

1875

JUNESWAR
DASS
v.
MAHABEER
SINGH.

ing that the cause of action arose within six years before the commencement of the suit. However, it is sufficient to say that their Lordships think the limitation applicable to the case is that under cl. 12, s. 1 of the Limitation Act.

In the result, their Lordships will humbly advise Her Majesty to affirm the decision of the High Court, and to dismiss this appeal with costs.

Appeal dismissed.

Agent for the appellant: Mr. *T. L. Wilson.*

Agents for the respondents: Messrs. *Watkins and Lattey.*

ORIGINAL CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Pontifex.

1876

March 1.

IN THE GOODS OF GLADSTONE (DECEASED).

Court Fees Act (VII of 1870), Sch. I., cls. 11 & 12—Probate Duty, Exemption from—Interest in Partnership Property.

The testator, a member of the firms of *G. A. & Co.*, of Calcutta, and *O. G. & Co.*, of Liverpool, died in England, leaving a will, of which he appointed *G* in England and *O* in Calcutta his executors. As a partner in the Calcutta firm, the testator was entitled to a share in an indigo concern and in certain immovable property in Calcutta, and his share in these properties was, on his death, estimated, and the money-value thereof paid to his estate by the firm in Liverpool, and probate duty had been paid thereon by *G* in obtaining probate of the will in England. Shortly after the testator's death, the indigo concern was contracted to be sold, and the testator's name appearing on the title-deeds as one of the owners, *O* applied for probate of the will, to enable him to join in the conveyance and in any future sale of the other immovable property. An unlimited grant of probate was made to *O*, who claimed exemption from probate duty in respect of the properties, on the grounds (a) that duty had already been paid in England on the testator's share in them, and (b) that there was no amount or value in respect of which probate was to be granted in India. *Held* on a case referred by the taxing officer, that *O*

was not entitled, in obtaining probate, to exemption from the probate duty payable under Sch. I, cl. 12 of the Court Fees Act, in respect of the properties.

1876

IN THE
GOODS OF
GLADSTONE.

CASE referred by the Taxing Officer of the Court under s. 5 of the Court Fees Act (VII of 1870) for the opinion of the Chief Justice.

The case arose on the petition for probate of the will of Murray Gladstone, who was a member of the mercantile firms of Gillanders, Arbuthnot and Co., of Calcutta and Rangoon, and Ogilvy, Gillanders and Co., of Liverpool and London, who died in Wales in August 1875. By his will he appointed Robert Gladstone and J. F. Ogilvy, the present petitioner, his executors.

An unlimited grant of probate was made by Phear, J., to Mr. Ogilvy, the executor in India, but exemption from probate duty was claimed. From the petition for probate it appeared that probate was taken out by Robert Gladstone in England, but not by the petitioner; that as a partner in the firm in Calcutta, Rangoon, and Liverpool, the testator was interested in the Otter Indigo concern in Tirhoot, and also in certain immovable property in Calcutta, *viz.*, one-half of No. 5 Clive Street. The 6th paragraph stated that the Otter indigo concern and share in the premises in Clive Street constituted part of the assets and capital of the partnership firms, and it had been the practice on the death or retirement of a partner, that his interest in such properties, and also in the other assets of the firms in India and elsewhere, should be ascertained by valuation or estimate, and the total amount of the share of such partner in the entire partnership assets paid to him or his legal personal representatives: and the adjustment of the account of such retiring or deceased partner was always made at the head office of the firms at Liverpool, to which particulars were supplied from all the other offices or branches of the firms, and the payments in respect of such share were always made in England, and not in India, and the annual balance sheets of the firms were also always prepared, settled, and adjusted at the head office in England. The petition further stated, that the entirety of the indigo concern was, soon after the testator's death, contracted to be sold, and that the valuation

1876

IN THE
GOODS OF
GLADSTONE.

had been made in the usual way in Liverpool and the money paid to the estate in England, and in obtaining probate of his will Robert Gladstone had paid probate duty in respect of the testator's share in the indigo concern and the premises in Clive Street; and that probate was only now required "for the purpose of joining in a conveyance of the said premises, because the name of the testator appeared in the title-deeds relating thereto as one of the owners thereof in respect of the partnership firm of Gillanders, Arbuthnot and Co."

After stating the facts, as alleged in the petition, the case stated:—

"The petition for probate, disclosing the above facts, is supplemented by two letters from the petitioner's attorneys, one of which contains the following statement: 'The estimated value of the share of the abovenamed deceased in the capital and assets of the firms mentioned in the petition for probate has, we understand, been paid to, or otherwise accounted for, and satisfied to, the executor in England. The only object in obtaining a grant here is to enable the executor here to join with the owners in the conveyance of the other indigo concern, which was agreed to be sold shortly after the death of Mr. Murray Gladstone, and also to join in any sale or dealings with the share of the firm in the Clive Street premises.'

"From this statement, taken together with the statements in the^s petition for probate, it would seem: (1) that the testator's share of the assets and property of the firms has been taken over by the firms; (2) that the value of the share so taken over has been received by the executor in England; (3) that the indigo concern was contracted to be sold after it had been taken over; (4) that no effectual transfer of either the house or the indigo concern can be made, except under the authority of a probate to be obtained in this country.

"Upon these facts, exemption from the payment of duty under the Court Fees Act, 1870, is claimed on the grounds: (1) that duty has been already paid in England in respect of the premises; (2) that there is no amount or value in respect of which probate is to be granted here."

With reference to the first ground of exemption, the Taxing Officer, referring to *Attorney-General v. Bouwens* (1) was of opinion, that no duty was properly payable in England in respect of these properties, and therefore that any duty paid in England in respect of the testator's share in the properties was an excess payment, of which a refund could be obtained under the provisions of 55 Geo. III, c. 184, s. 40.

As to the second ground for exemption, the Taxing Officer observed, "that it could not be maintained that there was no amount or value in respect of which probate is to be granted here," since probate was to be granted here in respect of the share itself; and referred to the case of *The Attorney-General v. Brunning* (2).

Mr. *Shiell* for the petitioner for probate contended, that he was entitled to the exemption from probate duty claimed. The Court Fees Act, Sch. I, cl. 12, made the duty payable when the amount or value was more than Rs. 1,000. Here the property, as far as the estate of the deceased was concerned, was of no amount or value whatever. By the arrangement, which was usual on the death of a partner as set out in para. 6 of the petition for probate, the property passed at the testator's death to the surviving partners in the firm, and the interest the deceased had when alive became property in England, on which probate duty was payable and on which probate duty has been paid. The deceased, for instance, had no interest in the property which he could have disposed of by will: nor, supposing the property which was contracted to be sold after the testator's death had increased in value between his death and the sale, would his estate have benefited by that increase. The estate was divested out of the deceased, and went to his partners. [PONTIFEX, J.—Then you don't require probate.] Probate is not required with respect to any interest the deceased had, but merely to complete a title by a conveyance to which, as his name appears in the title deeds of the property, his representatives are necessary parties. If this property had been

1876

IN THE
GOODS OF
GLADSTONE.

(1) 4 M. & W., 171.

(2) 4 H. & N., 94; S. C. on appeal, 30 L. J., Ex., 379; 8 H. L. C., 243; and 6 Jur., N. S., 1083.

1876

IN THE
GOODS OF
GLADSTONE.

in England, probate duty, and not succession duty, would have been payable on it. [PONTIFEX, J., referred to *Custance v. Bradshaw* (1).] See *The Attorney-General v. Brunning* (2), where, as in the present case, there was a change in the nature of the property created by the arrangement between the members of the firm, and where on that ground probate duty was held to be payable. [PONTIFEX, J.—In *Custance v. Bradshaw* (1) the property does not appear to have been partnership property, as it is stated to have been in 1 Wms. on Executors, 622, 7th Ed. GARTH, C. J.—Suppose the property became money on the death of the testator, was it not money in India?] It is submitted not under the partnership arrangement. [GARTH, C. J., referred to the case of *The Attorney-General v. Bouwens* (3), where foreign bonds were held to be subject to probate duty in England.] There the bonds were from their negotiability considered as property in England. The executor as representing the testator has no such substantial interest in the property as would give a purchaser a right to require him to join in conveying it; and probate being required merely to enable him to become a formal party to a conveyance, the mere fact that the testator's name appears in the title deeds as one of the owners does not constitute an interest in him of any "amount or value" in respect of which probate duty can be said to be payable.

The *Standing Counsel* Mr. Kennedy (with him *The Advocate-General*, offg. Mr. Paul), for the Crown.—Assuming probate is considered necessary, it must be because the testator has an interest in some property in India. If duty was not payable here, it would not be payable in England; yet it has been paid there. The fact of its having been paid there does not exempt the petitioner for probate here from payment. *The Attorney-General v. Higgins* (4) was a case, where it was held that, though probate duty had been paid on certain shares in England,

(1) 4 Hare, 315.

(3) 4 M. & W., 171.

(2) 4 H. & N., 94; S. C. on appeal,
8 H. L. C., 243; 6 Jur., N. S., 1083;
and 30 L. J. Ex., 379.(4) 2 H. & N., 339; S. C., 26 L. J.
Ex., 403.

yet on probate duty being required in Scotland, probate duty was again payable. That was a case, too, where the double probate duty went to the same revenue; here it does not; see also *Attorney-General v. Dimond* (1). The duty was wrongly paid in England; the Court there had no jurisdiction to grant it in respect of this property. The proper Court was the Court here, and parties cannot, by agreement among themselves, deprive the proper Court of jurisdiction over the property in respect of which probate duty is payable. It is submitted that the deceased had an interest in real property here. Wigram, V.C., in *Custance v. Bradshaw* (2), lays down the principle that the fact of the property being partnership property makes no difference: the same results will follow. The provisions of the partnership deed cannot alter the relations of the partners with respect to the ordinary incidents of partnership property; see *Matson v. Swift* (3). Suppose this was the only asset of the deceased, would there be nothing liable to probate duty? It is submitted there would be, and it cannot make any difference that there are other assets. Where it is assumed that probate is necessary, that appears to be conclusive of the question. It is another matter whether probate is necessary.

1876

 IN THE
 GOODS OF
 GLADSTONE.

Mr. *Shiell* did not reply.

The opinion of the Court was as follows:—

GARTH, C.J.—In this case an unlimited grant of probate in the usual form has been granted to the executor of Mr. Murray Gladstone by Phear, J., and the only question which we have to decide is, whether any duty should be paid in respect to the two properties mentioned in the petition, *viz.*, an indigo factory in Tirhoot, and a share in the premises Nos. 5 to 8 Clive Street, Calcutta, which formed part of the partnership property of the firm of Gillanders, Arbuthnot and Co., of which the testator, Mr. Murray Gladstone, was a member. It is stated in the petition, that Mr. Murray Gladstone was one of the

(1) 1 C. & J., 356; S. C., 1 Tyr., 243.

(2) 4 Hare, 315.

(3) 8 Beav., 368.

1876
 IN THE
 GOODS OF
 GLADSTONE.

persons to whom both these properties were conveyed, and it is therefore necessary, in order to enable the firm to deal with them, that probate of Mr. Gladstone's will should be taken out in this country; but it is contended that no duty should be charged in respect to those properties, because, by some arrangement between the partners, Mr. Gladstone's share of the partnership assets has been paid to his estate in England, and probate duty has been paid in England upon that amount.

The question then raised by the petition has been referred to me, and I have requested Pontifex, J., to sit with me, for the purpose of hearing counsel upon it.

Having now heard Mr. Shiell's argument, we are unable to discover any reason why Mr. Gladstone's share of the properties in question should be exempt from duty. They appear to have formed part of the assets belonging to the partnership, and it may very well be that the value of Mr. Gladstone's share in them may, by some arrangement, have been paid to his estate in money by the firm; but that is no reason why they should be exempt from duty; and looking at the articles of partnership (1), a copy of which has been produced to us by the petitioner, we find no provision there which even affords a basis for Mr. Shiell's argument.

The prayer of the petition will therefore be refused, and the Crown will be entitled to the costs of the hearing.

Attorneys for the petitioner: Messrs. *Chauntrell, Knowles and Roberts.*

Attorney for the Crown: *The Government Solicitor, Mr. Sanderson.*

(1) The partnership agreement provided for the settlement and adjustment of the accounts, and the valuation of each partner's share in all the firms taking place at the head office in Liverpool, the amount of the share being placed to the credit of the partners respectively in the books of the Liverpool firm.