BETWEEN:

1960
Feb. 3
July 27

BEULAH GORKIN and JACK ADILMAN as Administrators with will annexed of the Estate of NATHAN ADILMAN, deceased .....APPELLANTS;

AND

THE MINISTER OF NATIONAL REVENUE ..... } RESPONDENT.

Revenue—Succession duty—Transfer of shares to corporation owned by transferor's children for an annuity—Value of shares much greater than annuity—Whether transaction a gift or for partial consideration—Dominion Succession Duty Act, R.S.C. 1952, c. 89, s. 3(1)(d) and (k).

T died on June 20, 1956 at the age of 67 years leaving a son and daughter to whom by his will dated January 3, 1956, he left the bulk of his estate. Shortly before his death T had intended to remarry and in contemplation of this event, some 20 days before he died transferred to Edison Wholesale Ltd. 72 shares of Adilman's Ltd. and the land and building on which the latter carried on a department store business in consideration of a monthly sum of $1,666.66 to be paid to him for his life or until the total of such payments reached $200,000. At the time of the transfer the son and daughter owned the balance of the issued common shares of Adilman's Ltd. and were the only beneficial shareholders of Edison Wholesale Ltd. At the time of T's death

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the fair market value of the property transferred was $344,400 and the present value of the annuity payable to T at the time of the transfer was $148,000. In assessing T's estate for succession duty the Minister included the $344,400 in the aggregate net value of the property of the deceased and assessed duty accordingly. On an appeal from the assessment the Administrators of T's estate contended that the property in question was "transferred for partial consideration" within the meaning of s. 3(1)(k) of the *Dominion Succession Duty Act*, R.S.C. 1952, c. 89, and accordingly the only amount which could be properly included in assessing duty was $196,400, the difference between the $344,400 and $148,000 the value of the annuity which Edison Wholesale Ltd. had agreed to pay. The Minister submitted that the transaction in question was a "gift" with a reservation of benefit to the donor by contract within the meaning of s. 3(1)(d) of the Act and that the $344,400 was accordingly properly included in making the assessment.

Held: That both clauses (d) and (k) of s. 3(1) of the *Dominion Succession Duty Act* are clauses which catch and require to be brought in on their terms transactions of the kind therein described, and, if a transaction fairly falls within one of them it makes no difference to the application of that clause that the transaction may also fall within another clause, the application of which might be either more or less burdensome to the taxpayer.

2. That in interpreting clause (d) of s. 3(1) the principle that the substance of the transaction must be ascertained, applied, and having regard to all the circumstances under which the transaction was entered into it was clear that it was not dictated by commercial considerations and the inference was that the object of the deceased was not to acquire the annuity in place of the property but to do something for the benefit of his son and daughter.

3. That the transaction was a "gift" with a benefit to the donor provided "by contract" within the meaning of s. 3(1)(d).

Semble—That the property was not "transferred for partial consideration" within the meaning of s. 3(1)(k), since the obtaining of the consideration was not the real object of the transaction.

Attorney-General for Ontario v. Perry [1934] A.C. 477; *Attorney-General v. Worrall* [1895] 1 Q.B. 99; *Attorney-General v. Johnson* [1903] 1 K.B. 617; *Re Baroness Bateman* [1925] 2 K.B. 429, referred to.

APPEAL under the provisions of the *Dominion Succession Duty Act*.

The appeal was heard before the Honourable Mr. Justice Thurlow at Toronto.

H. H. Stikeman, Q.C., J. M. Goldenberg, Q.C. and *P. N. Thorsteinsson* for appellants.

D. S. Maxwell, T. E. Jackson and *G. W. Ainslie* for respondent.

THURLOW J. now (July 27, 1960) delivered the following judgment:

This is an appeal by the administrators with will annexed of the estate of Nathan Adilman, deceased, from an assessment of duties in respect of successions arising upon his death. In making the assessment, the Minister included in the aggregate net value of the property of the deceased and in the dutiable value of a succession to Edison Wholesale Limited, a corporation, a sum of $344,400, representing the value of certain property which had been the subject matter of an agreement made between the deceased and the corporation some twenty days before his death and assessed duty accordingly, and the issue in the appeal is whether the Minister was right in including the whole of this sum. As to $196,400 of it, there is no dispute. The matter comes before the Court on an agreed statement of facts which, together with the documents transmitted by the Minister pursuant to s. 42 of the Act and certain admissions contained in the pleadings, constitute the whole of the material upon which the issue is to be decided.

The deceased died on June 20, 1956 at the age of 67 years, leaving a son and daughter who are the administrators with will annexed of his estate. By his will made on January 3, 1956 he made specific bequests to a number of charitable organizations, to a brother and to several grandchildren, as well as to his son and daughter and also gave to his son and daughter the residue which comprised the great bulk of his estate. On June 1, 1956, by the agreement above mentioned, the deceased transferred to Edison Wholesale Limited 72 shares of a corporation known as Adilman's Limited and a parcel of land with the building thereon, in which Adilman's Limited carried on a department store business, in consideration of a monthly sum of $1,666.66 for as long as he should live, payable on the first day of each month, beginning on the first day of July, 1956, provided that the payments should in any event cease when their total reached $200,000. At the time of the making of this agreement, the appellant's son and daughter were already the owners of 88 of the 160 issued common shares of Adilman's Limited, and they were also the only beneficial shareholders of Edison Wholesale Limited.

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In paragraph 8 of the agreed statement of facts, it is stated that:

> 8. The said agreement was entered into by the deceased and Edison Wholesale Ltd. in good faith, for legitimate family reasons and in view of the intended re-marriage of the deceased, and not in attempt to avoid the payment of any Succession Duty.

Paragraph 2 of the agreed statement of facts also refers to the deceased's death as sudden, which I take it means unexpected.

The fair market value of the property so transferred to Edison Wholesale Limited at the time of the death of the deceased was $344,400, and the annual value or profit from it as in June, 1956 was $28,000. The present value on June 1, 1956 of the annuity payable to Nathan Adilman was $148,000. The succession duty return filed by the appellants indicates that, apart from the properties in question, the deceased had assets with an aggregate net value of $353,311.75.

The Minister's case for including the $344,400, representing the value of the property in question, is that the transaction in question, though couched in the form of a contract, was in substance a "gift" within the meaning of s. 3(1)(*d*) of the *Dominion Succession Duty Act*, R.S.C. 1952, c. 89. The appellants, on the other hand, take the position that the property was "transferred for partial consideration" within the meaning of s. 3(1)(*k*) and that, accordingly, the only amount which could properly be included was $196,400, that is to say, the difference between the $344,400 and $148,000, the value of the annuity which Edison Wholesale Limited had agreed to pay.

These provisions of the statute are as follows:

> 3. (1) A "succession" shall be deemed to include the following dispositions of property and the beneficiary and the deceased shall be deemed to be the "successor" and "predecessor" respectively in relation to such property:—
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> * * *
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> (*d*) property taken under a gift whenever made of which actual and *bona fide* possession and enjoyment has not been assumed by the donee or by a trustee for the donee at least three years before the death of the deceased and thenceforward retained to the entire exclusion of the donor or of any benefit to him, whether voluntary or by contract or otherwise;
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> * * *

(*k*) property transferred within three years prior to the death of the deceased for partial consideration in money or money's worth paid or agreed to be paid to the deceased, to the extent to which the value of the property when transferred exceeds the value of the consideration so paid or agreed to be paid.

By the other clauses of the same subsection, there are included in what are deemed to be successions several other types of dispositions of property, including in clause (*b*) donations *mortis causa* and in clause (*c*) dispositions operating or purporting to operate as immediate gifts *inter vivos*.

It will be observed that, if clause (*d*) is applicable, the property to be included is greater than under clause (*k*) and that, if these clauses are mutually exclusive, as the appellants maintained and counsel for the Minister did not dispute, some line of demarcation must differentiate a transaction by which property is "transferred . . . for partial consideration" from a gift transaction in which a benefit is obtained by the donor "by contract". Yet, where the benefit obtained by the donor is less than the value of the property given, the latter type of transaction, on first impression, seems to be readily describable as or likely to fall within the meaning of the expression "transferred . . . for partial consideration". Nor is the difference between the two rendered any less difficult to define by reason of the absence of a statutory definition of gift. For the purposes of this case, however, it is unnecessary to attempt to define the line of demarcation if, indeed, any definition is possible for it is not difficult to conceive of cases which fall within clause (*k*) and which clearly are not gifts and cases can also be conceived which are more readily classified as gifts, even though accompanied by a contractual benefit to the donor, than as transfers for partial consideration. Each case must be considered on its own facts to determine under which clause the transaction falls and, while there undoubtedly may be cases which may present considerable difficulty, the present is, in my opinion, not such a case, the circumstances affording a fairly clear indication of the side on which the transaction falls.

The wording of these clauses bears considerable similarity to that of provisions in the *Customs and Inland Revenue Act*, 1881 (44 and 45 Vict., c. 12, Imp.) as amended by the

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Customs and Inland Revenue Act, 1889 (52 and 53 Vict., c. 7, Imp.) and incorporated by reference, with certain amendments, by the *Finance Act,* 1894 (57-58 Vict., c. 30, Imp.).

By the *Customs and Inland Revenue Act,* 1881, as amended in 1889, it was provided that account duty should be paid in respect of property which included "any property taken as a *donatio mortis causa* made by a person dying after June 1, 1881, or taken under a *voluntary* disposition, made by a person so dying, purporting to operate as an immediate gift *inter vivos* whether by way of transfer, delivery, declaration of trust, or otherwise, which shall not have been *bona fide,* made three months before the death of the deceased, and property taken under any gift, whenever made, of which property *bona fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise".

By the *Finance Act,* 1894, it was enacted that property passing on the death of a deceased should be deemed to include "property which would be required on the death of the deceased to be included in an account under s. 38 of the Customs and Inland Revenue Act, 1881, as amended by s. 11 of the Customs and Inland Revenue Act, 1889, as if those sections were herein enacted and extended to real property as well as personal property and the words 'voluntary' and 'voluntarily' and a reference to a 'volunteer' were omitted therefrom". By s. 3 of the same Act, it was provided:

> 3. (1) Estate duty shall not be payable in respect of property passing on the death of the deceased by reason only of a bona fide purchase from the person under whose disposition the property passes, nor in respect of the falling into possession of the reversion on any lease for lives, nor in respect of the determination of any annuity for lives, where such purchase was made, or such lease or annuity granted, for full consideration in money or money's worth paid to the vendor or grantor for his own use or benefit, or in the case of a lease for the use or benefit of any person for whom the grantor was a trustee.
>
> (2) Where any such purchase was made, or lease or annuity granted, for partial consideration in money or money's worth paid to the vendor or grantor for his own use or benefit, or in the case of a lease for the use or benefit of any person for whom the grantor was a trustee, the value of the consideration shall be allowed as a deduction from the value of the property for the purposes of Estate duty.

The evolution of these provisions and its effect on their interpretation is discussed in *Attorney-General for Ontario v. Perry*[1], where the lack of the same historical background in similarly worded Ontario legislation was considered by the Privy Council to be an important difference between the two statutes. Lord Blanesburgh said at p. 483:

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

And at p. 487 he also said:

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

Save for certain immaterial amendments which have since been made, clauses (*b*), (*c*), (*d*) and (*k*) of s. 3(1) of the *Dominion Succession Duty Act* also came into the law as original enactments, full grown and without ancestry, when that statute was enacted in 1941, and, though they have some similarity to the English provisions, the principle so stated must, I think, be applied and, in considering and applying decisions on the English statutes, care must first be taken to see how far they are based on the historical evolution of such statutes.

It was submitted that there is a further distinction between the English statutes and the *Dominion Succession Duty Act* in that s. 3 of the *Finance Act*, 1894, deals only with *bona fide purchases* for full or partial consideration, while clause (*k*) of s. 3(1) of the Canadian statute applies to all *transfers* for partial consideration. It was urged that the meaning of transfer is broader than purchase or sale and includes gifts as well. I do not think, however, that the word "transferred" in its context in clause (*k*) necessarily bears so wide a connotation for it is limited by the words

[1] [1934] A.C. 477.

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"for partial consideration in money or money's worth", and I am inclined to think that the words "for partial consideration in money or money's worth" connote not alone what the transferor is to receive in money or money's worth but, as well, his object in making the transfer. And if, as I think, this is the correct interpretation of clause (*k*), there is not much difference between what is there contemplated and what is contemplated in the expression "bona fide purchase" in the *Finance Act,* 1894.

It should be observed, however, that, unlike s. 3(2) of the *Finance Act,* 1894, which is an excepting provision, clause (*k*) of s. 3(1) of the *Dominion Succession Duty Act* defines a type of transaction which gives rise to a succession and does not operate as an exception to clauses (*c*) or (*d*). Both (*d*) and (*k*) are thus clauses which catch and require to be brought in on their terms transactions of the kinds therein described, and, to my mind, if a transaction fairly falls within one of them it makes no difference to the application of that clause that the transaction may also fall within another clause, the application of which might be either more or less burdensome to the taxpayer. *Vide Speyer Brothers v. C. I. R.*[1]

Accordingly, as I view it, the problem which I have to consider is whether or not the transaction in question falls within the wording of clause (*d*) of s. 3(1) for, if it does, the appeal cannot succeed and, if it does not fall within that clause, there is no dispute as to the application of clause (*k*).

Turning now more particularly to the interpretation of clause (*d*), under the corresponding enactments it has been consistently held in England that it is the substance of the transaction that must be ascertained and I see no reason to think that this principle is not applicable in interpreting s. 3. Secondly, the words "by contract or otherwise", which on first impression seem repugnant to the notion of gift, appear to require a wider interpretation of "gift" in clause (*d*) than what has been referred to as "a pure and simple" gift. In clause (*d*), this is made even more manifest than in the corresponding English clause for the Canadian clause uses the expression "whether voluntary or by contract or otherwise", while the English clause has never had

[1] [1908] A.C. 92.

the word "voluntary" included in this position in its text. The English decisions on the meaning of "gift" in the provision corresponding to clause (*d*), insofar as they are not based on the historical development of the provision can, accordingly, in my opinion, be of some assistance so far as they go. This, I think, is also the effect of what Lord Blanesburgh said at p. 486 in *Attorney-General for Ontario v. Perry* (*supra*), a case which arose under a provision of the *Ontario Succession Duty Act*, corresponding with s. 3(1)(*c*) of the *Dominion Succession Duty Act*:

> Their Lordships cannot leave the consideration of the Finance Acts without referring to a series of decisions under what may be regarded as the third limb of s. 38, sub-s. 1(9.), of the Inland Revenue Act, 1881, as amended by s. 11 of the Act of 1889. A reference to that limb of the sub-section supra, shows that the gift therein being dealt with need not be preceded by a "disposition", but that the words following seem to contemplate that there may be within their meaning a gift, although accompanied by some benefit to the donor by contract. On that part of the section it has been held that a gift does not cease to be a gift although there is some consideration for it received by the donor: a gift, it has been said, may be something which is not "a pure and simple gift." *Attorney-General v. Worrall,* [1895] 1 Q.B. 99, and *Attorney-General v. Johnson,* [1903] 1 K.B. 617, may be cited as typical; and see *Attorney-General v. Holden,* [1903] 1 K.B. 832, 837. These authorities would have had greater significance on the present occasion if upon construction it were held that the final words of s. 7(*b*) of the Succession Duty Act applied to the second limb of the sub-section as well as to the third. But, as will presently be seen, this, in the opinion of their Lordships, is not the case.

Earlier, at p. 485, he had said:

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

In *Attorney-General v. Worrall*[1], a case which arose before the enactment of the *Finance Act*, 1894, Lopes L.J. said at p. 105:

> One question is whether there was a "gift" of property at all. It is suggested that there was not, because there was a collateral covenant by the son to pay to the father an annuity. It appears to me that there was not the less a gift within the meaning of the Act on that account.

[1] [1895] 1 Q.B. 99.

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A. L. Smith L.J. said at p. 107-8:

> The next point is this: It is said that the transaction is not a gift within the meaning of the statute because a consideration was given. On reading sec. 11, sub-s. 1, it seems clear that the legislature in using the word "gift" in that section contemplated cases where the donee enters into a covenant such as this.

In *Attorney-General v. Johnson*[1], Vaughan Williams L.J. said at p. 624:

> Having regard to the terms of s. 11 of the Customs and Inland Revenue Act, 1889, which speaks of a benefit to the donor by contract, and to the language of the Finance Act, 1894, s. 2, sub-s. 1(*c*), which incorporates the provisions of s. 11 of the Customs and Inland Revenue Act, 1889, as if the words "voluntary" and "voluntarily" and "volunteer" were omitted, and to the decisions in *Crossman v. Reg.*, 18 Q.B.D. 256, and *Attorney-General v. Worrall*, [1895] 1 Q.B. 99, we come to the conclusion that the Legislature intends that property shall be treated as taken under a "gift", although such gift may have been made under a contract by which the donor takes a benefit.

On the question whether the transaction was in substance one of gift, Vaughan Williams L.J. discussed the facts as follows at p. 624:

> If, then, the substance of the transaction between Mr. Burton and the Missionary Society be looked at, it seems to us that it was intended not to be a matter of pure business, but one of bounty on the part of Mr. Burton. The facts that the payment was made "in lieu of a legacy", and that the amount paid largely exceeded the market value of the annuities agreed to be paid to Mr. and Mrs. Burton are sufficient to establish this. Consequently, the transaction must, in our opinion, be held to be a gift within the meaning of s. 2, sub-s. 1(*c*), of the Finance Act, 1894.

Later, at p. 627, when dealing with the question whether the transaction could be regarded as a purchase, he also said:

> Phillimore J. has held that the whole 500*l.* is, in the first instance, taxable—a conclusion in which we agree—but has further held that in this case 210*l.*, the value of an annuity of 25*l.* a year for two lives, ought to be deducted from the 500*l.*, and that therefore only 290*l.* remains to be taxed. This is a conclusion in which we cannot agree, because, in our judgment, this is not a case of a bona fide purchase of an annuity at all. It is a case of a testamentary gift effected by the machinery of a present donation, subject to a reservation of something intended to be the equivalent of a life interest in the subject-matter of the donation.

[1] [1903] 1 K.B. 617.

In *Re Baroness Bateman*[1] the deceased had purported to sell to her son certain furniture at a price below its value and the question before the court was whether the transaction was in substance a purchase for partial consideration within the meaning of s. 3(2) of the *Finance Act*, 1894. Rowlatt J. said at p. 435:

> The transaction here was induced of course by family considerations, but that does not conclude the matter. My attention has been drawn to observations in *Lethbridge v. Attorney-General*, [1907] A.C. 24, in the House of Lords, where it is pointed out that there might be a family arrangement co-existent with a purchase. The question is whether the object of the transaction was really on the one side to get money for goods by disposing of the goods in the future, and on the other side to pay money and obtain goods. In *Brown v. Attorney-General*, 79 L.T. 572, a father entered into a partnership deed with his son, one of the provisions being that on his death the son should take over the father's share in consideration of a payment of 10,000*l.* to the estate. There the motive and intention were clearly not to turn something into money either in the present or in the future, but to provide for the disposal of the business after death, and to prevent the business going to the eldest son without his making some corresponding contribution to the estate. It was held that that could not fairly be described as a sale and purchase. In the present case the mother was in want of money, and she obtained it by a simple sale of her furniture subject to her life interest. The sum paid, whether it was the full amount which would have been obtained for it or not, was certainly not so inadequate as to be an unreality. I think therefore that this was a bona fide sale and purchase by the son, and that no succession duty is payable.

Now what, in the present case, is the substance of the transaction in question? In form, the transaction is a contract for substantial consideration and not a gift at all, but that is merely one of a number of facts that must be taken into account and it can be outweighed by the other circumstances. The deceased was a man 67 years of age with a son and a daughter. He had property worth somewhere in the vicinity of $700,000. His will, made some months earlier, shows his disposition to benefit his son and daughter in the event of his death, but he was contemplating re-marriage, an event which would revoke his will and, at the same time, bring into his family another person who might be expected to be an object of his bounty. A substantial portion of his property—amounting to nearly half of it—was made up of the land and building in which Adilman's Limited carried on its business and in common shares of that company. His son and daughter owned the remaining issued common

[1] [1925] 2 K.B. 429.

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shares of that company. The real estate and shares which he held were producing a substantial income. In this setting, "for legitimate family reasons", which I would infer included the safeguarding to the son and daughter of complete ultimate control of this particular portion of his property, the deceased made an agreement to transfer that portion of his property to Edison Wholesale Limited, a company whereof his son and daughter were the only beneficial shareholders, in consideration of an annuity which, in itself, was substantially less than the income which the property in question was producing, the present value of the annuity being much less than half the value of the property transferred. It seems a fair assumption that the transferee would not expect to be obliged to dip into its own resources to pay any portion of the annuity or to use for that purpose the capital of the property transferred but that, on the contrary, the transferee would enjoy a considerable benefit immediately from the income of the property, even after paying the annuity therefrom. That this transaction was not dictated by commercial considerations is perfectly clear, and I would also infer that the object of the deceased in entering into it was not really to acquire the annuity in place of or for this property but to do something for the benefit of his son and daughter. The circumstance that the transaction was entered into with a corporation, rather than with the son and daughter, militates to some extent in favour of the transaction being in substance what its form suggests, but there is no reason to doubt that, in law, a gift may be made to a corporation and, as the only beneficial shareholders of Edison Wholesale Limited were the son and daughter of the deceased, for the purposes of the present problem I see in the fact that the transaction was made with the corporation little reason to differentiate it in substance from a similar transaction made with the son and daughter. On the whole, therefore, I am of the opinion that the transaction in question was a "gift" with a benefit to the donor provided "by contract", within the meaning of s. 3(1)(*d*) of the *Dominion Succession Duty Act*. It is perhaps unnecessary that I should go any further, but I also

think that the property was not "transferred for partial consideration" within the meaning of s. 3(1)(*k*), since the obtaining of the consideration was not, in my view, the real object of the transaction.

The appeal, accordingly, fails, and it will be dismissed with costs.

Judgment accordingly.