In the Privy Council

No. of 193

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—

GORDON PERRY,
(Defendant) RESPONDENT.

RECORD OF PROCEEDINGS

INDEX OF REFERENCE

No. 1

*STATEMENT OF CLAIM

BETWEEN:

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

(Plaintiff) APPELLANT,

—AND

GORDON PERRY,

(Defendant) RESPONDENT.

Writ issued the 8th day of January, 1932.

1. The plaintiff alleges that the defendant Gordon Perry resides in the City of Toronto, in the County of York and Province of Ontario, and is the surviving Executor and Trustee of the Will and Estate of Cawthra Mulock, deceased.

2. The plaintiff alleges that by Indenture dated the 23rd day of June, 1903, and made between the said Cawthra Mulock of the first part, The Honourable William Glenholm Falconbridge, of the City of Toronto, Chief Justice of the King's Bench, of the second part, The Honourable Sir William Mulock of the same place, Knight Companion of the Most Distinguished Order of St. Michael and St. George, and Robert Cassels of the same place, Banker, the Trustees of the Third Part, and Adele Baldwin Falconbridge, of the same place, of the Fourth Part, the Settlor agreed that, upon his marriage with the Party of the Fourth Part taking place within twelve months from the date of the Indenture, he would assign, transfer and set over or cause to be assigned, transferred and set over to the parties of the Third Part, money or securities for money to the extent of Two Hundred and Fifty Thousand Dollars ($250,000) upon the trusts set out in the said indenture and more fully to be set out in a settlement to be thereafter prepared and executed, the said Indenture being as follows:

"ARTICLES OF AGREEMENT made in duplicate the twenty-"third day of June, one thousand nine hundred and three—Between "Cawthra Mulock, of the City of Toronto in the County of York, Esquire, "of the first part, The Honourable William Glenholm Falconbridge, of "the same place, Chief Justice of the King's Bench of the second part, "The Honourable Sir William Mulock, of the same place, Knight Com-"panion of the Most Distinguished Order of St. Michael and St. George, "and Robert Cassels, of the same place, Banker, at present employed in "the Canadian Bank of Commerce, the trustees of the third part, and

"Adele Baldwin Falconbridge, of the same place, Spinster, an infant "under the age of twenty-one years, daughter of the party hereto of the "second part, of the fourth part—Witnesseth that whereas a marriage is "about to be solemnized between the parties hereto of the first and fourth "parts, and it has been agreed between the parties of the first, second "and fourth parts that the party hereto of the first part shall assign and "transfer, or cause to be assigned and transferred to the parties hereto "of the third part, their heirs, executors, administrators and assigns, "the sum of Two Hundred and Fifty Thousand Dollars or securities for "that amount to hold upon the trusts and for the purposes hereinafter "set out and more fully to be set out in a settlement hereafter to be "executed in pursuance of these articles and whereas the said party hereto "of the first part is entitled to certain property devised and bequeathed "to him by the will of the late Sarah Ellen Cawthra-Murray, which is "now in the hands of the said Honourable Sir William Mulock, a party "hereto, as executor of the said will, and is not yet assigned to the party "hereto of the first part—Now these articles witness as follows:—"

"1. In consideration of the said intended marriage, the party hereto "of the first part covenants and agrees with the parties hereto of the "second and fourth parts, their and each of their executors and adminis- "trators, that upon such marriage taking place within twelve months from "this date, he, the said party of the first part, will assign, transfer and "set over or cause to be assigned, transferred and set over to the parties "hereto of the third part, money or securities for money to the extent "of Two Hundred and Fifty Thousand Dollars upon the trusts hereinafter "set out and more fully to be set out in a settlement to be hereafter "prepared and executed in pursuance of these Articles, which said settle- "ment is to contain such further and other provisions, covenants, stipula- "tions and matters not repugnant to these Articles as Counsel for the "said party hereto of the first part may reasonably devise and advise, "who shall also interpret these present Articles if any question shall arise "as to the interpretation thereof for the purpose of preparing such settle- "ment, such interpretation to be final and conclusive upon the parties "hereto."

"2. And the said party of the first part doth hereby request and "direct the said Sir William Mulock forthwith after the said marriage to "set apart out of the property so devised and bequeathed to the said party "hereto of the first part, either the sum of Two Hundred and Fifty Thou- "sand Dollars or securities for that amount and to transfer the same or "cause them to be transferred by good and sufficient assurances to the "parties hereto of the third part, their heirs, executors and administrators, "according to the several natures and tenures thereof."

"3. To have and to hold the same to the said parties hereto of "the third part to and for the following purposes, uses and trusts, "namely:—

"(a) To invest and keep invested the said money with power to the "said Trustees to retain as investments hereunder and under the said "settlement the securities, if any, which shall be transferred to them and "from time to time as occasion may require to alter, transpose and vary "the investments and as often as any moneys shall be paid in upon capital "account to re-invest the same and so keep all moneys invested and upon "trust as to the nature of the investments not to invest any of the trust "moneys upon securities other than first mortgages of real estate in fee "simple in the Province of Ontario, or Dominion or Provincial Stock or "securities, or Municipal Debentures of Municipalities in Ontario."

"(b) To pay the income arising from such investments after deduct- "ing therefrom all proper costs, charges and expenses to the party hereto "of the fourth part from and after the said marriage half yearly, quarterly "or more frequently, as the said Trustees may in their discretion think "fit and for her sole and separate use without any power to anticipate the "growing proceeds thereof, her receipt alone being a good discharge."

"(c) From and after the death of the said party of the fourth part, "to hold the said capital to and for such one or more or all of the children "or other issue of the said intended marriage, and in such portions or "proportions and for such estates or interests as she, the said party of the "fourth part, may, by her last will and testament, appoint, no appoint- "ment to be deemed illusory and in default of appointment or in so far "as any appointment shall not take effect to and for the children or other "issue of the said marriage in equal shares, if children, but if more remote "issue, or if some are children and some are more remote issue per stirpes, "according to the number of children, each deceased child leaving issue "being a stirps, and in case any part of the said capital shall be appointed "to or amongst one or some only of such issue, then so far as any part of "the said capital or income may not be appointed to hold the same upon "trust equally to be divided amongst all the children or other issue as "aforesaid, provided that they and each of them holding appointed shares "bring the appointed shares into hotchpot and in default of their doing so, "to hold the same equally to be divided amongst all the children or other "issue in whose favour no appointment shall have been made. But if "there shall be no issue of the said marriage or no issue surviving the said "party of the fourth part, then to hold the said capital fund to and for the "party hereto of the first part for his own use absolutely, if he shall be "alive at the death of the party of the fourth part, but if the party of the "first part be not then alive, then upon trust for such person or persons "uses or purposes as the said party of the fourth part shall, by her last "will, direct, limit or appoint."

"4. And in case any trustee shall either before or after such settle- "ment, be executed, refuse or become incapable to act, or shall desire to "be discharged or shall die, then and in every such case it shall be lawful "for the surviving trustee or remaining trustee or the executors or admin- "istrators of the last surviving trustee, if both are dead, or for either

"trustee if both retire with the consent and approbation of the party "hereto of the first part during his lifetime, and after his death with the "consent and approbation of the party of the fourth part, if she survives, "expressed in writing under his or her hand, to appoint a new trustee or "new trustees and the number is not to be diminished but may, with the "consent and approbation expressed as aforesaid, be increased and all "the trust property is forthwith thereafter to be transferred to the new "trustees."

"5. And until such settlement shall have been prepared and executed "it is agreed that such sum of money as aforesaid or such securities as the "case may be, shall be held upon and for the uses and trusts hereinbefore "set out."

"6. And as soon as such settlement shall have been prepared, the "parties hereto other than the party of the second part, agree each and "everyone with the other to execute the same."

"IN WITNESS WHEREOF the parties hereto have hereunto set their "hands and seals."

"SIGNED, SEALED AND DELIV-"ERED, in the presence of	"CAWTHRA MULOCK"	(Seal)
	"W. G. FALCONBRIDGE"	"
"JOHN D. FALCONBRIDGE"	"W. MULOCK"	"
	"R. CASSELS"	"
	"ADELE B. FALCONBRIDGE"	"

3. The plaintiff alleges that the said Adele Baldwin Falconbridge was married to the said Cawthra Mulock within the period of twelve months from the date of the said Indenture and that pursuant thereto, the said Cawthra Mulock caused to be transferred to the said parties of the third part in the said Indenture mentioned, as Trustees, money and securities for money situate in Ontario, to the amount of Two Hundred and Fifty Thousand ($250,000) Dollars and that no other settlement was made as contemplated by the said Indenture.

4. The plaintiff alleges that the said Honourable Sir William Mulock and Robert Cassels resigned as Trustees under the said Indenture and that the Chartered Trust and Executor Company of the said City of Toronto thereupon became and has since been and is now the Trustee thereunder and has since held and now holds the said money and securities for money or the reinvested proceeds thereof as such Trustee.

5. The plaintiff alleges that the said Cawthra Mulock was, in his lifetime, and died on the first day of December, 1918, domiciled in Ontario, leaving him surviving the said Adele Baldwin Mulock and issue of the said marriage.

6. The plaintiff alleges that at the date of the death of the said Cawthra Mulock, the fair market value of the said money and securities for money was Two Hundred and Fifty Thousand ($250,000.00) Dollars and the fair market value of all the property, to which the said Cawthra Mulock died entitled (after the allowances authorized by Section 4 of the Succession Duty Act R.S.O. 1914 Cap. 24 had been deducted) was $828,492.68, making a total of $1,078,492.68.

7. The plaintiff submits that the said money and securities for money were property passing on the death of the said Cawthra Mulock under "The Succession Duty Act," R.S.O. 1914 Cap. 24 and Amendments thereto.

The plaintiff therefore claims:

(1) A declaration by this Honourable Court that the said money and securities for money were property passing on the death of the said Cawthra Mulock under "The Succession Duty Act."

(2) An Order prohibiting the defendant from transferring any of the property of the said Cawthra Mulock or income therefrom, vested in the defendant as Executor and Trustee of the Will and Estate of the said Cawthra Mulock deceased, to which any legatee, donee or other successor is beneficially entitled, without deducting therefrom the duty for which such legatee, donee or other successor is liable, together with interest thereon from the date of the death of the said Cawthra Mulock as set out in that behalf in the Succession Duty Act R.S.O. 1927 Cap. 26 and amendments thereto.

(3) His costs of this action.

(4) Such further and other relief as the nature of the case may require and this Honourable Court may think proper.

The plaintiff proposes that this action be tried at the City of Toronto, in the County of York.

DELIVERED this 28th day of November, 1932, by John A. McEvoy, 45 Richmond Street West, Toronto, Solicitor for the plaintiff.

**Amended the 2nd day of December, 1932, pursuant to Consent filed the 2nd day of December, 1932.*

E. HARLEY,
Senior Registrar, S.C.O.

RECORD

In the Supreme Court of Ontario

No. 2
Statement of Defence
November 29, 1932

No. 2.

STATEMENT OF DEFENCE

1. The Defendant admits the allegations contained in paragraphs 1, 2, 3, 4, 5 and 6 of the Statement of Claim, but submits that the money and securities for money referred to in the Statement of Claim were not property passing on the death of Cawthra Mulock, deceased, under "The Succession Duty Act," R.S.O. 1914, Cap. 24, and Amendments thereto, and that this action should therefore be dismissed with costs.

DELIVERED this 29th day of November, 1932, by D. L. McCarthy, 320 Bay Street, Toronto, Solicitor for the Defendant.

RECORD

In the Supreme Court of Ontario

No. 3
Notice of Motion for Judgment
December 2, 1932

No. 3.

NOTICE OF MOTION FOR JUDGMENT

TAKE NOTICE that the Court will be moved on behalf of the Plaintiff at Osgoode Hall, Toronto, on Thursday, the Eighth day of December, 1932, at eleven o'clock in the forenoon or so soon thereafter as Counsel can be heard for judgment on the pleadings herein.

DATED at Toronto, the 2nd day of December, 1932.

JOHN A. McEVOY,
45 Richmond Street West,
Toronto,
Solicitor for the Plaintiff.

To:

D. L. McCARTHY, ESQ.,
320 Bay Street,
Toronto.

Solicitor for the Defendant.

No. 4.

REASONS FOR JUDGMENT OF GARROW, J.

GARROW, J.:—This is a motion by the plaintiff for Judgment upon the pleadings.

The facts are not in any way in dispute and appear fully set out in the statement of claim. The question for determination is whether the securities which are the subject of the marriage settlement set out in full in paragraph 2 of the Statement of Claim are property passing upon the death of the testator within the meaning of The Succession Duty Act.

The death took place on December 1st, 1918. On that date, as at present, although in a somewhat altered form the statute provided by section 7 (2) (b) that property passing on the death of the deceased shall be deemed to include,

"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 voluntarily or by contract, or otherwise, except as hereinafter mentioned."

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.

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 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.

Dealing with the first point and considering whether the transaction is simply a disposition operating as an immediate gift "*inter vivos*" by way of declaration of trust, I think it is clear in the first place that it does not come within any of the exceptions provided for in sec. 7 (3). The only one which

In the Supreme Court of Ontario

No. 4
Reasons for Judgment of Garrow, J.
January 30, 1933

could by any possibility apply is (3) (d) which exempts property "actually and *bona fide* transferred for a consideration in money or money's worth paid to the transferor for his own use or benefit." The only consideration here was the marriage or the promise to marry and it has been expressly held that similar language in the corresponding English statute was "introduced to exclude marriage as a consideration." *Attorney General v. Earl of Sandwich* (1922), 2 K.B. 500 at p. 517.

But I apprehend that it is not sufficient to say in construing a statute of this kind that the subject matter does not come within any of the exceptions created by the statute. It may be the law that this kind of enactment is to be construed as any other—*Attorney General v. Carlton Bank* (1899) 2 Q.B. 158 at p. 164. But I think it is also clear that before it can be said that any particular disposition is subject to its terms it must be made clearly to appear that it comes within the section or sections imposing the tax or duty and not merely that it is not to be found among the exceptions and therefore is presumed to be liable to the burden imposed. *Partington v. Attorney General* (1869) L. R. 4 H. L. 100 at p. 122.

In support of the contention that the arrangement was in law a contract and not a gift, reference was made to the case of *Attorney General for Ontario v. Brown* (1903) 5 O.L.R. 167 in which it was held that a sum of money transferred to his niece by the deceased by way of a *donatio mortis causa* was not subject to Succession Duty, the transaction, although carried into effect by way of what was found in earlier proceedings to be a *donatio* being nevertheless founded upon "a valid and long standing contractural obligation" between the parties under which "full value of moneys' worth was given for all that was received." The transaction was not simply a gift but the implementing of a contract and the niece was not estopped from so alleging by reason of the earlier proceedings in which the transfer had been sustained as a valid *donatio mortis causa*. It was indeed that, but it was more than that, it was the payment of a just debt for which the deceased had received full value.

That case is on the facts quite different from the present. No doubt the marriage settlement here had it not been carried into effect could have been enforced, the marriage having taken place—Halsbury, 1st Ed. vol. 25, par. 984. But I think the authorities indicate that that which is in substance a gift does not lose its character merely because the terms of the instrument under which it is given may be enforced in a court of law or equity, and such a gift may be liable to duty although made in pursuance of an enforceable voluntary obligation. Halsbury, vol. 13, p. 188. *H.M. Advocate v. Heywocd-Londsales Trustees* (1906) 43 Sc.L.R. 529. *Attorney-General, Informant v. Smyth, et al* (1905), 2 Ir. 553.

I am of opinion therefore that on the first ground the defence fails and 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.

Coming now to the second point that is whether the limitations of the subsection as to the non-assumption by the donee of actual and *bona fide* possession and enjoyment apply to all the classes of property mentioned therein or only to "any gift whenever made."

In my opinion it is quite clear that they refer to the latter only. There are three classes of disposition dealt with by the subsection. (1) Gifts *mortis causa*, (2) Dispositions operating as gifts *inter vivos* made since July 1st, 1892; and (3) any gift whenever made under which possession and enjoyment have not been assumed by the donee to the exclusion of the donor.

It is one of the conditions of a valid *donatio mortis causa* that there must be delivery of the subject of the donation, that complete dominion over the subject matter of the gift must be intended to pass to the donee—*Re Johnson, Sandy v. Reilly* (1905) 92 L.T.R. 357. I do not think it is possible to speak with legal accuracy of property taken as a *donatio mortis causa* of which the actual and *bona fide* possession (exclusive of enjoyment) had not been assumed by the donee. Such a transaction would not be a *donatio mortis causa* whatever else it might be and no such intention as is implied in this construction can be imputed to the Legislature.

If the limiting words do not relate to the first class of property there is certainly no grammatical reason for relating them to the second. Nor can I readily conceive of an immediate gift *inter vivos* in respect of which actual possession and enjoyment of that which is actually "given" is not assumed by the donee to the exclusion of the donor. See *in re The Finance Act, 1894*, and *Cochrane* (1906) 2 I. R. 200.

It is pointed out that in the Revised Statute of 1914 ch. 24 the word "property" followed the word "or" in the sixth line of section 7, but that by The Succession Duty Act, 1914, 4 Geo. V. ch. 10, the whole subsection was repealed and a new one substituted in exactly the same language except that the word "property" was dropped. What the intention of this may have been I do not know. With the word "property" inserted, the meaning I think was perfectly clear. Dropping it left the meaning perhaps not so clear but still sufficiently so I think.

It is also the fact that in 1919 by 9 Geo. V., ch. 9, the whole clause is broken up into three parts, but precisely the same language is retained. It is abundantly plain that whatever the interpretation of the earlier subsection, there can be no doubt whatever about the meaning of the clause as enacted in 1919, and it is argued that because this change in arrangement was made, it must be regarded that under the subsection as it stood at the time of the death here in question, the limiting words applied to all three classes of property.

I take it that I am entitled to look at this amendment with a view to assisting me in the determination of the meaning of the clause which it superseded. Craies on Statute Law, 3rd Ed. p. 134. But doing so I confess I fail

In the Supreme Court of Ontario

No. 4
Reasons for Judgment of Garrow, J.
January 30, 1933.

to gather any support for defendant's contention. The effect of the amendment seems to be merely a new arrangement of exactly the same language made in such a way as to put beyond all question that which to my mind was sufficiently clear before.

I have examined all the authorities referred to by counsel and have already referred to several of the more important. Most of them are decisions of the English, Irish or Scotch Courts upon the corresponding sections of the Finance Act and all these are referred to and discussed in Hanson's Death Duties, 8th Ed., in the chapter on Estate Duty beginning at p. 61. By the law as it stands at present in England such a disposition as that in question here would be exempt from duty and would not be deemed to be property passing. But until 1909 this was not so in England as it is still not so here so far as express statutory enactment is concerned. And having regard to the very wide terms of the section and the evident intent of the Legislature to include as property passing on the death all property except as provided for in section 7 (3) which has been the subject of a gift, since 1892 in some cases, and whenever made as to the others, I am quite unable to reach any other conclusion than that the disposition in question comes clearly within the plain meaning of the section.

There will therefore be judgment for the plaintiff declaring that the moneys and securities the subject of the settlement were property passing within the meaning of the statute, and for the relief claimed in the prayer with the costs of the action. There will be a stay of fifteen days.

No. 5.

JUDGMENT OF GARROW, J.

IN THE SUPREME COURT OF ONTARIO

THE HONOURABLE MR. JUSTICE GARROW — MONDAY, THE 30TH DAY OF JANUARY, 1933.

BETWEEN:

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

Plaintiff,

—AND—

GORDON PERRY,

Defendant.

UPON MOTION for judgment upon admission of fact in the pleadings made unto this Court on the ninth day of December, 1932, by Counsel on behalf of the Plaintiff in the presence of Counsel for the Defendant and in the presence of Counsel appointed by this Court to represent unascertained persons or interests under Rule 77 of the Rules of Practice of the Supreme Court of Ontario, upon hearing read the pleadings herein and upon hearing what was alleged by Counsel aforesaid and judgment upon the Motion having been reserved until this day.

1. THIS COURT DOTH DECLARE that for the purposes of the Succession Duty Act R.S.O. 1914 Chapter 24 and Amendments thereto, the money and securities for money of a value of Two Hundred and Fifty Thousand Dollars ($250,000.00) referred to in the Statement of Claim herein, were property passing on the death of the late Cawthra Mulock AND DOTH ORDER AND ADJUDGE the same accordingly.

2. THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the Defendant do pay to the Plaintiff and to the Counsel appointed to represent unascertained persons or interests out of the Estate of the said Cawthra Mulock, their costs of this action forthwith after taxation thereof.

Judgment signed this 27th day of February, 1933.

D'ARCY HINDS,
Registrar.

Entered J. B. 52, pages 541-2.
February 27th, 1933.
"H.F."

No. 6.

No. 6
Notice of Appeal to the Court of Appeal by the Defendant February 15, 1933

NOTICE OF APPEAL TO COURT OF APPEAL

TAKE NOTICE that the Defendant appeals to the Court of Appeal for Ontario from the judgment pronounced by the Honourable Mr. Justice Garrow on the 30th day of January, 1930, on the ground that the learned Judge erred in holding that the money and securities for money referred to in the Statement of Claim were property passing on the death of Cawthra Mulock, deceased, under the Succession Duty Act, R.S.O., 1914, Cap. 24, and amendments thereto.

Dated the 15th day of February, 1933.

D. L. McCARTHY,
Solicitor for the Defendant.

To:

JOHN A. McEVOY, ESQ.,
Solicitor for the Plaintiff:

AND TO:

C. H. A. ARMSTRONG, ESQ.,
Appointed to represent unascertained persons or interests.

No. 7.

No. 7
Reasons for Judgment of the Court of Appeal May 31, 1933.

REASONS FOR JUDGMENT OF THE COURT OF APPEAL

The judgment of the Court was delivered by LATCHFORD, C. J.:—This appeal is from the judgment pronounced by the Honourable Mr. Justice Garrow on January 30, 1933, holding that the money and securities referred to in the statement of claim herein were "property passing on the death of Cawthra Mulock, deceased, and subject to the provisions of the Succession Duty Act, R.S.O., 1914, ch. 24, and amending Acts."

Error in so holding is the ground of the appeal.

As pointed out by the learned trial Judge, no facts are in dispute.

By the deed of June 23, 1903, the late Cawthra Mulock agreed that upon his contemplated marriage with Adele Baldwin Falconbridge he would transfer to certain trustees money, or securities for money, amounting to $250,000. The marriage took place and the transfer was made.

Mr. Mulock died in December, 1918, his widow and issue of the marriage surviving.

Whether, and to what extent, the original trustees and their successors discharged the duties of their office is not in question here. The only point of importance in their regard is the fact, admitted by the plaintiff, that, in virtue of their position, they received the $250,000 mentioned in the marriage settlement.

That the settlor had the right to deal with the $250,000 as he did deal with it is not disputed. He had agreed to dispose and did dispose of so much of his estate in consideration of the marriage. Fourteen years after his death, more than fifteen years later, the Attorney-General of Ontario launched the present action, claiming that the estate of the deceased was as liable to taxation under the Succession Duty Act as if the $250,000 still formed part of Mr. Mulock's estate, and the learned trial Judge has so held.

The claim is tersely set forth by the plaintiff in paragraph 7 of his pleading in the following words:

"The plaintiff submits that the said money and securities for money were property passing on the death of the said Cawthra Mulock under 'The Succession Duty Act,' R.S.O. 1914, ch. 24, and amendments thereto."

The contention of the appellant is that under the statute mentioned, the $250,000 was neither *property passing on the death of the deceased*, nor property within any of the descriptions mentioned in the statute as liable to taxation as not so included nor covered elsewhere in the Act, and that the fund transferred was not subject to succession duty.

Referring to the Act so far as it appears to be of possible application to the matter in appeal, sec. 7 prescribes that "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."

Thus, not only the property subsequently mentioned is to be dutiable, but "all other property subject to succession duty upon a succession." I understand this provision to cover property not within the categories subsequently prescribed, but all property passing upon death which the statute otherwise and elsewhere makes liable to taxation. Unless clearly so imposed, no unenumerated property is subject to succession duty.

"The following property" includes "all property situate in Ontario or any income passing on the death of any person." Sec. 7 (1) (a).

Subsec. 2 of sec. 7 provides that "property passing on the death of the deceased shall be deemed to include for all purposes of the Act. . . (a) any property voluntarily transferred by deed . . . or gift made in contemplation of the death of the grantor . . . or donor and with or without regard to the imminence of such death; (b) any property taken as a *donatio mortis causa*, or taken under a disposition operating . . . as an immediate gift *inter vivos*,

In the Supreme Court of Ontario

No. 7
Reasons for Judgment of the Court of Appeal
May 31, 1933.

whether by way of transfer, delivery or declaration of trust, or otherwise made since the 1st day of July, 1892 . . . of which property actual and *bona fide* possession and enjoyment shall not have been assumed by the donee upon such gift, and thence forward retained to the entire exclusion of the donor".

The subsequent paragraphs of sub-sec. 2 appear to me to have no application here.

Subsection 3 of sec. 7 may also be disregarded as it refers only to property in respect of which no duty is payable.

It is clear, as stated by the learned trial Judge, that the transfer to the trustees does not fall within any of the exceptions from the incidence of duties under this sub-section.

Reverting to the provision in subsec. (1) of sec. 7 that "taxation may be imposed on all other property subject to succession duty upon a succession," I may say that I have sought in vain to find anywhere in the Act, a provision making any property subject to succession duty upon a succession except as stated in sec. 7.

Hence, if my search has been exhaustive, and the property transferred to the trustees is not included in the enumeration contained in sec. 7 (2) of the Act, the $250,000 is not, in my opinion, subject to succession duty.

This phase of the case impressed itself on the learned trial Judge when he observed that "before it can be said that any particular disposition of property is subject to its (the Act's) terms, it must be made clearly to appear that it comes within the section or sections imposing the tax or duty." In this I respectfully concur.

The right to collect such a tax must be founded on express legislation, and if the statute does not accord such a right, the action should have been dismissed.

The ground of the decision is based, first, on the very wide terms of sec. 7, and then on "the evident intent of the legislature to include as property passing on the death, all property except as provided for in sec. 7 (3) which has been the subject of a gift since 1892 in some cases, and whenever made as to the others." I shall presently refer again to the terms of sec. 7, but at the moment I may say that the intention of the legislature is not evident to my mind that all property not included in sec. 7 (3) whether the subject of a gift or not, shall be subject to succession duty.

The sub-section quoted expressly excludes certain transactions, but I do not take that to mean that other transactions may not be excluded. Unless they are *included* in the terms of sec. 7 imposing taxation, they cannot, I consider, be the subject of taxation.

In 7 (1) the words "passing on the death of any person" refer as well to all property situate in Ontario as to any income therefrom. I cannot think that property which passed in fact from the deceased to trustees of his marriage settlement, passed also on his death fifteen years later.

Then under subsec. 2 (a) of sec. 7, the $250,000 was not voluntarily transferred, nor was it made in general contemplation of the death of the grantor, nor was it intended to take effect after the death of the grantor. It may be that the effect of what was done entitled the widow and the issue of the marriage to become ultimately owners of the fund; but the transfer was not, in my opinion, a voluntary transfer. It was made in pursuance of a contract.

Marriage has long been declared a valuable consideration for a contract. Such was the declaration of Lord Chancellor Hardwicke, in *ex parte March* (1744) 1 Atkyns, 158, when he declared that marriage alone is a sufficient consideration for an agreement.

The $250,000 was therefore not voluntarily transferred but was transferred for valuable consideration.

Coming to subsec. 2 (b) of sec. 7 it is plain that the transfer was not a *donatio mortis causa*. "Marriage" is not a synonym for "death."

Even regarding the transfer as a gift, though I do not so regard it—as it was in my opinion paid in the discharge of a binding contractual obligation, —the transfer did not fall within this sub-section which covers a case where the *bona fide* possession and enjoyment of the thing transferred has not been assumed by the donee. Here the $250,000 was assumed by the trustees immediately upon the transfer.

Subsection 2 (c) has no application, as the settlor did not cause the fund to be transferred "to himself and any other person," nor did he "reserve any right to himself" under the trust deed pursuant to subsec. 2 (d).

Section 8 of the Act does nothing more than fix the amount of duty payable "in respect of any succession or on property passing on the death", subject to the exceptions mentioned in secs. 6 and 7 of the Act. The material part of this section is "*property passing on the death.*"

Property which in fact passed fifteen years prior to the death of Mr. Mulock not voluntarily, that is, without consideration,—per Boyd, C., in *Attorney-General v. Brown* (1903), 5 O.L.R. 167—and not transferred as a gift, but in fulfilment of a valid and enforceable contract, made for valuable consideration, is not in my opinion "property passing on the death of the deceased," and is not expressly or by implication subject to taxation under The Succession Duty Act.

I therefore think the appeal should be allowed with costs and the action dismissed with costs.

No. 8.

JUDGMENT OF THE COURT OF APPEAL FOR ONTARIO

IN THE SUPREME COURT OF ONTARIO

THE HONOURABLE THE CHIEF JUSTICE IN APPEAL
THE HONOURABLE MR. JUSTICE RIDDELL
THE HONOURABLE MR. JUSTICE FISHER

WEDNESDAY, THE 31ST DAY OF MAY, 1933.

BETWEEN:

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

Plaintiff,

—AND

GORDON PERRY,

Defendant.

UPON MOTION made unto this Court on the 10th day of March, 1933, by Counsel on behalf of the Defendant in the presence of Counsel for the Plaintiff and in the presence of Counsel appointed by this Court under Rule 77 of the Rules of Practice to represent unascertained persons or interests, by way of appeal from the judgment herein pronounced by the Honourable Mr. Justice Garrow on the 30th day of January, 1933; upon hearing read the pleadings herein and the judgment aforesaid; and upon hearing what was alleged by Counsel aforesaid; and judgment upon the motion having been reserved until this day:

1. THIS COURT DOTH ORDER that this appeal be and the same is hereby allowed, and that this action be and the same is hereby dismissed.

2. AND THIS COURT DOTH FURTHER ORDER that the Plaintiff do pay to the Defendant, and to the Counsel appointed as aforesaid to represent unascertained persons or interests, their costs of this action and appeal forthwith after taxation thereof.

"D'ARCY HINDS,"
Registrar, S.C.O.

Entered O.B. 133, page 440,
June 13th, 1933.
"V.C."

No. 9.

ORDER ADMITTING APPEAL

IN THE SUPREME COURT OF ONTARIO

THE HONOURABLE THE CHIEF JUSTICE IN APPEAL IN CHAMBERS.

TUESDAY, THE 27TH DAY OF JUNE, 1933.

BETWEEN:

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

Plaintiff,

—AND—

GORDON PERRY,

Defendant.

UPON THE APPLICATION of Counsel for the Plaintiff in the presence of Counsel for the Defendant and in the presence of Counsel appointed by this Court under Rule 77 of the Rules of Practice to represent unascertained persons or interests; UPON HEARING read the judgment herein of the Court of Appeal pronounced on the 31st day of May, 1933, and the bond of the United States Fidelity and Guaranty Company, dated the 23rd day of June, 1933, filed; AND UPON HEARING what was alleged by Counsel aforesaid; AND IT APPEARING that under the provisions of the Privy Council Appeals Act, R.S.O. 1927, Chapter 86, the Plaintiff has a right to appeal to His Majesty in His Privy Council:

1. IT IS ORDERED that the said bond be and the same is hereby approved as good and sufficient security that the Plaintiff herein will effectually prosecute his appeal to His Majesty in His Privy Council from the said judgment of the Court of Appeal and will pay such costs and damages as may be awarded in case the said judgment is affirmed.

2. AND IT IS FURTHER ORDERED that an appeal by the Plaintiff herein to His Majesty in His Privy Council from the said judgment of the Court of Appeal be and the same is hereby admitted.

3. AND IT IS FURTHER ORDERED that the costs of this application shall be costs in the said appeal.

D'ARCY HINDS,
Registrar.
S.C.O.

Entered O.B. 134, pages 279 and 80,
June 27, 1933.
V.C.