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*May 2, 3, 31.

UNITED STATES FIDELITY AND GUARANTY COMPANY (DEFENDANT) ..... APPELLANT;

AND

HIS MAJESTY THE KING (PLAINTIFF) ..... RESPONDENT;

AND

L. J. QUAGLIOTTI (DEFENDANT).

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Succession Duty—Guaranty bond—Executor also devisee—Application for bond by executor—"Coming into the hands"—"Succession Duty Act," R.S.B.C., c. 217, ss. 2, 23, 24, 29, 36, 37, 42, 43.—"Administration Act," R.S.B.C., c. 4, ss. 74, 75.

Action was brought by the respondent upon a bond given by the defendant Q., executor and sole devisee of the estate of P. Q. and by the appellant as his surety, for the payment of succession duties. The bond stipulated that "the condition of this obligation is such that if L. J. Q., the executor of all the property of P. Q., * * * do * * * pay to (the respondent) any and all duty to which * * * the * * * estate * * * of the said P.Q. coming into the hands of the said L. J. Q. may be found liable under the 'Succession Duty Act' * * * , then this obligation shall be void * * * ."

Held, per Duff, Anglin and Mignault JJ.—According to the terms of the bond, the appellant would become liable under it only if the real property came into the hands of Q. as executor. Idington and Brodeur JJ. *contra*.

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*PRESENT.—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

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Per Duff, Anglin and Mignault JJ.—Although section 37 of the "Succession Duty Act," gives the executor of an estate the power to sell so much of the real estate devised as would enable him to pay succession duty on it, such real estate is not thereby deemed to have "come into the hands" of the executor within the meaning of the terms of the bond which follow the statutory form. (Sect. 24 of the Act). Davies C.J. and Brodeur J. *contra*. *Ianson* v *Clyde* (31 O. R. 579) dist.

Per Davies C. J., Idington and Brodeur JJ.—Upon the terms of the bond the appellant must be held to be liable, as Q.'s guarantor, for succession duties on real and personal property of the estate.

Judgment of the Court of Appeal (30 B.C. Rep. 440) affirmed on equal division of this court.

APPEAL from a judgment of the Court of Appeal for British Columbia (1), affirming the judgment of Gregory J. at the trial (2) and maintaining the respondent's action upon a bond given to secure the payment of succession duty upon an estate.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

Tilley K.C. and *H. B. Robertson K.C.*, (*L. B. Campbell* with them) for the appellant.

Lafleur K.C. for the respondent.

THE CHIEF JUSTICE.—I would dismiss this appeal for the reasons stated by Mr. Justice Galliher when delivering the judgment of the Court of Appeal and with which reasons I fully concur.

IDINGTON J.—This is an action brought by the respondent under the 42nd section of the "Succession Duty Act," upon a bond given, 29th July, 1912, by

(1) 30 B.C. Rep. 440; [1922] 1 W.W.R. 389; 63 D.L.R. 469.

(2) [1921] 2 W.W.R. 697.

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the defendant, Quagliotti, the executor and sole devisee of the estate of his late wife, and the appellant ash is surety, for the payment to the respondent of the succession duties under the said Act.

The bond was given by them in the penal sum of $88,575 and the condition thereof is as follows:—

> The condition of this obligation is such that if Lorenzo Joseph Quagliotti, the executor of all the property of Petronilla Quagliotti late of the City of Victoria, in the Province of British Columbia, deceased, who died on or about the 20th day of May, 1913, do well and truly pay or cause to be paid to the Minister of Finance of the Province of British Columbia for the time being, representing His Majesty the King in that behalf, 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, or such further time as may be given for payment thereof under the provisions of said Act, or such further time as he may be entitled to otherwise by law for the payment thereof, then this obligation shall be void and of no effect, otherwise the same to remain in full force and virtue.

The said Quagliotti applied to the Supreme Court of British Columbia for a grant of letters probate of the will of his said late wife, and as required by the said Act and the "Administration Act" and rules made thereunder, made the required affidavit estimating the value of the property of deceased at the date of her death on the 29th of May, 1913, at the sum of $886,000, as set forth in the statutory inventory annexed thereto.

That was referred by the registrar of the court to the Minister of Finance who duly authorized the Auditor General to determine the amount of the succession duty thereon.

The duty of verifying same was assigned to one Burdick who reported thereupon a slightly less value than the said sum, and thereupon the Auditor General accepted the said valuation of Quagliotti and

determined that the succession duties should be the sum of $44,287.50, and directed the said registrar to collect the said sum as provided by sec. 23 of the Act, and sent him his consent to the issue of letters probate.

The said Quagliotti not having the cash availed himself of the privilege given by sections 23 and 24 of the said "Succession Duty Act," allowing the authorities to be satisfied by such a guarantee bond as was given as set forth above.

Thereupon the probate of the said will was granted as prayed for in consideration of the said bond having been given, but no payment having been made of the succession duty as above determined to be the proper amount; hence this action.

The several defences set up may be briefly condensed into the one that the property had fallen in value and, in fact, never had the extreme value the executor had set up, and the Auditor General had assented to, no doubt with the knowledge of the appellant.

The learned trial judge held, and I think rightly, that the appellant is clearly liable upon its bond, and this has been upheld by the Court of Appeal.

A great deal of unnecessary confusion has been brought into the case both here and in the courts below by the appellant's contentions, first, that the amount had not been finally determined by what had transpired as related above, because there was no commissioner appointed to determine same, and next, that the said Quagliotti was only executor and it was only what came to his hands as such upon or in respect of which the appellant is liable. In short, as the entire estate (except a trifling five hundred dollars of personalty) consisted of real estate, the appellant was not liable at all, according to that contention.

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If we apply a little general knowledge of the world and the business therein, we must assume that the appellant was paid on the basis of the amount involved in this bond as guarantor and not otherwise, and that it certainly did not intend to be taking the money paid it for doing nothing but writing out the bond and application therefor, which would be the case if its present contention that there never was any liability incurred be correct.

I hold that all parties concerned, by their conduct towards each other, agreed that the amount determined by the Auditor General was to be and consequently remained the correct amount of succession duty as intended by the Act that it should, unless and until otherwise determined by one or other proceeding which the Act furnishes as a means of substituting another amount.

In the first place the Crown is sometimes imposed upon by a fraudulent or mistaken estimate leading up to the consent to granting of probate.

There is given by the 29th and following sections of the "Succession Duty Act" a means of rectifying this by appointment of a commissioner to inquire and proceed as directed under the "Public Inquiries Act" and the relevant sections of the "Succession Duty Act."

No occasion has arisen therefor herein, hence all argument based thereon is, I respectfully submit, but idle confusion.

It matters not whether the party called in to assist the Auditor General is, in the ordinary speech of those concerned, called a commissioner or agent, or aught else. That furnishes no excuse for the pretension that the power of the Crown to so investigate must be invoked and exercised by it as a necessary preliminary to any liability upon the bond in question herein.

The converse case of an executor or administrator having been misled into an over estimate, or having misunderstood the operation of the Act, or of any other person concerned being erroneously held by the executor, or others concerned, the proper party to pay any part of the duty is amply provided for by section 43 of the Act, which reads as follows:—

> 43. A judge of the Supreme Court shall also have jurisdiction upon motion or petition, to determine what property is liable to duty under this Act, the amount thereof, and the time or times when the same is payable, and may himself or through any reference exercise any of the powers which by sections 29 to 31, both inclusive, of this Act are conferred upon any officer or person.

This never was invoked by the parties concerned herein though it was the proper remedy if any unjustifiable mistake made as against the executor or his surety the appellant.

If there is anything in the pretension set up in the defence, that seems to have been the proper and only mode of relief and enables the resort to all the powers conferred on the Crown as already pointed out when it has ground of complaint.

Independently of either of these proceedings the respondent is enabled by section 42 to sue as has been done herein. And in the event of doing so the proceedings authorized by sections 29 to 32 seem to be excluded from operation by the latter part of the section, which reads as follows:

> 42. Any sum payable under this Act shall be recoverable with full costs of suit as a debt due to His Majesty from any person liable therefor by action in the Supreme Court, and it shall not in any case be necessary to take the proceedings authorized by sections 29 to 32, both inclusive, of this Act.

Unless and until the amount determined by the Auditor General and in compliance therewith made

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the condition upon which probate was granted, has been displaced by either of the said proceedings provided by the Act, I hold it is conclusively established.

The contention that the executor as such, or his surety, is not liable because the executor has, as such, only to deal with personalty, seems wholly unfounded in face of the express language of the bond and manifold provisions in the "Administration Act," extending his powers and duties beyond those originally devolving on him, and especially sections 74 and 75 cited in illustration of what he can do as pointed out by Mr. Lafleur in relation to the law created by the "Succession Duty Act."

I am, however, of the opinion that the plain meaning of the bond in question made it the duty of the executor to exercise his powers of devisee and meet thereby the obligations he entered into and that the appellant surety could at any time have insisted upon his furnishing the means thereby to relieve it.

I do not think it necessary or indeed quite proper to express herein any opinion as to the rights of the Crown to assert at any time and stage the lien declared by the Act.

If the contention made in that regard be correct, the right of subrogation given by the judgment appealed from can be attempted by appellant thereunder.

I think this appeal should be dismissed with costs.

DUFF J.—The bond is the bond required by the statute. The registrar has no authority to exact and the applicant was under no obligation to give a security of wider limits than required by the law. I agree with the view of the Court of Appeal that sec. 24 in prescribing that the bond shall be

conditioned for the due payment to His Majesty of any duty to which the property coming into the hands of the applicant * * * may be found liable

is imposing a condition which must be observed before the application is granted and since that is the subject of this provision the words "coming into the hands of the applicant" must be read as coming into his hands under the authority with which he is petitioning the court to clothe him. The condition of the bond is that as regards property acquired by him under the authority vested in him by the probate or the letters of administration, as the case may be, he is to be responsible for the payment of all duty to which that property is liable under the Act.

The sole remaining question is that arising under the contention of the respondent that this property came "into the hands" of the executor within the meaning of the condition.

Now it is quite clear that as executor he acquired no title to the testatrix' real estate. In that sense it did not come into his hands. But there is, it is contended, an authority conferred upon him—an authority (under sec. 37) to sell the real estate of the testatrix, for the purpose of paying the duty to which the property itself is liable—and that circumstance, it is argued, is sufficient to bring that property within the category of property to which the condition applies.

The construction of sec. 37 of the Act is not, I think, free from doubt. But for the purpose of deciding the question now raised I shall assume that it has the scope ascribed to it by the judgment of the Court of Appeal. It does then, we may assume, give authority to the executor to sell for the purpose mentioned. But it is surely a non-natural construction of the language to hold that property has come "into the

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hands" of an official or a person charged with the performance of duties merely because by statutory enactment he has been endowed with authority to sell for the purpose of paying a public charge upon it, an authority which has never been exercised. I think the construction is not an admissible one.

The appeal should be allowed and the action dismissed with costs.

ANGLIN J.—Having regard to the terms in which the statute (R.S.B.C., c. 217, s. 24) directs that the bond (to be furnished by the personal representative applying for probate or letters of administration) to secure payment of succession duties shall be conditioned, I agree with the interpretation put upon the bond of the appellant by the Court of Appeal, namely, that it secures payment of succession duties only upon property which came into the hands of its co-obligor in his quality as executor of his deceased wife. As real estate, the property in question came into the hands of Quagliotti not as executor but only as devisee of his wife. In interpreting the statute and the bond, in my opinion, the adventitious circumstance that Quagliotti was both executor and devisee must be put aside and the position of the executor and his surety considered as if the devise of the property had been to another person.

I incline to accept the contention of Mr. Tilley that the words "the said duty" in sec. 37 of the statute refer to the duty which a personal representative or trustee is by sec. 36 required to deduct, i.e., duty on "any estate, legacy or property in (his) charge or trust" which is subject to duty. I am, moreover, with great respect, unable to assent to the view that because the power to sell conferred on the executor

by s. 37 (assuming its applicability) would empower him to sell so much of the real estate devised as would enable him to pay the duty on it, that property can be said to have come in (or into) his hands as executor within the meaning of the bond sued upon and s. 24 of the statute. *Ianson* v. *Clyde et al.* (1), cited by Mr. Justice Galliher, seems to me to be clearly distinguishable. Although only for the purpose of enabling the personal representative to sell it to pay the debts of the *de cujus* the effect of the Ontario legislation there dealt with was to vest in him the title to the decedent's real estate *ad interim* and to postpone the vesting of it in the devisees or next-of-kin until the right of the personal representative thereto was determined. Sec. 37 of the British Columbia "Succession Duty Act" has no such effect.

There is no doubt force in the contention that ss. 23-4 prescribe that the security to be given shall be

> in a penal sum equal to ten per centum of the sworn value of the property of the deceased person,

including his real estate. *Prima facie* the object would seem to be to secure payment of succession duties on the real estate as well as on the personal property of the decedent. But we are here dealing with the obligation of the executor and his surety and it is trite law that the surety is entitled to the benefit of the most favourable construction of its obligation which the instrument embodying it reasonably admits of. Section 24 of the statute and the terms of the bond itself, as already indicated, in my opinion entitle the appellant to maintain that its obligation is restricted to the satisfaction of the respondent's claim for unpaid succession duties in respect of such of the property of the *de cujus* as

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came into the hands of Quagliotti in his capacity as executor of his deceased wife. The real estate devised to him did not come into his hands in that quality.

I would therefore allow this appeal with costs here and in the Court of Appeal and would direct the entry of judgment dismissing the action with costs.

BRODEUR J.—This is an appeal concerning a bond given under the provisions of sec. 23 of the "Succession Duty Act" of British Columbia as security for the payment of succession duty.

Mrs. Quagliotti died in 1913 and by her will she gave all her real and personal estate to her husband and appointed him her executor.

Having applied for letters probate Quagliotti filed an affidavit of value and relationship required by the "Succession Duty Act" in which it is shown that the estate was estimated at nearly a million dollars and was, with the exception of $500 of personal estate, composed of lands situated in the city of Victoria.

This inventory was accepted by the provincial authorities and Quagliotti gave a bond of the United States Fidelity and Guarantee Co. as security for the payment of the succession duty to which the property of the deceased might become liable.

The condition of the bond was that Quagliotti

> the executor of all the property of Petronilla Quagliotti * * * do well and truly pay * * * to the Minister of Finance of the Province of British Columbia for the time being representing His Majesty the King in that behalf any and all duty to which the property estate and effects of the said Petronilla Quagliotti coming into the hands of Laurenzo Joseph Quagliotti may be found liable under the provisions of the Succession Duty Act.

It is contended by the appellant company that the real estate never came in the hands of L. J. Quagliotti as executor but was in his hands as devisee.

The bond given was made according to the provisions of the Act. It is true that at first the bond describes Quagliotti as executor; but the condition is that payment be made "of all duty to which the property, estate and effects of the said Petronilla Quagliotti coming into the hands of her husband may be found liable." Whether this estate came into the hands of L. J. Quagliotti as executor or devisee does not make any difference, because the intention of the Act is that the security should cover all succession duties to which the estate might be liable.

Besides, by section 37 of the "Succession Duty Act" it is formally enacted that an executor has the power to sell so much of the property of the deceased as will enable him to pay the duty, and by section 2 the word *property* is defined as including real property of every description. Some similar powers are to be found in sections 74 and 75 of ch. 4 of the Revised Statutes of British Columbia, and show that the executors exercise authority with regard to both personal and real estate. If the executor, Quagliotti, had been only liable for succession duty on $500 for the personal estate, why should he and the appellant company give a bond for nearly $100,000?

The appellant also contended that the trial judge should have revalued the assets.

The value of those assets was declared by the affidavit of value and relationship filed by the applicants for letters probate. The Government authorities were satisfied with such a value and the bond was given in conformity with the decision of the authorities. In these circumstances, there was virtually an agreement which relieves us from reconsidering this question of value.

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It is to be expected, however, that the provincial authorities, when they come to consider the case, will not forget the suggestion which has been made by the court below as to the advisability, in view of the peculiar circumstances of the case, of reducing the amount for which they obtained judgment.

The appeal should be dismissed with costs.

MIGNAULT J.—The action of the respondent is on a bond for succession duties given by the defendant, now appellant, and by one Lorenzo Joseph Quagliotti, who was also a defendant. The respondent sets up the bond and alleges that the succession duties have not been paid and asks for judgment for $44,287.50, being the succession duties due the province of British Columbia on an estate of which Quagliotti was sole devisee and testamentary executor under the will of his wife, and which estate Quagliotti, in his affidavit, accompanying his application for probate, valued at $885,750.00. Among other defences, the appellant alleges that the property never came into the hands of Quagliotti as executor of his wife's estate, and further, in the alternative, that the valuation was made by Quagliotti by mistake and inadvertence, that the property was valueless or its value was grossly exaggerated, and asks that the amount of the duty be ascertained by the court.

As briefly as possible, I will say that the "Succession Duty Act" of British Columbia requires that an applicant for probate shall make and file with the registrar of the court two duplicate original affidavits of value and relationship, with inventories annexed. One of these originals is sent by the registrar to the Minister of Finance at Victoria, who authorizes the Auditor General to determine the amount of succession

duty and forwards a statement of the same to the registrar. The latter then requires immediate payment of the amount due or security therefor to be given by bond. This bond, as stated by section 24 of the Act, is in a penal sum equal to 10% of the sworn value of the property of the deceased liable to succession duty; it must be executed by the applicant or applicants and two or more sureties to be approved by the registrar, and is conditioned for the due payment to His Majesty of any duty to which the property coming to the hands of the said applicant or applicants may be found liable.

The bond sued on is by its terms a promise to pay $88,575.00, which is 10% of $885,750.00, the valuation mentioned in the affidavit, and the condition of the obligation is that if Lorenzo Joseph Quagliotti, the executor of all the property of Petronilla Quagliotti, pays to the Minister of Finance the duty to which the property, estate and effects of the said Petronilla Quagliotti coming to 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 death of Petronilla Quagliotti, or such further time as may be given, the obligation shall be void and of no effect, otherwise the same to remain in full force and virtue. This bond follows the statutory form.

Although the non-payment of succession duty by Quagliotti, by the terms of the bond, renders the sum of $88,575.00 payable, the claim of the Crown is for $44,287.50, the alleged amount of the succession duty, with interest, the respondent stating, in the indorsement on the writ, that the bond was entered into to secure the succession duty. This construction of the bond carries out the intention of the statute

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which, when the applicant for probate does not immediately pay the succession duty, requires this security as to all property coming to the hands of the applicant liable for the payment of the succession duty. I will therefore treat this bond as being security for the payment of the succession duty. This payment, as I have said, is all that the respondent demands. The main ground of defence of the defendant is that Quagliotti, as executor of his wife's estate, was the applicant for probate, that this bond was given by him and the appellant to secure the payment of any duty to which the property coming to the hands of the applicant, i.e., Quagliotti as executor, might be found liable, that none of this property came to the hands of Quagliotti, as executor, and consequently the condition of the bond was not fulfilled.

The Court of Appeal construed the bond as being conditioned on the property coming to the hands of Quagliotti as executor. The learned trial judge found that Quagliotti, who was devisee of the property which principally consists in real estate, took possession of the property, managed it and received the profits. He was, however, not registered as owner.

The question is whether, assuming, as I think we must assume, that the condition of the bond was that the property should come to the hands of Quagliotti *qua* executor, this possession by Quagliotti as devisee fulfils this condition.

Undoubtedly the appellant, being a surety under this bond, is entitled to the most favourable construction which can be placed on its bond. The construction which I adopt conforms strictly to section 24 of the statute which must govern the interpretation of the bond it requires from the applicant, and it is only when the property comes to the

hands of the applicant that the amount of the bond becomes payable. Here it never came to the hands of the applicant, the executor, for, as Mr. Justice Galliher, who rendered the judgment for the Court of Appeal, states:

> under our law in British Columbia real estate did not, at the time of Mrs. Quagliotti's death, devolve upon the executor.

The possession taken by Quagliotti therefore was and could only be as devisee under the will. It is true the executor and the devisee were in fact the same person but, in law, the situation is the same as if the devisee and the executor were different persons. And although, as Mr. Justice Galliher observes, the executor had the power to sell the lands of the testator to pay the succession duty, I do not think that the mere existence of this power would warrant us in saying that this property came to his hands. The learned judge cites the case of *Ianson* v. *Clyde* (1), where Chancellor Boyd explains the meaning of the words "in the hands of the executors," but the learned Chancellor was not construing a statute like the one in question but merely discussing the effect of a judgment which had been rendered by the county court against the property in the hands of the executors, and I do not feel bound by his definition.

I may add that were I convinced that any obligation arises under this bond, I would not grant the respondent the amount of succession duty demanded. The learned trial judge found that the gross value of the property was $500,000, the valuation in the affidavit being the result of the boom in the real estate prevailing in 1913. The learned judge, if the bond was obligatory on the appellant, should, in my opinion,

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have based the amount of the succession duty on this value and not on the value stated by obvious mistake by Quagliotti's affidavit. Both courts were under the erroneous impression that a commissioner was appointed under the Act to value this property and that Quagliotti had failed to appeal from his award. No commissioner, the parties admit, was ever named. Under all the circumstances, I think the learned trial judge could fix the valuation of the property notwithstanding the valuation in the affidavit, and the least that can be said is that no higher valuation should have been considered than $500,000.00.

But, in my opinion, no obligation exists under the bond and I would allow the appeal with costs throughout and dismiss the respondent's action.

Appeal dismissed without costs.

Solicitors for the appellant: *Robertson, Heislerman & Tait.*

Solicitor for the respondent: *W. D. Carter.*