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Present: Lascelles C.J. and De Sampayo A.J.

THE ATTORNEY-GENERAL *v.* PEDRU.

87—D. C. Galle, 4,132.

Testamentary proceedings—Newspapers produced that order nisi was advertised need not be stamped—Stamp Ordinance of 1909, schedule.

Newspapers produced in testamentary proceedings to prove that an order *nisi* for the administration of an estate has been duly advertised need not be stamped as exhibits.

THE question involved in this case was whether newspapers produced before the Court, to prove that an order *nisi* for administration of a deceased person's estate was duly advertised in terms of section 532 of the Civil Procedure Code, should be stamped as exhibits.

The following is the judgment of the District Judge (F. J. Smith, Esq.):—

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1. The duties in testamentary proceedings fixed by Schedule B III. to Ordinance No. 22 of 1909 are more favourable to "estates" than those of Ordinance No. 3 of 1890, in that estates of under Rs. 2,500 are made free of stamps for the various pleadings, &c., enumerated; and also affidavits and affirmations attached to inventories or accounts no longer require stamping. The schedule, however, includes a fresh item: "Every exhibit of any document on which no stamp is fixed or impressed unless the duplicate bears a stamp," and the question now is whether the production in the ordinary course by a proctor of copies of *Gazette* and local newspapers containing the advertisement of testamentary proceedings required by section 532 of the Civil Procedure Code to be made makes them "exhibits" of documents within the meaning of the schedule.

2. Neither "document" nor "exhibit" is defined in the Stamp Ordinance or in the Civil Procedure Code or in the Interpretation Ordinance.

3. In the Evidence Ordinance, No. 14 of 1895, "document" is defined as any matter expressed or described upon any substance by means of letters intended to be used, or which may be used, for the purpose of recording that matter.

4. "Exhibit" is defined in Wood Renton's *Encyclopadia of Laws* as "a document or other thing shown to a witness and referred to by him in the course of his evidence," more particularly the term denotes some document referred to in an affidavit.

"Exhibit" is also defined in Iely's *Wharton's Law Lexicon* as a document or other thing shown to a witness when giving evidence and referred to by him in his evidence.

5. Assuming for the moment that it is necessary for the contents of the advertisement to be proved by the petitioner, the Evidence Act, section 64, says they must be proved by primary evidence, i.e., the document itself produced for the inspection of the Court; and section 62, explanation 2, in the case of print each copy is primary evidence of the contents of the rest.

6. If, then, the petitioner gets into the witness box and says: "I have had the advertisement published in manner prescribed by Court," and produces the best evidence of this, viz., printed copies of the advertisement in the publications named, I hold these to be exhibits of documents liable to stamp duty.

7. But does the Code throw this duty on the petitioner? His duties are laid down in section 530; then the Court, if it orders order *nisi* to be entered, has to see that the application and its order are made known as widely as possible for the benefit of those interested in the estate and direct the publication. Is this order directed to the applicant? I do not consider that the ordinary interpretation of the section warrants such a construction. Had the Code meant to cast the duty on the applicant, there is no reason why it should not have said so in plain words.

8. I hold the direction is to the officers who carry out its orders—in this case the Secretary of the Court—and do not consider that the fact

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that in ordinary practice the applicant's proctor gets the advertisement inserted and pays for it, instead of the Secretary of the Court on payment of charges to him, affects his liability.

9. Then, under section 114 (illustration E) of the Evidence Act, the Court may presume that its subordinate officers have carried out its orders regularly, and asking them to file copies of the advertisement in the case book (though such not being legally proved, and not such as the Court may take judicial cognizance of, are not technically on the record) is really an act *ex abundanti cautela* to satisfy its conscience. It probably arose when Court officials, to save themselves the trouble, delegated the sending of the advertisement to the applicants and proctor, and it was recognized that it might be unsafe to leave the publication altogether to them without some *de facto* (if legally inadmissible) evidence of publication.

10. Section 256 of the Code requires Fiscals' sales of property valued at over Rs. 1,000 to be advertised in the *Gazette*. But I never heard of a Court requiring proof of this before confirming a sale. (The case, of course, is hardly parallel, as the party most interested in the sale would at once complain to Court if the necessary step was omitted, whereas these parties in testamentary cases might fail to receive notice if there were no advertisement.) In insolvency cases, too, as pointed out by Mr. Goonewardena, the due publication in the *Gazette* is generally "presumed."

11. I am of opinion that the duty of duly advertising the Court order *nisi* rests in the Court officials, and that no proof of publication is necessary, and therefore do not call upon Mr. Ranasuriya to supply stamps in this case.

The Attorney-General appealed.

van Langenberg, K.C., Acting S.-G., for the Attorney-General, appellant.—In terms of Part III. of Schedule B to the Stamp Ordinance (No. 22 of 1909) every exhibit of any document on which no stamp is affixed or impressed should be stamped unless its duplicate bears a stamp. Newspapers or cuttings therefrom are exhibits. They are produced to prove advertisements as required by section 532 of the Civil Procedure Code. They should, strictly speaking, be identified by affidavit or oral evidence, but the mere fact that such affidavit or oral evidence is dispensed with by the Court does not make the documents any the less exhibits. Wills are stamped when produced as an exhibit to an affidavit.

The Court directs the publication of the order *nisi*. If the direction is to a subordinate no stamp is necessary; if, however, the direction is to an applicant, the newspaper becomes an exhibit when produced by him in proof of the publication. The test is, Who pays for the advertisement? [De Sampayo A.J.—Is not the publication after all a mode of service on an unnamed class of persons? And if so, is not the production of a newspaper the same thing as the production of a Fiscal's report of service?] Then the Fiscal will

have to send the advertisement. [Lascelles C.J.—It is a direction to the Court officers, and for convenience the proctor sends up the advertisement.]

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No appearance for the respondent.

Cur. adv. vult.

July 15, 1912. LASCELLES C.J.—

This is an appeal taken by the Attorney-General for the purpose of obtaining a ruling whether newspapers produced in testamentary proceedings to prove that an order *nisi* for the administration of an estate has been duly advertised under section 532 of the Civil Procedure Code ought to be stamped as exhibits. It is conceded that it has not been the practice to stamp such documents, and that they were not liable to stamp duty under the repealed "Stamp Ordinance, 1890"; but it is contended, or perhaps only suggested, that the effect of the words, "every exhibit of any document on which no stamp duty is affixed or impressed unless the duplicate bears a stamp," which have been added to the schedule of the duties in testamentary proceedings in "The Stamp Ordinance, 1909," is to render them liable to duty. There can be no doubt that the documents in question, if produced by a party in support of his case, would be liable to stamp duty. But it is clear from the terms of section 532 of the Civil Procedure Code that the applicant for administration is not required either to advertise the order *nisi* or to furnish proof of its advertisement. The Code casts this duty upon the Court. The section provides that the Court "shall direct the order to be advertised in the *Gazette*" and it contains a proviso that the Court may "in its discretion direct such other mode of advertisement in lieu of such publication as to it seems sufficient." The section contemplates directions being given by the Court to its own officers for the advertisement of the order, and it would then be the duty of these officers to satisfy the Court that they had carried out its directions.

The present practice, under which the applicant's proctor sees to the advertisement of the order, and produces the newspaper in which the order has been advertised, has grown up as a matter of convenience. If the requirements of the Code had been strictly followed, and the Court had directed the Secretary to advertise the order, and the latter had filed a copy of a newspaper in proof of his compliance with the Court's direction, it could not have been contended that the newspapers ought to be stamped as an exhibit.

The fact that proctors, as a matter of convenience, and in order to expedite their business, have undertaken duties which are strictly incumbent on the Court and its officers, cannot alter the character of these duties. The advertisement of the order and the proof of the advertisement are duties which are assigned to the Court.

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When a proctor relieves the Court of its duties in this respect, and sees to the advertisement of the order, any document which he produces in proof of the advertisement must be treated as if it were furnished by an officer of the Court to whom the Court had entrusted the duty of carrying out the advertisement. Such a document is clearly not an exhibit, and is not liable to be stamped as such.

I think the decision of the District Court is quite right, and I would dismiss the appeal.

DE SAMPAYO A.J.—I agree.

Appeal dismissed.

