

rights of the parties, to insist on putting an auction-purchaser into possession in spite of the resistance or obstruction of a third party having no connection with the judgment-debtor; and, therefore, it seems to us that, ordinarily, officers should be directed to abstain from any act of dispossession in such a case, leaving the execution-purchaser to his remedy by suit.

1878

IN THE  
MATTER OF  
HARASAT  
OOLLAH  
v.  
BROJONATH  
GHOSE.

## ORIGINAL CIVIL.

*Before Sir Richard Garth, Kt., Chief Justice.*

IN THE GOODS OF GASPER MALCOLM GASPER (DECEASED).

1878

June 1 3/4 18.

*Ad valorem Duty—Act VII of 1870, sched. i, cl. 11—Act XIII of 1875, s. 6 (19c)—Notification No. 2623 of 24th April 1874.\**

Executors obtaining a second grant of probate subsequent to the enactment of the Court Fees Act of 1870 (the first grant having been taken out previously to that enactment) are not exempted from the payment of the *ad valorem* duty chargeable under that Act, although the full fee then chargeable by law had already been paid at the time when the first probate was taken out.

THIS was a reference under s. 5 of Act VII of 1870, made by Mr. Belchambers, the Taxing Master of the Court.

It appeared that one Gasper Malcolm Gasper died on the 5th August 1862, appointing by will one Johannes George Bagram his executor, and directing that each of his sons who attained the age of 21 years should also be joined with him as executors. Johannes George Bagram, in August 1862, applied for and obtained probate of the testator's will and paid the only fee

\* Financial Notification, No. 2623, *Gazette of India*, 26th April 1874, Part I, p. 264.

perty belonging to the same estate identical with or including the property to which the former grant relates.

In exercise of the power conferred by s. 35 of the Court Fees Act of 1870, the Governor-General in Council is pleased to make the following reduction and remission:—

(b) Whenever a grant of probate or letters of administration shall have been made in respect of any property belonging to an estate, no fees shall be chargeable under the said Act when a like grant is made in respect of the whole or any part of the same property belonging to the same estate.

(a) Whenever a grant of probate or letters of administration shall have been made in respect of any property forming part of an estate, the amount of fees then actually paid under the said Act shall be deducted when a like grant is made in respect of pro-

(c) This notification applies to the whole of British India.

1878

IN THE  
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which was at that time leviable under the law in force, *viz.*, a commission fee amounting to Rs. 10. On the 30th April 1878 Johannes George Bagram died, and in May of the same year two of the sons of the testator applied for probate.

The Registrar was of opinion that an *ad valorem* duty of 2 per cent. was chargeable on the value of the unadministered estate under cl. 11 of the 1st schedule of Act VII of 1870. In support of this view he cited the case of *In the Goods of Chalmers* (1), the Financial Notification No. 2623 of 24th April 1874, and s. 19 of the Court Fees Act, read with s. 6 (19c) of Act XIII of 1875.

Mr. G. Gregory for the executors.—The duty claimed here is not payable under Act VII of 1870, or Act XIII of 1875; those Acts can only apply to cases where the testator dies after those Acts have come into operation. To apply the provisions of the Court Fees Act to the present case would be to give a retrospective effect to the Act. In cases of this description the Courts have always been averse to construe Acts in that manner; see Maxwell on the Interpretation of Statutes, p. 192, and the case of *Earl Cornwallis* (2). To put a retrospective construction on the Act would be, in the present case, to subject the estate to a heavy duty under an enactment the provisions of which do not expressly apply, the duty leviable at the time when the first probate was taken out having already been paid; and further there is no express provision in the Act applicable to cases of wills admitted to probate before the Act came into force.

*The Advocate-General* (Mr. Paul) for the Crown.—Act VII of 1870 expressly requires that *ad valorem* duty shall be paid upon any grant of probate, and the amending Act, Act XIII of 1875, s. 6 (19c), merely states, “that when the full fee chargeable under the Court Fees Act has been once paid, no fee shall be chargeable under the same Act on any further grant

(1) 6 B. L. R., Apx., 137.

(2) 25 L. J., Ex., 149; S. C., 11 Ex., 580.

made in respect of the whole or any part of the same property belonging to the same estate." Now the probate duty payable under the Court Fees Act has never in this case been paid before. The only fee that has been paid is a commission fee of Rs. 10, payable under the law in force when the first probate was taken out. So, clearly, the exemption claimed under s. 6 (19e) of Act XIII of 1875 does not apply to the present case. The case of *In the Goods of Chalmers* (1) is exactly in point.

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IN THE  
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The opinion of the Chief Justice was as follows :—

GARTH, C. J.—I think it is quite clear that the *ad valorem* duty must be paid upon the present grant of probate. At the time when the first grant of probate was made to one of the executors named in the will, no *ad valorem* duty was payable. The only sum charged was a commission fee of Rs. 10. That executor has died, and the other two executors now wish to prove the will. Act VII of 1870 requires the *ad valorem* duty to be paid upon any grant of probate, and I find no provision exempting these executors from payment of the duty. In fact, but for the official notification made under the provisions of the Act, dated the 24th of April 1874, the *ad valorem* fee would be payable a second time upon any second grant of probate. But here no injustice is done, because the duty has never been paid upon this property.

The case of *In the Goods of Chalmers, deceased* (1), decided by Sir R. Couch, is in point, and is entirely in accordance with the view which I take of this question.

The English case to which my attention has been called by Mr. Gregory—*In re the Executors of Lord Cornwallis* (2)—will be found to have no application to the present. That case merely decided that the Succession Duty Act of 1853 did not apply to annuities granted before the passing of that Act.

Attorney for the executors : Mr. Zorab.

Attorney for the Crown : The *Government Solicitor*.

(1) 6 B. L. R., Apx., 137.

(2) 25 L. J., Ex., 142 ; S. C., 11 Ex., 580.