

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Oriental Bank Corporation v. Wright, from the High Court of the Province of Griqualand West, delivered 14th July 1880.*

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Present:

LORD BLACKBURN.

SIR JAMES W. COLVILLE.

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

SIR ROBERT P. COLLIER.

THIS is an appeal by the Oriental Bank Corporation against an order of the High Court of the Province of Griqualand West, made upon the application of the Respondent, the Acting Treasurer of the Province, whereby the Bank was directed to make a return (1) of its own notes outstanding on the 1st of November 1875, and (2) of all bank notes of the Kimberley agency of the Oriental Bank, or any other bank, which on the face of them bear to have been issued at or from any place in Africa, or elsewhere not within the Province, and which, since the 1st November 1875, have been paid out or put into use and circulation in the Province by the Bank. The order for this return was based on an Act of Parliament of the Cape Colony, No. 6, 1864, "For imposing a Duty upon Bank Notes," with a view to the imposition of the duty chargeable by that Act.

This case has been twice argued at their Lordship's bar.

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Two objections, and two only, were urged on behalf of the Appellants, either of which would, if established, be sufficient to show that the order appealed against was wrong. Their Lordships are of opinion that the second of these objections is well founded; and they do not express any opinion upon any other matter. Although on the first objection they give no decision, it must not be inferred that they have formed an opinion upon it adverse to the Appellants.

In order, however, to make intelligible the point on which their Lordships express an opinion, a short statement is necessary.

On the 27th October 1871 several proclamations were issued by Sir Henry Barkly, then High Commissioner. The most material of these are Nos. 67 and 68, which must be construed together, from which the following are extracts:—

“No. 67, 1871. October 27th, 1871.

“Proclamation declaring Waterboer and Tribe of Griquas British subjects, and their territory British territory. Boundaries set forth.

“Whereas Captain Nicholas Waterboer, paramount chief of the Griqua people and territory of Griqualand West, with his Raad or Council, has on behalf of himself and his said people petitioned Her Britannic Majesty Queen Victoria that she would be graciously pleased to accept into her allegiance him, the said Nicholas Waterboer, and his said people, and to declare him and his people to be British subjects, and their territory to be British territory.

“And whereas Her said Majesty, on receiving the said petition, was graciously pleased to signify her assent to the prayer thereof, and to authorize me in her name, as her High Commissioner, to grant the said prayer, and to accept the said allegiance, and to declare the said chief, Nicholas Waterboer, and his said people to be British subjects, and the territory of the said chief and people to be British territory, conditionally on the Parliament of the Colony of the Cape of Good Hope consenting that the said territory shall become part of the Colony aforesaid, and undertaking to provide for the Government and defence thereof and of the said people.

“3. And whereas the two Houses of Parliament of the said Colony of the Cape of Good Hope, by addresses, dated respec-

tively the 5th day of August 1871 and the 8th day of August 1871, presented to me have communicated to me that they have resolved that, pending the adjustment of certain disputes therein referred to regarding the boundaries of the said territory, and the passing of a law for the annexation of the said territory, therein called the Diamond Fields, to this Colony, the said Houses were of opinion, respectively, that I should be requested to adopt such measures as might appear to me to be necessary and practicable for the maintenance of order among certain inhabitants of the said territory engaged in searching for diamonds therein, and in the said resolution termed the diggers, and the other inhabitants of the said territory, as well as for the collection of revenue and the administration of justice.

"4. And whereas it is necessary, for the purpose of so maintaining order, collecting revenue, and administering justice in the said territory, that I should, in Her Majesty's name, grant the prayer of the said chief, Nicholas Waterboer, and his said people, and assume sovereign jurisdiction in and over the said territory.

"5. Now, therefore, I do hereby proclaim and declare that from and after the publication hereof the said Nicholas Waterboer, and the said tribe of the Griquas of Griqualand West, shall be, and shall be taken to be, for all intents and purposes British subjects, and the territory of or belonging to the said Nicholas Waterboer and the said tribe shall be taken to be British territory, and I hereby require all Her Majesty's subjects in South Africa to take notice, of this my Proclamation, accordingly."

"No. 68, 1871.

"October 27th 1871.

"Proclamation declaring laws and usages of Cape Colony as laws for Griqualand West, so far as the same shall not be inapplicable. Quarterly Wine and Spirit Licensing Board vested with the powers of the March Licensing Board in Cape Colony. Stamps. Licence duties and fees of office payable as in Cape Colony. Cape stamps valid. Recorders' powers as to Resident Magistrates' Courts.

"Whereas I have, by proclamation of this day's date, No. 67, declared the sovereignty of Her Majesty Queen Victoria over the territory of Griqualand West, as defined by my said proclamation, and it is expedient to make provision for the good government of this said territory pending the passing of a law to annex the same to the Colony of the Cape of Good Hope.

"2. Now, therefore, I do hereby proclaim, declare, and make known that, except in so far as I have already proclaimed, or may hereby or hereafter proclaim to the contrary, the laws and usages of the said Colony of the Cape of Good Hope shall be deemed to be the laws of the said territory, so far as the same shall not be inapplicable thereto.

"3. The laws relating to the sale of wines, malt liquors, and spirituous liquors within the said territory shall be the same as the laws of the said Colony relating to the same matters, save that the several quarterly licensing boards in the said territory shall at each meeting thereof have the like powers as the licensing boards in the said Colony now possess at the February meeting of such boards only."

"4. All stamp and licence duties and all fees of office now payable in the said Colony shall be payable likewise in the said territory as if the same were part of the said Colony, and the stamps and fees payable in the Supreme Court and the Court for the Eastern Districts of the Cape of Good Hope shall be payable as near as may be in the High Court of Griqualand in like manner as in the said Supreme Court and Court for the Eastern Districts of the Cape of Good Hope, and all stamps of the said Colony shall be deemed likewise to be stamps for the said territory, and shall be valid therein and used as if the said territory were part of the said Colony."

The condition attached to the previous authority given by Her Majesty to the High Commissioner, viz., "the Parliament of the Colony of the Cape of Good Hope consenting that the said territory should become part of the Colony aforesaid, and undertaking to provide for the government and defence thereof and of the said people," has not been fulfilled to this day. But Her Majesty having been pleased subsequently to ratify the proclamations, they have the same validity as if they had been previously authorized. The argument of the Appellant was that the temporary object which was contemplated when the proclamations were issued was very important to be considered in construing the 2nd clause of the Proclamation No. 68. And his first objection to the order appealed against was, that the proclamation made for such a temporary object could not be construed as intended to apply to the territory any such Act as the Act for imposing a duty on bank notes, or, indeed, any Acts imposing duties other than those specially mentioned.

Their Lordships, as already stated, do not think it necessary to determine what the true construction of the proclamation is, for they are

of opinion that the second objection made to the order must prevail. That objection was that, assuming the Act for imposing a duty upon bank notes to have been validly extended to the Province, and to be construed as if the words Province of Griqualand West were to be read in it instead of Colony of the Cape of Good Hope, that Act originally applied only to banks of issue within the Colony, that is, banks issuing within the Colony notes of their own, purporting to be issued within the Colony, and so (unless expressed to be payable elsewhere) to be payable by them within the Colony; and that the Oriental Bank, though having a branch at Kimberley, within the Province, and there putting in circulation notes issued by it in the Colony and payable there, did not issue any notes payable in the Province, and so was not liable to make any return.

What the Kimberley branch bank in fact did, is thus stated in the affidavit of Mr. Ross, the manager of it:—

“I. That this agency of the said Corporation has never issued its own local notes, or any notes purporting on the face of them to be issued in this Province, but has always used the notes of the Oriental Bank dated and payable in Port Elizabeth, and which notes have in every case been put into circulation, and have paid bank note duty in the Cape Colony previous to having been used at my agency.”

Port Elizabeth is in the Cape Colony, not in the Province.

The material parts of the Colonial Act are as follows:—

“Whereas the privilege enjoyed by the joint stock banks of this colony of issuing bank notes is one in regard to which a duty, regulated by the average amount of such notes kept in circulation by each bank, may justly be imposed: Be it enacted by the Governor of the Cape of Good Hope, with the advice and consent of the Legislative Council and House of Assembly thereof, as follows:—

“1. Every joint stock bank trading as bankers in this colony, and issuing bank notes, shall be bound and obliged to transmit to the Treasurer General of this Colony monthly returns of the amount of bank notes in circulation by such

banks: Provided that for the purpose of this Act the term 'bank notes' shall not include bank post bills.

" 2. The first return to be made by every such bank under this Act shall state the amount of the bank notes of such bank outstanding on the last day of September 1864, and every succeeding return shall state the amount of such notes outstanding on the last day of each succeeding month."

It then prescribes the form of the return.

4. Imposes a duty "of one pound and ten shillings per centum upon the average issues of each year, ending the 31st of December, such average issues to be ascertained by adding together the amounts set forth in the several monthly returns of such bank for such year, and by then dividing the result by 12."

Section 5 provides the mode in which an order may be obtained for enforcing the return. It is under this section that the order now appealed against is framed.

" 6. If any person or copartnership, not being a joint stock bank, shall issue notes payable to bearer, or at sight, or on demand, in which notes the amount for which such notes are made shall not be written, but engraved, printed, or lithographed, such person or copartnership shall come under the provisions of this Act in like manner as if such person or copartnership were a joint stock bank."

7 and 8 are not material.

"9. As often as any joint stock company carrying on business as bankers in this Colony, whether their chief seat of business shall be in this Colony or elsewhere, shall have in this Colony a head office, and one or more branch banks also in this Colony, the monthly returns mentioned in the 1st section of this Act shall be made as follows, that is to say :

" 1. If the branch bank shall issue its own notes, namely, notes purporting to be issued by or at the place of business of such branch bank, then the returns aforesaid shall be made by such branch bank direct, precisely as if such bank were an independent and unconnected bank and not a branch.

" 2. No such last-mentioned branch bank shall, in calculating its bank notes outstanding, be at liberty to deduct from its circulation any bank notes of its head office, or of any other branch of the same bank, which notes such branch bank may happen to have on hand.

" 3. In like manner, no head office of any bank having one or more branches shall, in calculating its bank notes outstanding, be at liberty to deduct from its circulation any notes of any of its branches, which notes such head office may happen to have on hand.

" 4. Should there be at any time in this Colony a bank having a head office and one or more branch banks, which branch bank or banks shall not issue any such notes as are in the first subdivision of this section

described, then the returns aforesaid shall not be made by or from the branch bank or banks, but by or from the head office, and shall include the whole outstanding circulation of the said bank, including all its branches.

“ 10. Every joint stock bank carrying on business as bankers in this Colony shall, in making its monthly returns for the purpose of this Act, include therein all bank notes of the same or any other bank, which notes shall, on the face of them, bear to have been issued at or from any place in Africa, or elsewhere not within the limits of this Colony, and which notes having come at any time and in any manner into the hands of such joint stock bank, shall, during the month for which any such return shall be made, have been by such joint stock bank paid out or put into use or circulation : Provided, however, that from and out of such bank notes as aforesaid so as to be included as aforesaid may be excepted notes of the Governor and Company of the Bank of England ; provided also, that the transmission of any such bank notes as are first aforesaid by any joint stock bank to the place where such notes were issued, or to any other place beyond the limits of this Colony, in a closed cover or parcel, shall not be deemed to be a paying out of such notes or a putting of the same into circulation, so as to require that the bank notes so transmitted shall be included in any such return as aforesaid. And provided lastly, that the duty imposed by the 4th Section of this Act shall be payable upon the amount of all such bank notes as shall, under and by virtue of this section, be included in any monthly return, precisely as if such bank notes so included had been notes of the bank making such return, and issued by it at the place of business of such bank by or from which such return shall be made.”

There is much weight to the argument, based on the words of the 2nd section, which require the return to be of “the bank notes of such “bank outstanding,” on the last day of the month, that the notes must be notes of that bank, issued within the Colony, still outstanding ; and consequently that the Act can only be meant to apply to those banks which act as banks of issue within the Colony, to banks which have such notes.

This argument is strengthened by the terms in which the 6th section is framed : the person who issues (that is within the Colony) notes payable on demand, must mean the person issuing his own notes. If it were not for the 10th section, on

which it will be necessary to comment hereafter, it could not be supposed that a private banker who issued no notes of his own, became liable to the tax, because he paid away, and so put in circulation, notes of other banks, instead of sending them in for collection. And the language of Section 9 (which is only material in as far as it throws light on the other sections) points strongly in the same way from the terms in which "its own notes" are defined, as being those purporting to be issued at, and consequently payable at, the place of business of that branch bank, and also from the 2nd and 3rd sub-sections which mark the distinction between its notes on hand in other branches of the same bank, which are not to be deducted, and notes payable at the branch which, when once paid by it, are no longer in circulation until reissued.

For these reasons, if the Colonial Act had stopped at the end of the 9th section, their Lordships would have had very little doubt that it only applied to banks of issue, issuing within the Colony notes payable by themselves there.

But a more difficult question arises whether the Bank is not liable to make returns under the 10th section.

The Kimberley branch of the Oriental Bank has indisputably put into use and circulation bank notes of the Oriental Bank, which, on the face of them, bear to have been issued at Port Elizabeth, a place out of the Province. And if it is liable to make a return, it must include these notes in that return. But the 10th section does not, in terms at least, impose any fresh obligation to make returns.

It has been contended that the Bank is not within this enactment, and that the description "every joint stock bank carrying on business as bankers in this Colony shall, in making its monthly returns" at the commencement of



Clause 10, ought, having regard to the context and the rest of the Act, to be construed as referring only to banks pointed at in the earlier sections which were by those sections required to make returns. It was contended that no bank, unless it also issued such notes, was liable to pay duty on the notes of its own or of any other bank that it might put into circulation. The primary object of the Bank Note Duty Act certainly seems to have been to subject banks issuing their own local notes (in the sense above mentioned) to duty on the notes they so issued; but it being doubtless foreseen that some banks, besides issuing such notes, might put into circulation notes of their own or of some other bank, which, though not purporting to be issued in the Colony, would still become part of its paper currency, the framers of the Act seem to have thought that banks of issue which thus increased the paper currency got an advantage thereby, and should be taxed, and introduced the 10th clause to meet such cases, and to bring within the scope of the Act all notes, except Bank of England notes, thus put into circulation by banks so carrying on business in the Colony. The question is whether, though the description at the commencement of the 10th clause is "every joint stock bank carrying on business as bankers in this colony" without the words "and issuing bank notes" found in Section 1, that description is not by implication confined to the banks pointed at in Section 1.

The legislature certainly seems, in the earlier provisions of the Act, to have had in its view banks of issue issuing local notes in the sense above mentioned, and to have contemplated the putting forth of the notes described in Section 10, as an addition or supplement to such issue. The Form of Return given in the Act plainly indicates that this was the state of things in the contemplation

of the legislature; for the form assumes that there would first be a return by a bank of its own local issue, and then provides by way of addition thereto, for a return of the notes described in Section 10, if any such notes should have been issued. It is true that this form is to be followed in substance only; but Section 10 itself implies an antecedent liability upon a bank to make a return of its local notes, to which the return under that Section would be supplemental and additional. The words of the 10th Section are: "Every joint stock bank carrying on business as bankers in this Colony shall, in making its monthly returns for the purpose of this Act, include therein" the bank notes described in that Section. From this language, as well as from the Form of Return given by the Act, it may be inferred that the legislature did not contemplate the case of a bank putting out such last-mentioned notes only, and so did not provide for a separate and independent return of such notes. Although therefore the 10th section enacts that the duty imposed by the 4th section shall be payable upon such notes when included in any return, "precisely as if such bank notes so included had been notes of the bank making such return, and issued by it at the place of business of such bank by or from which such return shall be made," yet it is only where the obligation to make returns exists that the duty is imposed, and, as already stated, this obligation does not seem to have been contemplated, nor created, except in the case of banks issuing their own local notes. The position of a bank putting forth only such notes as are described in Section 10, without any of its own local notes, would thus seem to be unprovided for by this Act.

Their Lordships, therefore, having regard to the rule that the intention to impose a charge on the

subject must be shown by clear and unambiguous language, are unable to say that the obligation of the bank to make the return applied for, and its consequent liability to pay duty on the notes put into circulation by its Kimberley Branch, are so clearly and explicitly imposed by the present Act as to satisfy this rule. This view of the Act appears to have been for a long time entertained and acted upon by the officers of the Government of the Province, for having made a claim for duty they expressly withdrew it, renewing it only after an interval of two years.

This limited operation of the Act undoubtedly entails the consequence pointed out by the learned Judge below, namely that duty will be payable upon all notes described in Section 10, when put forth by banks which issue any notes purporting to be locally issued, however few; whilst it will not be payable at all by banks which, not issuing notes purporting to be locally issued, put into circulation within the province their own notes, issued in London or elsewhere, however large the amount so put into circulation may be. But if the legislature, from want of foresight or for any other reason, has omitted to provide for such a case, it is the province of the legislature itself, and not of the Courts, to supply the omission.

In the result, their Lordships will humbly advise Her Majesty to discharge the order of the High Court, and in lieu thereof to direct that the application of the Respondent be dismissed. The Appellant will have the costs of the appeal to Her Majesty.

