Privy Council Appeal No. 43 *of* 1938

Michael Burns - - - - - - *Appellant*

v.

Mabel Burns - - - - - - - *Respondent*

FROM

THE COURT OF APPEAL FOR BRITISH COLUMBIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 17TH OCTOBER, 1938

Present at the Hearing :

LORD ATKIN
LORD THANKERTON
LORD RUSSELL OF KILLOWEN
LORD ROCHE
SIR LYMAN POORE DUFF
(Chief Justice of Canada)

[*Delivered by* LORD THANKERTON]

The appellant, who is plaintiff in the action as administrator of the estate of Dominic Burns, deceased, and in his own right, appeals from a judgment of the Court of Appeal for British Columbia dated the 11th January, 1938, affirming the judgment of Robertson J., dated the 26th May, 1937, which dismissed the appellant's action against the respondent as administratrix of the estate of James Francis Burns, deceased, and in her own right, in which the appellant sought revocation of the grant, whereby letters of administration of the estate of James Francis Burns issued out of the District Court of the District of Southern Alberta were resealed in the Province of British Columbia on the 22nd September, 1936, and sought a grant of administration of the estate of James Francis Burns to the appellant, an uncle of the deceased, as his next-of-kin.

Dominic Burns, a brother of the appellant and an uncle of James Francis Burns, died on the 19th June, 1933, intestate and without issue, and domiciled in British Columbia. James Francis Burns then became entitled to a share of the estate as one of the next-of-kin. The appellant was granted letters of administration of the estate of Dominic Burns on the 19th July, 1934.

James Francis Burns, being then domiciled in the Province of Alberta, died at Calgary on the 31st December, 1935, intestate and without leaving issue. The respondent, as his widow, was appointed administratrix of his estate by letters of administration issued out of the District Court of the District of Southern Alberta on the 25th April, 1936, which were resealed in British Columbia on the 22nd

September, 1936. Thereafter the respondent instituted proceedings, as lawful widow and administratrix of her husband's estate, for an account from the appellant of his administration of the estate of Dominic Burns, which was of considerable amount, and these proceedings were held over to enable the appellant to bring the present action.

The appellant based his claim for revocation of the resealing of the letters of administration granted to the respondent on two separate and alternative grounds, vizt., (1) that at the time when the respondent and James Francis Burns, on the 22nd March, 1923, went through a form of marriage at Vancouver, the respondent was the lawful wife of one Melvin Stuart Huggins, who is still living, and that, accordingly, the respondent is not the lawful widow of James Francis Burns, and (2) that at the time of the death of James Francis Burns, the respondent had left him and was then living in adultery and that she was not entitled to take any part of her husband's estate, by reason of the provisions of section 19 (1) of the Alberta Intestate Succession Act, 1928, cap. 17, which is in identical terms with section 127 (1) of the Administration Act, British Columbia 1925, cap. 2, and provides as follows:—

> "If a wife has left her husband and is living in adultery at the time of his death, she shall take no part of her husband's estate."

The first ground of the appellant raises a question of fact as to the alleged marriage of the respondent to Huggins, and the Courts in Canada have concurrently found against the appellant, having accepted the evidence of the respondent, despite her cross-examination, on which the appellant relied, no independent evidence of any such marriage having been submitted by the appellant. Their Lordships see no reason for reconsidering the concurrent findings of the Courts below.

The appellant, as regards his second ground, raised two questions of construction of the statute, and a question of burden of proof. The findings of the trial Judge on this branch of the case are as follows:—

> "Now the facts in this case are that prior to her marriage to Burns the defendant had lived in adultery with Huggins up to about 1919. There is nothing to show what her actions were between that date and 1923 when she married Burns with whom she lived for about three years and then separated. It is shown that she had a child in 1931. It is also shown that she went into a mental hospital in 1934 and continued there until 1935 and that she was suffering from neuro-syphilis. There is nothing to show when she became infected with the disease mentioned or by whom she was infected; in fact it might have been hereditary. There is nothing to show any improper conduct on her part since she left the hospital."

The appellant maintained, in the first place, that if the wife had left the husband, and had lived in adultery prior to the husband's death, the statute would apply, even though she was not living in adultery at the time of his death Their Lordships find it difficult to take this contention

seriously, and their Lordships agree with the trial Judge that "the statute means exactly what is says, and that it means a state of affairs existing at the death of the husband."

The appellant next maintained that if it be established that the wife had left the husband and had been living in adultery prior to the husband's death, the burden of proof was shifted and it would be for the wife to prove that the adulterous life had not existed at the time of the husband's death. Their Lordships are of opinion that this contention is equally untenable. It is for the appellant to prove the facts necessary to establish the statutory forfeiture. As the learned trial Judge states, there must be evidence from which the Court can draw the inference that the wife was living in adultery at the time of her husband's death. If, for instance, association with a man other than the husband was proved to have been adulterous during a period prior to the death, and the association was proved to have been still continuing at the time of the husband's death, the Court might find itself in a position to infer that the adulterous nature of the association still continued, but the appellant's contention necessarily goes far beyond this, as the facts of the present case admittedly afford no material for any such inference, since no such association is suggested to have been proved to exist at the time of the husband's death, or for a material period prior thereto.

The appellant having thus failed in his first two contentions as regards the statutory forfeiture, he has failed to establish that the respondent was "living in adultery at the time of her husband's death," and the forfeiture cannot apply. It therefore becomes unnecessary to consider the appellant's third contention, which relates to the construction of the words "has left her husband" in the section, and their Lordships express no opinion on this matter.

The appeal fails, and their Lordships will humbly advise His Majesty that it should be dismissed with costs and that the judgment of the Court of Appeal of British Columbia should be affirmed.

(11874—3A) Wt. 8168—30 120 11/38 P. St. G. 338

In the Privy Council

MICHAEL BURNS

v.

MABEL BURNS

DELIVERED BY LORD THANKERTON

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