

UNIVERSITY OF LONDON
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INSTITUTE OF ADVANCED
LEGAL STUDIES

30108

In the Privy Council

No. 88 of 1933.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

BETWEEN:

THE ATTORNEY GENERAL OF
THE PROVINCE OF ONTARIO,
ON BEHALF OF HIS MAJESTY THE KING,

(Plaintiff) Appellant,

—AND—

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GORDON PERRY,

(Defendant) Respondent.

APPELLANT'S CASE

RECORD

1. This is an appeal from a judgment of the Court of Appeal for Ontario, dated 31st May, 1933, reversing a judgment of the Honourable Mr. Justice Garrow, dated 30th January, 1933, in favour of the Appellant. p. 18. p. 13.

2. The Respondent is the surviving Executor and Trustee of the Will and Estate of Cawthra Mulock, late of the City of Toronto, in the Province of Ontario, Esquire, deceased, who died on the 1st December, 1918. p. 3, l. 12. p. 6, l. 39.

20 3. The deceased in his lifetime, by Indenture dated the 23rd June, 1903, made in contemplation of marriage covenanted and agreed to assign, transfer and set over or cause to be assigned, transferred or set over to the Trustees of the said Indenture money or securities for money to the extent of Two Hundred and Fifty Thousand (\$250,000) Dollars upon the trusts set forth in the said Indenture. The contemplated marriage was solemnized and the p. 3, l. 30 to p. 6, l. 23. p. 6, l. 24.

p. 6, l. 27. deceased caused to be transferred to the said Trustees the said money or securities for money.

p. 7, l. 12. 4. This action was brought by the Appellant for a declaration that the said money and securities for money were property passing on the death of the deceased under The Succession Duty Act of Ontario, R.S.O. 1914, ch. 24 and amendments thereto.

5. The following provisions of The Ontario Succession Duty Act (Revised Statutes of Ontario, 1914, Chapter 24 as amended up to and including the year 1918) are referred to:—

“2. In this Act:—

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“(g) ‘Property’ shall include real and personal property of every description and every estate and interest therein capable of being devised or bequeathed by will or of passing on the death of the owner to his heirs or personal representatives;

“7. (1) The following property as well as all other property subject to succession duty upon a succession shall be subject to duty at the rates hereinafter imposed.

“(a) All property situate in Ontario and any income therefrom passing on the death of any person, whether the deceased was at the time of his death domiciled in Ontario or elsewhere;

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“(2) Property passing on the death of the deceased shall be deemed to include for all purposes of this Act the following property:—

“(b) Any property taken as a *donatio mortis causa*, or taken under a disposition operating or purporting to operate as an immediate gift *inter vivos* whether by way of transfer, delivery, declaration of trust or otherwise made since the first day of July, 1892, or taken under any gift whenever made, of which property actual and *bona fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift, and thenceforward retained to the entire exclusion of the donor, or of any benefit to him whether 30 voluntary or by contract or otherwise, except as hereinafter mentioned.

“(3) Notwithstanding anything herein contained, no duty shall be payable in respect of any property

“(a) Given absolutely more than three years before the death of the donor to the father, mother, child, son-in-law or daughter-in-law, of the donor to the value or amount of \$20,000 in the aggregate to the persons named in this subsection.

“(b) Given by the donor where the gift is proved to have been absolute and to have taken effect in the life-time of the donor and 40

to have been part of his ordinary and normal expenditure and to have been reasonable, having regard to the amount of his income and the circumstances under which the gift was made,

of which property actual and *bona fide* possession and enjoyment shall have been assumed by the donee immediately upon the gift and thenceforward retained to the entire exclusion of the donor or of any benefit to him, whether voluntary or by contract or otherwise,

nor in respect of property

10 “(c) Given by the donor in his lifetime and not exceeding in value the sum of \$500 in the case of any one donee, or

 “(d) Actually and *bona fide* transferred for a consideration in money or money's worth paid to the transferor for his own use and benefit, except to the extent, if any, to which the value of the property transferred exceeds that of the consideration so paid.

 “8. Subject to the exceptions mentioned in sections 6 and 7 there shall be levied and paid for the purpose of raising a revenue for Provincial purposes in respect of any succession or on property passing on the death according to the dutiable value the following duties over and above the fees paid under The Surrogate Courts Act..”

20 6. Section 7 Subsection 2 (b) of The Ontario Succession Duty Act is similar to the Imperial Customs and Inland Revenue Act, 1881 (44 and 45 Vict. ch. 12) Section 38, subsec. 2 (a) as amended by the Customs and Inland Revenue Act, 1889, (52 and 53 Vict. ch. 7) Section 11, subsec. 1. These sections were by Section 3 of the Finance Act, 1894 (57 and 58 Vict., ch. 30) incorporated in that Act.

 7. Upon the facts admitted in the pleadings the Appellant moved the Court for judgment and on the 30th January, 1933, the Court (Garrow J.) delivered judgment declaring that for the purposes of The Succession Duty Act, 1914, chapter 24 and amendments thereto, the money and securities
30 for money were property passing on the death of the deceased. p. 8, l. 12. p. 13.

 8. The Contentions of the Appellant and of the Respondent are stated by the Honourable Mr. Justice Garrow as follows:

 “It is the plaintiff's contention that the settlement constituted an immediate gift *inter vivos* by way of declaration of trust within the language of this section. p. 9, l. 22 to l. 36.

 “The contention of the defendant is two-fold. First, that the transaction was not a gift at all, but a contract for valuable consideration as distinguished from a gift, and second, that the words beginning in the sixth line of the above clause of which property
40 actual and *bona fide* possession and enjoyment shall not have been

assumed by the donee immediately upon the gift, etc., relate not only to the words which immediately precede them 'taken under any gift whenever made', but also to 'any property taken as a *donatio mortis causa* or taken under a disposition operating or purporting to operate as an immediate gift *inter vivos*', etc., and that inasmuch as actual and *bona fide* possession and enjoyment were assumed immediately upon the gift by virtue of the transfer to the trustees of the settlement and they, or their successors have had continuous possession since, the section can have no application to the present case." 10

p. 10, l. 41
to
l. 44.

p. 10, l. 3.

p. 11, l. 5.

9. The Honourable Mr. Justice Garrow was of opinion that the transaction in question was one by which property of the deceased was taken under a disposition operating as an immediate gift *inter vivos* by way of declaration of trust, and that marriage or the promise to marry was not such a consideration as would under The Succession Duty Act exempt the property transferred. He was also of opinion that the limitations contained in Section 7, subsection 2 (b), namely "of which property actual and *bona fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift, and thenceforward retained to the entire exclusion of the donor, or of any benefit to him whether voluntary or by contract, or otherwise," did not apply to all the classes of property mentioned in that Subsection, but only to "any gift whenever made". 20

p. 14, l. 1.

p. 18.

p. 14, l. 20.

p. 17, l. 2.

p. 17, l. 15.

p. 17, l. 19.

10. The Respondent appealed from this judgment to the Court of Appeal for Ontario and on the 31st day of May, 1933, the Court made an order allowing the appeal and dismissing the action. The judgment of the Court was delivered by Latchford, C.J.

The Honourable Chief Justice Latchford was of opinion that "property which passed in fact from the deceased to trustees of his marriage settlement, could not pass also on his death fifteen years later." He was also of opinion that the transfer of the money and securities for money was not a gift, but was a transfer for valuable consideration, and further, that even if the transfer was regarded as a gift, it did not fall within subsection 2 (b) of Section 7 because the *bona fide* possession and enjoyment of the money and securities transferred had been assumed by the donee immediately upon the gift. 30

11. The Appellant submits that the appeal should be allowed and that it should be declared that for the purposes of the Succession Duty Act, R.S.O., 1914, Chapter 24 and Amendments thereto, the money and securities for money were property passing on the death of the late Cawthra Mulock.

REASONS

1. Because by Section 7, subsection 2 (b) of the said Succession Duty Act, property passing on the death of a deceased person is to be deemed to include any property "taken under a disposition operating or purporting to 40

operate as an immediate gift *inter vivos* whether by way of transfer, delivery, declaration of trust, or otherwise made since the first day of July, 1892."

2. Because the word "gift" where used in Section 7, subsection 2(b) of the said Act includes not only a voluntary transfer of property, but also a transfer of property for consideration.

3. Because a transfer *inter vivos* of property within subsection 2 (b) of Section 7 of the said Act to be exempt from duty under the said section must be for a consideration in money or money's worth.

4. Because marriage is not a consideration in money or money's worth.

10 5. Because the limitations contained in Section 7, subsection 2 (b) of the said Act, "of which property actual and bona fide possession and enjoyment shall not have been assumed by the donee immediately upon the gift, and thenceforward retained to the entire exclusion of the donor, or of any benefit to him whether voluntary or by contract or otherwise," are repugnant to the meaning of a "*donatio mortis causa*" or an "*immediate gift inter vivos*" and only refer to "any gift whenever made."

6. Because the judgment of the Honourable Mr. Justice Garrow is right and should be affirmed.

JOHN A. McEVOY,
J. T. WHITE.

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APPELLANT'S CASE

MESSRS. BLAKE & REDDEN,
17, Victoria Street,
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For the Appellant.