

Privy Council Appeal No. 53 of 1931.

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

v.

The National Trust Company, Limited, executors of the will of
William Edward Wilder, deceased, and another - - - *Respondent*

FROM

THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 28TH JULY, 1931.

Present at the Hearing :

LORD BLANESBURGH.

LORD MERRIVALE.

LORD HANWORTH.

LORD ATKIN.

LORD MACMILLAN.

[*Delivered by* LORD HANWORTH.]

The point to be decided in this appeal can be stated quite shortly—Is the value of property, the subject of a gift *inter vivos*, to be taken for the purpose of succession duty as on the date of the gift, or as on the date of the death of the donor ?

The facts which give rise to the question are admitted. William Edward Wilder of the City of Toronto, an investment banker, on the 30th December, 1925, gave to his wife, the second defendant upon the record, as an immediate gift *inter vivos*, within the meaning of Clause (ii) of Section 8 (2) of the Succession Duty Act, R.S.O. 1927, Cap. 26, and amendments, 500 shares in the capital stock of Picton Securities, Limited.

Picton Securities, Limited, is a private company incorporated under the Companies Act (Ontario), with its head office in the said Province. Its shares are not transferable to any person who is not already a shareholder without the previous consent of the directors of the company. None of its shares have ever been sold or offered for sale.

William Edward Wilder died on the 28th May, 1929, leaving his widow him surviving, and the first defendant as the sole executor and trustee of his will. No change occurred in the ownership of these 500 shares between the date of the gift and the date of the death of the donor. They remained in the possession of his donee, who did not part with the shares, or charge, or in any way deal with them, nor were the shares in any way commuted or altered.

The value of the shares at the date of the gift was \$50,240, and the value at the date of W. E. Wilder's death was \$264,183-50. Which of these values is to be taken as subject to Succession Duty?

The Attorney-General claims a declaration that the true date is the 28th May, 1929, the date of the death, and the defendants submit that the true date is that of the gift, the 30th December, 1925. The second declaration asked for in the prayer of the statement of claim was not considered in the Court of first instance or in the Court of Appeal, and before the Board it was by consent expressly struck out.

Orde, J., who tried the case decided in favour of the defendants' contention and made a declaration that the shares were to be valued as at the 30th December, 1925.

The Court of Appeal by a majority, upheld that decision, and hence the Attorney-General appeals.

The charging Section of the Act is :—

“ 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 :—

* * * * *

“ (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.”

By virtue of the terms of (2) (b) (ii) above, it would seem that the 500 shares given by the testator on the 30th December, 1925, are covered by the charge to tax, and must be subject upon the very simple facts of the present case to the appropriate duty imposed.

An argument was addressed to their Lordships upon the true meaning of the word “ passing.” The difficulty or rather the impracticability was insisted upon, of including within that word, property which it is to “ be deemed to include ” ; that is property notionally passing, when such a notion may be derived from facts which occurred as far back as the 2nd July, 1892, during which lapse of time assignments, charges, deaths, assignments by operation of law in bankruptcy and in winding up, may have obscured or indeed obliterated the original transaction.

But their Lordships are not concerned to consider these problems and difficulties. There is no question raised in the case whether the Act applies to this donation. That is admitted for the purpose of the case and this appeal, though all other rights which the defendants may have are reserved to them. The only submission of the defendants in the case—the respondents in this appeal—is that the 30th December, 1925, “the date of the gift thereof” is the date at which the value of the shares is to be taken. See para. 2 of the defence.

Whatever may be obscure in this Act it is not easy to raise a doubt upon this point. Assuming that there is a liability to the duty, Section 4 seems to lay down in simple plain terms the date at which the value is to be determined. Its terms are as follows:—
 “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.” The section proceeds to permit certain deductions to be made from the value thus ascertained; but these provisions introduce no obscurity to the principle on which the value is to be determined. It is to be noted, too, that what is to be determined is the dutiable value of the property—not of the original gift as it was made.

Section 4 on this point appears to coincide with Section 8 (2) in which property passing on the death is to be deemed to include property passing and taken under a disposition previous to the death. If the date of the disposition were to prevail the terms of (2) should have been differently drawn, for at the date of the transfer the property disposed of was the property of the transferor and no such notional inclusion would be called for.

The attention of their Lordships was called to the Scottish case of *Strathcona v. Inland Revenue Commissioners*, 1929, Session Cases, p. 800. In that case the Court had to consider the effect of the provisions of the Imperial Finance Act, 1894, Sections 2 (1) (c) and 7 (5), which bring into the estate of the deceased, at the value which it would fetch in the open market at the time of the death of the deceased, property which the deceased has within a term of three years anterior to his death made the subject of a gift *inter vivos*. Lord Sands’s observations in his judgment are germane to the point under consideration. At p. 807 he says:—

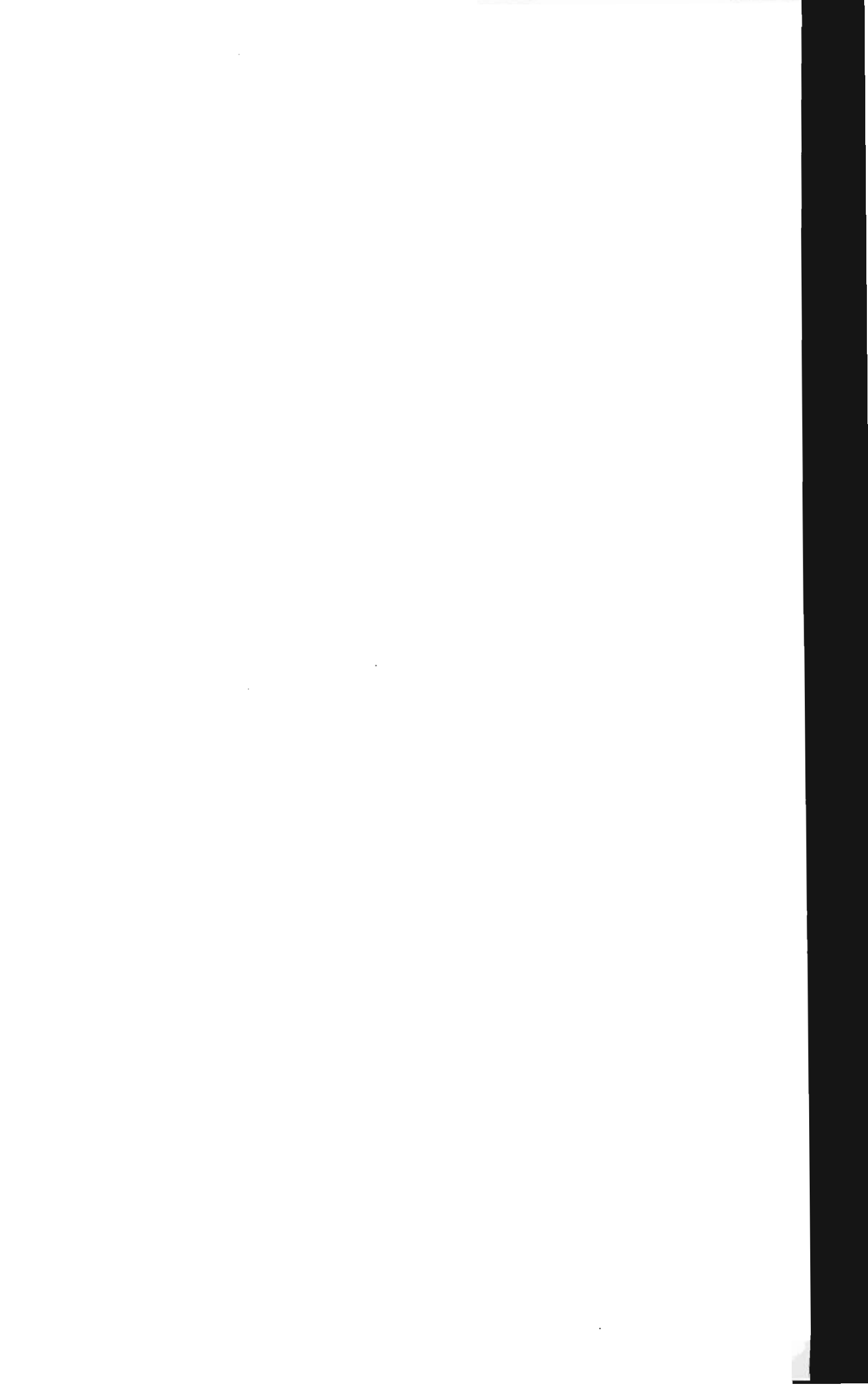
“The keys to the interpretation of that legislation are the ideas of property passing, and of property being deemed to pass although it does not actually pass. These ideas have been the subject of much judicial exposition, and are now familiar, so I do not dwell upon them. It is enough that property which is deemed to pass upon death is upon the same footing as regards liability for estate duty as property which actually passes. One of the classes of property which are deemed to pass on death and so become subject to estate duty is property which is the subject of donation before death as described in the 1881 Act; . . . for estate duty purposes the property donated is to be treated just as if it had remained the property of the deceased until his death, and had then passed as a part of his estate.”

Their Lordships are not unmindful of the problems and anomalies to which the statute may give rise. These persuaded Orde, J.A., to reject the interpretation adopted in this opinion in order to mould the scheme of the Act on to what he thought would be more symmetrical and satisfactory lines.

In the Supreme Court of Ontario, Appellate Division, a number of illustrations are suggested which it is claimed are such that the interpretation contended for by the appellant cannot have been intended by the legislature. But it must be remembered that it would not be difficult to suggest analogous illustrations from an opposite point of view. To take one only—suppose on the facts of the present case that the value of the property at the time of the gift had been \$260,000, and that it had dwindled down to \$10,000 at the time of the death, there would have been a hardship upon the donee who would then have been compelled to pay duty as upon a value 26 times that to which the property had diminished at the time of the death. The tax would have been payable, but the gift would provide no sufficient resources from which to pay it. Such illustrations are to be found *pro* and *con* in any statute which touches so many of the manifold and complex aspects of human life and endeavour, as a taxing Act does. A solution to some of them is to be found as pointed out by Lord Sands—see the case above cited, p. 809—by directing attention to the terms of the statute which imposed, in that case, as well as in the present, the duty not upon the value of the gift, but upon the value of the property which is brought into charge.

While the Board fully recognise the difficulties and inequalities that may arise under a statute which looks back over a span of more than a full generation of years, their Lordships find themselves required to construe the words of the sections in relation to the simple facts of this case. A citizen of Toronto gave to his wife shares in a company incorporated under the Ontario Companies Act, which has its head office in the Province. His wife retained those shares in her own hands, and held them at the time of his death, when his estate became subject to the Ontario Succession Duty Act. Upon such facts Section 4 appears unequivocal. The dutiable value of property shall be determined and “taken as at the date of the death of the deceased.”

Their Lordships will humbly advise His Majesty that the appeal should be allowed and the judgments of the Courts below set aside, and that a declaration should be made in the action as asked in (a) of the prayer of the statement of claim. The respondents will be ordered to pay the costs of this appeal, and of all the proceedings in the Courts below.



THE ATTORNEY-GENERAL OF ONTARIO

vs.

THE NATIONAL TRUST COMPANY, LIMITED,
EXECUTORS OF THE WILL OF WILLIAM
EDWARD WILDER, DECEASED, AND
ANOTHER.

DELIVERED BY LORD HANWORTH.