APPELLATE CIVIL.

Before Mookerjee and Newbould JJ.

SWARNAMAYEE DEBI

v.

SECRETARY OF STATE FOR INDIA.*

1915

Aug. 10.

Probate—Succession duty—Court Fees Act (VII of 1870) s. 19 (c) as amended by Act XIII of 1875, s. 19 (c)—Death of the first executrix—Application for second probate—Duty payable, if any, on second probate.

When an executor, to whom probate has been granted, dies leaving a part of the testator's estate unadministered, and a new representative is appointed for the purpose of completing the administration, there being no new succession and no new devolution of the estate, no fresh succession-duty should be levied.

What the Legislature appears to have intended is that where the full fee, chargeable under the Court Fees Act on a probate, at the time it is granted, has been paid, no further fee shall be chargeable when a second grant is made in respect of that property as comprised in that estate.

In the goods of Chalmers (1), *In the goods of Gasper* (2), *In the goods of Innes* (3), *In the goods of Balthazar* (4), *In the goods of Ameerun* (5), *Webster* v. *Spencer* (6), *Cummins* v. *Cummins* (7), *In the goods of Bell* (8), *Anon* (9) *Anon* (10) and *Watkins* v. *Brent* (11) referred to.

APPEAL by Swarnamayee Debi (petitioner).

The facts are shortly these. One Prasanna Kumar Bhattacharya died on the 28th of October 1908. On the 24th of March 1907, he had made a testamentary

*Appeal from Order, No. 110 of 1915, against the order of J. D. Cargill, District Judge of Mymensingh, dated Jan. 18, 1915.

(1) (1870) 21 W. R. 246 n.
(2) (1878) I. L. R. 3 Calc. 733.
(3) (1871) 16 W. R. 253.
(4) (1908) L. B. R. 255.
(5) (1871) 15 W. R. 496.
(6) (1820) 3 B. & Ald. 360.
(7) (1845) 3 Jo. & Lat. 64.
(8) (1871) L. R. 2 P. & D. 247.
(9) (1675) 1 Freeman 313.
(10) (1675) 1 Ch. Cas. 265.
(11) (1835) 1 Myl. & Cr. 104.

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disposition of his properties whereby he appointed two successive executrices: his eldest sister Gobinda Sundari Debi and in case of her death, his widow Swarnamayee Debi.

On the 29th of April 1909, probate was granted to Gobinda Sundari Debi; after her death fresh probate was applied for by Swarnamayee Debi, on the 9th of September 1914.

On the occasion of the first probate, the assets were valued at Rs. 77,006 and, according to the scale then obtaining, Rs. 1,541 was paid by Gobinda Sundari. But since the grant of the first probate the scale of probate duty on estates valued at above Rs. 55,000 had been raised from 2 to 3 per cent. by Act III of 1910, and as duty had been paid at the rate of 2 per cent. the petitioner was called upon to pay the difference between the duties calculated at 2 per cent. and 3 per cent. respectively. The petitioner contended that no further duty was payable, but the District Judge refused to issue probate to the petitioner until the difference was paid. Hence this appeal to this Court.

Babu Dwarka Nath Chakravarti and *Babu Kali Kinkar Chakravarti*, for the appellant.

The Senior Government Pleader (*Babu Ram Charan Mitra*), for the respondent.

MOOKERJEE AND NEWBOULD JJ. This appeal is directed against an order, whereby the District Judge has in substance refused to issue a probate to the appellant till a sum of Rs. 769-3-0 had been paid as succession duty. The facts are not in controversy, and may be briefly recited. One Prasanna Kumar Bhattacharyya died on the 28th October 1908. He had previously made a testamentary disposition of his properties on the 24th March 1907. The will provided

that during the minority of his son, Amulya Kumar Bhattacharyya, his estate would be administered, first by his eldest sister, Gobinda Sundari Debi, and, next, upon her death, by his widow Swarnamayee Debi; the ladies were thus constituted the two successive executrices. On the 29th April, 1909, probate was granted to Gobinda Sundari Debi under section 31 of the Probate and Administration Act, 1881, though it was not explicitly stated that the grant was made *durante minore aetate*. The executrix died on the 17th July 1914. As the sole residuary legatee had not yet attained his majority, the second executrix named in the will applied for probate on the 9th September, 1914. An order was recorded on that date that no probate duty appeared necessary as it had been paid already, and the case was fixed for disposal on the 7th November 1914. On that date the Court directed that the original probate produced by the applicant be cancelled and that a fresh probate with a copy of the will annexed be granted to the petitioner. On the 21st December 1914, the Court reconsidered the matter and held that as the scale of probate duty on estates valued at above Rs. 50,000 had been raised from 2 to 3 per cent. by Act VII of 1910 and as duty had been paid at the rate of 2 per cent. on the first probate, the petitioner should be called upon to pay the difference between the duties calculated at 2 per cent. and 3 per cent. respectively. The petitioner was heard on the 18th January 1915, and contended that under section 19C of the Court Fees Act, 1870, as amended by Act XIII of 1875, no further duty was payable. This contention was overruled and she was called upon to pay the additional sum named before the probate could be issued to her. The petitioner has appealed to this Court and has also obtained a Rule in the alternative, should a question be raised as to the

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competency of the appeal. It is plain that the order, in effect, refuses the application for probate and is appealable under section 86 of the Probate and Administration Act.

Section 19C of the Court Fees Act, 1870, which was inserted therein by section 6 of Act XIII of 1875, is in these terms: "Whenever a grant of probate or letters of administration has been or is made in respect of the whole of the property belonging to an estate, and the full fee chargeable under this Act has been or is paid thereon, no fee shall be chargeable under the same Act when a like grant is made in respect of the whole or any part of the same property belonging to the same estate." It is plain that as the fee chargeable upon a probate is required by section 19 I to be paid before the order for grant of probate is made, what constitutes "the full fee chargeable under this Act" must be determined by reference to the point of time when the grant of probate is made. We are unable to accept the contention that "the full fee chargeable under this Act" must be determined, with reference to the point of time, when the second grant is sought. We are further unable to accept the contention that the expressions "under this Act" and "under the same Act" refer to, not the Court Fees Act but the subsequent Acts amending the Court Fees Act; what the Legislature appears to have intended is that where the full fee chargeable under the Court Fees Act on a probate at the time it is granted has been paid, no further fee shall be chargeable when a second grant is made in respect of that property as comprised in that estate. If this interpretation were not accepted, and if the contention of the Government Pleader were to prevail, the anomalous result would follow that section 19C would have no application where, as in the case before

us, the scale of probate duty has been raised in the interval between the grant of the first and the second probates, and consequently, the entire probate duty on the enhanced scale would be payable without deduction of the duty previously paid. This could hardly have been the intention of the Legislature. The second paragraph of section 19C would be of no avail, as it is restricted to grants in respect of property forming part of an estate. In our opinion, the interpretation put upon the first paragraph of section 19C by the appellant is reasonable and is undoubtedly consistent with the language used. We hold accordingly that as the full fee chargeable under the Court Fees Act on the first probate granted in this case on the 29th April 1909 was paid thereon, no fee is now chargeable under the Court Fees Act on the second grant. This view does not militate against the decision of Couch C. J. in *In the goods of Chalmers* (1) and of Garth C. J. in *In the goods of Gasper* (2). In the former case, the first grant had been made and a fixed duty paid thereon under the Indian Succession Act, 1865, while the second grant was made after the Court Fees Act, 1870, had come into force. In the latter case, the circumstances were similar, with this difference that section 19C had meanwhile been inserted in the Court Fees Act, but that section could not avail, as it refers expressly to cases where both the first and the second grants had been made after the Court Fees Act had come into force. Nor is any assistance derived from the decision of Norman C. J. in *In the goods of Innes* (3), which merely recognises the principle subsequently embodied in the second paragraph of section 19C. We may add that the view adopted by us places the law in this country in a line with what has

(1) (1870) 21 W. R. 246. (2) (1878) I. L. R. 3 Calc. 733.
(3) (1871) 16 W. R. 253.

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long been the law in England. There, all second and subsequent grants of probate and administration, in respect of property on which the full duty has been already paid upon a previous grant, are exempted from further stamp duty by section 3 of 41 Geo. III, c. 86; section 36 of 5 and 6 Vict. ch. 82 contains a corresponding provision for Ireland. It may further be observed that if the question be considered as one of principle, the rule as formulated in England and as interpreted by us is evidently just. When an executor, to whom probate has been granted dies, leaving a part of the testator's estate unadministered and a new representative is appointed for the purpose of completing the administration, there is no new succession, no new devolution of the estate, and it is difficult to appreciate why fresh succession duty should be levied. A good illustration is afforded by the case of *In the goods of Balthazar* (1); there, letters of administration had previously been issued in respect of the whole property, and the full fee chargeable on the property at the value then placed upon it had been levied. It was ruled that when a new grant had to be made under section 229 of the Indian Succession Act on the death of the first administrator, no further court-fee was leviable, although the value of the property had increased in the meantime. This is consistent with the decision of Norman C. J. in *In the goods of Ameerun* (2), that no duty is payable on a double probate which recites and in fact proceeds upon the first. Reference may in this connection be made to the following passage from Williams on Executors, 10th Ed, Vol. I, p. 295: "Probate granted to one of several executors enures to the benefit of all: *Webster* v. *Spencer*(3), *Cummins* v. *Cummins* (4). Where there are several

(1) (1908) 4 L. B. R. 255.
(2) (1871) 15 W.R. 496.
(3) (1820) 3 B. & Ald. 360
(4) (1845) 3 Jo. & Lat. 64.

executors, upon the grant of probate to one of them, it is usual to reserve power of making a like grant to the others. But this appears to be unnecessary, both because the probate already granted enures to their benefit, and because they have a right to the grant, whether the power be reserved or not. The practice is to take out what is called a double probate which is in this manner. The first executor that comes in, takes probate in the usual form, with reservation to the rest. Afterwards if another comes in, he also is to be sworn in the usual manner and an engrossment of the original will is to be annexed to such probate in the same manner as the first, and in the second grant such first grant is to be recited; and so on, if there are more that come in afterwards: 4 Burn Ec. Law 310; *In the goods of Bell* (1). If there be several executors appointed with distinct powers, as one for one part of the estate, and another for another, yet there being but one will to be proved, one proving of it suffices. Bacon's Abr. Tit. Exec. (c) 4. So, if B is made executor for ten years and afterwards C is to be executor, and B proves the will and the ten years expire, C may administer without any further probate: *Anon* (2), *Anon*(3), *Watkins* v. *Brent* (4)." In our own opinion, we cannot reasonably hold that the appellant is bound to pay additional probate duty.

The result is that this appeal is allowed, and the order of the District Judge, dated the 18th January 1915, set aside. Probate will be granted to the appellant without payment of fresh probate duty. The Rule will stand discharged.

S. K. B. *Appeal allowed.*

(1) (1871) L. R. 2 P. & D. 247.
(2) (1675) 1 Freeman 313.
(3) (1675) 1 Ch. Cas. 265.
(4) (1835) 1 Myl. & Cr. 104.