

1947

Present : Wijeyewardene and Canekeratne JJ.

HASSAN, Appellant, and MUTHUWAPPA, Respondent.

77 Inty.—D.C. Colombo, 15,916.

Administration—Stamps—Probate or letters of administration—Abrogation of a statutory provision—Stamping not necessary—Stamp Ordinance, No. 22 of 1909, ss. 68 to 73—Estate Duty Ordinance (Cap. 187), s. 52—Civil Procedure Code, s. 547.

The provision relating to the due stamping of a probate or letters of administration has been rendered unnecessary by the Estate Duty Ordinance.

A PPEAL from an order of the District Court of Colombo.

S. J. V. *Chelvanayagam* (with him A. C. *Nadarajah*) for the defendant appellant.

C. *Thiagalingam* (with him C. *Chellappah*) for the plaintiff, respondent.

H. W. R. *Weerasooriya, C.C.*, for the Attorney-General, on notice.

Cur. adv. vult.

JANUARY 29, 1947 CANEKERATNE J.—

Some years ago the defendant and one Mohamed Sheriff carried on, as partners, the business of a restaurant called the Colombo Buhari Hotel. The plaintiff, as the administrator *de bonis non* of the estate of Mohamed Sheriff, who is said to have died on April 99, 1941, applied to the Court in this action to wind up the business and affairs of the partnership, for an order on the defendant to render an account and pay the sum found due on the accounting. After sixteen issues had been framed the plaintiff led evidence and closed his case; the defendant then raised an issue relating to the competency of the plaintiff to maintain the action on the ground that the letters of administration had not been duly stamped. This is an appeal from the decision of the trial Judge refusing to proceed with the action until the inventory has been amended by the plaintiff.

It appears that a grant of administration in respect of the estate of the deceased was originally made to one Mohamed Cassim and he included in the inventory a half share of the business called the Colombo Buhari Hotel, the value of which he estimated at Rs. 768.12. The contention of the defendant, below and in this Court, as stated by his Counsel, has been that the duty paid by the administrator was in fact insufficient to cover the property claimed in this action, inasmuch as the relief claimed is estimated by the plaintiff at Rs. 40,000, not at Rs. 768.12, and that the letters of administration were not duly stamped and the plaintiff was therefore debarred by the provisions of section 547 of the Civil Procedure Code (Ch. 86 of the Legislative Enactments of Ceylon) from maintaining this action. Counsel for the appellant contended that the provisions of the section were no bar to the maintenance of the action. As the question in dispute was one of importance to the public the Court expressed a desire to hear the views of the Attorney-General; Crown Counsel appeared

on behalf of the Attorney-General at the adjourned hearing and advanced the view that the regulation prescribing due stamping of the instrument cannot now be applied and that it has been repealed.

One who desires to obtain a grant of representation to the estate of a deceased person has a right to make an application to the District Court which has territorial jurisdiction over the place where the intestate died. On the relevant facts being proved—such as the death of the intestate the leaving of property by him, the right of the applicant to make the application, &c.—the Court would, as a general rule, make an order in his favour. The Legislature may qualify this general right by imposing conditions: one such condition was imposed by the Stamp Ordinance of 1871 for the purpose of obtaining the proper and full duty exigible on the property and estate of the deceased in Ceylon: a Court was debarred from making a grant of letters of administration until it obtained an affidavit from the applicant or some other competent person that the property and estate of the intestate are of the value of a certain sum to be therein specified to the best of the deponent's knowledge, information and belief (section 29 of Ordinance No. 23 of 1871).

The Code of Civil Procedure was passed in 1889 and the Stamp Ordinance which was then in force was Ordinance No. 23 of 1871. The Code of Civil Procedure came into operation on August 1, 1890, but before that date the Legislature enacted a new Stamp Ordinance, Ordinance No. 3 of 1890, which also came into operation on August 1, 1890. Sections 24 to 30 of that Ordinance deal with probates and letters of administration. While these sections substantially repeat the language used in sections 29 to 35 of the repealed Ordinance, the Legislature made one important alteration; the power of cancelling the stamps representing the amount of duty was taken away from the District Court issuing the grant. Section 29 provides that the Judge shall transmit the amount of the stamp duty paid into Court by the applicant to the Commissioner of Stamps, together with the letters of administration, who shall cause the instrument to be duly stamped and return it to the Judge. In 1909 the Legislature substituted Ordinance No. 22 of 1909 in place of the Stamp Ordinance of 1890. The provisions relating to testamentary duties are found in Ch. 7 of this Ordinance which consists of sections 68 to 73. Section 68 contains provisions similar to those of section 24 of the earlier Ordinance; it shows that probate or letters of administration will not be granted except on an affidavit of property setting out the approximate value of the estate. Sections 69 and 70 contemplate the possibility of overpayment and underpayment of probate duty on that affidavit and its proper adjustment (these sections correspond to sections 25 and 26 of the Ordinance of 1890 and sections 30 and 31 of the Ordinance of 1871); underpayment is made an offence as regards an executor or administrator under certain circumstances (section 73 of the Ordinance of 1909 which corresponds to section 29 of the Ordinance of 1890 and section 34 of the Ordinance of 1871).

Estate duty was introduced by Ordinance No. 8 of 1919; it was to be calculated at the proper rate on the value of the estate as set forth in the statement delivered by the executor if the Commissioner of Stamps was satisfied with it—otherwise on the estimate made by an assessor (section

22 (1)). The duty is then assessed ; on payment of the duty or on proper security for its payment having been given the Commissioner of Stamps issues a certificate ; sub-section 4 of section 23 provides that no probate or letters of administration are to be issued by a District Court unless and until such certificate has been filed. The Ordinance repealed sections 68 to 73 of the Stamp Ordinance of 1909 and the portion referring to duty on probate and letters of administration as contained in part 3 of Schedule B of the Ordinance. Ordinance No. 8 of 1919 was repealed in 1935 (Ordinance No. 51 of 1935).

The present Ordinance relating to estate duty is Ordinance No. 1 of 1938 (Ch. 187 of the Legislative Enactments). It provides that the executor of every deceased person shall deliver to the Commissioner of Estate Duty a declaration of property containing a full and true statement of particulars relating to the total estate of the deceased including the value thereof (section 29, sub-section 1). An assessor may at any time, whether the declaration has been delivered or not, assess the estate duty payable and shall issue to the person or persons whom he considers liable to pay such duty a notice of assessment (section 32) : the duty becomes due on the date specified in the notice (section 44 (1)) ; power is given to the Commissioner to allow the duty to be paid by sixteen half-yearly instalments in certain cases (section 48 (1)), the person liable to pay must furnish security to the satisfaction of the Commissioner (sub-section 2). The Commissioner issues a certificate of payment to the executor when he has paid or secured to his satisfaction the payment of all estate duty for which he is liable (section 49). Section 52 provides that no probate or letters of administration shall be granted by the Court until the Commissioner has issued the certificate above named and the certificate has been filed in Court.

Probate duty (the same provision applies to the duty payable on letters of administration) was a stamp tax payable on the value of the estate of a deceased by means of a stamp on the affidavit of value which every person applying for a grant of representation to the estate of a deceased person was required to make as to the particulars and value of the estate of the deceased to whose estate he sought representation, and no grant of representation could be made by a Court till the affidavit has been received. After the amount payable as probate duty has been assessed the legal representative pays it into Court and the Court sends it together with the probate (or letters) to the Commissioner of Stamps. The Commissioner causes stamps of the proper value to be affixed to the instrument and cancelled (see section 3 (10) of the Stamp Ordinance of 1909).

Section 547 of the Civil Procedure Code states thus:—"No action shall be maintainable for the recovery of any property belonging to or included in the estate or effects of any person dying testate or intestate where such estate or effects amount to or exceed in value the sum of Rs. 1,000 unless grant of probate or letters of administration duly stamped shall first have been issued to some person or persons as executor or administrator of such testator or intestate". The sum of Rs. 2,500 was substituted later for the sum of Rs. 1,000.

Estate duty is, according to the Ceylon Ordinance, a first charge on all the property of the deceased (section 26 (1)) ; it is a sum payable by the person accountable, be he executor (part (a) of sub-section 4) or person other than the executor (part (b)). It does not seem to be a stamp duty. It was stated in the course of the argument by Counsel for the appellant (and the form of the probate and letters issued in cases which have come before this Court shows that this is correctly stated) that no stamp is now affixed to the probate or letters. There is no provision now for affixing stamps on the instrument ; an applicant for probate or letters now pays directly the amount assessed as estate duty to the Commissioner by tendering money, or perhaps a cheque, and the Commissioner issues a certificate ; the Court grants probate or letters after the certificate has been filed in Court.

The provision relating to the due stamping of the probate (or letters) was complementary to the provisions of the Stamp Ordinance ; that Ordinance required a tax to be paid in a particular way. So long as there was in existence a statutory enactment providing for the affixing of stamps on a probate (or letters) and for the instrument being duly stamped, there would be no difficulty in construing the expression "duly stamped" used in section 547. Since 1919 no provisions relating to the affixing or cancellation of stamps are to be found in any statutory enactment ; all the reasons which imposed an obligation on the applicant to tender the amount of probate duty to the Court and a duty on the Commissioner of Stamps to cause the proper stamps to be affixed and cancelled have wholly ceased to operate. Reason is the soul of the Law and when the reason of any particular law ceases, so does the law itself (see Broom's Legal Maxims, 10th edition, page 110). Legislation has thus rendered unnecessary the provisions relating to the due stamping of a probate or letters of administration. It would be impossible to apply such a provision to an instrument on which no stamps are affixed granted since the coming into operation of the Estate Duty Ordinance without doing considerable violence to the language used.

The order of the trial Judge is set aside ; the respondent will pay the costs of the hearing in the District Court and the costs of appeal to the appellant.

WIJEYWARDENE J.—I agree.

Order set aside.

