Privy Council Appeal No. 88 *of* 1933.

The Attorney-General of Ontario - - - - - *Appellant*

v.

Gordon Perry - - - - - - - *Respondent*

FROM

THE COURT OF APPEAL FOR ONTARIO.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 19TH JUNE, 1934.

Present at the Hearing:

LORD BLANESBURGH.
LORD ATKIN.
LORD WRIGHT.
LORD ALNESS.
SIR LANCELOT SANDERSON.

[*Delivered by* LORD BLANESBURGH.]

The principal question for decision on this appeal is whether property to be held upon trusts for the benefit of his wife and the issue of their marriage, transferred by a husband in pursuance of a covenant contained in marriage articles is, within the meaning of the Succession Duty Act of Ontario a " gift " so as to be chargeable with succession duty on the death of the husband.

That issue, with another of less general importance, was determined in favour of the Crown by the learned Trial Judge in the Supreme Court of Ontario: on appeal to the Court of Appeal the Crown's claim to duty was rejected, on every ground put forward in its support, and the suit of the Attorney-General of the Province in which the claim was made was by judgment dated the 31st May, 1933, dismissed. From that order of dismissal the Attorney-General now appeals to His Majesty in Council.

The facts are not in dispute. As formulated in the statement of claim, they were and are accepted by the respondent defendant, the legal personal representative of Cawthra Mulock, the settlor.

It was in contemplation of his marriage with Adele Baldwin Falconbridge, then an infant, that the marriage articles in question were on the 23rd June, 1903, entered into. The parties to them were the settlor, of the first part, the father of the bride of the second part, the trustees named, of the third part, and the bride herself, of the fourth part, and on a recital that a marriage was about to be solemnized between the parties thereto of the first and fourth parts, and that it had been agreed between the parties of the first, second and fourth parts that the party thereto of the first part should assign and transfer, or cause to be assigned and transferred to the parties thereto of the third part, as trustees, the sum of $250,000, or securities for that amount to be held upon the trusts therein detailed or referred to, it was witnessed that in consideration of the said intended marriage the party of the first part covenanted and agreed with the parties thereto of the second and fourth parts that upon the contemplated marriage taking place within twelve months from the date of the articles the payment or transfer aforesaid to the trustees, parties of the third part, would be made. The trusts declared were those of a marriage settlement of personal estate, predominantly in favour of the wife and issue of the marriage, the settlor himself taking no interest thereunder except in the event, which did not happen, of his surviving his wife and all their children.

Their Lordships think it important at once to observe—the observation will be found to supply one key to the solution of the appeal—that the settlement here is one made by a husband of his own property for objects all of which are within the marriage consideration. The settlor's agreement to settle is made, and the covenant in pursuance of such agreement—expressly stated to be in consideration of the intended marriage—is entered into by him with the bride and her father alone. It may ultimately become a question decisive of the appeal whether a transaction from which, on the part of the settlor, every element of gift or bounty is so entirely absent is one upon which any claim to duty under the Succession Duty Act can be based.

The marriage was shortly afterwards duly solemnized and the settlor's covenant duly performed. The trust funds have since been held by the trustees of the marriage articles, and are still so held, no further formal settlement having ever been executed. The settlor died on the 1st December, 1918, and was survived by his wife and by issue of their marriage.

More than twelve years afterwards the suit above mentioned was instituted, and by his statement of claim, the Attorney-General of Ontario made against the legal personal representative of the settlor, the demand for succession duty on the $250,000,

which more than twelve years before his death had been transferred by the settlor to the trustees pursuant to his covenant already stated. The institution of the proceedings so long after the death of the settlor is matter of comment. No explanation of the delay is forthcoming. It is not, however, suggested by the respondent that any equitable answer to the claim is on that score open to him. There are apparently still funds in his hands available to meet the demand for duty should it turn out to be otherwise well founded.

It is upon section 7 of the Succession Duty Act of Ontario, and in particular upon sub-section 2 (*b*), as the sub-section stood at the date of the settlor's death that the claim is based.

The immediately relevant provisions of the section are those which for convenience of reference are now set forth.

> 7.—(1) The following property . . . . 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. . . ."
>
> "(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.
>
> "(3) Notwithstanding anything herein contained no duty shall be payable in respect of the property . . . .
>
> "(*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."

Upon the above enactment the judicial task is to ascertain how far a transfer not purely voluntary may still be a "gift" within the meaning of sub-section (2) (*b*), and in particular whether the transfer made by the settlor here can be properly so described.

In support of his submissions upon that question, learned counsel for the Attorney-General invited their Lordships to trace in the Imperial statute law from which it was obviously borrowed the evolution of the sub-section, and, having done so to utilise in its interpretation in relation to settlements made in consideration of marriage the authorities, English, Scottish and Irish, bearing upon the corresponding Imperial enactment.

For reasons which will emerge as they proceed, their Lordships are not satisfied that in the circumstances this course is properly open to them. Accordingly their acceptance of the

appellant's invitation is made with all reserve and really because, as they believe, the inquiry may be generally illuminating, and, in so far as it throws permitted light on the Ontario enactment in relation to the present question, significant.

It will be convenient in what follows sometimes to refer to the British Finance Acts as the Finance Acts, and to the Ontario Succession Duty Act as the Succession Duty Act, and it may at once be accepted that section 7 (2) (*b*) of the Succession Duty Act was originally inspired by, although it is not in its precise terms translated from, the Finance Act, 1894, section 2 (1) (*c*).

That subsection enacts that property passing on the death of a deceased shall be deemed to include

> " Property which would be required on the death of the deceased to be included in an account under section 38 of the Customs and Inland Revenue Act, 1881, as amended by section 11 of the Customs and Inland Revenue Act, 1889, if those sections were herein enacted and extended to real property as well as personal property and the words ' voluntary ' and ' voluntarily ' and a reference to a ' volunteer ' were omitted therefrom."

Sub-section 1 (9) of section 38 of the Act of 1881 there referred to is that which is now in point. As amended by section 11 of the Act of 1889, and omitting words irrelevant, here the sub-section runs as follows :—

> " Any property taken as a *donatio mortis causa*, or taken under a [*voluntary*] disposition purporting to operate as an immediate gift *inter vivos*, whether by way of transfer delivery, declaration of trust, or otherwise, which shall not have been *bona fide* made twelve months before the death of the deceased and property taken under any gift, whenever made, of which property *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 by contract or otherwise."

The similarity of this sub-section to section 7 (2) (*b*) of the Succession Duty Act as above set forth is obvious. But the identity of the two is not complete. This was not possible if the scheme of the Ontario legislation was to be adhered to. Essential difference on this score does not, however, explain every variation between the two enactments.

To pass by, for the moment, one other to which reference must later be made, it may be taken that for present purposes the great difference between the two sub-sections consists in this—that the sub-section appears in the Ontario statute as an original enactment with no trace of its origin or history to be found either in its terms or in any other Ontario legislation, whereas the British sub-section is, on its face, an amendment of an existing Act of Parliament, which, as so amended, remains the substantive operative enactment.

Now, before considering the possible consequences of the above difference in the form of the two enactments, it will not be inconvenient at once to emphasise a clear line of demarcation

between two classes of settlement made in consideration of marriage, the subject with which this appeal is immediately concerned. It will be found that this line of demarcation remains prominent throughout this judgment.

In the first class of these settlements—such settlements as the articles with which we have to do—settlements made by a husband on his own marriage for the benefit of his wife and the issue of the marriage, we see, as Kay, L.J. put it in *Attorney-General* v. *Jacobs-Smith* [1895] 2 Q.B. 341, " A settlement which as between the settlors is made for the most valuable consideration imaginable, that of marriage." In other words, the husband's covenant or transfer of property, under such a settlement, is the price paid by him for the hand of his bride, with no element whatever either of gift or bounty involved.

But there is a second class of settlement, such for example, as one made by a father on the marriage of his son or daughter—a settlement made in consideration of marriage, truly enough, but not made in consideration of marriage with the settlor. In the case of such a settlement it is not true to say that the consideration moving to the settlor is " the highest consideration imaginable." In *Shadwell* v. *Shadwell*, 9 C.B., N.S. 159, for example, where a promise was made by an uncle in a letter to his nephew in anticipation of the marriage of the young man to a named lady, while Erle, C.J. and Keating, J., were with some difficulty able to find a consideration moving to the uncle, Byles, J. could discover none. The truth is that the so-called consideration of marriage in such a case is based upon results to the settlor totally distinct from those which follow his own marriage. Indeed, in the case of settlements of this second class in the contribution of the settlor there is, found even in common parlance, an element of gift or bounty. As Lord Macnaghten observed in *Wheeler* v. *Humphreys* [1898], A.C. 506 at p. 509 :—

> " You give your daughter in marriage and you give a portion with your daughter."

And it will be found to be of the last significance in the examination of the Finance Acts, and the authorities thereon to which their Lordships now proceed that it is only in marriage settlements of this second class that any element of gift or bounty has ever been discovered. Nowhere has it been suggested that that element is even latent in the class of marriage settlement now in question.

It was always held in Great Britain, under S. 38 (1) (9) of the Inland Revenue Act, 1881, amended as above but with the word " voluntary " remaining before the word " disposition," that an ante-nuptial settlement of the second class above alluded to, not being in law a voluntary settlement, did not fall within the second limb of the section. It is interesting here to note, as will be seen later, that something which was not a " pure and simple " gift might however have come under the third limb.

In other words "gift" in the two limbs had not the same meaning. It is, however, now settled as a result of the omission of the word "voluntary" from the sub-section as incorporated in the Finance Act, 1894, that marriage settlements of the second class are brought within its second limb as well. But so far as decision is concerned, only by reason of the form of enactment. This is made very clear by the leading authority on the subject—the judgment of Palles, C.B., in *Att. Gen.* v. *Smyth* (1905), 2 Ir. 553. It was not permissible, the Chief Baron there held, in construing the sub-section of the Finance Act, merely to strike out the word voluntary from the previous—the 1881—description, and then to construe the description thus modified as if it were contained in an original enactment without regard to its history or evolution and irrespective of the new context in which it was found. It had been argued that the description thus arrived at would contain the word "gift" as a substantive part without any controlling context, and therefore would exclude property comprised in a settlement of the second class. But the contention was inadmissible. It was necessary to look at the repealed portion of the Act of Parliament in order to see what was the meaning of that which remained of it, and accordingly, being entitled on that view of the statute to regard the "disposition" as one which need not be voluntary, the Chief Baron held that a settlement by a father on the marriage of his son might be regarded within the meaning of the Finance Act as a disposition "purporting to act as an immediate gift." And the same principle in relation to a similar settlement was applied in Scotland in the case of *Lord Advocate* v. *Heywood Lonsdale's* Trustees, 43 Sc., L.R. 529, and in England in the case of *Attorney-General* v. *Holden* [1903] 1 K.B. 832.

But this construction of the Act of 1894—never applied be it remembered to settlements in consideration of marriage other than those of the second class—did not ultimately commend itself to the British Legislature, even with regard to them: and in 1910, by the Finance Act of that year, 10 Ed. 7 c. 8, section 59 (2), it was enacted that gifts *inter vivos*, in the Act of 1881, as amended, should not apply to gifts made in consideration of marriage.

Their Lordships cannot leave the consideration of the Finance Acts without referring to a series of decisions under what may be regarded as the third limb of section 38 1 (9) of the Inland Revenue Act, 1881, as amended by section 11 of the Act of 1889. A reference to that limb of the subsection *supra*, shows that the gift therein being dealt with need not be preceded by a "disposition," but that the words following seem to contemplate that there may be within their meaning a gift, although accompanied by some benefit to the donor by contract. On that part of the section it has been held that a gift does not cease to be a gift although there is some consideration for it received by the

donor: a gift, it has been said, may be something which is not "a pure and simple gift."

Attorney-General v. *Worrall* [1895], 1 Q.B. 99: *Attorney-General* v. *Johnson* [1903], 1 K.B. 617, may be cited as typical. And see *Attorney-General* v. *Holden* [1903], 1 K.B., at p. 837. These authorities would have had greater significance on the present occasion, if upon construction it were held that the final words of S. 7 (*b*) of the Succession Duty Act applied to the second limb of the sub-section as well as to the third. But, as will presently be seen, this, in the opinion of their Lordships, is not the case.

Their Lordships now return to the consideration of the Ontario statute with the information culled from the immediately relevant authorities on the British Finance Acts, that—whereas under a form of statute in terms an amendment of another, but which as amended remains the substantive enactment, property transferred by a settlor on the marriage of another may, on the settlor's death, be subject to duty, as being in the nature of a gift—there is first of all no decision to that effect under an enactment which is original: and there is no decision anywhere that a transfer under such a settlement as the marriage articles here can for any purpose whatever be regarded as a gift.

First then, is the Ontario subsection unlike the corresponding British enactment, an "original" section? In their Lordships' judgment it undoubtedly is, and must be so construed. It contains on its face no reference to any origin. It comes into Ontario legislation full grown and without ancestry. It would, in their Lordships' judgment, be contrary to all principle, for the purpose of construing it, to look at the evolution even of the same enactment under some other system of law.

Next, even if the present were such a settlement as those which in Great Britain were by decision brought within the Finance Acts, ought that same result to follow under an enactment like the Ontario statute original in form? There is no British authority that it ought: it may, perhaps, be surmised that Chief Baron Palles would have held that it ought not. And quite certainly caution must be exercised before the opposite conclusion is reached, because such a decision in Ontario would lead to a result which, in Great Britain, has been avoided by subsequent legislation.

And who can say that the absence of a similar amending statute in Ontario is not due to the fact that no such statute was deemed there to be necessary? Such so-called "gifts" were never caught by the Ontario Succession Act at all.

It is in these circumstances some satisfaction to their Lordships to find that they are not in this case called upon to express any concluded opinion on this question. In its determination they would desire the assistance of the Provincial Courts which have not here dealt with it. They are able to dispose of the appeal on another ground, and they do so. It fails, they

think, for a reason which they have elaborated throughout this judgment, that the settlor's covenant or transfer in this instance had in it no element of gift or bounty whatsoever, and is therefore in no way caught by the Succession Duty Act, whether in section 7 (2) (*b*) of that Act, and in view of the later reference to a " gift " the word " voluntary " is, or is not, to be implied before the word " disposition."

This conclusion deprives of final importance the appellant's second attack on the decision of the Court of Appeal. But their Lordships must not pass it by. The question already referred to in another connection turns on the construction of the concluding words of section 7 (2) (*b*) of the Succession Duty Act and it raises a somewhat curious point into the consideration of which amendments successively introduced into that sub-section itself find their place.

The sub-section as it stood at the date of the settlor's death is set out above.

On reference to its terms it will be found that the word " property " referred to in its first limb is not repeated, but is implied, in relation to its second, and third limbs, and the question is whether the " property " mentioned last in the section is by reference carried back to the only " property " previously named (that is to the word at the beginning of the section), with the effect that the proviso applies not to the third limb of the sub-section only, but to all three. In other words the " property " here in question, coming under the second limb, escapes duty on the ground that actual and *bona fide* possession of it by the donee trustees was in fact assumed immediately upon the gift.

Now before considering grammatically with regard to this point, the effect of the section as it stood at the settlor's death, something should be said as to its Ontario legislative history in this regard.

The section of the Inland Revenue Act, 1881, above quoted differs it will be seen from its existing Ontario reproduction in this: that its first two limbs are disjunctive, " any property taken as a *donatio mortis causa, or* taken under a disposition," etc., while the third limb is cumulative, and in terms independent, with the word " property " repeated: " *and property* taken under any gift." The repetition of the word " property " in the third limb following the word " and " results in this, that the same word when next used in the section is referable only to that last-mentioned property: that is to say, to the third limb of the section. And such has been the construction placed upon the sub-section in Great Britain.

It will be noticed, however, that in the Ontario statute, unlike in this respect its British counterpart, all three limbs are disjunctive, the second and third being each introduced by the word " or." Moreover, when the sub-section first appeared in Ontario legislation, the word " property " remained inserted before the words

" taken under any gift " the effect very clearly being, as in the British enactment, to refer the word " property " next mentioned to that third limb and to no other. But by 4 Geo. 5. c. 10, s. 5, section 7 (2) (*b*) of the Succession Duty Act is re-enacted, with the word " property " before the third limb omitted, and thus the section stood as above seen at the settlor's death. But not for long. The matter was taken up again by the legislature in 1919, the year following the death, and the enactment now in force (9 Geo. 5 (Ont.), c. 9, s. 1) runs as follows :—

> " 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."

In other words, the original sense is now restored to it without ambiguity of any kind. The question is, what interpretation is to be placed upon the sub-section in its intermediate state, between 1914 and 1919.

Now upon this point their Lordships are impressed with the purely grammatical difficulty in the way of the Crown's construction, even apart from any argument for the respondent resulting from the amendment of 1914. Grammatically it seems to them the word " property " when last used should strictly be referred back to the same word where it alone previously appears in the sub-section, and being so referred back is then necessarily carried forward with that word into both the second and the third limbs of the sub-section.

But this construction is strict and not, their Lordships think, necessarily compelling. It must, they are satisfied, yield to results, and if the result of it must be, and so they think, that referring the proviso to the first limb it would prevent there ever being under the section any *donatio mortis causa* at all, it must follow that the reference to " property " is confined to that word as impliedly introducing the third limb and to that word only. For, no one has suggested that if the word does not apply to property covered by the first limb it can extend to property covered by the second.

And their Lordships do not feel themselves precluded by the statute of 1919 from reaching this conclusion as to the meaning of the enactment thereby superseded. The new enactment did not necessarily mean more than that in the opinion of the legislature the enactment of 1914 being possibly ambiguous it

was desirable that the Act of 1919 should resolve the ambiguity in the sense always intended.

On this point, therefore, their Lordships find themselves at variance with the Court of Appeal and in agreement with Mr. Justice Garrow. On the whole case, however, the appeal in their judgment fails, and they will humbly advise His Majesty that it be dismissed and with costs.

In the Privy Council.

THE ATTORNEY-GENERAL OF ONTARIO

v.

GORDON PERRY.

DELIVERED BY LORD BLANESBURGH.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.2.

1934.