

UNIVERSITY OF LONDON
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INSTITUTE OF ADVANCED
LEGAL STUDIES

30110

In the Privy Council

No. 88

of ~~1931~~ 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.

CASE FOR THE RESPONDENT
AND FOR UNASCERTAINED PERSONS OR INTERESTS

1. This is an appeal from a judgment of the Court of Appeal for Ontario delivered on the 31st day of May, 1933, which reversed the judgment of first instance delivered by Mr. Justice Garrow on the 30th day of January, 1933, whereby it had been declared that certain money and securities which Cawthra Mulock had in 1903 caused to be transferred to trustees for his wife and issue, were, for the purposes of The Succession Duty Act in force at the time of his death in 1918, property passing on his death.

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p. 13.

2. All the facts were set out in the statement of claim, and admitted in the statement of defence, and the appellant moved for judgment upon such

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admissions. Upon the hearing of the motion for judgment Mr. Justice Garrow, pursuant to Rule 77 of the Rules of Practice of the Supreme Court of Ontario, appointed Counsel to represent unascertained persons or interests, and Counsel so appointed appeared and was heard on that motion, and on the appeal to the Court of Appeal for Ontario, which unanimously reversed the judgment of first instance, and dismissed the action.

3. The facts so admitted may be summarized as follows: The respondent is the surviving executor and trustee of the will and estate of Cawthra Mulock, who, by indenture made the 23rd day of June, 1903, in consideration of his intended marriage with Adele Baldwin Falconbridge, an infant, agreed with her father, the trustees named in the indenture, and herself, that upon the marriage taking place within twelve months from that date he would cause money or securities to the extent of \$250,000 to be transferred to the trustees so named, in trust to keep the same invested, and from and after the marriage to pay the net income to her during her life, and on her death to distribute the capital amongst their issue as she might by her last will appoint, or amongst their issue in default of such appointment, or to him if no such issue should survive her and he should survive her, or, if neither he nor any such issue should survive her, as she might by her last will appoint. The marriage took place within twelve months from the date of the indenture, and money and securities to the extent mentioned were transferred as agreed. Cawthra Mulock died on the 1st day of December, 1918, leaving his said wife and issue of their marriage surviving him, and the said money and securities are now held by a successor of the original trustees, as trustee under the said indenture.

4. In the Courts below the appellant contended that the said money and securities were "property passing on the death" of Cawthra Mulock within the meaning of the provisions of Section 7 (2) (b) of The Succession Duty Act in force at the time of his death (R.S.O. 1914, Chapter 24, Section 7, sub-section 2 (b), as amended by 4 Geo. V. (Ont.), Chapter 10/ Section 5) which were as follows:

"7 (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 voluntary or by contract or otherwise, except as hereinafter mentioned."

5. The provisions of Section 7 (2) (b) of The Succession Duty Act in force at the time of the death of Cawthra Mulock were amended in the year following his death to read as follows (9 Geo. V. (Ont.), Chapter 9, Section 1):

"1. Clause (b) of subsection 2 of section 7 of *The Succession Duty Act*, as enacted by section 5 of *The Succession Duty Act, 1914*, is repealed, and the following substituted therefor:—

- (b) (1) Any property taken as a *donatio mortis causa*;
- (2) Any property 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;
- (3) Any property taken under any gift whenever made of which 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, except as hereinafter mentioned."

6. The respondent, and the representative of unascertained persons or interests, contend that the said money and securities were not "property passing on the death" of Cawthra Mulock within the meaning of the provisions of The Succession Duty Act in force at the time of his death.

7. The respondent, and the representative of unascertained persons or interests, therefore submit that this appeal should be dismissed for the following among other

REASONS:

(a) Because Section 7 (2) (b) of The Succession Duty Act in force at the time of the death of Cawthra Mulock was not applicable to a transaction such as that here in question, and the said indenture was not "a disposition operating or purporting to operate as an immediate gift *inter vivos*" nor "a gift", being an agreement in consideration of marriage.

(b) Because the transfer of the said money and securities pursuant to the said indenture was not a "gift", but was performance of the said agreement.

(c) Because even if the said agreement was "a disposition operating or purporting to operate as an immediate gift *inter vivos*" or "a gift", or the

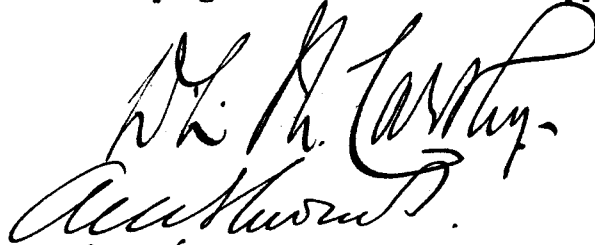
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12 transfer of the said money and securities was a "gift", the said money and securities were not "property passing on the death" of Cawthra Mulock because "actual and *bona fide* possession and enjoyment (were) assumed by the donee immediately upon 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."

(d) Because the said money and securities cannot be made subject to taxation under The Succession Duty Act by implication merely from the exceptions mentioned in Section 7 (3) thereof in force at the time of the death of Cawthra Mulock. 10

13 (e) Because The Succession Duty Act, being a taxing statute, must be strictly construed.

(f) Because the reasons for the judgment of the Court of Appeal for Ontario are right.



of Counsel for the Respondent.



*Counsel appointed to represent
unascertained persons or interests.*

In the Privy Council

No. 88 of 1924/25

*On Appeal from the Court of Appeal
for Ontario.*

BETWEEN

THE ATTORNEY GENERAL OF
THE PROVINCE OF ONTARIO,
(*Plaintiff*) Appellant.

AND

GORDON PERRY,
(*Defendant*) Respondent.

CASE FOR THE RESPONDENT
AND FOR UNASCERTAINED PERSONS OR
INTERESTS

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