Saskatchewan Court of Appeal

[1943] 2 W.W.R. 188, [1943] 4 D.L.R. 610

In re Shawaga Estate

Bogucki (Claimant) Appellant v. Custodian of Enemy Property (Respondent) Respondent and Western Trust Company (Administrator) Respondent

Martin, C.J.S., Mackenzie and MacDonald, JJ.A.

Judgment: October 2, 1942

Counsel: *S. R. Curtin, K.C.*, for Custodian of Enemy Property.
E. C. Leslie, K.C., for Annie Bogucki, the claimant.
W.J. Mars, for Western Trust Company, the administrator.

***Bigelow, J.*:**

1 The Western Trust Company, hereinafter referred to as the trust company, is the administrator of the estate of Mike Shawaga. Annie Bogucki claims that the said Mike Shawaga did by valid gifts made in contemplation of death give to her certain personal property, being deposits in different banks, war savings certificates and victory bonds, the value of which is not stated.

2 On September 8 last an issue was directed between Annie Bogucki and the trust company to determine the question of whether there was any such gift.

3 The Custodian of Enemy Property now applies to be made a party defendant to such issue under Rules 44 and 48 of the Rules of Court. The affidavit of S. R. Curtin states that he is informed by the said custodian and verily believes that the legal heirs of Mike Shawaga reside in Poland. The affidavit of R. M. Crowe, for the trust company, throws doubt on whether there are any children of the said Mike Shawaga in Poland but that he may have left a wife in Poland when he left there in 1911, although Mr. Crowe says he has no knowledge of that. Nor is there any evidence that the wife, if there was one, survived the said Mike Shawaga. If she did survive him and there are no children she would be entitled to all of the estate: *Intestate Succession Act*, R.S.S., 1940, ch. 109, sec. 6.

4 I think it is very material to know whether there are any heirs in Poland. Any property in Canada belonging to a person in Poland is vested in the Custodian of Enemy Property: See sec. 21 of the Consolidated Regulations respecting Trading with the Enemy (1939) which is as follows:

> 21. (1) All property in Canada belonging to enemies at or subsequent to the commencement of the present war, and whether or not such property has been disclosed to the Custodian as required by these Regulations, is hereby vested in and subject to the control of the Custodian.
>
> (2) This regulation shall be a vesting order and shall confer upon the Custodian all the rights of such enemies,

including the power of dealing with such property in such manner, as he in his sole discretion decides.

5 The attitude of the trust company is in conflict with that of the Custodian. The trust company does not know whether there are any heirs in Poland or not. The Custodian says there are. Under those circumstances I think that the Custodian should be entitled to come in and defend this issue. I have examined all the authorities cited but think it is only necessary to refer to one: *Fulton v. Mercantile Trust Co.* (1917) 41 O.L.R. 192. There it was held that where in an action by a stranger against an administrator the question to be decided is who are the beneficiaries, the administrator may be justified in joining all the heirs and allowing them to conduct their own defence. At p. 194 Mulock, C.J. said:

> There existed a substantial doubt as to who were the *cestuis que trust*, and until the Court decided the question the trust company was not aware for whom it held the property.

6 The order will go as asked for in the notice of motion with leave to enter an appearance within six days and to file a defence within ten days thereafter. The costs are reserved for the trial Judge. If the Custodian cannot prove that there are heirs in Poland he may be saddled with the costs.

7 There is another point which occurs to me and was not raised at the argument, and which I do not have to decide. If there are no heirs in Poland, who are the heirs? Should they not be served with notice of these proceedings and have an opportunity of coming in to defend?

The claimant appealed. Appeal dismissed with costs.

The judgment of the Court was delivered by *Mackenzie, J.A.*:

8 This is an appeal from an order adding a party defendant. The material facts are as follows: One Mike Shawaga, late of the post office of Finnie in this province, died intestate on December 13, 1941. Letters of administration of his estate were granted to the Western Trust Company hereinafter referred to as "the administrator" at Regina on February 2, 1942.

9 For some years prior to his death one Annie Bogucki, hereinafter referred to as "the claimant," lived with the deceased when she went by the name of Annie Shawaga and was commonly known as his wife.

10 When the administrator, following its appointment, sought to obtain possession of the deceased's assets the claimant made claim to certain thereof consisting of bank deposits, war savings certificates and Dominion of Canada Victory Bonds on the ground that the deceased had made a gift of the same to her on the day before his death and in contemplation thereof. The administrator refused to entertain her claim and in order to determine its validity she and the administrator through their respective solicitors agreed to the trial of an issue by the Court and for that purpose subscribed to a consent which was submitted to Doiron, J. in Chambers, who on September 8, 1942, was pleased to direct that such an issue should be tried before a subsequent sittings of the Court of King's Bench. Upon the application of the solicitor for the Custodian he also directed that a copy of such order should be served upon him.

11 A copy of the order was accordingly served upon the said solicitor who thereupon launched an application returnable

before the presiding Judge in Chambers at Regina on September 29, 1942, for an order that the Custodian be added as a party defendant to the proceedings commenced by the above consent order, to enable him to "defend the same on behalf of the legal heirs of the said deceased now residing in Poland, an enemy occupied country" and on the ground that he is not satisfied with the attitude of the administrator towards such heirs nor with the terms of the above consent order.

12 The application came before Bigelow, J. in Chambers, who on October 2, 1942, rendered a decision wherein he expressed the opinion that under the circumstances submitted to him the Custodian should be entitled to come in and defend the issue. He therefore ordered that the Custodian should be added as a party defendant to such proceedings giving him leave to enter an appearance and to deliver a defence therein.

13 From such order the claimant has now appealed. Her counsel does not deny that the deceased left relatives in Poland who were entitled to benefit in his estate. He seeks however to invoke K.B. Rule 44 (1), which reads as follows:

> Trustees, executors and administrators may sue and be sued on behalf of, or as representing the property or estate of which they are trustees or representatives, without joining any of the persons beneficially interested in the trust or estate, and shall be considered as representing such persons; but the court may, at any stage of the proceedings, order any of such persons to be made parties either in addition to, or in lieu of, the previously existing parties.

14 Counsel submits that it is clear from this Rule that in a proceeding by a stranger, such as a claimant against an administrator, the only necessary defendant in the first instance is the administrator himself. In making such submission counsel appears to assume that the Custodian is beneficially interested in the deceased's estate or at any rate is representative of the deceased's relatives in Poland who are beneficially interested therein, and that consequently he is sufficiently represented by the administrator in these proceedings.

15 We do not think that such an assumption is legally tenable. The Custodian derives his authority from the regulations made under the *War Measures Act*, R.S.C., 1927, ch. 206. By sec. 3 of that Act the Governor in Council is empowered to make such orders and regulations as he may by reason of the existence of war "deem necessary or advisable for the security, defence, peace, order and welfare of Canada." By par. (*f*) thereof such power is specifically extended to:

> Appropriation, control, forfeiture and disposition of property and of the use thereof.

16 The office of Custodian of Enemy Property is created and his authority defined by the regulations made under the said Act, such regulations being given the force of law under subsec. (2) of said sec. 3.

17 Referring then to the regulations, we find that No. 6 provides that the Secretary of State for Canada is appointed, "to receive, hold, preserve and deal with such property rights and interests as may be paid or vested in him," pursuant thereto of which he is designated "the Custodian," while Regulation No. 21 says:

> (1) All property in Canada belonging to enemies at or subsequent to the commencement of the present war and whether or not such property has been disclosed to the Custodian as required by these regulations is hereby vested in and subject to the control of the Custodian.
>
> (2) This regulation shall be a vesting order and shall confer upon the Custodian all the rights of such enemies including

the power of dealing with such property in such manner as he, in his sole discretion, decides.

18 According to Regulation 1 (*b*) (*ii*) the term "enemy" is to be construed to include "any person who resides within territory occupied by a state or sovereign for the time being at war with His Majesty."

19 Judicial notice may be taken of the fact that Poland is at present enemy-occupied territory: *Cornelius v. Banque Franco-Serbe*, [1942] 1 K.B. 29, 110 L.J.K.B. 573, [1941] 2 All E.R. 728, at 731; *Phipson*, 8th ed., p. 19.

20 From the foregoing provisions of the Act and regulations it seems to us clear that the Custodian has been appointed and the properties of the enemies of our country, defined as above, have been vested in him, not that he may exercise the powers conferred upon him as representative, or on behalf, of the enemy holders thereof, such as those in Poland in this case, but in order that he may deal with them for the "welfare" or benefit of Canada in its prosecution of the war.

21 Since he is thus clothed with a special capacity of his own as an officer of the Crown, it follows that the Custodian cannot properly be classed as one of "the persons beneficially interested in the estate" within the meaning of K.B. Rule 44 of whom only in our view the administrator may be validly deemed to be the representative. Hence it is our opinion that the Rule is without application to the Custodian and consequently that the administrator cannot represent him in these proceedings.

22 As we see it the rights of the Custodian in the deceased's estate are by virtue of the nature of his high authority altogether paramount to the rights of the persons who may be interested therein in Poland (although they are founded thereon) because of the fact that he may ultimately be required to exercise his powers over enemy property in such a way that those persons will forever be precluded from realizing any benefit therefrom. That must depend upon the terms of the peace to be concluded by the Government of Canada with the governments of those countries with which it is now at war. Such terms will probably be given effect to in the form of a treaty between them. In this respect the Custodian's interests are adverse to those of the persons in Poland.

23 It is obvious that the Custodian's rights are threatened with impairment by the claimant in the present proceedings, and in our opinion he is not only entitled to be, but should be, made a party thereto. Counsel for the claimant denies the sufficiency of the reasons he puts forward for seeking to become a party, but in view of what we find to be his rights it is unnecessary for us to consider such a question here.

24 Support for the above conclusions may, we think, be found in some of the English decisions implementing the authority of the Public Trustee (who in England is the Custodian) and of the Controller of the Clearing House for Enemy Debts to deal with the property of alien enemies of which they assumed control during the last war. We would refer to the following: *In re Schiff Estate*, [1915] P. 86, 84 L.J.P. 79; *In re Bluhm Estate*, [1921] P. 127, 90 L.J.P. 94; *In re von dem Busche Estate*, 38 T.L.R. 171, [1921] W.N. 359.

25 Apart from adding the Custodian, it is our opinion that so far as circumstances disclosed now show the administrator sufficiently represents all those who may be beneficially entitled in the deceased's estate for the purpose of the present proceedings.

26 The appeal therefore must be dismissed but, as all the counsel engaged therein seem to have misconceived what, in our opinion, is the real status of the Custodian and we have found it necessary to determine the appeal on an issue which was not submitted by counsel to the Court, there will be no costs.