v.

Mary Isabel Jarvis - - - - - - - *Respondent*

FROM

THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 21ST JUNE, 1926.

Present at the Hearing:

VISCOUNT HALDANE.
LORD ATKINSON.
LORD SHAW.
LORD PARMOOR.
LORD WRENBURY.

[*Delivered by* LORD PARMOOR.]

This is an appeal from a judgment of the Second Appellate Division of the Supreme Court of Ontario, affirming, with a variation, the judgment of the Trial Judge, Riddell, J. Three questions were argued in this appeal on the hearing before their Lordships.

(1) Whether all shares of the Hollinger Gold Mines, Ltd., pledged by the appellant, to the Bank of Ottawa, and held by the Ottawa Bank on the 16th of May, 1916, were given by the appellant to the respondent as her absolute property, subject to the indebtedness of the appellant for which they had been pledged by him, and in consideration of her assumption of the said indebtedness as her own?

(2) Whether the respondent became entitled to a block of 2,228 shares of Hollinger Consolidated Gold Mines, Ltd., which she paid for and took over from Messrs. Jaffrey, Cassels and Biggar, the appellant's brokers?

(3) As to the allowances due to the respondent for herself, her household, and children, during the appellant's absence on military service overseas?

The appellant and respondent are husband and wife and at the date of the transactions in question were living in amity. In May, 1916, the appellant, being about to sail on foreign service, was desirous to obtain from the Bank of Ottawa a call loan of, say, $25,000 on the security of shares of the Hollinger Gold Mines, Ltd. It was arranged that the appellant should pay off his present liability to the bank, and that the loan, then contemplated, should be put in the name of the respondent, and that the collateral, "the shares in question," should be continued as at present in the name of Mr. Ross, the local manager of the bank "in trust." The local manager states that he is placing the whole loan in the name of the respondent for two reasons.

(1) In case Jarvis should be wounded or killed at the front. (2) In case any acts of moratoria should be passed giving protection to soldiers on active service. On the 13th May the appellant executed a power of attorney in favour of the respondent, placing his affairs under her control as his agent and attorney during his absence on foreign service.

On the 16th May, the day before the appellant left Canada on foreign service, a conversation took place between him and the brother of the respondent, W. A. Hoskin, relating to the obligations and position of the respondent, during the absence of the appellant. There was a conflict of evidence between the appellant and W. A. Hoskin as to what took place on this occasion, but the Trial Judge accepted the evidence of W. A. Hoskin. This decision was concurred in by the Appellate Court. Their Lordships have frequently held that the credibility of a witness is primarily a question for the decision of the Trial Judge. They accordingly accept the evidence of W. A. Hoskin as that of a credible witness.

The question to be determined, in reference to this evidence, is whether it supports the contention of the respondent, that a gift was or had been made to the respondent of the Hollinger shares deposited in the Bank of Ottawa on the 16th May, 1916? The importance of this evidence is such that it will be convenient to set out a passage from it as quoted in the judgment of Latchford, C.J.

> "He (Jarvis) was out on the lawn and I spoke to him, and asked him if there was anything I could do to help him with his affairs while he was away. He made a very jocular answer and I told him I was really serious. He said, everything is arranged at the Bank of Ottawa. All you have to do is to take my sister down in the morning. Everything is arranged with Mr. Ross. Take her down. I said, what is the nature of the arrangement made with Mr. Ross? and he said she is to take over the loan I have in the Bank of Ottawa. I said, I do not think I want to be a party to a transaction like that. I do not know that I want her to go on a loan like that without some provision by you for her. He said, I am turning all the stock over to her, making a gift of it. I said, if that is the situation, that alters it, and I

will certainly go down with her, and I did, next morning. That is all the conversation that took place. He never mentioned any details of his affairs."

The important words are "I am turning all the stock over to her, making a gift of it." Their Lordships do not find in this statement any proof that a gift was, or had been, made of the shares to the respondent, as her absolute property. It may be that the appellant did express to W. A. Hoskin an intention of transferring all the stock to the respondent in her own right and making a gift of it to her, but whether the intention, if so expressed, was ever carried out, as a completed gift, must depend on other evidence. No doubt, at this time, it had been arranged that the wife should be substituted for the husband as the bank's debtor, and that the shares in question should be held by the local manager in trust as collateral security for the indebtedness to be assumed by the respondent, but whether this arrangement amounted to a transfer of the shares as a gift to the wife will depend on a consideration of the true nature of that transaction. It is material, in this connection, that the respondent does not in her evidence state that the Hollinger shares deposited at the Bank of Ottawa were handed over as a gift to her by the appellant. She says that the appellant did not explain the transaction to her except that she was to take over a loan, as she understood, in the bank, and that her husband explained to her nothing more of the transaction on the evening before he went away, except that she was to sign any papers that Mr. Ross had prepared for her.

On the following day, the 17th May, the respondent attended at the bank accompanied by her brother, W. A. Hoskin, who had had business experience, and signed certain documents to carry out the arrangement already referred to. The respondent states in her evidence that she signed these documents without question, as placed before her by Mr. Ross. She signed a letter of hypothecation, acknowledging the receipt of $19,685 from the bank as an advance by way of loan to be repaid on demand, in consideration whereof and as security wherefor, 1,090 shares Hollinger were deposited with the bank to be held by the bank as collateral security for the repayment of the loan, interest, and costs. The letter of hypothecation appears to be in ordinary form, and contains no provision that in the event of the repayment of the loan to the bank the 1,090 shares Hollinger shall be handed over to the respondent as her property, or as being entitled to the equity of redemption. The 1,090 shares Hollinger placed in the name of Mr. Ross, in trust, consisted of 540 shares already deposited at the bank to secure a call loan of about $7,000, and of 550 shares, formerly deposited with Ericksen Perkins and Co., to secure the sum of about $12,000. The respondent at the same time signed two cheques, one in discharge of the amount then due to the bank from the appellant and one in favour of Ericksen Perkins and Co. for $12,042·44 in order to redeem the 550 Hollinger

shares held by that firm, that they might be deposited in the bank as collateral security for the advance. Subsequently the shares of the Hollinger Gold Mines, Limited, were exchanged for fully paid-up shares in Hollingers Consolidated Gold Mines, Limited, in the proportion of four new shares for one old share, but this is not material to the questions raised in the present appeal.

The argument on behalf of the respondent was, that these transactions constituted a transfer of the Hollinger shares in the bank as a gift for the benefit of the respondent, and that, in consideration of this transfer, she consented to come under personal liability for the advance thus made. It is no doubt true, that the respondent, in signing the letter of hypothecation, did come under a personal obligation to the bank pledging her separate estate, and that there was a substantial risk involved owing to the speculative character of the Hollinger shares. In fact, these shares at one time sank to such a level that they did not constitute full security to the bank, and there was a request for further security. This consideration, however, does not establish the proposition that the appellant made a gift of the shares to the respondent. The explanation of the respondent coming under the obligation is to be found in the requirement of the bank, that to make the new advance asked for by the appellant, such advance should be made to the respondent for the two reasons stated, first, in case Jarvis should be wounded or killed at the front, and secondly, in case any acts of moratoria should be passed giving protection to soldiers on active service.

Their Lordships are of opinion that it is not established that the Hollinger shares of the appellant in the Bank of Ottawa on the 16th of May, 1916, were given to the respondent as her absolute property, and will humbly advise his Majesty that the judgments of the Courts below should be reversed.

On the second issue raised in the appeal, the question depends on the validity of the purchase of certain Hollinger shares which, prior to his departure abroad, the appellant had deposited with his brokers, Messrs. Jaffray and Cassels. The Courts below have found that there was no gift of these shares to the respondent, and the respondent does not question her obligation to account for them. After the departure of the appellant on foreign service Messrs. Jaffray and Cassels, from time to time, sold part of the shares deposited with them to liquidate the debt due to them from the appellant. On the 10th and 11th of July, 1917, the respondent gave Messrs. Jaffray and Cassels an order in the following form: "You are hereby authorised to sell to Mary I. Jarvis 2,228 shares of Hollinger Company for the account of W. H. P. Jarvis in consideration of the payment of the sum of $10,000." This authority was signed W. H. P. Jarvis by his attorney, Mary I. Jarvis. The price of the Hollinger shares had at one time fallen heavily during the appellant's absence, and Messrs. Jaffray and Cassels were pressing the respondent, as his agent and attorney,

to provide additional margins, or to sell the stock. They threatened to continue to sell, unless an additional sum of $10,000 was paid to them in cash, to increase the margin of security on the appellant's account. To meet the difficulty the respondent arranged, through her brother, for an advance of $10,000·00 from a friend of her family, and upon receipt of this sum gave the authority to Jaffray and Cassels set out above. In addition to the payment of $10,000 as the purchase price for the shares, the respondent pledged them as collateral security to support the appellant's account. It is not said that less than a market price was paid, or that the transaction was not carried out on a business footing by the respondent as the agent or attorney for her husband. It is, however, the fact, that the shares so purchased constituted a sale by the respondent as the agent or attorney of the appellant to herself. Such a sale by an agent or attorney cannot be held good as against the principal. For some reason, which was not explained to their Lordships, this question does not appear to have been considered in the Court of Appeal. It is suggested in favour of the respondent that the appellant ratified the transaction and approved the purchase of these shares by the respondent on his return to Canada. It is noticeable that the decision of the Trial Judge did not proceed on this basis, who found that the transaction whereby the appellant obtained some 2,228 shares is valid, because she paid in cash, and paid her own money for them. Their Lordships are of opinion that there was no ratification or approval of this transaction, and that the sale by the respondent of these shares to herself as the agent and attorney of the appellant cannot be regarded as a valid sale.

On the third ground of appeal, regarding the allowances to be made to the respondent, the appellant did not argue that the respondent was not entitled to all proper allowance for the support and maintenance of herself and her household, and the support, maintenance and education of the children of the parties, or that there was any error in the order made under this head in the formal judgment.

Their Lordships will humbly advise His Majesty that this appeal ought to be allowed in part, and the judgment of the Appellate Division of the Supreme Court of Ontario dated 5th June, 1925, varied in the following respects:—(*a*) By declaring that the Hollinger shares of the appellant in the Bank of Ottawa on the 16th May, 1916, remained the property of the appellant, and that the respondent must account for the same subject to the indebtedness for which the same had been pledged, and after allowances made to her for all expenses properly incurred in respect thereof; and (*b*) by declaring that the respondent must account to the appellant for the value of the 2,228 shares which she had paid for and taken over from

Messrs. Jaffrey, Cassels and Biggar after allowance for the sum of $10,000 spent by her in the purchase thereof, and for any expenses properly incurred by her in carrying through this transaction as the appellant's agent and attorney, that the reference to the Master in paragraph 4 of the Appeal Court's judgment must be varied in accordance with these declarations. As regards the costs, the respondent must pay those of the appeal to His Majesty in Council. As the parties in the Courts below were each partly successful, their Lordships think that there should be no order as to those costs, except that any costs paid by the appellant to the respondent must be returned. As regards the costs to be incurred in Canada of and consequential upon the inquiry before the Master, these should be in the discretion of the Supreme Court.

In the Privy Council.

WILLIAM HENRY POPE JARVIS

v.

MARY ISABEL JARVIS.

DELIVERED BY LORD PARMOOR.

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