

[HIGH COURT OF AUSTRALIA.]

NEW BRITAIN PLANTATIONS LIMITED . APPELLANT;

AND

THE ACTING TREASURER OF THE }
TERRITORY OF NEW GUINEA . } RESPONDENT.ON APPEAL FROM THE SUPREME COURT OF THE
TERRITORY OF NEW GUINEA.

Stamp Duty—Territory of New Guinea—Sales of land effected before commencement of ordinance—Instrument of transfer executed subsequent thereto—Transfer by direction—Liability to duty—Stamp Duties Ordinance 1927-1933 (N.G.) (No. 37 of 1927—No. 16 of 1933), secs. 6, 8 (1), 15, 37.

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May 5, 6, 14.

Starke, Dixon
and Evatt JJ.

The *Stamp Duties Ordinance 1927-1933 (N.G.)* commenced on 1st February 1928. It provides, by sec. 6, that from and after the commencement of the ordinance there shall be charged on conveyances or transfers on sale of any real property, duty as prescribed. Sec. 15 provides that any instrument which was executed before the commencement of the ordinance shall not be liable to duty thereunder. By sec. 37 (3), every sale of real property shall be chargeable with ad valorem duty upon the consideration therefor, and that duty shall be paid on the conveyance which seeks to give effect, whether directly or indirectly, to every sale of real property.

After the commencement of the ordinance an instrument of transfer, in respect of land situate in New Guinea, was executed by C, the transferor, and A and B, two directing parties, in favour of the appellant. The land had been sold by C to A, by A to B, and by B to the appellant. The consideration for each of these sales was set forth in the transfer. The contract for the first and second sales had been made before the commencement of the ordinance, and the contract for the third sale after its commencement.

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Held that the instrument of transfer was dutiable under the *Stamp Duties Ordinance 1927-1933 (N.G.)*, and that the duty should be calculated upon all three considerations.

Decision of the Supreme Court of the Territory of New Guinea (*Phillips J.*) affirmed.

APPEAL from the Supreme Court of the Territory of New Guinea.

On 10th May 1926 the Custodian of Expropriated Property, a corporation sole created by reg. 32A of the *Treaty of Peace Regulations* made under the *Treaty of Peace (Germany) Act 1919-1920*, as vendor, and Wilhelm August Mirow, as purchaser, entered into an agreement for the sale and purchase of certain lands, known as Kalili Plantations, situated in the Territory of New Guinea, for the sum of £73,500. By an agreement dated 1st November 1926, Mirow, with the assent of the Custodian, sold his interest in Kalili Plantations to Frederick Reidy Jolley for the sum of £100,450, and, by an agreement dated 23rd July 1931, Jolley, with the assent of the Custodian, sold his interest in the plantations to New Britain Plantations Ltd. for the sum of £47,882 10s. On 7th June 1935 an instrument of transfer under the *Lands Registration Ordinance 1924-1933 (N.G.)*, dated 30th April 1935, was produced on behalf of New Britain Plantations Ltd. to the Treasurer of the Territory, for an assessment of the amount of stamp duty payable thereon under the *Stamp Duties Ordinance 1927-1933 (N.G.)*. The three agreements for sale and purchase referred to above were also produced to the Treasurer on that date.

The *Stamp Duties Ordinance 1927-1933 (N.G.)* came into force on 1st February 1928. Sec. 6 provides that, from and after the commencement of the ordinance, there shall be charged, subject to certain exemptions, upon the several instruments specified in the schedule, the several duties therein set forth. Among the instruments specified in the schedule was a "conveyance or transfer on sale of any real property." But sec. 15 provides that any instrument executed before the commencement of the ordinance shall not be liable to stamp duty under the ordinance. By sec. 5, "instrument" is defined as including every written document, and by sec. 31, the expression "conveyance or transfer on sale of any real property" is defined as including every instrument of any officer authorized

by law, whereby any property, upon the sale thereof, was legally or equitably transferred to or vested in the purchaser, or in any other person on his behalf or by his direction. Sub-sec. 3 of sec. 37 provides that every sale of real property shall be chargeable with ad valorem duty upon the consideration therefor and that duty shall be paid on the conveyance which seeks to give effect whether directly or indirectly to every sale of real property. Other provisions of the ordinance are set forth in the judgments hereunder.

By the instrument of transfer the Custodian, as registered owner of an estate in fee simple in the land comprised in Kalili Plantations, "in consideration of the sum of £73,500 paid" to him by Mirow (the receipt whereof was thereby acknowledged) "and in consideration of the sum of £100,450 paid" to Mirow by Jolley (the receipt whereof was thereby acknowledged) "and in consideration of the sum of £47,882 10s. paid" to Jolley by New Britain Plantations Ltd. (the receipt whereof was thereby acknowledged) "with the consent of and by the direction of . . . Mirow and . . . Jolley" transferred to New Britain Plantations Ltd. all his—the Custodian's—estate and interest in Kalili Plantations. The instrument of transfer was executed by the Custodian, by Mirow, by Jolley and by New Britain Plantations Ltd. The Treasurer decided that the instrument of transfer was chargeable with duty in respect of all three considerations referred to therein, and assessed the amount of duty payable thereon at £1,228 15s. This amount was paid by New Britain Plantations Ltd. to the Treasurer, who, at the request of that company, stated a case, in which the above-mentioned facts were set forth, for the opinion of the Supreme Court of the Territory of New Guinea.

The questions reserved for the opinion of the Court were:—

- (a) Is duty payable on the instrument of transfer in respect of the consideration for the sale by the Custodian to Mirow, and the consideration for the sale by Mirow to Jolley, made before 1st February 1928, the date of the commencement of the ordinance?
- (b) With what amount of duty is the instrument of transfer chargeable?

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Phillips J. answered question (a) : Yes, and question (b) : £1,228 15s.

From that decision New Britain Plantations Ltd. now, by leave,

appealed to the High Court.

Teece K.C. (with him *Sturt*), for the appellant. Ad valorem duty should be calculated only on the consideration for the last sale. In any event it should not be calculated upon the second sale. Sec. 37 of the *Stamp Duties Ordinance* defines the way in which the duty is imposed, and the nature and extent of the obligation imposed on the various classes of taxpayer. It is set forth in general terms in the schedule. The provisions of sec. 6 apply to all conveyances generally, those of sec. 37 are directed to a particular class of conveyance, and *qua* that particular class, overrule the general provisions of sec. 6 (*Pretty v. Solly* (1) ; *Baird v. Federal Commissioner of Land Tax* (2)). Where there is a single sale it is covered by sec. 6 and the schedule, and where there are a number of sub-sales the provisions of sub-secs. 3, 5 and 6 of sec. 37 apply. If sub-sec. 3 of sec. 37 applies to all sales, then no duty is payable with respect to any sale completed before the commencement of the ordinance. The words in that sub-section clearly show that the Legislature intended to tax the transaction and not the instrument. Unless the section is given a retrospective operation it does not impose a charge on sales effected prior to the commencement of the ordinance. If applied retrospectively, then, by sub-sec. 6, a retrospective burden is cast upon the two prior purchasers in respect of the first two sales. The liability of the prior purchasers to contribute to the ultimate purchaser their respective proportions of the duty charged is shown in *Hales v. Freeman* (3), *Foster v. Ley* (4) and *Bate v. Payne* (5). It may be that the appellant cannot now recover by way of contribution the amounts which, under a retrospective construction, are made payable by the prior purchasers. This serves to show that the Legislature did not intend the ordinance to have a retrospective operation (see *War Service Homes Commissioner v. Collector of Imposts* (Vict.) (6)). Sec. 37 explains and

(1) (1859) 26 Beav. 606, at p. 610 ;
53 E.R. 1032, at p. 1034.
(2) (1915) 19 C.L.R. 490, at p. 497.
(3) (1819) 1 Brod. & Bing. 391 ; 129
E.R. 773.

(4) (1835) 2 Bing. N.C. 269 ; 132
E.R. 106.
(5) (1849) 13 Q.B. 900 ; 116 E.R.
1507.
(6) (1920) 27 C.L.R. 334.

elaborates the duty imposed by sec. 6. The meaning and effect of the words "directly or indirectly" was discussed in *Roberts v. Collector of Imposts* (1). It is competent for the Legislature, in clear words, to impose in the same statute a tax on instruments and a tax on transactions (*Halsbury's Laws of England*, 1st ed., vol. 24, pp. 701, 702, par. 1531). What the Legislature intended when it provided that a conveyance was to be taxed with ad valorem duty on the consideration for the sale, was that the conveyance was to be the vehicle upon which the tax on the transaction was to be collected, so that if the transaction were never completed there would be no tax, because there would be no vehicle for the collection of the tax (*Maple & Co. (Paris) Ltd. v. Inland Revenue Commissioners* (2)). The principles there set forth are unaffected by the fact that the decision was reversed by the House of Lords (*Inland Revenue Commissioners v. Maple & Co. (Paris) Ltd.* (3)). A burden should not be imposed upon a primary or secondary taxpayer unless the words of the statute leave no other alternative. Here the Legislature has by clear words imposed a duty upon transactions. *Roberts v. Collector of Imposts* (4) is distinguishable, and is not of much, if any, assistance to the Court in this case.

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E. M. Mitchell K.C. (with him *Kitto*), for the respondent. The provisions of sec. 15 of the ordinance clearly show that any instrument executed after the commencement of the ordinance is, if it answers the description of an instrument specified in the schedule, subject to the duties therein prescribed. The transfer in this case is an "instrument" within the meaning of the ordinance and is not exempted from liability. The instrument, not the transaction, is dutiable (*Commissioner of Stamps (Q.) v. Wienholt* (5)). Duty is payable on the respective considerations for all three transactions set forth in the instrument of transfer (*War Service Homes Commissioner v. Collector of Imposts (Vict.)* (6); *Roberts v. Collector of Imposts* (4)), and, by virtue of sec. 6, would be so payable even if an instrument of transfer had been executed in respect of each transaction, provided that those instruments had been executed

(1) (1919) V.L.R. 638, at pp. 653, 654.

(2) (1906) 2 K.B. 834, at pp. 843, 852.

(3) (1908) A.C. 22.

(4) (1919) V.L.R. 638.

(5) (1915) 20 C.L.R. 531, at p. 541.

(6) (1920) 27 C.L.R. 334.

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after the commencement of the ordinance. Sec. 6 is a taxing section. It cannot be said that the ordinance has a retrospective operation merely because the instrument evidences past sales. The charge in sec. 37 (3) throws light upon the meaning of the words used in sec. 6, and in the schedule: it acts as a definition of those words (*Maple & Co. (Paris) Ltd. v. Inland Revenue Commissioners* (1)). That, in substance, was the way in which *Roberts v. Collector of Imposts* (2) was used. A contract for sale is not a conveyance (*Commissioners of Inland Revenue v. Angus* (3)). By bringing conveyances by direction within the scope of the ordinance the definition includes consideration on sale or sales. That is made clear by sec. 37. Secs. 31 to 37 do not deal with the imposition of taxation; their purpose is to define and to explain the machinery for carrying out the provisions of the ordinance. Sec. 37 (3) does not impose a tax; it creates a measure. That sub-section should be read: "Ad valorem duty shall be paid on the conveyance which seeks to give effect directly or indirectly to every sale of real property and shall be chargeable on the consideration for every sale to which the conveyance gives effect."

[DIXON J. referred to *National Land Co. v. Comptroller of Stamps* (4).]

Cur. adv. vult.

May 14.

The following written judgments were delivered:—

STARKE J. Case stated under the provisions of the *Stamp Duties Ordinance* of the Territory of New Guinea (1927, No. 37, sec. 18), which was set down for hearing and heard before the Supreme Court of the Territory.

On 30th April 1935 the Custodian of Expropriated Property, which was a corporation sole and the registered owner of an estate in fee simple in certain land situated in the Territory of New Guinea, transferred the said land to the New Britain Plantations Ltd. with the consent and by the direction of Wilhelm August Mirow and Frederick Reidy Jolley. The consideration stated in the transfer was the sum of £73,500, paid by Mirow to the Custodian, and the

(1) (1906) 2 K.B., at p. 852.
 (2) (1919) V.L.R. 638.

(3) (1889) 23 Q.B.D. 579.
 (4) (1883) 9 V.L.R. (L.) 87; 5 A.L.T. 5.

sum of £100,450, paid by Jolley to Mirow, and the sum of £47,882, paid by the New Britain Plantations Ltd. to Jolley. The case states that the Custodian, by an agreement in writing dated 10th May 1926, sold the land to Mirow for the sum of £73,500, that Mirow, by an agreement in writing dated 1st November 1926, sold the land to Jolley for £100,450, and that Jolley by an agreement in writing dated 23rd July 1931 sold the land to New Britain Plantations Ltd. for £47,882 10s. A *Stamp Duties Ordinance* came into operation in New Guinea on 1st February 1928. It provided (sec. 6) that "from and after the commencement of this ordinance there shall be charged . . . upon the several instruments specified in the schedule the several duties therein set forth." One of these instruments specified in the schedule was "Conveyance or transfer on sale of any real property." But sec. 15 provided that any instrument executed before the commencement of the ordinance should not be liable to stamp duty under the ordinance.

The questions stated for the opinion of the Supreme Court were:—" (a) Is duty payable on the said instrument of transfer dated 30th April 1935 in respect of the considerations for the sales " from the Custodian to Mirow and from Mirow to Jolley "made before the first day of February 1928, the date of the commencement of the said ordinance? (b) With what amount of duty is the said instrument of transfer chargeable? "

Phillips J., of the Supreme Court of the Territory of New Guinea, declared that duty was payable on the instrument of transfer in respect of the considerations for the sales in the first question mentioned, and that the amount of duty with which the instrument was chargeable was £1,228 15s.

The amount of duty was calculated on the sales in the first question mentioned, on the scale applicable as on the 1st January 1931, and on the sale from Jolley to New Britain Plantations Ltd. on the increased scale in force since the passing of the ordinance 1931 No. 15 (see sec. 2 (c) of that ordinance). Leave to appeal from this judgment was granted by this Court, and the appeal now falls for determination.

The transfer was executed after the commencement of the ordinance 1927 No. 37. It falls within the class of instruments

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charged with stamp duty under sec. 6 of that Act, and is not exempted by sec. 15. The critical question is: With what amount of duty is the instrument of transfer chargeable? The ordinance, by sec. 8 (1), provides that any instrument containing or relating to several distinct matters shall be separately and distinctly charged with duty as if it were a separate instrument. And sec. 37 (3) enacts that every sale of real property shall be chargeable with ad valorem duty upon the consideration therefor, and that duty shall be paid on the conveyance which seeks to give effect, whether directly or indirectly, to every sale of real property. The result of this legislation is that the instrument of transfer dated 30th April 1935 is chargeable with duty in respect of each of the three sales which it effectuates. It was contended that the ordinance should not receive a retrospective construction. But it is instruments of a particular class or description that are charged with duty. A contract of sale is not chargeable with the duty payable upon "conveyance or transfer on sale of any real property." It is only an instrument of conveyance or transfer that is chargeable (*Commissioners of Inland Revenue v. Angus* (1)). It is sec. 6 that is the charging section, and not sec. 37 (3). The provisions of sec. 37 (3) do not change the nature of the duty imposed by sec. 6 upon instruments, nor create a new duty or tax upon sales of real property as such. But they do enable the duty chargeable upon the instrument to be ascertained or calculated by reference to the sales to which, in the words of the ordinance, the conveyance "seeks to give effect." The ordinance is not, therefore, in any relevant sense, retrospective: it only imposes a duty upon a conveyance or transfer executed after the commencement of the Act. It is true that the amount of stamp duty may be ascertained or calculated by reference to sales of real property made antecedently to the commencement of the ordinance—whether a single sale or a series of sales. But the ordinance is not therefore properly called retrospective. The Act explicitly imposes stamp duty upon instruments executed after its passing, calculated upon the considerations for the sales effectuated by the instruments, whether the considerations arose antecedently to the commencement of the ordinance or not. Again, the provision

(1) (1889) 23 Q.B.D. 579.

in sec. 37 (6) that the duty payable on a sale of real property shall be borne by the purchaser at the sale, cannot and does not exclude the operation of the charging section of the ordinance as to cases within its terms.

In my opinion, the decision of *Phillips J.* was right, and this appeal should be dismissed.

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DIXON AND EVATT JJ. The *Stamp Duties Ordinance* 1927-1933 of the Territory of New Guinea came into force on 1st February 1928. Up to that time under the law of the Territory transfers on sale of real property had not been liable to stamp duty. But item VIII. of the schedule of the ordinance includes such instruments. Sec. 6 provides that, from and after the commencement of the ordinance, there shall be charged upon the several instruments specified in the schedule the several duties therein set forth. Sec. 15 provides that any instrument which was executed before the commencement of the ordinance shall not be liable to stamp duty under the ordinance.

After the commencement of the ordinance an instrument of transfer was executed in favour of the appellant. It was executed by the transferor and by two directing parties. The land comprised in the transfer had been sold by the transferor to the first directing party, by the first directing party to the second directing party and by the second directing party to the transferee. The transfer sets out the respective considerations for each of these sales. The contracts for the first and second sales had been made before the ordinance commenced and the contract for the third sale after its commencement.

The questions for decision are whether the transfer is liable to stamp duty, and, if so, upon which of the considerations duty should be calculated.

Phillips J., from whose decision this appeal is brought, held that the instrument was dutiable and that the duty should be calculated upon all three considerations. We agree in this decision.

That the transfer is liable to stamp duty does not, in our opinion, admit of any doubt. It is an instrument executed after the commencement of the ordinance, and, therefore, falls within sec. 6

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and is not excluded by sec. 15. It is clear too, we think, that, if instead of carrying the three contracts of sale to completion by means of one transfer, a separate transfer had been executed after the commencement of the ordinance in respect of each sale, all three such transfers would have been dutiable. The third or last transfer would, of course, raise no question, because the contract of sale which it would complete was made after the ordinance came into operation. But, although it was not conceded at the Bar that the first two such transfers would be dutiable, the terms of secs. 6 and 15 and of item VIII. of the schedule afford no ground for a contention that they would escape liability. They would be transfers on sale executed after the commencement of the ordinance and each would be liable to stamp duty calculated on the amount of the consideration for the sale.

In our opinion the provisions of the ordinance which relate to or affect instruments carrying out more than one transaction produce the same result in the case of a single transfer giving effect to all three sales. These provisions are sec. 8 (1) and sec. 37 (3). Sec. 8 (1) provides that "except as is otherwise provided in this or any other ordinance, any instrument containing or relating to several distinct matters shall be separately and distinctly charged with duty in respect of each matter, as if it were a separate instrument." Sec. 37 (3) provides that "every sale of real property shall be chargeable with ad valorem duty upon the consideration therefor, and that duty shall be paid on the conveyance which seeks to give effect, whether directly or indirectly, to every sale of real property." The appellant contends that sub-sec. 3 of sec. 37 imposes a charge or tax upon the sale or sales to which it refers and that it should be construed as applying only to sales made after the ordinance came into force. In further support of this contention, he relies upon sub-sec. 6 of sec. 37, which casts the burden of the duty upon the purchaser, a provision which, he says, could not have been intended to affect transactions entered into before the ordinance was made.

Sub-sec. 3 does not make a contract of sale liable to duty independently of the transfer by which it is carried into effect. The sale is not chargeable as such. But instruments of transfer on

sale are made dutiable and their very description involves reference to the transaction they effectuate. It is in this sense that the sale is "chargeable." When the ordinance makes it clear, as in our opinion it does, that an instrument of transfer executed after the ordinance begins is to be liable to stamp duty, although the sale took place before the ordinance, it appears to us to follow that the antecedent sale or sales are "chargeable" in the sense that the duty on the instrument of transfer is calculated by reference to them. In strictness, the imposition is not retrospective; for it is levied on the execution of the instrument. It is true that it is measured in amount by reference to past facts. But to discuss whether the calculation or measurement of the duty in this way involves retrospectivity is futile, because, in any case, the presumption against retrospective imposition could not prevail against the combined effect of secs. 6, 15, and 37 (3). And even if sec. 37 (6) were inapplicable to purchasers under contracts already made, a view to which we do not say that we subscribe, that circumstance could not exclude the operation of sub-sec. 3 on transfers giving effect to sales made before the ordinance.

For these reasons we think the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant, *MacMaster, Holland & Co.*

Solicitor for the respondent, *W. H. Sharwood*, Crown Solicitor for the Commonwealth.

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