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Re Estate of MARGARET WERNHAM.

D. C., Kandy, 1,979.

Stamp Ordinance, No. 3 of 1890—Executor's inventory in testamentary proceeding—Civil Procedure Code, s. 733—Affidavit verifying such inventory—Stamp duty thereon—Interpretation of Ordinance.

Per BONSER, C.J., and LAWRIE, J. (*dissentiente* WITHERS, J.).—An affidavit in support of an intermediate account filed by an executor under section 733 of the Civil Procedure Code is not chargeable with stamp duty under the Ordinance No. 3 of 1890, section 5 (schedule B, part III.).

In interpreting an Ordinance imposing burdens on the subject, it must be construed favourably to the subject; and *optima est legis interpres consuetudo.*

THE facts relevant to this appeal, which came on for argument on 8th November, 1898, appear in the following judgments pronounced on the 16th December, 1898.

Van Langenberg, for the administrator, appellant.

Loos, C. C., for the Attorney-General.

BONSER, C.J.—

In this case, the District Judge of Kandy has required the affidavits verifying respectively an executor's inventory of the estate of his testator and an intermediate account filed by an executor under section 733 of the Civil Procedure Code to be stamped with an *ad valorem* duty, as being " affidavits in a testamentary proceeding," and chargeable with duty under part III. of the schedule to the Stamp Ordinance, 1890. It was contended by Mr. Van Langenberg that the verification on oath of the correctness of the inventory required by section 538 of the Civil Procedure Code is not an affidavit. But I am clearly of opinion that it is. The only question in both cases is whether these affidavits are chargeable with stamp duty.

Now, the first observation which I would make is that it has never been suggested that these documents were chargeable with duty until the question was raised by the District Judge of Kandy in the present case. I have ascertained by inquiry that it has been the practice of the two principal District Courts of the Island—the Courts of Colombo and Kandy—ever since the year 1841, when stamp duties were first imposed on legal proceedings, to treat these affidavits as not being chargeable with duty, and it may safely be assumed that the practice of these Courts was also the practice of the other Courts of the Island.

It is not necessary to go further back than the Stamp Ordinance No. 11 of 1861. Part II. of the schedule to that Ordinance headed " Containing the Duties on Law Proceedings " contains tables of the fees chargeable in the various Courts under the headings " Supreme Courts," " District Courts," and " Courts of Requests," respectively. The first item in each table is " every affidavit or affirmation," and the stamp depended in each case on the class of the action, which class was determined by the value of its subject-matter. There was a footnote to the table of fees in the Supreme Court in the following words:—" Testamentary proceedings shall " be charged in the class corresponding with the value of the estate, " which must be set out by affidavit when the application for " probate or letters of administration is made." This note was repeated at the foot of the table of District Court fees. There was no such note appended to the table of fees in the Courts of Requests, for the obvious reason that Courts of Requests have no testamentary jurisdiction. Part III. of the schedule to the same Ordinance was headed thus:—" Containing the Duties in Testamentary Proceedings; on Probates of Wills and Letters of Administration." This part contained only four items, viz., (1) every account, provisional or final; (2) every bond; (3) every copy of any document; and (4) probates and letters of administration. It is obvious, therefore, that this part III. did not comprise all the duties payable on testamentary proceedings, but that the duties on documents such as petitions, affidavits, proxies, applications to the Supreme Court for the conferring of jurisdiction on a particular District Court, and the like, were left to be determined by part II. In 1884 a new Stamp Ordinance was passed, but in the particulars to which I have referred above it was identical with the Ordinance of 1861. In 1890, the Stamp Ordinance now in force was passed. The schedule was remodelled by striking out the notes relating to testamentary proceedings, at the foot of the tables of fees in the Supreme Court and the District Courts in part II., and by inserting specifically in the table in part III. the items of the various proceedings which had been up to that time chargeable under the tables in part II. by virtue of the appended notes. Amongst those items appears " every affidavit or affirmation." The duty for a provisional account was omitted, whilst an " inventory was, for the first time, rendered liable to duty. In my opinion, this remodelling of the schedule was not intended to have, nor did it have, the effect of altering the meaning of the words " every affidavit or affirmation." The usage of twenty-three years between the Ordinance of 1861 and 1884 had fixed the meaning of that expression as not including affidavits verifying accounts

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in testamentary cases. That usage must be taken to have been approved by the Legislature, when in 1884 it re-enacted the schedule in identical terms with those of the schedule to the Ordinance of 1861. Again, in 1890, when the present Ordinance was passed, the Legislature manifested no express intention of making these affidavits, which had hitherto been considered exempt from duty, chargeable with duty. The Ordinance of 1890 made no difference in this respect. It simply re-enacted that every affidavit or affirmation in a testamentary proceeding should be chargeable with duty. Such affidavits as the present were never regarded as chargeable with duty under the Ordinances of 1861 and 1884, and I hold that they are not chargeable with duty under the Ordinance of 1890.

There are two well-known rules which are applicable to this case. The first is, that a charge on the subject must be expressed in clear and unambiguous language, or, in other words, that Ordinance imposing burdens on the subject must be construed favourably to the subject. The other is expressed in the maxim: *Optima est enim legis interpres consuetudo.* In the present case we have an unbroken usage from 1861 to 1898, under which these affidavits, though they were undoubtedly "affidavits in testamentary proceedings," and therefore, *primâ facie*, liable to duty, have been uniformly regarded as not being such for the purpose of duty. I am therefore of opinion that these appeals must be allowed.

I may add that this decision, at all events in the case of provisional accounts, furthers the policy of the Legislature, which in 1890 deliberately exempted provisional accounts from duty, no doubt with the intention of encouraging a frequent accounting to the Court by executors and administrators. The duty on a provisional account was five shillings, *i.e.*, Rs. 2.50, in every case irrespective of the value of the estate. Is it conceivable that the Legislature intended, whilst abolishing the duty on these accounts, to re-introduce it indirectly by imposing a duty, varying from Rs. 2 to Rs. 10, according to the value of the estate, on the affidavits verifying such accounts, or that, while it increased the duty on a final account from the uniform fee of Rs. 2.50 to a duty varying from Rs. 2.50 to Rs. 10, it intended by a side wind to double that increased duty by charging a like varying duty on the affidavit which must necessarily accompany every account for the purpose of verification? It is abundantly clear to my mind that such was not the intention of the Legislature. I need hardly point out the hardship and injustice of holding otherwise.

The proctors who have filed these affidavits without objection will be liable to be called upon to make good to Government the

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stamp duties which, with the acquiescence of the Courts and the officers of Government, they have innocently omitted to pay. In my opinion the District Judge was ill-advised in making the order now appealed from. He should not have disturbed the settled practice of his Court thus of his own mere motion, but should have left the Law Officers of the Crown to make a formal application in the matter.

LAWRIE, J.—

The Stamp Ordinance is silent as to the stamping of the verification of an inventory. The verification is required by section 538, and should be in the form 92 (p. 543).

It seems to me that the verification should (in the ordinary case) be made in open Court by the executor or administrator in the presence of the District Judge, and if that be done it is evidence taken in Court, on the record of which no stamp is required but if from special circumstances the executor is excused from verifying the inventory by oath in open Court, if (he being absent) his proctor submits an inventory to the judge on which is written a verification in the form of an affidavit sworn to before a Justice of the Peace, or other officer having power to administer oaths, then I read the inventory and the verification as one document, not as two. The inventory without the verification is a mere list. With the verification it becomes an inventory, and to that inventory must be affixed the stamps required by the Ordinance in an estate of that value; but no other stamp on the verification seems to me to be necessary.

The next question raised in this appeal is whether, when an administrator or executor files an account under chapter LV. duly verified by affidavit, the affidavit must be stamped. On this question I am content to agree with the Chief Justice.

WITHERS, J.—

These are questions arising under the Stamp Ordinance of 1890. One is: How should a verified inventory exhibited in the course of testamentary proceedings, under chapter XXXVIII. of the Civil Procedure Code, be stamped? The other is: Is an affidavit in support of an intermediate account rendered by an executor or administrator chargeable with duty? Part III. of the schedule to the Stamp Ordinance of 1890 appears to me to be decisive on the point. It contains the duties on testamentary proceedings, and by it every affidavit or affirmation is made chargeable with duty. Section 538 of the Civil Procedure Code requires the inventory of a deceased person's estate and effects to be verified

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on oath or affirmation. The Stamp Ordinance of 1890, section 63, enacts that " if more than one instrument is written upon the same "piece of material, every one of such instruments is to be separately "and distinctly stamped with the duty with which it is chargeable." A duly verified inventory is at once an inventory and an affidavit. It must therefore be stamped with an amount of duty appropriate to an inventory and an affidavit of the particular class in which it is filed. We are informed that, since the Stamp Ordinance of 1890 came into operation, it has not been the practice in the principal Courts of first instance to stamp a verified inventory except as an inventory, and not to stamp at all an affidavit appended to an intermediate account.

I should attach much weight to that usage if the terms of the Stamp Ordinance of 1890 were not quite clear to my mind. The preceding Stamp Acts of 1884 and 1861 were drawn up differently to that of 1890 in regard to duties chargeable on testamentary proceedings, and I must say somewhat confusedly. In the body of those earlier statutes it was provided that the several instruments mentioned and described in the schedule annexed (*except those standing under the head of exemptions*, and as shall thereafter be excepted) should be subject to the stamp duties set down in figures against the same respectively or otherwise specified and set forth in the said schedules.

The schedules were divided into three parts. Part I. need not be considered. Part II. purported to contain duties on law proceedings, and in the Supreme Court, District Court, and Court of Requests respectively. Part III. purported to contain the duties on testamentary proceedings; on probates of wills and letters of administration.

One would expect to find that part III. exhausted the contents of the duties. But it does not appear to do so. It contains a few fixed charges for provisional and final accounts for bonds, copies of a will, codicil, or extract therefrom, or (copy?) of any document mentioned in this part of the schedule, and it further contains a scale of duties chargeable on probate of a will or letters of administration according to the value of the deceased's estate, exclusive of trust property and of debts due by the estate on mortgage or other notarial bonds. Oddly enough under the head of *Exemptions* under part II. containing the duties on law, *i.e.*, civil proceedings in the Supreme Court, are to be found these words:—" Testamentary proceedings shall be charged in the class " corresponding with the value of the estate, which must be set " out by affidavit when the application for probate or letters of " administration is made." A similar clause in part II. containing

the duties chargeable in civil proceedings in the District Court immediately precedes the clause of exemptions from duties on proceedings in that Court.

Thus, instruments specified in Part II. which were used in testamentary proceedings were chargeable in a class different to the class specified in Part III., for no allowance was made in Part II. for trust property or debts on mortgage or other notarial bonds.

To reduce this state of things into order, part III. in the schedule to the Stamp Ordinance of 1890 was made so as to exhaust the duties chargeable in testamentary proceedings in the Supreme Court and the District Courts, and part II. makes no reference to such proceedings.

I take it then that part III. is a clear indication of what instruments are chargeable with duty in testamentary proceedings.

A further difference in the old and new law on the points before us is that, whereas an inventory was not before, it is now chargeable with duty, and whereas a provisional account was chargeable with duty, it no longer is so.

It was suggested that, as the new Ordinance has taken off the stamps from a provisional account, we should be only carrying out its intention if we admitted without a stamp the affidavit which is required by the Civil Procedure Code to be appended to a provisional account. It was also suggested that as an inventory was not chargeable under the earlier Ordinances, and was introduced for the first time into the Stamp Ordinance in 1890, it was introduced to make but one dutiable instrument of it, though the Code requires an inventory verified by affidavit.

I cannot accept those suggestions. The law, as I said before, is too hard for us. It has been the practice to accept affidavits of the kind unstamped and to accept an inventory as a single instrument subject to duty, but the practice is, to my mind, wrong.