

1941

Present: Moseley S.P.J.

In re ESTATE OF HARRY DOUGLAS GRAHAM  
IN THE MATTER OF AN APPLICATION UNDER SECTION 68 OF  
THE COURTS ORDINANCE

*Testamentary application—Transfer of case—Testamentary proceeding—Stamp Ordinance (Cap. 189), Schedule A, Part III.*

An application to the Supreme Court under section 68 of the Courts Ordinance for the transfer of a testamentary case from one District Court to another should be stamped under Part III. of Schedule A of the Stamp Ordinance.

**T**HIS was an application for the transfer of a testamentary case under section 68 of the Stamp Ordinance.

*H. V. Perera, K.C.* (with him *F. C. W. VanGeyzel*), for appellants.—The question for decision is whether applications to the Supreme Court under section 68 of the Courts Ordinance, Chapter 6, for sole testamentary jurisdiction and for the transfer of testamentary cases should be stamped under Part III. of Schedule A, of the Stamp Ordinance, Chapter 189, as the appellants contend, or as the Crown claims, under Part II, which contains the duties on civil proceedings in the Supreme Court.

The application for sole testamentary jurisdiction is the foundation of a testamentary proceeding for administering the estate of a deceased who has died out of the Island; it has no significance except in relation to testamentary matters in which the Supreme Court has no original jurisdiction. Accordingly, the schedule appropriate to it is that contained in Part III. according to which the relevant documents have been stamped.

A review of earlier legislation supports this view. Part II. of the Stamp Ordinance of 1861 contained *inter alia* two schedules of duties on civil proceedings in the Supreme and the District Courts, and each schedule contained a footnote as follows:—“Testamentary proceedings shall be charged in the class corresponding with the value of the estate . . . .”; there was also a schedule in Part III. enumerating a few items “containing the duties in testamentary proceedings, on probates of wills and letters of administration”, and it is clear, therefore, that the Legislature intended that proceedings in the Supreme Court relating to testamentary matters outside Part III. should be stamped as civil proceedings in the Supreme Court.

The Ordinance of 1861 was, however, replaced by Ordinance No. 3 of 1890. The items in Part III. are substantially the same as those in the present Ordinance, the footnotes to the schedules relating to proceedings

in the Supreme and District Courts were deleted and Part III. was enlarged, indicating that thereafter the duties on testamentary proceedings were to be governed entirely by Part III. This was the view taken by the Supreme Court in the case of *Re estate of Margaret Wernham*<sup>1</sup>, and in the course of his judgment in that case Bonser C.J. regarded an application to the Supreme Court for the conferring of jurisdiction on a particular District Court as a testamentary proceeding. This, it is submitted, concludes the matter.

*M. T. de S. Amerasekere, K.C., Acting S.-G.* (with him *H. H. Basnayake, C.C.*), for the Attorney-General on notice.—The Supreme Court has no original testamentary jurisdiction and the orders in question are made on a totally different basis. Neither the applications nor the orders are in their nature testamentary and, therefore, do not come under Part III.

These proceedings are in the nature of civil proceedings and would fall under Part II. "Civil Proceedings in the Supreme Court". Part III. provides for the steps to be taken in the District Court and provides a special tariff for testamentary proceedings in that Court. Proceedings in the Supreme Court in an appeal in a testamentary proceeding in the District Court would fall for duty under Part II. "Civil Proceedings in the Supreme Court" and not under Part III. Similarly proceedings under section 68 of the Courts Ordinance would attract duty under the appropriate heading of Part II. The Solicitor-General also examined the history of Part III. of the Stamp Ordinance and argued that its legislative history supported his contention.

*Cur. adv. vult.*

April 8, 1941. MOSELEY S.P.J.—

This was an application to this Court made under the provisions of section 68 of the Courts Ordinance (Cap. 6) for the transfer of testamentary action No. T/197, brought in the District Court of Kandy, to the District Court of Colombo. Order was made in terms of the motion, but the point has been taken on behalf of the Crown that the proxy and affidavit, which have been stamped as provided by Part III. of Schedule A of the Stamp Ordinance (Cap. 189), should be stamped under Part II. of that schedule, and further, that the order of this Court directing the transfer should be stamped under the same part.

Part II. of the schedule is described in the caption as "containing the duties on law proceedings" and has several sub-divisions of a somewhat irregular character, the first of which is headed "In the Supreme Court". The column wherein appear the descriptions of the documents liable to duty is headed "In civil proceedings". I would observe parenthetically that it is into this subdivision that the Crown seeks to bring the documents now under discussion. The next subdivision is headed "In the District Courts", and there is a further subdivision as follows:—"A.—In Civil Proceedings. B.—Claim Proceedings". The next heading is "C" which might also be expected to refer to proceedings in the District Courts. That is not the case. It is further labelled "in the Courts of Requests", and is followed by "D.—Claim Proceedings",

which merely appears to be the third part of "C". "E" refers to "Exhibits", and "F" is styled "Miscellaneous" and deals *inter alia* with matters in connection with Guardianships and Matrimonial suits.

Part III. in the caption, claims to contain the "dutes in testamentary proceedings". For a considerable time applications of this nature have been stamped in accordance with the scale here laid down. The present would appear to be the first occasion upon which the correctness of the practice has been challenged.

The question for decision is shortly this: Is an application, made to this Court under the provisions of section 68 of Cap. 6, a testamentary proceeding?

In regard to the broad meaning of the word "testamentary" I would observe that it seems to be beyond doubt that it has ceased, as Kekewich J. put it in *In re Clemow, Yeo v. Clemow*<sup>1</sup>, "to have its purely etymological meaning . . . it may be equally applied to the case where there is no testament, but where the estate is being administered according to the law of the land". Is then, an application of this nature a testamentary proceeding within the meaning of the caption of Part III.?

Chapter VI. of the Courts Ordinance (Cap. 6) is headed "District Courts" and the first section therein, viz., section 62, confers upon every District Court original jurisdiction in "all civil, criminal, revenue, matrimonial, insolvency, and testamentary matters . . .". Section 63 deals with civil jurisdiction in respect of what was described in a recent judgment of this Court (S.C. 120/1940) as an "ordinary civil action" i.e., an action between party and party. Sections 64, 66 and 67 deal respectively with criminal, revenue and testamentary jurisdiction. The wording of section 62 and the arrangement of the following sections seems to indicate that proceedings in revenue, matrimonial, insolvency and testamentary matters are regarded as something apart from the civil jurisdiction of the District Court. The scheme of Parts II. and III. of the schedule of the Stamp Ordinance may be said to conform, to some degree, with this view. We now come to section 68 which confers upon this Court a power of a two-fold nature. It first deals with the case of a person who dies out of the Island leaving property within the Island. In such a case this Court may appoint the District Court which appears most expedient to exercise sole testamentary jurisdiction in respect of the estate of the deceased. It further empowers this Court to transfer, in appropriate cases, a testamentary cause from one District Court to another. The present application was made under the latter provision. It should be observed that these powers are conferred upon the Supreme Court by a section which forms part of the chapter dealing with District Courts. On the other hand the Criminal and Appellate jurisdictions of the Supreme Court are conferred by section 42, in the chapter headed "The Supreme Court". Moreover the jurisdiction of this Court to entertain proceedings such as *mandamus* and prohibition is conferred by section 42 in a chapter styled "General Provisions". That section 68 should appear in its present context is at least an indication that the Legislature regarded the matters therein provided for as being in the nature of a step in a testamentary action.

In the course of argument the history of the legislation in regard to stamp duties was closely examined.

In the Stamp Ordinance, 1861, there was a Part III. of the schedule which contained a limited number of items among which, for the sake of example, there is no duty prescribed for a proxy. In Part II. the arrangement of duties in the Supreme Court and in the District Courts respectively is for practical purposes the same as in the present Ordinance. There is however at the foot of the scale in each case a note under the heading "exemptions" to this effect:—"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 letter of administration is made". As Bonser C.J. pointed out in *Re estate of Margaret Wernham*<sup>1</sup> "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 1890, the footnotes above referred to were struck out in both cases, and Part III. was amplified by the inclusion of a number of items hitherto chargeable under Part II. The removal of the footnotes and the enlargement of Part III. seem to me together to form a circumstance which irresistibly points to the conclusion that Part III. was intended to be a comprehensive table of duties payable in testamentary proceedings irrespective of the Court in which the proceedings were taken. If this view is taken it must be conceded as a fact that there is what appears to be an omission in that no duty is prescribed for an order of this Court made under section 68 of the Courts Ordinance. The Legislature may however have regarded such an order as inter-departmental and the apparent omission may be intentional. Indeed in the case referred to immediately above, Withers J. described the purpose of Part III. in the Ordinance of 1890 as "to exhaust the duties chargeable in testamentary proceedings in the Supreme Court and the District Courts".

In the case of *In re the Guardianship of Richard and James Henry*,<sup>2</sup> minors, it was held that in guardianship matters, since a special duty is prescribed for a certificate of curatorship, and another for an account, "this would seem to exclude the position that any other duties were chargeable in respect of proceedings of the same nature . . . .". This authority does not appear to have been brought to the notice of the Court in the case to which I have referred above (*S. C. 120/1940*). The Court nevertheless arrived at the same conclusion.

So, here, it seems to me that, since Part III. provides expressly for duties in testamentary proceedings, the Legislature did not intend that any other duties, such as one in respect of the order of the Supreme Court, should be payable. Moreover, in my view, it is unnecessary to consider what the intention of the Legislature may be in a case where the actual words of an enactment do not bear any ambiguity. Further, if any ambiguity

<sup>1</sup> 4 N. L. R. 236.

<sup>2</sup> 1 S. C. R. 15.

existed in an enactment of this nature which imposes a burden upon the subject, it would be the duty of the Court to construe it in favour of the people.

The conclusion at which I have arrived is that a testamentary proceeding is something apart from the civil jurisdiction of the Courts, that an application made to this Court under section 68 of the Courts Ordinance is a testamentary proceeding and that the documents in connection therewith are properly stamped under Part III. of the schedule.

*Appeal allowed.*