HIS MAJESTY THE KING.....APPELLANT;

AND

CALEDONIAN INSURANCE COMPANY.RESPONDENT.

1924

*Feb. 5, 6.
*Mar. 21.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Statute—Succession duty—Probate—Surety bond—Lien—"Succession Duty Act"—R.S.B.C., c. 217, ss. 20, 50.

When under the "Succession Duty Act" of British Columbia, as a condition of granting probate, a surety bond in favour of the Crown for payment of the succession duty has been obtained by the executor and accepted by the Crown, the executor *virtute officii* is clothed with authority to distribute the estate and to receive and give a good discharge for moneys payable to it and the estate is thus freed from any claim for a lien by the Crown in respect of succession duty.

Judgment of the Court of Appeal (33 B.C. Rep. 29) affirmed.

APPEAL from the decision of the Court of Appeal for British Columbia (1), affirming the judgment of McDonald J. and granting a petition by the respondent under the "Land Registry Act" for an order upon the registrar to register a title to certain land.

The material facts of the case are fully stated in the judgments now reported.

J. A. Ritchie K.C. for the appellant.

Eug. Lafleur K.C. for the respondent.

THE CHIEF JUSTICE.—I am of opinion that this appeal must be dismissed with costs.

IDINGTON J.—The land in question herein being owned by the late Sheriff Higginson, was sold by him by virtue of an agreement in writing before his death, which occurred on or about the 15th of September, 1911, to Stonehouse and Carlow for the sum of $6,000, of which there was due at his death $1,207.84, including accrued interest.

On the 29th November, 1911, William Burdis, the executor of the last will and testament of said Higginson, who had meantime obtained probate of said will, conveyed said lands to said vendees.

By several mesne conveyances pursuant to respective purchases the said lands were conveyed for respective good

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

(1) 33 B.C. Rep. 29; sub. nom. *Minister of Finance* v. *Caledonian Ins. Co. Ins. Co.*

1924
THE KING
v.
CALEDONIAN INS. CO.
Idington J.

and valuable consideration until thereby the land became vested in one Arbuthnot, who mortgaged same to respondent and then conveyed the equity of redemption to Maud Peck. And respondent thereafter foreclosed said mortgage and got final order therefor on the 29th of May, 1922, and on the 5th of June, 1922, made an application to the registrar of titles in Vancouver to have said final order duly registered, as all said previously mentioned conveyances had been.

On the 27th of November, 1922, said registrar declined to do so, except subject to a lien for succession duties payable in respect of the estate of said Higginson.

Hence the petition of respondent praying for an order directing the said registrar to register said final order of foreclosure clear of all encumbrances and especially the lien claimed by appellant for the said succession duties.

The registrar had received for registration, at 10 a.m. of the 5th of June, 1922, from the Minister of Finance of the Crown, on behalf of British Columbia, a caution claimed to have been so tendered pursuant to section 50 of the "Succession Duty Act" of British Columbia enacted in 1907.

That section provides

> and any subsequent dealing with such land, mortgage or charge shall be subject to the lien for such duty.

I fail to see how that can help the appellant under the facts in question herein whereby the registered title of the many prior grantees had become under the provisions of the "Land Registry Act," absolute.

There had also been registered in the said Registry Office, prior thereto, on the 1st of August, 1921, a certificate of *lis pendens* in said foreclosure action.

True the said section 50 ends by saying

> but nothing herein contained shall effect the rights of the Crown to claim a lien independently of the said caution.

That does not in itself give any lien.

But had the Crown any lien under the said Act under the circumstances in question herein? I am presently about to shew why I think it had not, but if it had any such effective lien why was this enacted?

The lien, if any, is given by section 20 of the "Succession Duty Act," and I must look to the purview of the

whole Act to realize how far and how and when it really was intended to become operative.

There are parts of the Act providing for the valuation of the property of the deceased, and a list thereof in detail to be made, and how it is to be dealt with in way of execution thereof.

Then it is only after all that has been done that a grant of probate or of letters of administration can be made by the proper court, but not until ample security, fixed by the order of the Minister of the Crown having charge of finance, and aided by his officers, has been given by the executor or administrator for the payment of the succession duties. The security may be given by the executor and sufficient sureties, or an approved corporate company having power to give same.

There is no distinction made between real estate and personal property in all this.

Are we then to assume that this statutory provision for the realization of the assets is to be read as if a lien existed also on each and every item of the said assets although by section 20 of the Act which gives such lien it is clearly contemplated by the provision for interest being only to run after two years from the death, that such length of time shall elapse before the assets are realized?

I submit not, for it is clear to my mind that the security alone is looked to and substituted for any lien existent prior thereto.

How could the executor effectively dispose of much of some estates, especially those largely composed of personal chattels which may have to be sold advantageously by carrying on the business of the deceased?

Is each purchaser of such articles to be supposed to investigate the title of each item he so buys? I submit not, and that such a scheme never was contemplated by the legislature. On the contrary the whole scheme is to enable the executor, or administrator, to realize the assets and then, as he does so, pay thereout from each item the succession duties payable in respect thereof.

From the moment the grant of probate is given—which must be preceded by the giving of ample security as was given in this case at the cost, no doubt, of a heavy premium,

1924

THE KING
v.
CALEDONIAN INS. CO.

Idington J.

the executor is entitled to proceed to realize by sale the several assets of the estate.

The same view must also be taken as to the collection of debts due the testator, as was the small item for balance of purchase money in question herein.

When the executor realized, as he did, the sum of $1,207.84, including accrued interest for the balance of the purchase money in question, the right to claim any lien thereon was gone, unless upon that which the executor had in his hands as the result of such realization. There are several later provisions in the Act for enforcing payment by application to a judge as against those liable, but nothing, I submit, justifying such pretension as set up herein.

Unless we actually realize by applying a little common sense to what people are about, the legislators especially, we are apt to misinterpret and misconstrue their real purpose.

There are many sections in this Act, of which the learned Chief Justice of the Court of Appeal below has selected section 28, and the respondent's factum has selected many more, as indicating the true interpretation and construction of the Act, including the references to liens of the Crown.

I submit that interpretation gives no encouragement to the pretensions set up by the appellant herein.

The claim that each item of the estate of a testator is liable to bear the burden of the entire succession duty and the rights of the parties concerned be blotted out thereby, when clearly it is contemplated that it is only the aliquot part thereof according to a great variety of ratios that the Act provides, which have to be considered, seems to me, with great respect, hardly arguable.

My brother Duff, in his opinion which I have had the opportunity of reading, points out in cogent reasoning, which I need not repeat here, why the subject matter in question herein cannot be held the subject of a lien such as claimed by appellant.

I agree in the main with the reasoning of the learned Chief Justice of the court below and am of the opinion that this appeal should be dismissed with costs.

1924

THE KING v. CALEDONIAN INS. CO.

Duff J.

DUFF J.—This appeal raises a question as to the construction of the "Succession Duty Act" of British Columbia, R.S.B.C., c. 217. The question arises in these circumstances: Thomas Sheriff Higginson, who died in September, 1911, and whose will was proved in November of that year by one Burdis, who was named one of his executors, had, before his death, sold to William H. Stonehouse and Frederick G. Carlaw for the sum of $6,000 certain real estate, the identity of which is of no importance, under an agreement for sale which, at the time of his death, was still *in fieri;* and under which there was owing at that date the sum of $1,207.84 for principal and interest. The purchase having been completed by payment of the purchase money and conveyance of the land to the purchasers, the title passed by several further conveyances to one George Allan Arbuthnot, who became the registered owner in indefeasible fee. Arbuthnot having mortgaged the land to the respondent, the Caledonian Insurance Company, foreclosure proceedings were ultimately taken by the respondent, and, a final order for foreclosure having been obtained by the 29th May, 1922, an application was made to the registrar of titles for the registration of the respondent as owner in fee simple. It then appeared that on the 5th June, 1922, after the final order for foreclosure had been obtained, a caution had been filed by the Minister of Finance, professing to act under the authority of section 50 of the "Succession Duty Act," in which it was declared that succession duty was claimed by the Minister in respect of the lands which were the subject of the respondent's application.

The statute enacts that on any application for probate or for letters of administration, the amount of the succession duty payable shall be determined in the manner thereby directed, and immediate payment made or a bond given by the applicant or applicants, with surety or sureties, for the payment of the duty; and by s. 5 of c. 60 of the British Columbia Statutes of 1917, the issuing of letters probate or letters of administration is prohibited unless and until the duty is paid or security given.

1924

THE KING
v.
CALEDONIAN INS. CO.

Duff J.

By section 7,

all property situate within the province, or so much as passes,

either by will or intestacy (as the case may be), is made liable to duty; and by section 2, the "interpretation" section, "property" includes,

real and personal property of every description and every estate or interest therein capable of being devised or bequeathed by will, or of passing on the death of the owner to his heirs or personal representatives;

and by section 20, the duties imposed by the Act are made payable at the death of the deceased and "shall," it is declared,

be and remain a lien upon the property in respect of which they are payable until the same are paid.

By section 50, it is enacted that

in case it is claimed that any land or money secured by any mortgage or charge upon land is subject to duty, the Minister, or the solicitor acting in his behalf, may, when deemed necessary, cause to be registered in the proper registry office a caution stating that succession duty is claimed by the Minister in respect of the said land, mortgage, or charge on account of the death of the deceased, naming him, and any subsequent dealing with such land, mortgage, or charge shall be subject to the lien for such duty; but nothing herein contained shall affect the rights of the Crown to claim a lien independently of the said caution.

On behalf of the Crown it is contended that a lien, the quantum of which was measured by the total amount of the duty which might ultimately prove to be payable, attached, upon the death of the testator, the deceased Thomas Sheriff Higginson, upon his interest in the lands which had been sold under the agreement for sale mentioned, and that the lien still attaches as security for the residue of the duty still unpaid. The amount involved is small, but leave to appeal was granted by the Court of Appeal for British Columbia on the 8th November, 1923.

On behalf of the respondent, it is contended that the acceptance of the bond, which was duly given by the executor, effects a discharge of any lien arising by virtue of section 20, and, in the alternative, that the whole of the duty payable by the estate is not charged upon each particular parcel of property, but only an aliquot part of it, measured by the ratio which the value of that part bears to the value of the estate as a whole.

The former view is that which prevailed with the Chief Justice in the court below. I do not think it necessary to pass upon the questions raised by these contentions of the

respondent. At the death of the testator the purchase moneys under the agreement of sale became moneys to which his legal personal representative would be entitled as legal assets, *virtute officii,* and the executor, upon the grant of probate, became entitled to them by virtue of the probate; *Attorney General* v. *Brunning* (1). The effect of the agreement of sale in the events which occurred may be stated in the terms of the following passage, taken from the judgment of Lord Justice James in *Rayner* v. *Preston* (2):

> I agree that it is not accurate to call the relation between the vendor and purchaser of an estate under a contract while the contract is *in fieri* the relation of the trustee and *cestui que trust*.. But that is because it is uncertain whether the contract will or will not be performed, and the character in which the parties stand to one another remains in suspense as long as the contract is *in fieri*. But when the contract is performed by actual conveyance, or performed in every thing but the mere formal act of sealing the engrossed deeds, then that completion relates back to the contract, and it is thereby ascertained that the relation was throughout that of trustee and *cestui que trust*. That is to say, it is ascertained that while the legal estate was in the vendor, the beneficial or equitable interest was wholly in the purchaser. And that, in my opinion, is the correct definition of a trust estate. Wherever that state of things occurs, whether by act of the parties or by act or operation of law, whether it is ascertained from the first or after a period of suspense and uncertainty, then there is a complete and perfect trust, the legal owner is and has been a trustee, and the beneficial owner is and has been a *cestui que trust*.

This passage is entirely consistent with the judgment of Lord Parker in *Howard* v. *Miller* (3), delivered on behalf of the Judicial Committee of the Privy Council, and the principle is not affected by the fact that the interest of the purchaser under the real property law of British Columbia is technically a charge upon the real estate. This is involved in the reasoning of Lord Parker's judgment, as well as in the decision of this court in *Church* v. *Hill* (4). It follows that it was upon this interest of the testator, the purchase money, that the lien, if lien there was, attached. Assuming that the purchasers were bound to see to the application of the purchase money in payment of the duty, then their responsibility was a personal responsibility which did not in any way attach to the property, and the burden of it did not pass to their grantees. This alone would be

(1) [1860] 8 H.L.Cas. 243.
(2) [1881] 18 Ch. D. 1, at p. 13.
(3) [1915] A.C. 318.
(4) [1923] S.C.R. 642.

1924
THE KING
v.
CALEDONIAN INS. CO.
Duff J.

sufficient to dispose of the appeal, but it is sufficiently clear to me that the statute cannot be held to impose upon debts payable to the executor, recoverable by him *virtute officii*, a charge while still in the hands of the debtor in such fashion that the debtor must ascertain at his peril, before paying his debt to the executor, that the duty has been paid. The statute contemplates the payment of the duty or the giving of a bond as security for the payment of the duty as the condition of granting probate. *Prima facie* the executor, upon a grant of probate, is clothed with authority to receive and give a good discharge for moneys payable to him in his capacity as executor, and it can, I think, never have been contemplated that in addition to the authority conferred by probate or letters of administration, the legal personal representative must receive from the Crown some additional authority enabling him as agent of the Crown to give a discharge to persons indebted to the estate for the moneys which it is his official duty to get in.

During the argument, I was inclined to think that the language of section 50 was a serious obstacle for the respondent. Further consideration, however, convinced me that, rightly construed, that section is not at all inconsistent with the view I have expressed. The effect, no doubt, is that where land or money secured by a mortgage, or a charge upon land is subject to a lien for the duty, then the proceedings therein specified may take place. This, as pointed out by the learned Chief Justice of the Court of Appeal in his judgment, is not necessarily inconsistent with the idea that where probate or letters of administration have been granted, the legal personal representative may be entitled to get in the property of the estate and to perform other acts of administration *virtute officii* without encountering the lien as a hindrance at every stage of his proceedings. If the foregoing reasoning be correct, then as a rule money secured by a mortgage or charge upon land in favour of the testator would be an asset which it would be the duty of the executor to realize; and land, if subject to an agreement for sale executed by the testator in his lifetime, which the vendee was able and willing to carry out, and in respect of which he desired to pay the purchase

money to the executor, would not be an asset which could be affected by proceedings under this section.

The appeal should be dismissed with costs.

ANGLIN J.—Taking into consideration all the provisions of the British Columbia Succession Duty Act, I am of the opinion that the better construction is that put on the statute by the learned Chief Justice of the Court of Appeal, namely, that upon the taking of the prescribed security for succession duties the lien of the Crown therefor is superseded. The implication of section 37 that that is the case seems to me to outweigh any contrary inference that might be drawn from the provisions of section 50. For the purposes of the grant of probate or administration and of the right of the personal representative to deal with and make title to the property of the decedent free from succession duty the taking of the prescribed security and actual payment of the duties seem to be put on the same footing.

I also agree that the succession duties imposed by the statute are chargeable distributively upon the several properties of the estate made subject to them and not as one entirety, or collectively, upon the whole estate and every part of it.

MIGNAULT J.—I would dismiss the appeal with costs for the reasons stated by my brother Duff.

MALOUIN J.—I concur with Mr. Justice Duff. I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Dugald Donaghy.*
Solicitors for the respondent: *Tupper, Bull and Tupper.*