

1938

*Present : Koch and Soertsz JJ.*CAROLIS *v.* COMMISSIONER OF STAMPS*S. C. 31/1938 Special.*

Probate duty—Estate of person dying in 1908—Probate issued in 1937—Effect of repealing Ordinances Nos. 8 and 10 of 1919—Estate Duty Ordinance, No. 8 of 1919, s. 34.

Where the last will of a person, who died in 1908, was admitted to probate in July, 1937, and the executor, when called upon to pay probate duty, contended that the duty had been repealed by the Estate Duty Ordinance, No. 8 of 1919, and the Stamp Ordinance, No. 10 of 1919,—

Held, that the effect of section 34 of the Estate Duty Ordinance, No. 8 of 1919, which repealed the duty was to incorporate into the provisions of that Ordinance, sections 68 to 73 of the Stamp Ordinance, No. 22 of 1909, in so far as regards the duty on the estates of persons dying before the commencement of the Estate Duty Ordinance of 1919, and that the estate was liable for probate duty.

Held, further, probate must be stamped in accordance with the law in force at the time it is signed by the Judge.

THIS was an appeal from an order of the Commissioner of Stamps under section 32 of the Stamp Ordinance.

C. Seneviratne, for appellant.

E. A. L. Wijeyewardene, K.C., S.-G. (with him *Pulle, C.C.*), for Crown, respondent.

April 25, 1938. KOCH J.—

Although the deceased, the widow of one W. D. Carolis, died in the year 1908, no steps in respect to probate of her will were taken till July, 1936. On July 13, 1937, the Court, however, issued probate in testamentary

case No. 7,443 in which her estate was being administered, and a duty of Rs. 2,937 was levied on and paid for by her executor. On July 21, 1937, an application was made by the executor to the Commissioner of Stamps for a ruling as to whether the probate duty was rightly levied, the executor taking up the position that no such duty was leviable and that the sum should be refunded to him. By his letter of February 10, 1938, the Commissioner of Stamps, acting under section 30 of the Stamp Ordinance, No. 22 of 1909, informed the executor that probate had been correctly stamped with a duty of Rs. 2,937. The executor being dissatisfied with the determination of the Commissioner has duly appealed to this Court under section 32.

It was contended on behalf of the appellant that probate was an instrument, that it was executed when signed by the Judge, and that it has to be stamped in accordance with the law in force at the date of its execution. This was conceded by the learned Solicitor-General who, nevertheless, took up the position that at such date, namely, on July 13, 1937, probate duty was leviable and that that duty amounted to the sum of Rs. 2,937.

The appellant, on the other hand, maintained that the law in regard to payment of probate duty had been repealed by Ordinance No. 19 of 1927, that since that Ordinance came into operation no probate duty was chargeable, and that wills had since then been admitted to probate free of duty. He was not quite correct here, for the estates of persons which escaped duty were the estates of those who died after October 1, 1935.

In taking up this position, the appellant's Counsel has also failed to take into account the effect of Ordinance No. 10 of 1919, which substituted a new schedule B for schedule B of the principal Ordinance No. 22 of 1909, (the Stamp Ordinance), as amended by Ordinance No. 16 of 1917. This new schedule B, in Part III., does not make provision for probate duty as was previously made in the principal Ordinance and its amendment, so that the position after Ordinance No. 10 of 1919, was precisely the same as it became after Ordinance No. 19 of 1927 was enacted. But, however this may be, the fallacy underlying the argument of the appellant's Counsel is his ignorance of the effect of section 34 of the Estate Duty Ordinance, No. 8 of 1919. This section runs thus :

“Sections 68 to 73 (both inclusive) and Part III., of schedule B, so far as the duty on probate or letters of administration is concerned, of ‘The Stamp Ordinance, 1909’, are hereby repealed, *except as regards the property and estate of any person dying before the commencement of this Ordinance*”.

The learned Solicitor-General argues that the words used clearly indicate that sections 68 to 73 and Part III. of schedule B, so far as probate duty is concerned, have not been repealed in respect of the estates of persons who died before the commencement of this Ordinance, and that the effect of this section is to incorporate into this Ordinance the provisions of the Stamp Ordinance relating to probate in respect of the estates of persons who died before this Ordinance came into operation. If he is right, the repeal by Ordinance No. 10 of 1919 of probate duty will not affect the cases of persons who died before the commencement of the Estate Duty Ordinance, No. 8 of 1919, provided that the effect of that

repeal does not extend to the repeal of this incorporation also. In support of his argument, he cited the case of *The Queen v. Smith*¹.

The question there was whether an appeal lay to Quarter Sessions from a refusal by the Justices of Lancashire to grant the applicant a certificate to sell beer, wines and spirits, for, if it did, the application for a writ of *mandamus* would fail. The application for a certificate was made under the Wine and Beerhouse Act, 1869 (32 & 33 Victoria c. 27), and the question therefore arose whether an appeal lay under this Act.

The position was this. Sections 27 to 29 of 9 George IV. c. 61 provided that a person who thought himself aggrieved by any act of any Justice *done in or concerning the execution of this Act* may appeal against such act to the next General or Quarter Sessions. There were also certain formalities and proceedings with respect to such appeals that were prescribed.

Section 8 of the Wine and Beerhouse Act, 1869 (32 & 33 Victoria c. 27), enacted, *inter alia*, that all the provisions of 9 George IV. c. 61 as to appeals from any act of any Justice *shall*, so far as may be, *have effect with regard to grants of certificates under this Act*.

Schedule 2 of section 75 of the Licensing Act, 1872 (35 & 36 Victoria c. 94), repealed, *inter alia*, sections 27 to 29 of 9 George IV. c. 61 except in certain cases not material for the present point; but section 8 of the Wine and Beerhouse Act was left untouched.

The question arose as to whether the repeal by the third Act of sections 27 to 29 of the first Act had the effect of taking away the right of appeal given in section 8 of the second Act by reference to sections 27 to 29 of the first Act. It was held that the incorporation of the provisions of the first Act into the second Act was the same thing as if the words of the first Act were repeated in the second Act, and the repeal by the third Act of the first Act did not take away the effect of the words which were so repeated in the second Act by incorporation. The consequence was that as the right of appeal was not taken away the applicant had his remedy by appeal and the application for a writ of *mandamus* failed.

Again Maxwell in his "*Interpretation of Statutes*" (7th ed.) at page 344 says: "Where the provisions of one statute are, by reference, incorporated in another and the earlier statute is afterwards repealed, the provisions so incorporated obviously continue in force so far as they form part of the second enactment".

Now, applying the same principles to the case before us, the effect of the language of section 34 of the Estate Duty Ordinance, No. 8 of 1919, is to incorporate into that Ordinance, sections 68 to 73 (both inclusive) and Part III. of schedule B of the Stamp Ordinance, No. 22 of 1909, so far as the duty on probate or letters of administration is concerned in regard to the property and estate of any person dying before the commencement of the Ordinance, namely July 1, 1919, the incorporation being equivalent to a repetition of the words of the Stamp Ordinance in the Estate Duty Ordinance. Therefore, although Part III. of schedule B of the Stamp Ordinance of 1909 was repealed by Ordinance No. 10 of 1919 and Ordinance No. 19 of 1927, Part III. of schedule B continued to remain in the Estate Duty Ordinance, 1909, and was unaffected as the repeal of that part of the Stamp Ordinance did not take away the effect of the words

which were repealed by incorporation in the Estate Duty Ordinance. It is further significant that sections 68 to 73 of the Stamp Ordinance have not been expressly repealed, the repeal being confined only to Part III. of schedule B, and also that Ordinance No. 10 of 1919, came into operation on the same day as the Estate Duty Ordinance, 1919.

In 1935, by Ordinance No. 51 of 1935 (section 2), the levy of estate duty was abolished only in respect of the estates of persons dying on or after October 1, 1935. This would imply that the abolition was not to affect the estates of those who died before that date. Section 3 makes this implication express and section 4 goes a step further in fully establishing this position by stating that "nothing in this Ordinance shall affect the provisions of section 34 of the principal Ordinance", and that "the repeal effected by that section shall continue to be operative subject to the exception in that section contained", namely, that the repeal was not to affect the estates of those who died before July 1, 1919.

It would therefore transpire that on July 1, 1937, the provisions of the Estate Duty Ordinance of 1919, with the incorporation of sections 68. to 73 and Part III. of schedule B of the Stamp Ordinance, 1909, were in full force as regards the estates of all persons who died before July 1, 1919; and, as the deceased testatrix, Mrs. Carolis, died in 1908, the levy of probate duty on her will was quite in order.

The appeal will therefore be dismissed with costs.

SOERTSZ J.—I agree.

Appeal dismissed.

