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 ONTARIO - -
(Plaintiff) Appellant

AND

NATIONAL TRUST COMPANY, LIMITED, EXECUTOR OF THE LAST WILL OF WILLIAM EDWARD WILDER, DECEASED, AND MARY MARJORIE WILDER -
(Defendants) Respondents.

RECORD OF PROCEEDINGS.

INDEX OF REFERENCE.

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(Defendants) Respondents.

RECORD OF PROCEEDINGS.

In the Supreme Court of Ontario.

No. 1.
Statement of Claim, 28th March 1930.

No. 1.

*** Statement of Claim.**

IN THE SUPREME COURT OF ONTARIO.

Writ issued the 27th day of March, 1930

Between

THE ATTORNEY-GENERAL OF ONTARIO - - - *Plaintiff*

and

NATIONAL TRUST COMPANY, LIMITED, Executor of the Last Will of WILLIAM EDWARD WILDER, deceased, and MARY MARJORIE WILDER - - - *Defendants.*

1. The Defendant, National Trust Company Limited, is the sole Executor and Trustee of the last Will of William Edward Wilder, late of the City of Toronto, in the Province of Ontario, Investment Banker, deceased, whose death occurred on the 28th day of May 1929, and the

In the Supreme Court of Ontario.

No. 1. Statement of Claim, 28th March 1930—*continued.*

defendant, Mary Marjorie Wilder, is the widow of the said William Edward Wilder, deceased.

2. The said William Edward Wilder on the 30th day of December 1925 gave to his wife, the defendant, Mary Marjorie Wilder as an immediate gift *inter vivos* (within the meaning of clause (ii) of section 8(2)(*b*) of the Succession Duty Act, R.S.O. 1927, cap. 26 and Amendments) 500 shares in the capital stock of Picton Securities Limited.

3. Picton Securities Limited is a private Company incorporated under the Companies Act (Ontario) with 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.

4. The value of said shares at the date of such gift was $50,240 and the value at the date of the death of the said William Edward Wilder was $264,183·50.

5. The Plaintiff submits that the value of the said shares for the purposes of succession duty under the Succession Duty Act, R.S.O. 1927, cap. 26 and Amendments should be taken as at the 28th day of May 1929, the date of death of the said William Edward Wilder and not as at the 30th day of December 1925, the date of the said gift.

6. The Plaintiff therefor claims :

(*a*) A declaration that the date as at which the value of the said shares should be taken for purposes of succession duty under the Succession Duty Act, R.S.O. 1927, cap. 26 and Amendments is the 28th day of May 1929 and not the 30th day of December 1925.

(*b*) A declaration that the Province of Ontario is entitled to recover succession duty under the said Act in respect of the value of the said shares so calculated.

(*c*) The costs of this action.

(*d*) Such further or other declaration or declarations and relief as may be just or necessary in the premises.

The Plaintiff proposes that this action be tried at Toronto.

Delivered this 28th day of March A.D. 1930, by J. T. White, K.C., Parliament Buildings, Toronto, Solicitor for the plaintiff.

* *Amended the 4th day of April* 1930 *pursuant to order of Hon. Mr. Justice Orde made herein on the 4th day of April* 1930.

" *E. Harley,*"

Senior Registrar, S.C.O.

In the Supreme Court of Ontario.

No. 2. Statement of Defence, 28th March 1930.

No. 2.

* Statement of Defence.

1. The Defendants admit the allegations contained in paragraphs 1, 2, 3 and 4 of the Statement of Claim.

2. The Defendants submit that the value of the shares mentioned in the Statement of Claim for the purpose therein stated should be taken as at the 30th day of December 1925, the date of the gift thereof and not as at the 28th day of May 1929, the date of death of the said William Edward Wilder.

Delivered this 28th day of March 1930 by Tilley, Johnston, Thomson & Parmenter, 80 King Street West, Toronto, Solicitors for the Defendant.

** Amended the 4th day of April 1930 pursuant to order of Hon. Mr. Justice Orde made herein on the 4th day of April 1930.*

" E. Harley,"
Senior Registrar, S.C.O.

No. 3. Notice of Motion, 28th March 1930.

No. 3.

* Notice of Motion.

TAKE NOTICE that the Court will be moved on behalf of the Plaintiff at Osgoode Hall, Toronto, on Saturday, the 29th day of March, 1930, at ten o'clock in the forenoon, or so soon thereafter as Counsel can be heard for judgment on the pleadings herein.

Dated the 28th day of March, 1930.

J. T. WHITE, K.C.,
Solicitor for the Plaintiff.

To Tilley, Johnston, Thomson & Parmenter,
80 King Street West, Toronto,
Solicitors for the Defendant.

** Amended this 4th day of April 1930 pursuant to order of Hon. Mr. Justice Orde made herein on the 4th day of April 1930.*

" E. Harley,"
Senior Registrar, S.C.O.

In the Supreme Court of Ontario.

No. 4. Reasons for Judgment of Orde, J.A., 20th August 1930.

No. 4.

Reasons for Judgment of Orde, J.A.

ORDE, J.A.: This is a motion for judgment upon the facts admitted by the pleadings.

The late William Edward Wilder, of Toronto, died on the 28th May, 1929, and the defendant company is the sole executor and trustee under his Will. The defendant Mary Marjorie Wilder is his widow.

On the 30th December, 1925, the deceased gave to his then wife, the defendant Mary Marjorie Wilder, 500 shares of the capital stock of Picton Securities Limited. It is admitted that the gift took effect as an immediate gift *inter vivos* within the meaning of clause (ii) of paragraph (*b*) of sub-section 2 of section 8 of the Succession Duty Act, R.S.O. 1927, Ch. 26 and the amendments thereto.

Picton Securities Ltd. is a private company incorporated under the Ontario Companies Act, and has its head office in this Province. Its shares are not transferable to any person not already a shareholder without the previous consent of the directors. No shares of the company have ever been sold or offered for sale.

It is admitted that the value of the 500 shares at the date of the gift was $50,240 and at the date of the death of Wilder was $264,183·50.

The Attorney General asks for a declaration that the value of the shares for succession duty purposes shall be taken as at the date of death, namely the 28th May, 1929, and not as at the date of the gift, the 30th December, 1925, and that the Province is entitled to recover succession duty in respect of the shares upon the value as so calculated.

The sections of the Act upon which the Attorney General chiefly relies are section 4, section 8, and particularly par. (*b*) (ii) of sub-section 2 thereof, par. (*a*) of sub-section 1 of section 12, and sub-section 5 of section 13.

Sec. 4 provides that "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 allowances "shall be made for reasonable funeral expenses, debts and encumbrances "and surrogate court fees."

By par. (*b*) of sec. 1 "dutiable value" is defined in much the same language with the additional inclusion in the deductions of "other "allowances and exemptions authorised by this Act."

Sec. 8 provides generally that "all property situate in Ontario and "any income therefrom passing on the death of any person . . . shall "be subject to duty . . ."

Sub-sec. 2 of sec. 8 is designed to impose duty upon property which but for some such statutory provision could not be subject to duty as part of the deceased's estate. It affects property transferred by the deceased in contemplation of death, *donationes mortis causa*, gifts *inter vivos*, gifts of property over which the donor retained the possession and enjoyment,

&c., &c., that part of the sub-section applicable to the issue here reads as follows :—

> " (2) Property passing on the death of the deceased shall be deemed to include for all purposes of this Act the following property:—
>
> (*b*) (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."

Sec. 12 (1) makes every heir, legatee, devisee or other successor and every person to whom property passes for any beneficial interest liable for the duty upon so much of the property as passes to him, and requires him within six months of the death of the deceased to file a statement 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."

Section 13 sets forth the procedure which the Provincial Treasurer may adopt when dissatisfied with the inventory and the values therein, and provides means for a valuation by the sheriff. Sub-sec. (5) requires the sheriff in that event to " 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."

The contention of the Attorney General is that under those provisions the property so given during the deceased's lifetime is to be treated as if it had remained the property of the donor, and had not passed to the donee until the donor's death; and that it must be valued accordingly.

Now we are dealing here with a statutory tax in respect of a gift *inter vivos* which is not imposed by direct or express language but under the guise of a legislative fiction, and it is important in determining how far this fiction is to be carried to keep in mind the realities of the situation. The property did not in fact or in law pass upon the death of the deceased. It passed when the gift was made, the donee's title to it was then complete, and no legislation short of a statutory divesting of such title can alter that fact.

The difficulty here arises from the language of section 4 and sub-section 2 of section 8. Sub-sec. 2 of sec. 8 says that " Property passing on the death . . . shall be deemed to include for all purposes of this Act " gifts *inter vivos*. Does this mean that for the purpose of taxation the property so given must be treated as if not given until the death of the donor and then to be taxed upon that footing? That is in substance the Crown's contention. But that is not the language of the section, nor is it, in my opinion, its effect.

The provision is designed to impose a succession duty upon the donee of property given during the lifetime of the donor, subject, of course, to the limitations as to amount and otherwise fixed by sub-section 3 of the same section. Having by sub-sec. 1 declared that all property passing on the death of any person shall be subject to duty, the Act merely provides

In the Supreme Court of Ontario.

No. 4. Reasons for Judgment of Orde, J.A., 20th August 1930—*continued.*

that property given during the lifetime of the deceased shall be included in that category. The effect of that is in my judgment to make the gift with all its attributes as to value and the person to be taxed and the death of the donor coincident.

If this is not the true meaning and intention of the Act, and it is to be construed as urged by the Crown, many anomalies result. The Act rakes into the category of taxable property all gifts as far back as the 1st July, 1892. If, for example, a man gave his daughter a home worth $25,000, as a wedding present, 35 years ago, and she had occupied it up to the date of her father's death in 1930 and in the meantime, without the expenditure of any money in improvements, the property had increased in value to $100,000, is the donee to be taxed upon that value? That is the Crown's contention, but the Act will have to say so explicitly before I can bring myself to believe that that is its meaning.

I asked Mr. White what would be the effect upon the donee's liability if, in the case I have just put, she had sold the house for $25,000, or if in the present case Mrs. Wilder had sold the shares for $50,240, and his answer was that the Succession Duty Office in such cases valued the gift at the amount realized and not at the present value of the property. But there is nothing in the Act to justify any such practice, though it would be palpably unjust if the practice were otherwise. But if the construction urged by the Crown is correct, the mere fact that the donee has disposed of the property can be of no consequence and the donee would be liable to duty upon the value at the death of the donor, whether or not the property was then still in her possession. If that is the true meaning of the Act, then the practice of the department cannot affect it, but the recognition of the palpable injustice in the one case is not without its significance.

Mr. White referred to a passage in the 6th Edn. of Hanson's Death Duties, where section 2 of the Imperial Finance Act of 1894 is discussed. The provisions of the English Act are not the same as ours and *bona fide* gifts made more than 12 months (now three years) before death are not subject to taxation. At p. 100 it is stated "Where the gift is of a sum of money, the value to be brought into account is the actual sum given. Where it is not money, the value of the property given is taken as at the death of the deceased" and there is a reference to section 7 which deals with valuation. Mr. White says that the practice thus stated in Hanson has been adopted by the Department. Just why this reference to the English practice in this respect should be adopted does not appear. There is no similarity in the language of the two Acts to warrant it. And it is noteworthy that in the 7th Edn. of Hanson published in 1925, fourteen years after the 6th Edn., the paragraph cited by Mr. White has been omitted, and is replaced by the following, at p. 80:—"The value to be brought into account is the value of the gift when made. The duty is paid by the donee."

It may seem that the view I have taken of the real effect of section 8 as to the inclusion of gifts *inter vivos* among the items constituting

" property passing on the death " is in the teeth of the express provision of sec. 4 that the dutiable value " shall be taken as at the date of the death of the deceased," but I think when the provisions of the Act as to valuation are carefully examined, it will be plain that this was intended to apply to the valuation of property passing to the beneficiary in either of two categories. The gift might be in the form of an annuity or of a life estate, or of a remainder dependent upon a life estate, or of some like interest in the estate the enjoyment or possession of which was either deferred or was in its nature partial. Or it might be an interest conferred in the lifetime of the deceased, but of such a character as to postpone any real possession or enjoyment until the death of the settlor or donor, such as are set forth in sub-section 2 of section 8. Apart from gifts which are really gifts *inter vivos*, the possession or enjoyment of the benefits of gifts within that latter category arises only upon the death of the donor, and so may justly and fairly be regarded as coming into effect as the result of his death, and as forming part of the " succession " to his estate.

But a real gift made in good faith during the donor's lifetime is of a different character. There is nothing about it to connect it with the death of the donor, and the inclusion of property so given among the classes of property or interests in property to be taxed by an Act whose sole purpose is to impose taxes upon the succession to property by reason of the death of the owner has always seemed to me to be a legislative anomaly.

I cannot bring myself to believe or to hold that sec. 4 was ever intended to apply to the valuation of the gifts *inter vivos* made perhaps as long ago as the year 1892, in such a way as to perpetuate what, in many cases, would palpably be a monstrous injustice upon the donee.

It may be noted in passing that under the English system of taxation of property passing upon death, the taxes are divided into three classes, namely, estate duties, legacy duties, and succession duties, which are dealt with by different acts of Parliament and upon different principles. Gifts *inter vivos* are not taxed by way of succession duty at all. A gift *inter vivos* cannot really be deemed to pass upon the death of the donor. Any such theory is incompatible with the truth. An Act of Parliament may perhaps make it so for certain purposes, just as it may declare black to be white, but no act of Parliament can really make black white, or a gift which really and legally takes full effect during the lifetime of the donor anything else but what it really is. Under the English Finance Act (1894) as amended, gifts *inter vivos* within three years of the death of the donor are treated as being evasions of the estate duty and so taxable; Hanson, 7th Edition, p. 3. They are not taxed as if they had passed to the donee by way of succession to the donor's estate upon his death.

There is an aspect of this question which was not referred to on the argument but which I think may be mentioned. There may be a good ground for the view that in so far as the Act attempts to impose a tax

In the Supreme Court of Ontario.

No. 4. Reasons for Judgment of Orde, J.A., 20th August 1930—*continued.*

upon the donee based upon the fiction, for it is a fiction, that the increased value of the property given has accrued to him by reason of the death of the donor, the Act goes beyond the limits of the provincial powers of taxation. Though the tax undoubtedly falls directly upon the donee, there is an element of indirectness in the ascertainment of the amount of it, if the Crown's contention is sound, which might well make it beyond the powers of the legislature. The amount is unascertainable until the death of the donor and falls to be determined by the value of the property on the very day of his death. The donee may have long since disposed of the property for a sum less than its value at the donor's death and yet he is taxable, if the Crown's contention is correct (whatever the Departmental practice in such cases may be), upon an increase in value which he never enjoyed. The donee may have long since died and his estate, including the subject matter of the gift, distributed. Must his legal personal representatives delay the winding-up of his estate until the death of the donor because of the uncertainty as to the amount of the estate's future obligation to the Crown for succession duties? In any of such cases it might well be held that the tax in respect of the increased value would be indirect.

Since the judgment of the Judicial Committee in *City of Halifax* v. *Estate of J. P. Fairbanks et al.*, [1927] A.C. 117, it is clear that the distinction between direct and indirect taxation for the purposes of determining the provincial power under paragraph 2 of section 92 of the British North America Act is not in all cases to be based solely upon John Stuart Mill's definition which was applied in *Bank of Toronto v. Lambe* [1887], 12 A.C. 575. I prefer not to elaborate this point, as it was not raised, but if the case goes higher, it might well be thoroughly canvassed.

In my opinion the property in question is to be valued for the purposes of the Succession Duty Act as of the date of the gift, that is, at $50,240·00, and there will be judgment accordingly. As the defendants have always been ready and willing to pay duties upon that value, the costs of the defendants should be paid by the Crown.

In the Supreme Court of Ontario.

No. 5.
Formal Judgment, 20th August 1930.

No. 5.

Formal Judgment.

IN THE SUPREME COURT OF ONTARIO.

THE HONOURABLE MR. JUSTICE ORDE.

Wednesday, the 20th day of August, 1930.

Between :

THE ATTORNEY GENERAL OF ONTARIO - - - *Plaintiff*

and

NATIONAL TRUST COMPANY, LIMITED, Executor of the last will of WILLIAM EDWARD WILDER, deceased, and MARY MARJORIE WILDER - - *Defendants.*

1. Upon motion for judgment upon admissions of fact in the pleadings made unto this Court on the 29th day of March, 1930, by Counsel on behalf of the Plaintiff in the presence of Counsel for the Defendants, upon hearing read the writ of summons and the pleadings herein and upon hearing what was alleged by Counsel aforesaid and judgment upon the motion having been reserved until this day.

2. THIS COURT DOTH DECLARE that for purposes of the Succession Duty Act, R.S.O. 1927, Chapter 26 and amendments, the 500 shares of the capital stock of Picton Securities Limited referred to in the Statement of Claim herein are to be valued as of the 30th day of December, 1925, AND DOTH ORDER AND ADJUDGE THE SAME ACCORDINGLY.

3. AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the Plaintiff do pay to the Defendants their costs of this action forthwith after taxation thereof.

In the Supreme Court of Ontario.

No. 6. Notice of Appeal to Appellate Division, 6th September 1930.

No. 6.

Notice of Appeal to Appellate Division.

TAKE NOTICE that the Plaintiff appeals to the Divisional Court from the Judgment delivered by the Honourable Mr. Justice Orde on the 20th day of August, 1930, on the following grounds :—

1. That the Judgment is contrary to Law.
2. The learned Judge erred in finding that the gift to the defendant, Mary Marjorie Wilder, of 500 shares in the capital stock of Picton Securities Limited should be valued for purposes of Succession Duty as of the date of the gift and not as of the date of the death of the deceased.

Dated the 6th day of September, 1930.

J. T. WHITE, K.C.,
Solicitor for the Plaintiff.

To Tilley, Johnston, Thomson and Parmenter, 80, King Street West, Toronto, Solicitors for the Defendants.

In the Supreme Court of Ontario, Appellate Division.

No. 7. Reasons for Judgment. (A) Magee, J.A.

No. 7.

Reasons for Judgment.

(*a*) MAGEE, J.A.

The appellant plaintiff claims that on 30 December, 1925, William Edward Wilder gave his wife Mary Marjorie Wilder 500 shares in a company incorporated under the Ontario Companies Act and he died on 28th May, 1929, that the company is a private one and none of its shares have ever been sold or offered for sale; that the shares were given " as an immediate gift *inter vivos* (within the meaning of clause (ii) of section 8 (2) (*b*) of the Succession Duty Act, R.S.O. 1927, cap. 26 and amendments " and that the value of said shares at the date of such gift was $50,240.00 and the value at the date of the death of the said William Edward Wilder was $264,153.50. All this is admitted on the pleadings by the defendant Trust Co. the executor of Mr. Wilder's will and by the co-defendant, his widow. Upon the strength of these admissions the plaintiff asks a declaration that the date as at which the value of the shares should be taken for purposes of succession duty under the Succession Duty Act is the 28th May, 1929, and not 30th December, 1925, and that the Province is entitled to recover succession duty in respect of the value so fixed. The defendants do not deny that the Province is entitled to duty but they say that the value should be taken as at 30 December, 1925, the date of the gift and not as at the date of the death. The judgment appealed from declares that for the purposes of the Act the shares are to be valued as of 30 December, 1925.

There is no suggestion that the gift was made in contemplation of the death of the donor or for the purpose of avoiding succession duty or that it was not an absolute one made bona fide and taking immediate effect. The " aggregate value " of Mr. Wilder's estate does not appear. There is no evidence or indication how the increase in value of the shares has been caused. It may have been from accumulated undistributed profits, or from improvements by others in properties adjoining the company's properties, or from the acquirement of a valuable invention or discovery of ore on its land or the falling in of a prior life estate or from the business ability of new management perhaps of the donee or from a score of other causes outside of inherent original value and not omitting possible payments by shareholders of calls on stock or contributions for development between the two dates in question. Also a donee might well have parted with the property before any increase in value.

The plaintiff bases his contention on three provisions in the Succession Duty Act (1) By sub-section 1 of section 8 all property and any income therefrom passing on the death of any person as well as all other property subject to succession duty upon a succession shall be subject to duty. (2) By sub-section 2 of the same section 8 property passing on the death is deemed to include (*b*) (II) any property taken under a disposition operating or purporting to operate as an immediate gift *inter vivos* made since 1 July, 1892. (3) By section 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. Therefore it is claimed these shares being taken as a gift *inter vivos* after 1892 are deemed to be property of the donor passing on his death in May 1929, and so subject to duty and their dutiable value is the fair market value at that time.

It may here be noticed that by paragraph (i) of sub-section 2 of section 8 property passing on the death is likewise deemed to include any property transferred since 1 July, 1892, for partial consideration paid to the transferor to the extent to which the value of the property so transferred exceeds the value of the consideration paid.

Also it is to be noted that by sub-sec. 3 of sec. 8 no duty shall be payable in respect of any property given (as these shares were given) more than three years before the death if given to the father, mother, child, son-in-law or daughter-in-law of the donor to the value or amount of $20,000.00 in the aggregate among all of them. This exception does not exempt from duty a gift to a wife—but clause (*b*) of the same sub-section 3 exempts gifts to any one not exceeding $500. Neither of these provisions would reduce the duty in favour of Mrs. Wilder but they serve to accentuate the liability to duty of gifts not falling within them.

The value of property passing on death is to be ascertained for two purposes under section 9 which imposes rates of duty varying from 1 to 35 per centum with the aggregate value of the property and additional rates varying from 1½ to 13 per centum with the value of the property passing

In the Supreme Court of Ontario, Appellate Division.

No. 7. Reasons for Judgment. (A) Magee, J.A.—*continued.*

to any one person of those of different degrees of relationship. Besides section 4 already quoted two other sections refer to the date for valuation. Section 12 (1) requires the filing of a sworn statement in detail by an heir, legatee, donee or other successor and every person to whom property passes for any beneficial interest of all property of the deceased person and the fair market value thereof on the date of his death, and Section 13 empowers the surrogate judge to direct an appraisement by the sheriff who is to appraise at the fair market value at the same date. But these two sections only refer to an inventory of the property of the deceased though sec. 12 requires a legatee or donee to file one.

It is manifest that the property given might be worth much less at the time of the death than at the time of the gift. Timber on woodland might have disappeared, a gold mine might have had all its ore withdrawn by the donee, the location of a city lot have become less desirable, a building have been damaged or destroyed by fire or a leasehold or an annuity wholly or nearly terminated or a company might have become bankrupt. In some of such cases the donee may before the death have actually realized from the property more than the fair market value when given to him. The Legislature therefore in fixing any date for valuation made the Province as well as those to whom property passed take a chance which might result favourably or to the contrary—and the fact that in this case or in any other it may seem to bear unduly heavily is no reason for giving the words of the Legislature other than their fair construction as required by section 9 of the Interpretation Act, although in this case they are part of an Act imposing taxation and so to be carefully scrutinized. The definitions of " aggregate value," " dutiable value " and " passing on the death " in section 1 of the Succession Duty Act, do not help in the present case. The definition therein of the word " property " is, I think, one of property in general and not limited to dutiable property although it can hardly be said that property which has been given away by the owner is capable of the qualification of being devised or bequeathed by him or of passing on his death to his heirs or personal representatives. Nor does this gift *inter vivos* or the subsequent death of the donor confer a " succession " under Sec. 3. We are left to the other provisions of the Act already mentioned.

It was not until 1919 (by 9 Geo. V. c. 9, s.1.) that this wide special provision for taxing gifts made at any time since 1st July, 1892, was enacted. The Act of 1914 (4 Geo. V. c. 10, s. 5) may have been intended to have the same effect but (by omitting a previously repeated word " property ") failed to apply to gifts where immediate and exclusive enjoyment was had by the donee. It might not unfairly be argued that in bringing in this new class of property which for years did not belong to the person dying the pre-existing provision that property passing should be valued as at his death could not be intended to apply and therefore did not apply. It is well, therefore, to look at the then existing law.

The original Succession Duty Act of 1892 (55 Vict. c. 6, s. 4) made subject to duty (save certain exemptions) all property passing by will or

intestacy or any interest therein or income therefrom which should be voluntarily transferred by deed grant or gift made in contemplation of the death of the grantor or bargainor or made or intended to take effect in possession or enjoyment after such death to any person in trust or otherwise or by reason whereof any person should become beneficially entitled in possession or expectancy to any property or the income thereof. It may be a question whether the gift here in question would not be covered by the latter part of this section. At all events there was made subject to duty property which had ceased to be property of the donor and property which at his decease formed no part of his estate.

This was re-enacted in 1896 by 59 Vict. c. 5, s. 4 (1) which added property taken as a *donatio mortis causa.* Here again the property would have passed from the donor subject to revocation by him and would form no part of his estate. While declaring in clause 8 that the generality of the words re-enacting the section of 1892 was not to be restricted that amendment of 1896 also made dutiable gifts *inter vivos* taking immediate effect not made bona fide more than twelve months before the donor's death and included gifts whenever made of property of which the donee had not assumed and retained bona fide enjoyment to the exclusion of the donor and settlements reserving to the settlor life interests or power of reclaiming. Here then again was included property not belonging to the donor and forming no part of his estate. It also included transfers to joint ownership and purchases of annuities where survivorship would cause the property not to belong to the estate of the deceased.

That Act of 1896 in sections 3 and 4 (amending the Act of 1892) authorized a valuation by the Sheriff of the fair market value of property mentioned in or omitted from the Executors or administrators inventory and the Surrogate Registrar was to fix the " cash value at the date of the death " of all estate interests annuities and life estates or terms of years " growing out of the estate." But this would hardly apply to dutiable property not forming part of the estate as there was not then any provision that such property was to be deemed passing on the death and the inventory was only to be of all the property of the deceased—and it would seem that the Registrar's power was only to apportion as at the date of the death the value of any item or items of property among the various interests therein so that the duty on each interest would be ascertained.

It is to be noted that these Acts of 1892 and 1896 directly declared that these properties which had passed from the deceased before his death were subject to succession duty while the present Act (in sec. 8) only declares that they are to be deemed to be included for all purposes of the Act in property passing on the death and declares that all property passing on the death and all other property subject to succession duty upon a succession shall be subject to duty. The acts were consolidated in R.S.O. 1897, c. 24.

In 1907 the various enactments were consolidated by 7 Edw. 7, c. 10 which in s. 2 declared that duty should be levied upon all property " passing on the death " of any person dying thereafter " according to the fair market

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No. 7. Reasons for Judgment. (A) Magee, J.A.—*continued.*

value of such property at the date of the death of such person." The words " passing on the death " were (in sec. 3) defined as in the present Act as meaning " passing immediately on the death or after an interval." By sec. 4 which corresponds with sec. 4 of the present Act, determining dutiable value the value shall be taken as at the "date of the death of the deceased." Section 6 followed the Act of 1896 in directly declaring the specified classes of property to be subject to duty include the specified *ante mortem* gifts—and it added in subsec. 2 (*b*) that any property within the meaning of the specified classes of dispositions should for all purposes of the Act be deemed to pass on the death. Then by sec. 7 (2) every person to whom for a beneficial interest property not included in the Executor's or Administrator's inventory passed, was made accountable for the duty.

This Act therefore clearly said not only that property passing on the death should be dutiable, but also that these specified past dispositions and gifts should be dutiable and that that dutiable value was to be taken as at the death and also finally that for all purposes of the Act they should be deemed to pass at the death.

In 1909 was another consolidating Act, 8 Edw. 7, c. 12 which (Sec. 24) declared the law since 1st July 1892. So far as is here important it remodelled the Acts substantially in the shape they were in R.S.O. 1914 cap. 24 when the Act of 1914 already referred to was passed followed by the Act of 1919 which first made the shares here in question clearly dutiable.

I have referred at length to this antecedent legislation to show that from the first imposition in 1892 of duty some property which had been disposed of by the owner in his lifetime and which forms no part of his estate was made dutiable, and that in 1896 when several classes of such cases were added and in four subsequent consolidations since then the date of death was expressly stated to be the date for valuation and in the wording of the Act of 1907 such property should be deemed to pass on the death. I see no escape from the conclusion that up to 1919 the date of death was the only date to be considered for valuation of the dutiable properties even though forming no part of the estate of the deceased. There was no attempt to interfere with the owner's right to dispose of his property or to restore it to his estate.

Then the addition of the class of gifts such as here in question in 1919 was no change in principle, but merely extended the limit of an already large pre-existing list of *ante mortem* dispositions and made as it was merely by re-arrangement of one clause of a subsection, it gives no warrant for segregating one class in the list from the provision which clearly applies, as I think to all the others. Therefore in my view the property given should be valued as of the date of the donor's death, that is of 28th May, 1929. The case cited for the plaintiff, *Strathcona* v. *Inland Revenue Commission*, 1929, Sc. L.T. 629, 249 at least does not oppose this view.

As the tax is to be paid by the donee and in respect of the gift it can hardly be called other than direct taxation, although he has the advantage of a possible though uncertain postponement of payment and the chance of a reduction instead of an increase in the amount and the uncertainty of

the aggregate value of the donor's estate. After all if the tax has increased it is only because the donee's good fortune has increased much more.

But it does not necessarily follow that the so-called market value of shares in 1929 should be the dutiable value, nor even the market value of the shares given. Property given in 1925 while bearing the same name in 1929 is not necessarily the same property. If land given in 1925 was built on by the donee it does not follow that the market value of the land improved is the market value in 1929 of that which was given three years previously. So with shares. Shares unpaid or partly paid in 1925 may have been increased in value as I have said by payments by the donee. Other causes not arising from inherent value of the shares or from mere rise or fall in the price of commodities or securities, as they stood in 1925 may have occasioned the increased market value in 1929. Unless the parties agree there should be a reference to ascertain what has caused the very great difference in value in this case. If it arose solely from accumulation of profits subsequent to the gift, or application of declared dividends to pay up shares, questions may arise from the wording of the Act which it is premature to discuss. Section 8 in subsection (1) mentions as dutiable all property (as therein) and any income therefrom. Clause (*a*) of Subsection (2) also mentions any property or income while clause (*b*) here in question does not mention income.

I would therefore be in favour of allowing the appeal and declaring that the dutiable value is to be ascertained as at the date of the death, but reserving the question of what was to be valued and what was such dutiable value until the reference suggested is reported on.

The appellant should in my view have the costs of the action to judgment and of the appeal, but the costs of the reference and further costs should be reserved.

(*b*) HODGINS, J.A.: The question in this case arises from the desire of the Province to tax under the Succession Duty Act, R.S.O. 1927, cap. 26, as amended in 1928, 500 shares of the capital stock of a private company known as Picton Securities Limited. These shares were given by the late W. E. Wilder to his wife on or about the 30th day of December, 1925, as an absolute gift. She has retained the shares, and, on the death of Mr. Wilder, which occurred on the 28th May, 1927, the taxing authorities put forward a claim under the Succession Duty Act in which the amount of the tax is based upon the present value thereof, which is stated to be about five times the value of the shares when given to the wife. I expressed my opinion in the *Erie Beach Case* (1929) 63 O.L.R. 469, that there were two classes of property subject to tax under the Succession Duty Act, namely, property which was subject to succession duty "upon a succession," as defined in sec. 3 and, secondly, "all property in Ontario . . . passing on the death of any person whether the deceased was at the time of his death domiciled in Ontario or elsewhere." The shares in question here do not come under sec. 3 as "a succession" subject to duty, as that section

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applies only on the beneficial interest arising on the death of some person domiciled in Ontario. Here it is obvious and indeed was admitted, that the beneficial interest passed when the gift was made. It is however contended that the shares are taxable under sec. 8, sub-sec. 2(*b*) (ii) which is as follows:—

> " Property passing on the death of the deceased shall be deemed to include for all purposes of this Act the following property . . . 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 of July, 1892."

The shares in question appear to be included in the words I have just quoted, as subject to taxation, but when the question arises as to the value to be put upon them for taxation purposes, difficulties occur. The Province contends that Sec. 4, which reads:

> " 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,"

applies to this case. I am unable to reach that conclusion. This property did not pass on the date of the death of the deceased, but it is to be " deemed" *for all purposes of the Succession Duty Act* to have passed at that time. Now what was it that did pass? It was stock to the value of $50,250, and not stock to the value of $264,183·50, which last figure, it is agreed, is the present value of the shares. I have no doubt that the meaning of the word " deemed " used in Section 8 of this Act is that given to the same word by Mr. Justice Riddell in *Re Rogers and McFarland* (1909), 19 O.L.R. 622. That learned Judge in that case considered practically all the leading authorities in England and in Canada, and concluded that as there used, the meaning was " considered, adjudged or held for the purpose of the statute." I may also add the definition in *Lawrence* v. *Willcocks* (1892) 1 Q.B. 696, where the words " deemed to be liquidated damages " were said to mean " deemed to be so, whether they are so or not." In *Green* and *Marsh*, (1892) 2 Q.B. 330, where the words were to the effect that security for money " shall be deemed to be a bill of sale " were treated as equivalent to saying that while it was not a bill of sale, it was to be treated as one for the purpose of registration. This is what Lord Cairns, L.C. in *Hill* v. *E. & W. India Dock Co.* 9 A. C. 448 at p. 455 calls a statutory fiction.

The alternative meaning attributed to the word " deemed " in *Hickey* v. *Stalker* (1923) 53 O.L.R. 44, namely, that it carries only a prima facie presumption is, of course, wholly inapplicable here as the facts of this case render such a construction a contradiction in terms.

Assuming that, for the purpose of the Act, these shares are to be considered, adjudged and held to have passed at the death, though they did not do so, then it seems to me that that negatives entirely the application of Sec. 4 implying that the value is to be calculated as at the date of the

death of the donor. The property did not pass at that time. What did pass is what the wife received on the 30th December, 1925, and it is that which is to be deemed to have passed at a later date. The increased value now set up did not pass at the earlier date but only the value of the rights as represented by those shares so here transferred. If these shares then had a par value and were after the transfer converted into shares of no par value that which passed to the wife would have disappeared and there would be nothing left which would be taxable, unless it were the value of the shares at the time of transfer. Any increased increment, either by additional share issues or increased monetary value had not attached to them when they were handed over. Similarly if the property had been land and the land had increased in value by reason of improvements on it or otherwise, that would not be what passed to the wife. All that she got was the shares in their then condition and at their then value. If something which did not pass at the death, but passed long previous to it, is taxable and for that purpose is deemed to have passed at the death, then it is the thing that was given and received and only its value and its then character can be deemed to have passed at the death. We must give due weight to all the provisions of the Statute but when we are dealing with a statutory fiction which purports to tax property upon a foundation confessedly untrue, it is our plain duty not to imply consequences not explicitly provided for.

For these reasons I have come to the conclusion that Sec. 4 is inapplicable and that if these shares are taxable they are taxable only at the value they had when they were transferred to the wife, if that can be or has already been ascertained in this case.

But the question whether such taxation as is covered by the Act is not in fact indirect taxation, though not really argued before us must be dealt with. Remembering that it is not property which in fact forms property of the deceased at the time of his death, the wording of sec. 12 is important. While the word " donee " in the first line of that section would include the wife in this case, making her therefore liable for the duty, and requiring her to file a full inventory in detail of all the property of the deceased person (a rather extraordinary provision as applied to the facts of this case), sub-section 3 limits the duty of the executor or administrator, as a condition of the issue of probate, to furnish a bond conditioned for the due performance of the duty of the executor or administrator as to accounting for the Succession Duty for which " the property of the deceased is chargeable in default of payment being made by the persons liable therefor." This provision clearly does not include the property in question in this case, for it is not the property of the deceased, and I do not find anywhere else anything that would suggest that the estate or the executor or administrator thereof is liable to this duty. This leaves the matter in a somewhat singular position. The property sought to be taxed is not taxable under sec. 3 as a " succession." It is not property passing on the death of the deceased, nor is it property of the deceased chargeable with succession duty. Notwithstanding however, that it is property which passed

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away from the deceased in his lifetime effectually, and belongs now to someone else, yet it and the original donee are held liable to taxation under an Act called a Succession Duty Act and on property which in other cases might well be the subject of several intermediate transfers. For taxation such as this, it is entirely inappropriate to describe the Act as a Succession Duty Act. It is merely direct taxation on the property of someone who has no concern with the issue of the probate or the estate of the deceased. This is a species of taxation described as Succession Duty Act in taxation which, if adopted at all, should, as it occurs to me, be made general and not exacted as succession duty or as a duty connected with or arising out of the death of the deceased. How this particular provision found its way into an Act of this kind I cannot say, but as the Legislature has the power to tax any property and has to my mind done so in this case, it must be left for remedy to the Legislature itself.

I would dismiss the appeal with costs.

(C) Middleton, J.A.

(*c*) MIDDLETON, J.A.: I have had the privilege of reading the judgment of my brother Grant, and fully concur in the result at which he has arrived. I desire, however, to add a few words embodying the conclusions at which I had independently arrived.

In endeavouring to ascertain the meaning of an Act of Parliament where there is any ambiguity, it is, I think, permissible to consider the object of the statute and the practical effect of attributing to it the meaning suggested by the opposing parties. If one possible construction leads to harsh and absurd results, and the other to a reasonable conclusion the latter was probably the real intention of the Legislature. This principle, I think, is justified by the decision in *City of Toronto* v. *Consumers Gas Co.*, 60 O.L.R., 336.

It is to be kept in mind that the Succession Duty Act applies to all gifts *inter vivos* after first of July 1892. The statute is not confined to gifts made shortly before death, and furthermore the statute covers every kind of benevolent gift for Section 6 (*d*) only exempts from taxation property "devised or bequeathed" for religious, charitable or educational purposes and affords no exemption from taxation of "gifts" made since the named date for these purposes.

I would illustrate the operation of the Act by several concrete instances.

(*a*) A man gives to his wife at or shortly after his marriage on the 2nd of July 1892, $100,000 cash. On his death in 1930 the wife must pay succession duty and this duty is not upon the scale in force when the gift was made, but the very much higher rate in operation in 1930. Both parties concur in this. $100,000 cash is $100,000 at all times and the Crown does not suggest that the wife must pay succession duty upon the earnings and increment of this $100,000 between the date of the gift and the date of the death.

(*b*) Instead of giving his wife $100,000 cash the donor gives her stock in a company of the market value of $100,000. The wife retains this stock

and by reason of the fact that the company does not distribute its earnings but capitalizes them, and by reason of fortunate speculations during the thirty-eight years that have passed the stock increases in value so that at the date of the death of the testator it is worth $500,000. The Crown contends that the widow must pay duty on the increased value, the defendants contend that duty must be paid upon the value at the date of the gift. This is the case in hand.

(*c*) Assume that instead of the stock increasing in value it had become during the thirty-eight years absolutely worthless. For the purpose of argument but without binding itself to the future the Crown is ready to admit that no duty is payable.

(*d*) Assume a gift of stock of the market value of $100,000 and a sale of it by the wife immediately after the gift, and that after the wife had ceased to hold it the stock had enormously increased in value, what is the right of the Crown? For the purpose of argument again the Crown now states that the Department will voluntarily forego any claim for duty beyond that payable on the $100,000.

(*e*) Assume a gift of $100,000 in cash which the wife immediately invests in stock which increased in value, could the Crown logically claim duty on this increased value?

(*f*) Assume the gift of an automobile costing $10,000 which has become worthless before the date of the death, would the crown be content to claim no duty ?

(*g*) Assume a gift of a young horse which became famous as a race horse and had offspring, would the Crown claim duty upon the value of the offspring and be content with nothing if the horse died before the donor ?

These illustrations, and many more that could be suggested, illustrate how unfair and unreasonable the contention made by the Crown is in its practical operation, and furthermore that in many cases its contention would be against the real interest of the Crown because, as recent events well illustrate, stock does not always increase in value.

These circumstances lead me to believe that the statute may fairly be construed in such a way that Section 8 should be regarded as merely bringing gifts *inter vivos* within the net spread for the imposition of taxation. Section 4 would then receive its legitimate operation by confining it to the ascertaining of the value of property actually passing at the date of death.

Another consideration which has much weight with me, is that the effect of the contention put forward by the plaintiff is to impose a tax upon that which was never the property of the deceased. That which he owned and gave away was the share or shares as they existed at the date of the gift. That which it is sought to tax is the value of a corresponding number of shares as at the date of his death. What is a share in a company ? It is, speaking generally, the right of a member of a company to share in the assets of a company as they exist at a particular date. The assets of this company at the date of the gift if realized and all liabilities were paid, would yield a certain sum agreed upon by the parties. By reason of the acquisition of new assets, from whatever source whether from capitalized

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earnings, successful speculations or what not, the company now has assets, also agreed upon by the parties, having five times the value at the time of the gift. This increment and all that constitutes it, was not at any time the property of the deceased. It is something that has arisen entirely after the gift and is the property of the wife and hers alone. It is as unjust to tax it as it would be to tax money that she had made by her industry and foresight and good fortune in speculations had the original gift been of cash.

(D) Grant, J.A. (concurred in by Mulock, C.J.O.).

(*d*) GRANT, J.A. (concurred in by MULOCK, C.J.O.): This is an appeal from the judgment of Orde, J.A. pronounced on the 20th day of August, 1930, upon a motion for judgment based upon admissions of fact contained in the pleadings.

The judgment is declaratory in form and gives effect to the contention put forward by the defendants.

The subject matter of the issue between the parties had to do with the construction to be placed upon certain sections of the Succession Duty Act of Ontario which may be found in R.S.O. 1927, cap. 26, as amended in 1928. The 1928 amendments do not appear to affect the sections involved. The material facts are set out in the reasons for judgment of Orde J.A., and may be summarized as follows:

One William Edward Wilder of Toronto, died on or about the 28th day of May, 1929. The Trust Company is executor and trustee under his will, and the defendant Mary M. Wilder is his widow. The late Mr. Wilder, being a man of considerable wealth, on or about the 30th day of December, 1925, gave to his wife 500 shares of the capital stock of a private company, known as Picton Securities, Limited, incorporated under the Ontario Companies Act, and having its head office in Ontario. The gift was absolute in character and formed a comparatively small portion of the fortune of the deceased. The value of the shares at the time of the gift, was agreed upon between the parties as having been $50,250. At the time of Mr. Wilder's death, so successful had the company been in the interval, that the shares had increased in value to the (agreed) sum of $264,183.50.

The plaintiff contends that the valuation to be placed upon these shares, under the provisions of the Succession Duty Act, is the larger sum, stating that the value must be that existing at the date of the death of the deceased, and not at the date of the gift, as urged by the defendants.

There is no suggestion that the transaction was other than an absolute gift by the husband to his wife, taking effect at the time when the gift was made and absolutely excluding the donor from all interest and right in the subject matter of the gift as and from the time when it was made.

The decision of Orde J.A. was to the effect that for the purpose of the Succession Duty Act, the 500 shares of Picton Securities Limited, are to be valued as of the date of the gift thereof, namely, the 30th day of December, 1925.

The following appear to be the relevant sections and subsections of the statute given in an order which appears to make for convenience of consideration of the issue involved.

8.—(1) " All property situate in Ontario and any income therefrom passing on the death of any person . . . 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*) . . .

(II) Any property taken under a disposition operating or purporting to operate as an immediate gift *inter vivos* . . . made since the 1st day of July, 1892 "

Sec. 1. (*f*) " Passing on the death " shall mean passing either immediately on the death or after an interval, either certainly or contingently, and either originally or by way of substitutive limitation . . . :

(*g*) " Property " shall include real and personal property of every description . . . capable of being devised or bequeathed by will, or of passing on the death of the owner to his heirs or personal representatives :

Sec. 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 allowances 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 : but an allowance shall not be made (certain debts specifically excepted).

Sec. 1. (2) " Aggregate value " shall mean the fair market value of the property after the debts, encumbrances and other allowances authorized by Section 4 are deducted therefrom, and for the purpose of determining the aggregate value and the rate or duty payable the value of property situate out of Ontario shall be included;

(*b*) " Beneficial interest " and " dutiable value " shall mean the fair market value of the property after the debts, encumbrances, and other allowances and exemptions authorised by this Act are deducted therefrom;

Sec. 9. Subject to the exceptions mentioned in sections 6, 7, and 8 there shall be levied and paid for the purpose of raising a revenue for Provincial purposes in respect of any succession or on property passing on the death according to the dutiable value the following duties . . .

Sec. 12. (1) Every heir, legatee, donee or other successor . . . 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 . . . file with the Registrar of the Surrogate Court . . . a full, true and correct statement under oath showing, (setting out particulars of property, etc.).

Certain other provisions of the statute were referred to upon the argument, as throwing light upon the sections quoted, or otherwise assisting in the proper interpretation thereof. To these further reference will be made.

It will be noted at once that if the plaintiff's contention is to prevail, it must be chiefly by virtue of the provisions of Sections 8 and 4, it being

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urged that by Section 8 the subject of a gift *inter vivos* becomes " property passing on the death " for the purposes of the Act, and that the value of such property, by virtue of the provisions of Section 4, is to be the fair market value as at the date of the death of the deceased.

In approaching the question involved, it is pertinent to note that, but for the statutory provisions which may have affected the matter, there was no legal obstacle in the way of the late Mr. Wilder making an absolute and perfectly valid gift to his wife of the shares in question. Apart from any such statutory provisions, such an absolute gift could and did validly and effectually transfer to her the property in the shares which, as a result of such transfer, passed out of the control of the donor, and could not form any part of his estate upon his decease, nor would they be subjected to any taxation to which his estate might be liable.

Before going on to deal with the provisions of the Act, it may not be amiss to refer to the well-known rule governing the construction to be placed upon statutes of this and a similar character. As is stated by the author of Craies' (Hardcastle) Statute Law, 4th Ed. (1907) at page 109 :—

> " Express and unambiguous language appears to be absolutely indispensable in statutes passed for the following purposes :— (1) imposing a tax or charge; (2) conferring or taking away legal rights, whether public or private."

That in order to impose or to increase or make more onerous a tax or charge upon a subject or upon his estate or property, the Crown must show that the subject or his property or estate comes clearly within the language of the statute imposing the tax, has been affirmed in a long line of judicial decisions, a number of which are referred to in the passage (in part) above quoted. The rule is so well established that citation of authorities appears almost superfluous.

> " If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardships may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover a tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute what is called an equitable construction, certainly such construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute."

(Lord Cairns in *Partington* v. *Attorney-General*, 4 L.R. E. & I. Appeals 100, at page 122.)

> " Therefore the Crown fails if the case is not brought within the words of the statute interpreted according to their natural meaning; and if there is a case which is not covered by the statute so interpreted, that can only be cured by legislation, and not by an attempt to construe the statute benevolently in favour of the Crown."

(Collins, M. R., in *Attorney-General* v. *Earl of Shelborne* (1902) 1 K.B.D. 388, at page 396.)

> " In the case of this statute (referring to the Australian Succession Duty Act) it would be sufficient to say that clear enactments are required for the imposition of a tax, and that this enactment is not clear."

(Lord Hobhouse delivering the judgment of the Judicial Committee in *Simms* v. *Registrar of Probates* (1900) A.C. 323, at page 337.)

> " Lastly the intention to impose a tax or duty, or to increase a tax or duty already imposed, must be shown by clear and unambiguous language and cannot be inferred from ambiguous words."

(Lord Parker of Waddington delivering the judgment of the Judicial Committee in *Brunton* v. *Commissioner of Stamp Duties* [1913], A.C. 747, at page 760).

If, in the case at bar, the plaintiff's contention is to prevail, then a sum or value of $200,000.00, the property of the widow, vested in her by the law of this Province, which did not at any time belong to the deceased, never was his property, was not actually given by him to her (it was not then in existence) and did not form any part of his estate, either actually or notionally, is to be subjected to taxation as though it did form part thereof. If such is to be the effect to be attributed to the language of the Act, then that language must so state in very clear and unambiguous words.

I note at once that the statute does not even say that the property, the subject of the gift, shall form part of his estate at his death. Much less does it say that any increment (the increased value) which may accrue thereto, after the property had validly passed from him, and before his death, and with which he had nothing whatever to do, should form part of his estate. Neither does it state that such increment shall be subject to taxation as though it formed part of his estate. Doubtless the legislature would have power to so enact (however greatly one's sense of justice might be offended at such legislation, in the absence of any suggestion of *mala fides* in the making of the gift), but it has not so enacted.

If therefore the shares of stock given by the late Mr. Wilder to his wife in 1925, are to be not merely subject to duty under this statute, but are to be valued for the purpose of estimating that duty, as of the date of the death of the donor, and not as of the time when the gift was made, the Crown must show that this is provided for by the statute in clear and unambiguous language.

There is a further rule for the guidance of the Courts in the interpretation of statutes, which may be of assistance, and that is, that where the language used is capable of more than one construction or meaning, that one is to be adopted which appears more reasonable and just, and less offends our sense of justice.

> " It is quite true, as Bundey, J., intimates when he is pointing out the severity of the law, that Courts must nevertheless construe

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it according to its true meaning. But where there are two meanings each adequately satisfying the language, and great harshness is produced by one of them, that has legitimate influence in inclining the mind to the other."

" It is more probable that the Legislature should have intended to use the word in that interpretation which less offends our sense of justice."

(Lord Hobhouse in *Simms* case at page 335.)

" Where in the statute words are used capable of more than one construction, the results which would follow the adoption of any particular construction are not without materiality in determining what construction ought to prevail."

" Suppose for example . . . then . . . the widow and children would be totally deprived of the relief intended (by the will) for them. There is no indication in the Act that any such result was intended, and the result itself is so strange that the Court may well hesitate in construing the doubtful words of the statute in such a way as to bring it about."

(Lord Parker in the *Brunton case* at page 759.)

By sec. 8 (2) b (ii) these shares, being the subject of an immediate gift *inter vivos*, are to be deemed to be included for the purpose of the Act within the class of property described in the Act as " property passing on the death of the deceased." I take this to mean that wherever the Act uses the expression " property passing on the death of the deceased," or clearly purports to deal with the same, the provisions thereby enacted must apply to the subject matter of gifts *inter vivos*. This, of course, is a purely arbitrary and artificial quality engrafted upon gifts *inter vivos*, and contrary to the facts respecting the same, as absolute gifts *inter vivos* do not pass on the death of the deceased, nor are they, apart from the effect of the statute, in any way affected by the death of the donor. The Act does not state that the subject matter of a gift *inter vivos* shall not pass to the donee at the time the gift is made, nor does it provide that such gift shall only take effect at the time of the death. All that the Act provides in this regard is, that the expression " property passing on the death of the deceased " shall for the purposes of the Act be deemed to include " property taken under a disposition operating . . . as an immediate gift *inter vivos*." It is apparent that the subject matter of a gift *inter vivos* can only be " deemed to be included " in " property passing on the death of the deceased " if the gift is to be deemed to have been made or to have taken effect, when the death actually took place; or the death is to be deemed to have occurred at or just before the time when the gift was actually made or took effect. The Act does not specify either, and the one is just as reasonable and as readily to be inferred from the language used, as is the other. In

considering the effect of these exact words in the English Finance Act, Lord Atkinson states :—

> " Sec. 2 enacts that property, which in fact, has passed while a person is alive, shall in certain cases, be deemed to have passed as if he were then dead."

Vide *Atty.-General* v. *Milne* [1914], A.C. 765, at p. 773.

If then the death is to be deemed for this purpose to have occurred when the gift was actually made or took effect then the value of the property at that time would be the value at the time of the death, within the meaning of the provision in that regard, and would " less offend our sense of justice " than the interpretation put forward by the plaintiff. This would not be an unreasonable construction to be placed upon the language used, in the opinion of Lord Blackburn in the *Strathcona Case* (*infra*) when dealing with the more specific wording of the English Statute (1929 Scots L.T.R. at 635).

It appears to me that one or two other clauses in this same Sec. 8 support that view. Sec. 8 (i) reads :—

> " Any property transferred since the 1st day of July, 1892, for partial consideration in money or money's worth paid to the transferor . . . to the extent to which the value of the property so transferred exceeds the value of the consideration so paid."

To illustrate: take a case in which property was transferred on August 1st, 1892, the property received by the transferor being then worth $1,000.00 less than that which he transferred. Transferor dies in 1930, 38 years after the transfer was made. During the interval the property transferred to him, has so fallen in market value as to be almost worthless, and, on the other hand, the property transferred by him has increased in value five-fold. By this sub-section the excess in value is to be liable to the tax, as being included in " property passing on the death of the deceased." Is that excess in value to be determined as of the time of and under the conditions existing at the death ? If the statute so directs, in clear unambiguous words, then the Courts must so determine, but unless the language is so clear and explicit as to be incapable of any other less unreasonable and less unjust construction, I do not think any court would reach such a decision. So also, with sub-sec. (c) of Sec. 8 (3) which provides that no duty shall be payable in respect of property " actually and *bona fide* transferred for full consideration, &c."

Is the question whether it was full consideration or not, to be determined as of the time when the transfer took place or 20 or 30 years later when the death occurred ?

When one traces back the provision of the Statute by which the subject of a gift *inter vivos* is made liable to duty, the reason for it is at once apparent.

At first, only gifts which were " *mortis causa* " and those made in contemplation of death, were affected. Later on the Act was amended

In the Supreme Court of Ontario, Appellate Division.

No. 7. Reasons for Judgment. (D) Grant, J.A. (concurred in by Mulock, C.J.O.)— *continued.*

to take in all gifts made within 12 months before the death. Such gifts were considered to be subject to the suspicion that they had been made with a view to evading liability to death duties, and the legislature endeavoured to defeat that purpose. The period of 12 months has eventually been lengthened to cover gifts made since July 1st, 1892. The purpose of the legislation was, quite evidently, to prevent a man, by making such gifts, from getting rid of his property and so cutting down the duty payable at his death. The then value of what he was giving away, was what the legislation aimed at, and, in my opinion, the effect which plaintiff puts forward, was never contemplated. If it had been, it would have been a simple matter to have said so.

It appears to me that when Sec. 4 provides the manner in which "dutiable value" of property is to be determined, it is not referring at all to property which only "notionally" passes on the death of the deceased, but, to property which was actually part of the deceased's estate. The language of the section is certainly not "clear and unambiguous," to the effect that property, the subject of a gift *inter vivos*, which only "notionally" passes "on the death of the deceased" is intended to be included when the word "property" only is used. The language of the latter part of the first paragraph of this section, also, makes rather against such an interpretation. It provides that "allowance shall be made for reasonable funeral expenses, debts and encumbrances and surrogate court fees (not including solicitor's charges)"; and it goes on to provide that such allowance shall be deducted from the "dutiable value" &c. Such a provision would not be in any sense, appropriate if the section were dealing with property, the subject of a gift *inter vivos* with which the deceased had parted many years previously, and which was in no way subject to his funeral expenses or debts.

In order to support the construction put forward by the plaintiff, Sec. 4 would have to read as though there were inserted in it a provision that where the word "property" is used, it shall be deemed to include all property which, by Sec. 8, is "deemed to be included" in and by "property passing on the death of the deceased."

In other words, a purely arbitrary and artificial meaning and application explicitly given by the Act to one expression, is to be extended and made applicable to another expression. It is sufficient to say that the Act does not so state.

The only decision cited as supporting the plaintiff's contention is *Strathcona* v. *Inland Revenue*, 1929 Scots Law Times 629, a judgment of the Court of Session (First Division) in Scotland. The judgment appealed from is reported at p. 249, in the same volume. The question involved was as to liability to estate duty in respect of the increased value of shares of stock in certain incorporated companies, which shares had been the subject of a gift *inter vivos* within the statutory period of three years before the death of the donor, the exact point being whether the value

of the shares was to be determined as of the date of the gift or as of the date of the death. The statutory provisions read as follows :—

> Sec. 1. In the case of every person dying after the commencement of this part of this Act there shall . . . be levied and paid *out of the principal value ascertained as hereinafter provided by all property . . . which passes on the death of such person a duty called* " estate duty."
>
> Sec. 2 (1) Property passing on the death of the deceased shall be deemed to include the property following :—
>
> (*a*) Any property . . . taken under a voluntary disposition made by any person so dying purporting to operate as an immediate gift *inter vivos* . . . (the time limited within which the gift must have been made being fixed by amendment at three years before the death).
>
> Sec. 7 (5) The principal value of any property *shall be estimated to be the price which in the opinion of the Commissioners, such property would fetch if sold in the open market at the time of the death of the deceased.*"

Without presuming to express any opinion as to the correctness or otherwise, of that decision, based as it was upon the language of the English statute, it seems to me manifest that there is a most material and substantial difference between the two Acts. In the English Act, Sec. 1, which provides for the levy of the duty, provides that it shall be " levied " . . . upon the *principal value ascertained as hereinafter provided* of all property . . . which passes on the death of such person &c."

It will be noted that by this section it is expressly stated that the principal value on which the duty is to be levied is to be " ascertained as hereinafter provided," as to all property passing on the death of the deceased; Sec. 2 follows and provides that property passing on the death of the deceased shall be deemed to include the property which is the subject of a gift *inter vivos*; Sec. 7 (5) states the manner, referred to in Sec. 1 as " hereinafter provided " in which the principal value is to be estimated, namely, which is to be the price which such property would fetch if sold in the open market at the time of the death of the deceased.

It is quite evident, upon a perusal of the reasons for judgment, that the decision was based upon the explicit language of the sections quoted, and which differs, in particulars vital to the question under consideration, from the language of our statute. In my opinion the case is clearly distinguishable upon that ground.

In my judgment therefore, the plaintiff's appeal must fail 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. I would dismiss the appeal with costs.

In the Supreme Court of Ontario, Appellate Division.

No. 8.
Formal Judgment, 9th March 1931.

No. 8.

Formal Judgment.

IN THE SUPREME COURT OF ONTARIO.

Monday, the 9th day of March, 1931.

The Honourable the CHIEF JUSTICE OF ONTARIO.
The Honourable Mr. JUSTICE MAGEE.
The Honourable Mr. JUSTICE HODGINS.
The Honourable Mr. JUSTICE MIDDLETON.
The Honourable Mr. JUSTICE GRANT.

Between :

THE ATTORNEY GENERAL OF ONTARIO - - - *Plaintiff*

and

NATIONAL TRUST COMPANY LIMITED, Executor of the last will of WILLIAM EDWARD WILDER, deceased, and MARY MARJORIE WILDER - - *Defendants.*

1. Upon motion made unto this Court on the 2nd day of October, 1930, by counsel on behalf of the Plaintiff in the presence of counsel for the Defendants, by way of appeal from the judgment pronounced herein by the Honourable Mr. Justice Orde on the 20th day of August, 1930, upon hearing read the writ of summons and the pleadings herein and upon hearing what was alleged by counsel aforesaid and judgment upon the motion having been reserved, and the same coming on this day for judgment.

2. THIS COURT DOTH ORDER that the said appeal be and the same is hereby dismissed.

3. AND THIS COURT DOTH FURTHER ORDER that the Plaintiff do pay to the Defendants their costs of this appeal forthwith after taxation thereof.

In the Supreme Court of Ontario, Appellate Division.

No. 9. Order admitting Appeal to His Majesty in Council, 24th April 1931.

No. 9.

Order admitting Appeal to His Majesty in Council.

IN THE SUPREME COURT OF ONTARIO.

Friday, the 24th day of April, 1931.

The Honourable Mr. JUSTICE MIDDLETON. In Chambers.

Between :

THE ATTORNEY-GENERAL OF ONTARIO - - - *Plaintiff*

and

NATIONAL TRUST COMPANY LIMITED, Executor of the last Will of WILLIAM EDWARD WILDER, deceased, and MARY MARJORIE WILDER - - - - *Defendants.*

1. UPON the application of counsel for the plaintiff in the presence of counsel for the defendants, upon hearing read the judgment of the First Divisional Court of the Appellate Division of the Supreme Court of Ontario pronounced herein on the 9th day of March 1931, the reasons for said judgment, the pleadings herein and the bond of the Dominion of Canada General Insurance Company dated the 24th day of April 1931, filed and upon hearing what was alleged by counsel aforesaid and it appearing that the plaintiff has under the provisions of the Privy Council Appeals Act, R.S.O. 1927, Chapter 86, a right to appeal to His Majesty in His Privy Council.

2. 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 First Divisional Court and will pay such costs and damages as may be awarded in case the said judgment is affirmed.

3. 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 First Divisional Court be and the same is hereby admitted.

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

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

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 ONTARIO - - (*Plaintiff*) *Appellant*

AND

NATIONAL TRUST COMPANY, LIMITED, EXECUTOR OF THE LAST WILL OF WILLIAM EDWARD WILDER, DECEASED, AND MARY MARJORIE WILDER - - (*Defendants*) *Respondents.*

RECORD OF PROCEEDINGS.

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For the Respondents.

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