Privy Council Appeals Nos. 46 and 62 of 1932.

The Commissioner of Stamps, Straits Settlements - - - *Appellant*

v.

Oei Tjong Swan and others - - - - - - *Respondents*

Same - - - - - - - - - *Appellant*

v.

Same - - - - - - - - - *Respondents*

(Consolidated Appeals)

FROM

THE COURT OF APPEAL OF THE STRAITS SETTLEMENTS, SETTLEMENT OF SINGAPORE.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 28TH FEBRUARY, 1933.

Present at the Hearing:

LORD BLANESBURGH.
LORD RUSSELL OF KILLOWEN.
LORD MACMILLAN.

[*Delivered by* LORD MACMILLAN.]

The late Oei Tiong Ham died in Singapore on the 3rd June, 1924. Though not a British subject he was at the time of his death domiciled in the Colony of the Straits Settlements. He left a very large estate which in addition to moveable and immoveable property in the Colony also comprised valuable moveable assets outside the Colony consisting chiefly of shares in companies in the Dutch East Indies valued at over $27,000,000.

The whole of the deceased's property within the Colony admittedly became liable on his death to estate duty under Ordinance No. 103 (Stamps) then in force in the Colony. The question is whether estate duty is also payable on the deceased's moveable property outside the Colony.

The Commissioner of Stamps of the Colony, who is the appellant before their Lordships, in determining the value of the deceased's estate for the purposes of the duty included the value of his moveable property outside the Colony. The present respondents, who are the executors under the deceased's will, objected and appealed to the Supreme Court of the Colony. By a judgment of Terrell, J., unanimously affirmed by the Court of Appeal, it was held that the deceased's moveable property outside the Colony was not liable to estate duty and consequently had wrongly been included by the Commissioner in his valuation.

The Commissioner applied to the Court of Appeal for leave to appeal to His Majesty in Council but leave was refused on the ground that such appeal was incompetent. The Commissioner then petitioned His Majesty in Council for special leave to appeal, which was granted. The Court of Appeal granted the Commissioner leave to appeal against their refusal of leave to appeal to His Majesty in Council and this appeal has been consolidated with the appeal by special leave on the merits. Their Lordships will deal in the first place with the latter.

Estate duty in the Colony at the date of the deceased's death was imposed and regulated by the Ordinance No. 103 (Stamps) above mentioned. Section 68 of that Ordinance provides as follows :—

> " (1) In the case of every person dying after the first day of February 1908 there shall, in the cases set out in article 1 of schedule A, be levied and paid upon the principal value ascertained as hereinafter provided of all property which passes on the death of such person a stamp duty called ' estate duty ' at the graduated rates mentioned in that article."

Section 2 of the Ordinance provides that " unless there is something repugnant in the subject-matter or context," " ' Property ' includes moveable and immoveable property . . ." Section 81 also contains provisions, immaterial to the present question, as to what is included in the terms " property " and " property passing on the death " for the purposes of the chapter of the Ordinance now under consideration. The provision for the ascertainment of the principal value of property passing on a death is contained in section 73 (4) which directs that the value is to be estimated at the open market price. The duty is payable by stamps affixed to an affidavit delivered by the executor to the Commissioner or, in so far as estate duty is not paid by the executor, by stamps affixed to an account setting forth the particulars of the property and delivered to the Commissioner by the person accountable. Schedule A under the heading " Description of Instrument " contains as the first item " Affidavit and Account of estate duty " and in article 1 sets out a graduated scale applying stamp duty at rising percentage rates according as the principal value of the estate rises in amount.

It will be observed that estate duty is leviable under section 68 (1) of the Ordinance above quoted on the principal value of " all property " which passes on the death of every person who

dies after the 1st February, 1908. As the deceased died after the 1st February, 1908, and as his moveable property outside the Colony undoubtedly passed on his death, the language of the section plainly covers the case of such property. But it is said that notwithstanding the generality of its language the section must be read subject to certain tacit exceptions and in particular subject to the exception of property outside the Colony.

It is common ground that immoveable property of the deceased situated outside the Colony is not subject to estate duty under the Ordinance although forming part of the property which passed on his death. This is conceded by the appellant on the ground that the Ordinance must be presumed not to infringe the comity of nations by taxing foreign land, which is subject only to the *lex loci rei sitae*. It is further conceded that the duty extends only to the moveable property situated abroad of a person who has died domiciled in the Colony. These are considerable breaches in the universality of the language of the Ordinance and the respondents at least have the argumentative advantage of starting with the admission in their favour that the words "all property which passes on the death" cannot be read literally but are to be interpreted as subject to substantial implied limitations. This no doubt carries them a certain length but does not absolve them, when they seek to impose a further restriction on the scope of the words, from showing that such restriction is necessitated by the terms of the Ordinance or by some presumption or rule of construction applicable to the case. The fact that the words are subject to certain admitted qualifications does not of itself afford any presumption that they are subject to a further restriction which is not admitted.

The respondents argued that they were entitled to rely on a presumption that the revenue laws of a country do not extend to property outside its territory and that in passing this Ordinance the local legislature must be taken to have intended to affect only property within its own jurisdiction. "But there is nothing in the law of nations which prevents a Government from taxing its own subjects on the basis of their foreign possessions. It may be inconvenient to do so. The reasons against doing so may apply more strongly to real than to personal estate. But the question is one of discretion, and is to be answered by the statutes under which each State levies its taxes." (*Blackwood* v. *The Queen*, 1882, 8 App. Cas. 82, *per* Sir Arthur Hobhouse, delivering the judgment of the Board, at p. 96.) Indeed, the Colony has now itself in a subsequent Ordinance expressly imposed estate duty on the foreign moveables of persons dying domiciled in the Colony. The respondents are thus not able to avail themselves of any general presumption to the effect suggested.

They next rely on the character of the duty itself. They assimilate it to probate duty and differentiate it from legacy and

succession duty and I invoke the authorities which have established that probate duty though imposed in the most all-embracing terms nevertheless does not extend to property out of the jurisdiction. The estate duty, however, imposed by the Ordinance is neither probate duty nor legacy and succession duty and to discuss whether it more resembles the one or the other is, again to quote *Blackwood* v. *The Queen*, at p. 91, "not very profitable."

The answer to the question must be found from an examination of the Ordinance itself, for the best and safest guide to the intention of all legislation is afforded by what the legislature has itself said. Is there then any light to be derived from the terms of the Ordinance itself as to the scope of the words "all property which passes on the death" and in particular as to whether these words were intended to include moveable property abroad? As it happens there is the clearest indication that the framers of the Ordinance had in view that it would extend to such property. In section 73 property situate out of the Colony is twice referred to in terms which unmistakably indicate that such property is contemplated as subject to the estate duty imposed by section 68. Subsection (2) of section 73 runs as follows:—

> "An allowance shall not be made in the first instance for debts due from the deceased to persons resident out of the Colony, unless contracted to be paid in the Colony or charged on property situate within the Colony, except out of the value of any property of the deceased situate out of the Colony in respect of which estate duty is paid; and there shall be no repayment of estate duty in respect of any such debts, except to the extent to which it is shown to the satisfaction of the Commissioner that the property of the deceased situate in the country in which the person to whom such debts are due resides is insufficient for their payment."

The subsection, it will be noted, expressly refers to estate duty paid in respect of property situate out of the Colony.

Then comes subsection (3) which reads thus:—

> "Where any property passing on the death of the deceased is situate in any country outside the jurisdiction of the Supreme Court and the Commissioner is satisfied that by reason of such death any duty is payable in that country in respect of that property, he shall make an allowance of the amount of that duty from the value of the property."

If possible, this subsection makes it clearer still that property outside the Colony is to be included in the valuation for estate duty.

Their Lordships find it impossible to say after reading these subsections that the Ordinance did not contemplate that the duty which it imposed should be imposed on property situate out of the Colony or that the language of section 68 must be held not to have been intended to include such property. Mr. O'Connor of the Straits Settlements Bar, to whose admirable and ingenious advocacy on behalf of the respondents their Lordships are much indebted, endeavoured to avoid the implication of these subsections by suggesting that they might have a use in certain abnormal or exceptional cases without actually involving the imposition of the duty but it is unnecessary to discuss these refinements for he

did not succeed in displacing the plain indication of the language of the Ordinance. The present case is really the converse of *Blackwood* v. *The Queen* (*cit. sup.*). In that case their Lordships discovered in the sections of the statute unmistakable evidence that the general language imposing the tax was not intended to include property situated outside the State of New South Wales. Here a similar examination of the statute has disclosed an even more distinct intention to include property situated outside the Colony of the Straits Settlements.

In the Courts below no satisfactory explanation is given of the presence in the Ordinance of these subsections (2) and (3) of section 73 or of the clear indication which these subsections give that the Ordinance intended to deal with property situated outside the Colony. The learned Judge of first instance (Terrell, J.) is driven to suggest that they may have been inserted *per incuriam* through careless drafting. Their Lordships can lend no countenance to such a method of treating a statutory enactment. The learned Chief Justice dismisses the subsections as dealing merely with the machinery for the calculation of the taxable estate, and as such ineffective to extend the charging provisions of the Ordinance. Thorne, J., deals with them in much the same way. But this is to miss the point. It may well be that provisions dealing merely with the machinery of taxation ought not to be presumed to impose a charge, but statutes must be read as a whole and the language used in so-called machinery sections may be called in aid for the interpretation of the charging sections.

The difficulty in which the learned Judges find themselves in accounting for the terms of section 73 (2) and (3) consistently with their decision is entirely occasioned by their approach to the problem of construction which the case presents. Instead of first considering the terms of the Ordinance itself, they have at once entered upon an elaborate comparison of its provisions with those of the Imperial Finance Act of 1894, and proceeded to draw inferences from the variations between the Ordinance and the Imperial statute. This is a perilous course to adopt and one which certainly does not commend itself to their Lordships. Decisions of the Imperial Courts on statutes dealing with the same subject matter may often be useful in the interpretation of similar provisions in colonial measures and a comparison between similar measures of the Imperial and the Colonial Legislatures may on occasion be helpful (Cf. *Alcock Ashdown & Co.* v. *Chief Revenue Authority, Bombay*, 1923, 50 I.A. 227 at p. 238). But it is quite a different thing to institute a textual comparison such as has here been made and to rely on conjectures as to the intention of the draftsman in selecting some and rejecting other provisions of his presumed model. The basis indeed of the judgments below is to be found in an inference drawn from the fact that while section 68 of the Ordinance corresponds generally with section 1 of the Imperial Finance Act, the Ordinance contains no provision equivalent to section 2 (2) of that Act. The case of

Winans v. *Attorney-General* [1910] A.C. 27 is then invoked as deciding that without section 2 (2) the language of section 1 of the Imperial Act would not include foreign personal property, and the conclusion is reached that as the Ordinance does not contain any provision corresponding to section 2 (2) of the Imperial Act, section 68 (1) of the Ordinance, which corresponds to section 1 of the Imperial Act, must be read as not extending to foreign personal property. Their Lordships cannot accept this reasoning. In the first place, while there are passages in the speech of Lord Atkinson in *Winans* v. *Attorney-General* which may well have led the Judges in the Courts below to conclude that section 2 (2) of the Finance Act was in the view of that noble and learned Lord an enlarging section without which a narrower interpretation must have been placed on section 1, their Lordships are by no means satisfied that this is the correct view of the effect of section 2 (2). The other noble and learned Lords who took part in the decision of the case do not so express themselves as regards the effect of section 2 (2).

" It is clear," says the Lord Chancellor (Loreburn) at p. 30, " that the language of section 1 of the Finance Act, 1894, is wide enough to cover the present case, and that the Act does not contain any exception which would withdraw the property in question from the incidence of estate duty." There is here no suggestion that section 1 contains an inherent restriction to property within the United Kingdom which is removed only by an inference from the terms of section 2 (2). At p. 47 Lord Shaw treats section 2 (2) as an exception from the generality of section 1, not as expanding its scope, when he says that : " In the case of an English citizen all his property ' wheresoever situate,' subject to the exception in the Act, is aggregated, and into that aggregation . . . all personal property situate out of the United Kingdom must come, unless legacy or succession duty would not have been payable in respect thereof."

Their Lordships do not agree with the view expressed by Thorne, J., in the present case and adopted by his colleagues that " the effect therefore of this subsection in England was to bring into charge as property passing on death assets locally situate out of the United Kingdom upon which probate duty would not before the passing of this Act have been chargeable but in respect of which legacy or succession duty was chargeable." On the contrary, their Lordships regard section 2 (2) as excluding from the operation of section 1 what would otherwise have been included under that section. This is the natural reading of the language of the subsection, which is expressed in terms of restriction, not of expansion. No doubt the interpretation of the general language of section 1, on any question arising as to its including property abroad, may be legitimately aided by a reference to section 2 (2), but that is a very different thing from saying that without such aid section 1 would necessarily be construed as excluding foreign

property and that section 2 (2) expands its meaning so as to bring into charge foreign property which would otherwise escape.

Starting from their assumption that section 1 of the Imperial Act would not have included property abroad in the absence of section 2 (2) and reasoning that, as the Ordinance contains nothing corresponding to section 2 (2), section 68 of the Ordinance, which corresponds to section 1 of the Imperial Act, must equally be held not to include property out of the Colony, the learned Judges below proceed to consider the rest of the Ordinance on the footing that section 68 of itself does not include property out of the Colony and find nothing elsewhere in the Ordinance to persuade them that it can have any application to such property, notwithstanding the terms of section 73 (2) and (3) for which they are unable to account. This in their Lordships' view, for the reasons already explained, is a false start and leads to inextricable difficulty.

It may well be that those who had at first to administer the Ordinance were not aware that it gave them the power to tax moveable property out of the Colony, and there are indications in the past history of the estate duty in the Colony, as expounded by Mr. O'Connor, which give much support to this view. But the fact that the potency of the weapon confided to them was not fully realised by those who wielded it cannot control the interpretation of the Ordinance now that its true scope has to be judicially ascertained.

Their Lordships accordingly are of opinion that the appeal should succeed and that the judgments below should be reversed.

Passing to what has been designated the procedure appeal, their Lordships have to consider whether it was within the competency of the Court of Appeal to grant leave in this case to appeal to His Majesty in Council. In holding the contrary, the learned Chief Justice stated that he did so "reluctantly and against his own opinion" in deference to a previous decision of his Court in a case of *The King on the Prosecution of the Income Tax Commissioner* v. *The Firms A.R.A.M. and P.A.* in 1922, which he felt himself constrained "from courtesy rather than conviction" to follow. Thorne, J., shared the reluctance of the Chief Justice, while Sproule, S.P.J., alone championed the soundness of the authority so manifestly distasteful to his colleagues.

Their Lordships did not have the advantage of a full argument on the question as the respondents, not having any interest in the matter, in view of the special leave to appeal granted by order of His Majesty in Council, did not feel called upon to contest the appellant's submission. The whole ground, however, is adequately explored in the judgment of the learned Chief Justice whose convincing argument against the decision which he reluctantly reached appears to their Lordships really unanswerable. It is true that the Ordinance in section 80 which deals with appeals from decisions of the Commissioner does not confer a right of appeal to His Majesty in Council. But the Colonial Charter of 1855 provides for leave to appeal being granted by the Court of the

Colony from " all judgments, decrees or determinations made by the said Court of Judicature in any civil cause." And section 1154 of the Civil Procedure Code provides that subject to certain conditions " an appeal shall lie from the Court of Appeal to His Majesty in Council (*a*) from any final judgment or order." Wider language it would be difficult to imagine. Their Lordships do not think it necessary to repeat the reasons adduced by the Chief Justice against excluding the decision of the Appeal Court in the present instance from the scope of these provisions and content themselves with expressing their agreement. The decision against which the Commissioner sought to obtain leave to appeal was in their Lordships' view not a mere award of an administrative character but a judgment or determination made by the Court in a civil cause within the meaning of the Charter and a final judgment or order within the meaning of section 1154 of the Civil Procedure Code, and as such the Court could competently have granted leave to appeal from it to His Majesty in Council.

In the result the Commissioner is entitled to succeed in both the consolidated appeals. Their Lordships will humbly advise His Majesty in the procedure appeal that the appeal be allowed and the order of the Appeal Court of 9th January 1932 except in so far as it deals with costs be recalled with a declaration that it was within the competence of the Court of Appeal to grant the leave to appeal craved in the petition which by that order was dismissed; and in the appeal on the merits, that the appeal be allowed, the order of the Appeal Court of 30th November 1931 and the order of Terrell, J., of 12th August 1931 be recalled and the case be remitted to the Supreme Court of the Straits Settlements with a direction to pronounce a judgment finding that the assets Nos. (10) to (17) inclusive of paragraph 9 of the originating petition No. 4 of 1931 are liable to estate duty in the Colony. In the appeal on the merits the appellant will have his costs both before their Lordships and in the Courts below and any costs paid by the appellant to the respondents other than costs under the order of the Appeal Court of 9th January 1932 will be repaid by the respondents; in the procedure appeal, in conformity with an arrangement between the parties of which their Lordships have been informed, the appellant will pay the respondents' costs of and in connection with the petition to consolidate the appeals and the costs of the respondents of and incidental to the procedure appeal subsequent to the petition to consolidate the appeals. There should be a set-off as regards such costs.

In the Privy Council.

THE COMMISSIONER OF STAMPS, STRAITS SETTLEMENTS

v.

OEI TJONG SWAN AND OTHERS

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DELIVERED BY LORD MACMILLAN.

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