

Privy Council Appeal No. 74 of 1922

The United States Fidelity and Guaranty Company - *Appellants*

v.

The King and another - *Respondents*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 27TH JULY, 1923.

Present at the Hearing :

EARL OF BIRKENHEAD.

VISCOUNT HALDANE.

LORD SUMNER.

SIR HENRY DUKE.

[*Delivered by* SIR HENRY DUKE.]

This is an appeal from a judgment of the Supreme Court of Canada affirming judgments of the Court of Appeal and Supreme Court of British Columbia whereby upon a bond given to secure payment of Succession Duty under a statute of British Columbia, \$44,287.50 was found payable by the obligors of the bond, the now appellants and one Lorenzo Joseph Quagliotti. Two questions are involved which depend for their decision upon the true construction of the bond upon which the action in the Supreme Court was founded and the effect of certain sections of the statute in question, the Succession Duty Act, 1907.

Petronilla Quagliotti, wife of Lorenzo, died in May, 1913, having by her last Will, dated in April, 1913, devised and bequeathed all her real and personal estate to her husband and appointed him her sole executor. Quagliotti, as executor, applied in the Supreme Court for, and in due course obtained, a grant of probate of the Will.

The Succession Duty Act, 1907, provides for ascertainment upon the death of any person of the whole value of the property of such deceased person and payment out of or in respect of the same of a duty, similar in some respects to the estate duty which was imposed in the United Kingdom by the Finance Act, 1894, which duty by Section 10 of the statute is to be "deducted from the share of each person entitled to share in the estate." The duty is declared "payable at the death of the deceased." In order to its enforcement, the statute enacts that on any application for probate or letters of administration, the amount of the succession duty payable shall be determined in manner thereby directed and (1) immediate payment made, or (2) a bond given by the applicant or applicants with a surety or sureties, conditioned for "the due payment of any duty to which the property coming to the hands of the applicant or applicants may be found liable." The Act further provides, by Section 42, that any sums payable thereunder shall be recoverable by action in the Supreme Court.

The succession duty payable upon the estate of Petronilla Quagliotti was ascertained at \$44,287.50, the bond in question was taken for a penal sum of \$88,575, being, as the statute requires, 10 per cent. of the sworn value of the property of the testatrix, and the condition of the obligation was that :—

"Lorenzo Joseph Quagliotti, the executor of all the property of Petronilla Quagliotti . . . do well and truly pay or cause to be paid . . . any and all duty to which the property estate and effects of the said Petronilla Quagliotti coming into the hands of the said Lorenzo Joseph Quagliotti may be found liable under the provisions of the Succession Duty Act, within two years from the date of the death of the said Petronilla Quagliotti"

The personal property which passed under the Will was no more than \$500 ; and there were medical and funeral expenses which amounted to \$750. The expenses of obtaining probate, including probate duty and the costs incidental to the bond for succession duty, were therefore testamentary expenses which fell to be provided out of the real estate. This was valued by the executor in his affidavit to lead probate at \$886,000. The title of the executrix to the realty in question was incomplete for want of compliance with the law of the Province with regard to the registration of land titles. The true value at the time of the death was declared by the learned judge at the trial to have been no more than \$500,000.

Action was brought in 1920 by the Minister of Finance against the executor and his surety to recover the succession duty of \$44,287.50 and at the hearing two defences were raised— firstly that nothing had come to the hands of the defendant Quagliotti, within the meaning of the bond, and secondly that no property of Petronilla Quagliotti had been found liable to succession duty in accordance with the provisions of the Succession Duty Act. Evidence was also given to show that Quagliotti

when he valued the property of the testatrix for probate at \$885,750 was mistaken in various material particulars. The defences raised were overruled and judgment was given for the Crown, and so far as is material was affirmed upon appeal. In the Supreme Court of Canada the learned judges who heard the appeal to that Court were divided in opinion, three against three, and the appeal to the Supreme Court accordingly failed.

The meaning of the words in the bond "property estate and effects of the said Petronilla Quagliotti coming into the hands of the said Lorenzo Joseph Quagliotti" is purely a matter of construction. Whether the realty in question came to the hands of Quagliotti as executor or otherwise is a mixed question of law and fact. The contention of Counsel for the appellants upon the point of construction was that the words cited apply to the property only which came to the hands of Quagliotti as executor, that is to say, became by operation of law vested in him in his capacity of executor. Counsel contended also that, in the circumstances of the case, notwithstanding that Quagliotti as devisee under the will dealt with or disposed of the devised realty in various ways, yet in the absence of legal or equitable title in him which resulted from non-registration of title, no property could be said to have "come to his hands" in any accurate sense of the term.

Some limitation of the generality of the words in the condition which define the property subject thereto was contended for by Counsel for the appellants as resulting by necessary implication, and Mr. Tilley contended in support of the construction for which he argued that regard must be had to the nature of the application for which the bond was required, namely a grant of probate to an executor. He urged also that, so far as Quagliotti was concerned, the bond ought to be deemed to be so expressed as to bind him only as executor, its condition of defeasance being that he, "the executor," should pay such duty as is specified. It was therefore claimed that the generality of the words "the property, etc., of the said Petronilla Quagliotti coming into the hands of the said Lorenzo Joseph Quagliotti," should be restricted so as to limit the obligation enforceable under the bond to the payment of duty on property coming to Quagliotti in his named representative capacity.

What was called a strict construction was also contended for on the grounds that the statute prescribing the making of the bond and its form, the Succession Duty Act, is a taxing statute, and that the Crown as the obligee ought as between two alternative possible constructions to be held bound by that which should be found the more favourable to the obligor. Further, the appellants' position as surety was relied upon.

On the part of the respondent the argument was that the language of the bond upon a fair attention to its terms is free from ambiguity, that the description of Quagliotti as executor has no necessary or proper effect which requires or warrants the introduction of the words "as executor" to narrow the

description of property coming to him upon which the effect of the condition depends, and that the provisions of the Succession Duty Act which regulate the taking of a bond from any applicant for probate or letters of administration are such that the intention of the Act would in many cases be defeated by introducing the suggested words of limitation.

Where there are alternative possible constructions of an instrument such as is here in question, it is proper and indeed necessary to refer to the statute by which the form and purposes of the instrument are prescribed in order to make sure that the construction determined upon is consistent with the provisions of the statute.

The object of the Succession Duty Act is to secure to the Crown by a charge which attaches to the whole of any estate passing upon death of a domiciled subject a fixed proportion of the entire value of the estate. The relative duty is directed to be deducted from the share of each person entitled to share the estate. Executors or administrators or trustees are empowered to sell the property of the deceased, whether realty or personalty, in order to provide funds for payment of the duty, in the same manner "as they may be enabled by law to do for the payment of debts of the testator." As a condition precedent to any grant of probate or letters of administration, the Court having jurisdiction must require (1) payment of the whole amount of the duty, or (2) the making by the applicant with surety or sureties of a bond such as is here in question. Such bond however, is defeasible by due payment of the duty to which the property coming to the hands of the applicant or applicants may be found liable.

The Succession Duty Act contemplates that the obligor of the bond given to obtain probate may be a person who is not liable for the whole duty payable in respect of the estate, and this conclusion makes it proper to consider the possible position in respect of liability to duty of some of the classes of applicants who may properly claim probate or letters of administration. Where there is a Will, then upon the death or renunciation of an executor, administration with the Will annexed may be claimed by divers classes of parties having interest. Where there is intestacy, the classes of possible applicants are at least as numerous. Devisees and legatees may obviously be among the applicants.

The construction of the bond required under the statute should therefore, if the terms of the statute admit of it, be wide enough to render the statutory form applicable and its possible operation effective to secure the object of the legislature, namely the satisfaction of the claim of the Crown as a first charge upon the estate and every distributive share of it.

Counsel for the Crown properly pointed out that the construction of the bond for which the appellants contend would have the effect of enabling the executor in a case like the present to obtain

a grant of probate without paying or securing to the Crown any sum whatever in respect of Succession Duty. This certainly was not the intention of the legislature.

Upon consideration of the bond in the light of the statute, clear reasons appear for the use in the condition for defeasance of words comprehensive enough to secure that the applicant who makes a bond shall secure payment of the duty upon so much of the estate as comes to his hands by means of the Will proved or the intestacy established in the particular case.

It was not conceded by Counsel on the part of the Crown that in the circumstances of this case the real estate of the testatrix, such as in fact it was, which was devised to him had not come to the hands of Quagliotti as an executor, he being alike devisee and executor. This question does not need to be determined. It is enough to say that property of the testatrix could be said to come to her executor as executor whenever by virtue of the grant of probate he became able to exercise in respect of the realty any disposing power belonging to the legal personal representative.

Whether in this case the realty came to the hands of Quagliotti as executor is not the decisive question.—Upon the true construction of the bond it must be held to have come to his hands in the fullest sense, that namely of ownership under the Will; whereof by means of the bond he obtained probate; and so to be property in respect of which Succession Duty must be paid before the condition of the bond can be held to have been performed.

Upon the questions whether before action brought the property devised to Quagliotti by the Will had been found liable to succession duty so as to establish cause of action in the Crown and whether the amount of the duty had been duly ascertained, the true view of the case depends upon Sections 21 to 23; Sections 29 to 33 and Section 43 of the Act. Under Section 22, the Auditor General was duly authorised by the Minister of Finance to determine, and did determine, the amount of Succession Duty on the property devised to Quagliotti, less a small deduction for medical and funeral expenses. It was contended for the appellant that this was not a determination binding upon Quagliotti and that in any view it could not bind the appellant corporation, his surety. The procedure under Sections 29–33 admittedly has no application, but Section 43 was relied upon for the appellants as conferring upon a Judge of the Supreme Court authority upon motion or petition—in this case—to determine both liability and amount. The powers of Section 43 were not invoked at any material time, if a resort to them was at any time open, as of right, to Quagliotti or the appellants. The Auditor General did, in fact, duly determine the amount of the duty upon the property in question, at the amount at which Quagliotti valued it. There is no valid ground for impugning the validity of the determination. Certainly the too sanguine estimate made by Quagliotti afforded no such

ground. Some misapprehension arose at the trial as to whether the determination in question had been made after resort to the means provided by Sections 29-33, but this is immaterial, for the determination in fact made was made by agreement with Quagliotti. It is not open to challenge now by his guarantors.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.





In the Privy Council.

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THE KING AND ANOTHER.

DELIVERED BY SIR HENRY DUKE.

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