will; he was declared not to be a seaman being at sea. The decisions do not seem reconcilable.

The Court however applied **In The Goods of Hale**; the result of the application it seems, widens the scope of the already liberal interpretation given by the Courts to the term "mariner or seaman being at sea".

Terence V. Kelly, Law III U.N.B.

Re ELLIOTT (deceased). LLOYDS BANK, LTD. v. BURTON – ON–TRENT HOSPITAL MANAGEMENT COMMITTEE AND OTHERS

Will – Condition Precedent – Illegal Condition – Gift of Personality Subject Thereto – Malum Prohibitum and not Malum In Se – Validity of Gift

The recent case of **Re Elliott (deceased) Lloyd's Bank Ltd. v. Burton-On-Trent Hospital Management Committee et Al** (1952) 1 A.E.R. 145, is of interest. It provides an example of the adoption by courts of equity of a civil law doctrine involving the distinction of **malum in se** and **malum prohibitum** in reference to conditions precedent and personal property.

The facts of the case are that the testator, Arthur Elliott, by his will appointed the plaintiff bank to be executor and trustee and directed the bank to convert the whole of his estate, both real and personal, into money. After payment of his debts and funeral and testamentary expenses, he gave the sum of £100 to the Burton-On-Trent Infirmary to be invested as the trustee should direct "for the purpose of maintaining and renovating my grave and headstone, subject to the Burton-On-Trent Infirmary accepting the above £100 and the terms as above attaching thereto then I give to the said Burton-On-Trent Infirmary the rest, residue and remainder of my estate to be applied to the general purposes of the said infirmary."

From the facts it will be apparent that this was not an absolute gift but rather a gift subject to a condition precedent under which the infirmary was to take the residue only if it accepted the legacy of £100 and also the terms, which were to maintain and renovate the testator's grave and headstone.

The Court held that on construction of the will, the legacy of £100 was intended to be set apart in perpetuity for maintaining the testator's grave, and, therefore, it was void as transgressing the rule against perpetuities and thus the condition precedent attached to the gift of residue was an illegal one which the residuary legatee could not lawfully carry into effect.

The question arose whether the illegality of the condition avoided the gift of residue or whether the illegal condition could be avoided. It was in this connection that the civil law distinction between **malum in se** and **malum prohibitum** was introduced.

Bouvier's Law Dictionary (Century Edition) states that "an offence **malum in se** is one which is naturally evil, as murder, theft, and the like. An offence **malum prohibitum**, on the contrary, is not naturally an evil, but became so in consequence of its being forbidden, as playing at games which being innocent before, have become unlawful in consequence of being forbidden."

The distinction has arisen in cases concerning illegality of contract, but Pollock on Contracts (13th Ed.) in discussing the effect of prohibitory statutes on agreements says at page 274 "When a transaction is forbidden, the grounds of the prohibition are immaterial. Courts of Justice cannot take note of any difference between **mala prohibita** (i.e. things which if not forbidden by positive law would not be immoral) and **mala in se** (i.e. things which are so forbidden as being immoral)."

In the field of personal property, however, it would seem from the cases cited by Harman, J. in the judgment of the case under discussion, that the distinction has not been altogether abandoned.

Mr. Justice Harman first emphasizes the fact that if this had been a gift of **real** property, failure to perform the condition must have avoided the gift, and he cites the case of **Egerton v. Earl Brownlow** (1).

The judge goes on to point out that when gifts of personalty are in question, different rules apply and he relies to a great extent on dicta in **Re Moore** (2). He cites Cotton, L. J., who cites from Jarman on Wills, (3): "The rule is thus stated by Mr. Jarman: 'But with respect to legacies out of personal estate, the civil law, which in this respect has been adopted by courts of equity, differs in some respects from the common law in its treatment of conditions precedent; the rule of the civil law being that where a condition precedent is originally impossible, or is made so by the act or default of the testator, or is illegal as involving **malum prohibitum**, the bequest is absolute, just as if the condition had been subsequent. But where the performance of the condition is the sole motive of the bequest, or its impossibility was unknown to the testator, or the condition which was possible in its creation has since become impossible by the act of God, or where it is illegal as involving **malum in se**, in these cases the civil agrees with the common law in holding both gift and condition void.' According to English law if a condition subsequent which is to defeat an estate, is against the policy of the law, the gift is absolute, but if the illegal condition is precedent there is no gift. In the civil law a distinction is taken between what is **malum in se** and what is only **malum prohibitum** . . ."

(1) (1853) 10 E.R. 359.
(2) (1888) 39 Ch. D. 116.
(3) 4th Ed., Vol. II, p. 12.

Later in the judgment Mr. Justice Harman cites a passage from Roper on Legacies, (4) to the effect that if the illegality of the condition precedent involves **malum in se** the disposition is void, but if it be merely **malum prohibitum,** then the condition is void and the bequest good.

The learned judge continues "The present illegality is of the second kind, and therefore, if this doctrine of the civil law has been imported into the English law, the condition can be disregarded. Mr. Roper is of the opinion that this rule was imported into equity, and for this there appears to be the authority of Lord Hardwicke, L. C. (3 Atk. 332) in **Reynish v. Martin,** quoted and accepted by Bowen, L. J. (39 Ch. D. 131) in **Re Moore,**" (supra).

Mr. Justice Harman concluded that the condition is avoided; the gift is unfettered and the first defendant can take the residue and disregard the condition.

Just how far this distinction is applicable in Canada would seem to be doubtful in the light of the decision of the Ontario Court of Appeal in **Re Going.** (5) In this case a testatrix attached to a gift of personalty to two nephews a condition precedent to the effect that they were to be "members and adherents in good faith and standing of a Protestant church . . ."

Although the validity of this condition was attacked on the ground of public policy the Court did not attempt to consider the question of illegality.

D. G. Farquharson, Q.C., in an illuminating note (6) says: "The court found that the condition was clearly a condition precedent and did not consider it necessary to decide whether the condition was or was not illegal since the court held:

> It is plain from the language of the Will that it was the intention of the testatrix that if the gift to her nephews failed the whole of the fund to be set aside by her executors under paragraph 5 of her will should go to the Pension Fund of The United Church of Canada. Thus, if the gift to the nephews fails because the condition annexed to it is void, as contended by their counsel the Pension Fund of the United Church is entitled to it. If the condition is a valid one, the fund likewise goes to that beneficiary because neither of the nephews of the testatrix had complied with the condition and the time permitted for doing so had passed."

Mr. Farquharson goes on to comment, "It is clear from this passage that the court was of the opinion that, if the condition was illegal, the gift to which it was attached failed with it."

In **Re Going,** the court had also referred to a statement of Middleton, J. A. in **Re Gross** (7). There, Middleton J. A., had cited a statement by Lord Sterndale in **In Re Wallace** (8). Then Lord

(4) 4th Ed., Vol. I, p. 757.
(5) (1951) O.R. 147.
(6). 29 C.B.R. 434.
(7) (1937) O.W.N. 88.
(8) (1920) 2 Ch. 274.

Sterndale had said: "This condition is clearly a condition precedent and in that case if a condition be void as against public policy, the gift fails."

Mr. Farquharson has this to say concerning the above citation: "With deference to the definite views expressed by Middleton, J. A., it is suggested that the English courts differentiate between such conditions attached to devises of real property and to bequests of personalty, and between failure of the condition as **malum prohibitum** and as **malum in se.** The statement quoted by Middleton, J. A. from the Wallace case was at most a dictum, because the court there held the condition to be valid."

Mr. Farquharson goes on to discuss the English approach to the problem in much the same fashion as did Jarman, J. in the case which forms the subject of this present note, and he concludes, "Since the Ontario Court of Appeal in **Re Going** did not find it necessary to consider the validity of the condition, much less to consider whether it was illegal as involving **malum prohibitum** or **malum in se,** it must be assumed that in Ontario any gift of personalty fails, if it is attached to a condition precedent which is illegal as contrary to public policy."

While the decision in **Re Elliott** could hardly be said to be one of outstanding importance, it does throw some interesting light on the importation into the law of England of a civil law doctrine involving the distinction between **malum in se** and **malum prohibitum.** As for its application in Canada, and particularly in Ontario, it is still doubtful, since the decision in **Re Going,** whether such an importation has taken place.

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