

In the Privy Council.

No. 53 of 1931.



APPELLANT'S CASE.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

BETWEEN

THE ATTORNEY-GENERAL OF THE
PROVINCE OF ONTARIO (Plaintiff) Appellant,

AND

THE NATIONAL TRUST COMPANY,
LIMITED, Executor of William Edward
Wilder deceased and MARY MARJORIE
WILDER (Defendants) Respondents.

APPELLANT'S CASE.

1. This is an appeal from a judgment of the Appellate Division of the Supreme Court of Ontario (Mulock C.J.O., Magee, Hodgins, Middleton and Grant J.J.A.) delivered on the 9th March, 1931, dismissing (Magee J.A. dissenting) an appeal from the judgment at the trial (Orde J.A.) delivered on the 20th August, 1930, declaring that the value of a gift *inter vivos* should be taken for the purpose of succession duty as on the date of the gift and not as on the date of the death of the donor. Record.
p. 30.
p. 11.

2. The Respondent, the National Trust Company, Limited, is the sole executor and trustee under the Will of the late William Edward Wilder of Toronto, who died on the 28th May, 1929, and the question involved in the appeal is the amount of the liability for succession duty in respect of certain shares given by the testator to his wife the Respondent Mary Marjorie Wilder during his lifetime. p. 3, l. 11.
p. 5, l. 1

3. On the 30th December, 1925, the said William Edward Wilder gave to his wife 500 shares in the capital stock of a private Company known as Picton Securities Limited. It is admitted that the gift took effect as an immediate gift *inter vivos*, that the value of the 500 shares at the date of the gift was \$50,240 and that at the date of the testator's death in 1929 the value had become \$264,183. p. 4, l. 3.
p. 6, l. 19.

Record.
pp. 3-4.

p. 5, l. 5.

On the 27th March, 1930, the Appellant brought an action in the Supreme Court of Ontario and by a statement of claim delivered on the 28th March, 1930, claimed a declaration that the date at which the value of the shares should be taken for the purposes of succession duty under the Succession Duty Acts was the date of death. The Respondents contended that such value should be taken as at the date of the gift.

4. The following provisions of the Ontario Succession Duty Act (Revised Statutes, 1927, chapter 26) are referred to:—

“ 1. In this Act,

* * * * *

10

“(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;

* * * * *

“ 4. In determining the dutiable value of property or the value of a beneficial interest in property the fair market value shall be taken as at the date of the death of the deceased, and allowance shall be made for reasonable funeral expenses, debts and encumbrances and Surrogate Court fees (not including solicitor’s charges); and any debt or encumbrance for which an allowance is made shall be deducted from the value of the land or other subject of property liable thereto;

* * * * *

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

“(2) Property passing on the death of the deceased shall be deemed to include for all purposes of this Act the following property:— 30

* * * * *

“(b) (i) Any property taken as a *donatio mortis causa*;

“(ii) 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 1st day of July, 1892;

* * * * *

“(i) Any property transferred since the 1st day of July, 1892, for partial consideration in money or money’s worth paid to the transferor for his own use and benefit to the extent to which the value of the property so transferred exceeds the value of the consideration so paid. 40

“(3) Notwithstanding anything herein contained, no duty shall be payable in respect of any property (of which 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 voluntarily or by contract or otherwise), —

10 “(a) given 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 among all of them ; or

“(b) given by the donor in his lifetime and not exceeding in value the sum of \$500 in the case of any one donee ; or

“(c) actually and *bona fide* transferred for full consideration in money or money’s worth paid to the transferor for his own use and benefit.

* * * * *

20 “ 12.—(1) Every heir, legatee, donee or other successor and every person to whom property passes for any beneficial interest in possession or in expectancy shall be liable for the duty upon so much of the property as so passes to him, and shall within six months after the death of the deceased or such later time as may be allowed by the Treasurer make and file with the Registrar of the Surrogate Court of the County or district in which the deceased had a fixed place of abode or in which the property or any part thereof is situate a full, true and correct statement under oath showing, —

“(a) a full inventory in detail of all the property of the deceased person and the fair market value thereof on the date of his death ;

30 “(b) the several persons to whom the same passes, their places of residence and the degrees of relationship, if any, in which they stand to the deceased.

* * * * *

40 “ 13.—(1) The surrogate Judge of the county in which the property or any part thereof, subject to duty is situate shall, at the instance of the Treasurer and upon such notice by personal or substitutional service to the executor or such interested parties as he by order directs, enquire into the correctness of the inventory, and as to the value so sworn to, and determine what property should be included in such inventory and the value of the same, fix and settle the amounts of the debts and other allowances and exemptions, and assess the cash value of every annuity, term of years, life estate, income or other estate, and of every interest in expectancy as provided by this Act, and shall at the time and place mentioned in the notice or any other time and place named by him value all property at the fair market value, and hear and determine all questions relative to the liability of property, the amount of duty and the successor and other persons liable therefor.

* * * * *

Record.

“(4) In lieu of or in addition to evidence of valuation of property the surrogate Judge may in the first instance or at any time before judgment, and at the request of the Treasurer shall, issue a direction to the sheriff of the county where any property is situate in respect to which duty is payable, or to some other competent person, to make an appraisement of the property mentioned in the inventory or any part thereof, or of any property wrongfully omitted.

“(5) When so directed the sheriff shall forthwith appraise the property mentioned in the inventory, or any part thereof, as directed by the surrogate Judge, or any property wrongfully omitted, at its fair market value at the date of the death, or at the time provided in section 17, as the case may be, and make a report in writing to the surrogate Judge of his appraisement and of such other facts as he may deem proper.”

5. Section 8 of the Ontario Succession Duty Act was taken from the Imperial Customs and Inland Revenue Act 1881 (44 & 45 Vict. ch. 12) section 38 as amended by the Customs and Inland Revenue Act 1889 (52 & 53 Vict. ch. 7) section 11. These sections were by section 3 of the Finance Act 1894 (57 & 58 Vict. ch. 30) incorporated in that Act.

p. 5, l. 15.

6. Upon the facts admitted in the pleadings the Appellant moved the Court for judgment and on the 20th August, 1930, the Court (Orde J.A.) delivered judgment declaring that the property in question should be valued for the purpose of succession duty at \$50,240 being the value as at the date of the gift.

p. 11.

pp. 6-10.

7. Mr. Justice Orde considered that the words of sub-section 2 of section 8 of the Act “Property passing on the death . . . shall be deemed to include for all purposes of this Act” gifts *inter vivos* did not mean that, for the purposes of taxation, the property given must be treated as if not given until the death of the donor and then be taxed upon that footing and stated that this was not the language of the section and was not in his opinion its effect. The provision was in his opinion designed to impose a succession duty upon the donee of property given during the lifetime of the donor and the intention was to provide that such property should be included in the category of property passing on the death and the effect was to make the gift with all its attributes as to value and the person to be taxed and the death of the donor co-incident. The provision in section 4 of the Act that the dutiable value “shall be taken as at the date of the death of the deceased” appeared, when the provisions of the Act as to valuation were carefully examined, to be intended to apply to the valuation of property passing to the beneficiary which was a deferred or partial interest or one in respect of which possession or enjoyment was postponed until the death of the donor. The learned Judge could not bring himself to hold that section 4 of the Act was ever intended to apply to the valuation of

gifts *inter vivos* made perhaps as long ago as 1892 in such a way as to perpetuate what in many cases would be a monstrous injustice. The learned Judge also suggested that the imposition of a tax based upon the fiction that the increased value of the property given had accrued to the donee by reason of the death of the donor might be beyond the provincial powers of taxation as being an indirect tax. The judgment accordingly declared that the value of the shares in question was to be taken as at the date of the gift.

Record.

8. The Appellant appealed to the Appellate Division and on the 9th March, 1931, the Court (Mulock C.J.O., Magee, Hodgins, Middleton and Grant, J.J.A.) delivered judgment (Magee J.A. dissenting) dismissing the appeal.

p. 30.

9. Chief Justice Mulock agreed with Mr. Justice Grant.

10. Mr. Justice Magee pointed out that a gift *inter vivos* might be worth much less at the time of death than at the time of the gift and that the legislature in fixing any date for valuation made the Province as well as those to whom property passed take a chance. He observed that if the tax had increased it was only because the donee's good fortune had increased much more. After referring to previous enactments for the purpose of showing that from the first imposition of duty in 1892 some property disposed of by the owner in his lifetime had been made dutiable and that since 1896 the date of death had been expressly stated to be the date for valuation, the learned Judge came to the conclusion that the property given should be valued as at the date of the donor's death and that this taxation was direct. He considered, however, that until it had been ascertained how the great increase in the value of the shares in question arose—whether by payments by the donee, accumulation of profits or otherwise—the value of the gift could not properly be determined and he would have directed a reference for this purpose.

pp. 12-17.

11. Mr. Justice Hodgins considered that what was to be deemed to have passed at death was shares of the value of \$50,250 which the wife received in December, 1925, and not shares of the value of \$264,183. He said that if something which did not pass on death, but long previously to it, is taxable, and for that purpose is deemed to have passed on death, then it is the thing that was given and received and only its then value and its then character which could be deemed to have passed at the death. For the reasons stated the learned Judge came to the conclusion that section 4 of the Succession Duty Act was inapplicable and that if the shares in question were taxable they were taxable only at their value when transferred.

pp. 17-20.

12. Mr. Justice Middleton agreed with Mr. Justice Grant but pointed out certain anomalies which would, he thought, result from taking the value at the date of death. He considered that the Crown's contention would have the effect of imposing a tax on what was never the property of the deceased.

pp. 20-22.

Record.
pp. 22-29.

13. Mr. Justice Grant, after referring to the rules that express and unambiguous language was indispensable in Statutes passed for the purpose of imposing taxes and that when the language of a Statute was capable of more than one construction or meaning that one was to be adopted which appeared most reasonable and just and less offends our sense of justice, states that the effect of the Succession Duty Act was that the expression "property passing on the death of the deceased" should for the purpose of the Act be deemed to include "property taken under a disposition operating . . . as an immediate gift *inter vivos*" and he considered it apparent that the gift could only be deemed to be included in property passing on the death if either the gift were to be deemed to have taken effect when the death took place or the death were to be deemed to have occurred at or just before the date of the gift. In the latter case the then value would be the value at the time of death and this would not be an unreasonable construction. He considered that when section 4 of the Act provides the manner in which "dutiable value" of property is to be determined it is not referring to property which only "notionally" passed on death but to property which was actually part of the deceased's estate and that the language was not "clear and unambiguous" to the effect that property which only "notionally" passes on death was intended to be included when the word "property" only was used. After distinguishing the case of *Strathcona vs. Inland Revenue* (1929) Scots Law Times 629 as depending on a different Statute, the learned Judge came to the conclusion that the appeal failed for the reason that the Statute does not provide in clear and unambiguous language that the value of the subject matter of the gift *inter vivos*, and upon which as a basis the duty is to be calculated, is to be such value as that property may have at the time of the death of the donor.

14. It is submitted that the clear intention of the Succession Duty Act is to make the date of death the date upon which the value of all property liable for succession duty is to be ascertained and that there is no warrant in the Act for taking the value at any other date. Alternatively, if the language of the Act is not clear and unambiguous and if preference is to be given to the construction which is the more reasonable and just, regard should be had not only to cases in which during the donor's lifetime the value of the gift has increased, but equally to the converse cases in which such value has substantially diminished or become exhausted before the date of the donor's death. The effect of the decision of the Appellate Division might well be that in particular cases the duty payable would exceed the value of the property as at the date of the death.

15. The Appellant submits that the appeal should be allowed and that it should be declared that for the purpose of determining the value of a gift *inter vivos* for succession duty purposes the valuation should be made as at the date of the donor's death for the following among other

REASONS.

1. Because by section 8 of the Succession Duty Act property passing on the death of a deceased person is to be deemed to include gifts *inter vivos*.
2. Because by section 4 of the Act for the purpose of determining the dutiable value of property the fair market value is to be taken "as at the date of the death."
3. Because by section 12 of the Act the donee is required to file a sworn inventory stating the value as at the date of death.
4. Because by section 13 of the Act the value to be appraised is the fair market value "as at the date of the death."
5. Because there is no warrant in the Act for taking the value at any other date.
6. Because, if the language of the Act is capable of more than one interpretation, that construction is to be preferred which appears most reasonable and just.
7. Because a rule that the value of gifts *inter vivos* is to be assessed as at the dates of the gifts would operate harshly in cases in which, during the donor's lifetime, the value, instead of increasing, had diminished or had become exhausted.
8. Because the Reasons of Mr. Justice Magee in the Appellate Division are right.

EDWARD BAYLY.

J. T. WHITE.

In the Privy Council.

No. 53 of 1931.

*On Appeal from the Appellate Division of the
Supreme Court of Ontario.*

BETWEEN :

THE ATTORNEY-GENERAL OF THE
PROVINCE OF ONTARIO

(Plaintiff) Appellant,

AND

THE NATIONAL TRUST COMPANY,
LIMITED, Executor of William
Edward Wilder deceased and MARY
MARJORIE WILDER

(Defendants) Respondents.

APPELLANT'S CASE.

BLAKE & REDDEN,
17, Victoria Street,
S.W.1.