Present: De Sampayo J. and Schneider A.J.

1920.

In the Matter of an Application of Notary ABEYERATNE.

Stamp Ordinance—Deed of exchange among co-heirs—Facts not disclosed in the deed.

A deed recited that A was entitled to property described in schedule X, and B was entitled to property described in schedule Y, and that they had agreed to effect an exchange of the properties in the two schedules, and in consideration of the premises A conveyed by the said deed property in schedule X to B, and B conveyed property in schedule Y to A. A stamp of Rs. 10 was affixed by the notary to the deed on the footing that this was a deed of exchange under article 27 of part I. of the schedule B. The notary submitted an affidavit to the Commissioner of Stamps stating that A and B were stepmother and stepson, and as such co-heirs of G.

Held, that as there was nothing in the deed itself to show that A and B were co-heirs, article 27 did not apply.

The affidavit provided for in section 30 (2) of the Stamp Ordinance is not to furnish evidence of facts and circumstances outside the instrument, but to prove that all the facts and circumstances are fully and truly set forth in the deed itself.

THE facts appear from the judgment.

A. St. V. Jayawardene (with him *Batuwantudawa* and *Weerasuriya*), for appellant.

Dias, C.C., for Attorney-General.

October 20, 1920. DE SAMPAYO J.—

Cyrus de Silva Abeyeratne, Notary Public, attested the deed No. 8,726 dated October 4, 1915. He affixed to it a stamp of Rs. 10 considering that it was a deed of exchange and came under article

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27 of part I. of schedule B to the Stamp Ordinance. A question having been raised as to the sufficiency of the stamp, he applied to the Commissioner of Stamps under section 30 (1) for his opinion.

The decision of the Commissioner was that the deed came under article No. 22 (*a*), and was stampable with *ad valorem* duty according to the value of the lands dealt with by the deed, and called upon the notary to supply the deficiency of stamps.

The notary has appealed to this Court under section 32.

There were two parties to the deed : Amelia Cornelia Gooneratne, Lama Etani, widow of E. R. Gooneratne, Gate Mudaliyar, of the first part ; and Dr. Valentine David Gooneratne of the second part. The deed recited that the party of the first part was entitled to the property described in schedule A of the deed, and the party of the second part to the property described in schedule B, and that they had agreed to effect an exchange of the properties in the two schedules, and the deed in the operative clause witnessed that the party of the first part, "in consideration of the premises and of the transfer hereinafter set forth and to be made in favour of her by the party of the first part, did give, convey, assure unto (the party of the second part) by way of exchange for the premises described in the said schedule B all that premises fully described in schedule A." And then was a similar conveyance by the party of the second part to the party of the first part of the property described in schedule B.

The deed also contained the usual covenants for good title and for further assurance.

Article 27, on which the notary relies, is as follows : "Deed for the exchange of land without other consideration between co-heirs or part-owners, Rs. 10."

The notary submitted an affidavit to the Commissioner stating : "The parties to the said deed are stepmother and stepson, and as such co-heirs of the late Mudaliyar E. R. Gooneratne." On the facts thus disclosed, the notary contends, in the first place, that the deed is a deed of exchange contemplated by article 27, and alternatively that it is a deed governed by article 28, which provides for stamping with a stamp of Rs. 10 "a deed or instrument not otherwise charged in the schedule not expressly exempted from stamp duty." With regard to the first contention, it should be noted that the deed itself does not in any part of it describe the parties as "co-heirs" of Mudaliyar E. R. Gooneratne. In the matter of the application of A. K. Chellappa, Notary Public,[1] this Court held that the facts and circumstances affecting the chargeability of an instrument with duty or the amount of the duty with which it is chargeable should appear in the instrument itself, and that calling a deed to be a deed of particular character would not make it so. That decision is applicable to this case. The deed not only

[1] (*1916*) *19 N. L. R. 116.*

does not refer to any fact or circumstance showing that the parties were " co-heirs " or " part-owners," but as a matter of fact the descriptions in the schedules seem to indicate that they are not. Schedule A describes twelve entire lands and an undivided fifth part of the soil and a tenth of the plantation of another land ; and schedule B describes half shares of nine other and entirely different lands.

The above decision is also an authority for the proposition that the affidavit provided for in section 30 (2) was not to furnish evidence of facts and circumstances outside the instrument, but to prove, as the section itself says, that all the facts and circumstances are fully and truly set forth in the deed itself. Mr. Jayawardene, however, contends that the decision in this respect is not good law, and he cited *Moore v. Garwood*,[1] *Garnett v. Commissioner of Inland Revenue*,[2] and *Maynard v. Consolidated Kent Collieries Corporation*.[3] I do not think that any of these cases supports his contention. The first and third cases are not appeals from the decisions of the Commissioner. Only the second of these cases is such an appeal. None of them deals with the question as to what evidence a party has the right to put before the Commissioners or with the specific point in issue in this case. I think the authority of the local decision stands. Even assuming that the party who seeks the opinion of the Commissioner of Stamps is entitled to adduce evidence of facts which are not set forth in the instrument itself, I do not think that the notary has put in the evidence required for this purpose. All that he has stated in his affidavit is that the parties to the deed are co-heirs of the late E. R. Gooneratne. This in itself is a curious way of putting it. I do not suppose the notary meant to say that the two parties and E. R. Gooneratne are all heirs of some one else. He probably means that the two parties are both heirs of E. R. Gooneratne, which even if true is a harmless statement. In order to avail himself of the provision of article 27 of the schedule to the Stamp Ordinance, the notary should have shown that the two parties derived their title to the property, which they exchanged, by inheritance from E. R. Gooneratne, and were therefore co-heirs. The evidence afforded by the affidavit is, therefore, wholly insufficient for the notary's purpose. Nor do I think that the deed can be brought under article 28, inasmuch as it is not an instrument " not otherwise charged in this schedule " within its meaning, but is chargeable under the article referred to by the Commissioner.

In my opinion the decision of the Commissioner of Stamps is right, and I would dismiss the appeal, with costs.

SCHNEIDER A.J.—I agree.

Appeal dismissed.

[1] *(1849) 4 Exch. 681.*

[2] *(1900) 81 L. T. 633.*

[3] *(1903) 2 K. B. 121.*