Privy Council Appeal No. 89 of 1918.

The Toronto General Trusts Corporation - - - - *Appellants*

v.

The King - - - - - - - - *Respondent*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 11TH APRIL, 1919.

Present at the Hearing:

VISCOUNT HALDANE.
VISCOUNT FINLAY.
VISCOUNT CAVE.
LORD DUNEDIN.
LORD SHAW.

[*Delivered by* VISCOUNT CAVE.]

This is an appeal by the administrator with the will annexed of Richard Grigg, deceased, from a judgment of the Supreme Court of Canada, affirming a judgment of the Supreme Court of the Province of Alberta, Appellate Division, which in its turn affirmed a judgment of Mr. Justice Hyndman upon a special case submitted to him. The effect of the judgments under appeal was to declare that certain mortgages secured upon land in the Province of Alberta which were held by the testator, who was domiciled and died in the Province of Ontario, were subject to succession duty in the Province of Alberta, and the question raised by this appeal is whether they were in fact so subject.

By section 92 of the British North America Act, 1867, it is provided that in each province the Legislature may exclusively make laws in relation (among other matters) to direct taxation

within the province. By section 7 of the Succession Duties Act of Alberta (Alberta Statutes of 1914, Cap. 5) it is enacted that :—

> " Save as otherwise provided, all property of any person situate within the province and passing on his death shall be subject to succession duties "

at certain rates therein set forth. By section 3 of the same Act the word " property " is defined as including real and personal property of every description. It was clearly within the power of the Legislature of the Province of Alberta to pass the Succession Duties Act above referred to, and the only question is whether the mortgages referred to in these proceedings were at the date of the testator's death " situate within the province."

The mortgages in question were executed and registered under the Land Titles Act of Alberta (Alberta Statutes of 1906, Cap. 24). By section 23 of that Act it is enacted as follows :—

> " Instruments registered in respect of or affecting the same land shall be entitled to priority the one over the other according to the time of registration and not according to the date of execution ; and the registrar, upon registration thereof, shall retain the same in his office, and so soon as registered every instrument shall become operative according to the tenor and intent thereof, and shall thereupon create, transfer, surrender, charge or discharge, as the case may be, the land or the estate or interest therein mentioned in the instrument."

By section 60 of the same Act it is enacted that mortgages shall be in a form set out in the schedule to the Act. This form does not provide for sealing, but a seal was in fact affixed to each of the mortgages in question in this case. No express provision is made in the Act for the execution of mortgages in duplicate, but the language of sections 63 and 65 (5) appears to assume that a duplicate will be executed and retained by the mortgagee, and this appears in fact to be the general practice. In the present case each of the mortgages was executed in duplicate, one of such duplicates being delivered to and retained by the registrar in accordance with the statute, and the other being delivered to the mortgagee and retained by him. At the date of the death of the mortgagee the duplicate mortgages delivered to him were in his possession at his residence in Ottawa, in the Province of Ontario, where he died, while those deposited at the registry were, of course, in the possession of the registrar in Alberta.

A claim to succession duty having been made, the administrator contended that the mortgages in question were, at the date of the testator's death, situate, not in Alberta, but in Ontario, and supported his contention by reference to the rule of law which provides that, whereas a simple contract debt is to be deemed to be within the area of the local jurisdiction within which the debtor for the time being resides, the locality of a specialty debt is the place where the specialty is found at the time of the creditor's death (" Wentworth on the Office of Executor," ed. 1720, p. 46 ; " Bacon's Abridgment," tit. Executors and Administrators (E), p. 462 ; *Gurney* v. *Rawlins*, 2 M. & W. 87 ; *Commissioner of Stamps* v.

Hope, L.R. 1891, A.C. 476). This rule has been recognised in numerous decisions both here and in the Dominion of Canada, and the general principle must be regarded as well settled. But in the present case there is a difficulty in applying the rule, owing to the fact that each of the mortgages was created and evidenced by duplicate deeds, and that at the date of the testator's death one of such deeds was in the Province of Ontario and the other in the Province of Alberta. An attempt was made to show that, having regard to the terms of the Land Titles Act, the duplicate of each mortgage held by the testator was the principal or dominant instrument, but in their Lordships' opinion no such ascendancy was made out, and the deed produced to and retained by the registrar under the provisions of the statute was not of less importance than the duplicate delivered to and retained by the mortgagee. In these circumstances any argument which goes to show that, under the rule which fixes the locality of a specialty debt in the place where the specialty is found, the debts in this case were situate in Ontario at the testator's death, is equally effective to prove that they were situate in Alberta : and yet it is plainly impossible to hold that they were situate in both provinces at once. A similar difficulty in applying the rule may arise in any case where an obligation is created or evidenced by two or more deeds of collateral value which are found in different jurisdictions : and the truth appears to be that in such cases the rule gives no guidance on the question of the locality of the debt, and regard must be had to the other circumstances of the case.

In the present case the circumstances, other than the single fact of the presence of a duplicate deed in the Province of Ontario, are all in favour of the conclusion that the mortgages were situate in Alberta. It is established by formal admissions made in the course of the proceedings that at the date of the execution of the mortgages the mortgagors were resident in the Province of Alberta, and that the place of payment of the debt was in each case in the Province of Alberta. The debts were secured, not only by the personal obligation of the mortgagors, but also by mortgages which created interests in lands in Alberta, and this fact cannot be put out of account (see *Walsh* v. *The Queen*, L.R. 1894, A.C. 144, 148). The mortgages are executed in a form prescribed by the Land Titles Act of Alberta, and derive their force and effect from the terms of that statute, and this is not less the case because a seal has been voluntarily affixed to each mortgage. The administrator cannot enforce any of his securities without procuring registration of his succession in the Alberta registry and relying on documents registered in that province ; and though the debtors may be prepared to pay the debts secured without putting the administrator to the trouble of suing or of realising his securities, it is plain that they would not do so except on the terms of the mortgaged lands being released in accordance with Alberta law. In short, the administrator cannot recover the debts or have the benefit of his securities

without claiming the protection and assistance of the Alberta law; and the case falls within the test laid down by Lord Cranworth in *Wallace* v. *The Attorney-General* (L.R., 1 Ch. 1, 9) as to the limitation on the imposition of succession duty, namely, that such a duty must be considered to be imposed only on those who claim title by virtue of the law of the taxing State.

When all these circumstances are taken into account, the only possible conclusion appears to be that the mortgages in question in this case were at the testator's death situate in Alberta. This conclusion is in accordance with the decisions of the Board in the cases of *Walsh* v. *The Queen* (L.R. 1894, A.C. 144), *Henty* v. *The Queen* (L.R. 1896, A.C. 567) and *Payne* v. *The King* (L.R. 1902, A.C. 552), and is not inconsistent with the judgment in *Commissioner of Stamps* v. *Hope*. It is indeed suggested that, as the mortgage referred to in the last-mentioned case was registered in New South Wales, it must be assumed that it was executed in duplicate, and that one original was filed in the office of the Registrar-General of New South Wales in accordance with section 35 of the Real Property Act of New South Wales (26 Vic. No. 9), and accordingly that the decision governs the present case. But no reference to such an execution in duplicate is found either in the record of the case, in the arguments of counsel, or in the judgment of the Board; and the case cannot therefore be taken as an authority on the question of the locality of a deed of which duplicates are found in two different jurisdictions.

For the above reasons their Lordships have come to the conclusion that this appeal should be dismissed.

Their Lordships understand that it has been agreed by the parties that they will bear their own costs of the appeal. No order therefore will be necessary respecting them.

Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

THE TORONTO GENERAL TRUSTS CORPORATION

v.

THE KING.

DELIVERED BY VISCOUNT CAVE.

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