1963
*May 9,10
Oct. 2

UNITED STATES OF AMERICA (*Plaintiff*) ..... APPELLANT;

AND

ESPERANZA P. HARDEN (*Defendant*) ..RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Conflict of laws—Rule that foreign States cannot directly or indirectly enforce their tax claims in our courts not affected by taking of judgment in foreign States—Stipulation judgment—Liability to pay tax not converted into contractual obligation.

The plaintiff issued a writ of summons against the defendant in the Supreme Court of British Columbia. The claim was upon a judgment of the United States District Court for the Southern District of California, the judgment being in respect of a claim for taxes. As a result of pre-trial hearings it was stipulated that judgment might be entered against the defendant for a stated amount, which was less than the amount originally claimed, and pursuant to this stipulation judgment was entered. An application to set aside the writ and all subsequent proceedings was granted by the judge who heard the motion on the ground that the action was an attempt to enforce the revenue laws of a foreign State. This judgment was upheld unanimously by the Court of Appeal. An appeal from the decision of the Court of Appeal was brought to this Court.

Held: The appeal should be dismissed.

A foreign State cannot escape the application of the rule that in no circumstances will the courts directly or indirectly enforce the revenue laws of another country, which is one of public policy, by taking a judgment in its own courts and bringing suit here on that judgment. The claim asserted remains a claim for taxes. It has not, in our courts, merged in the judgment; enforcement of the judgment would be enforcement of the tax claim.

Similarly, the argument that the claim asserted was simply for the performance of an agreement, made for good consideration, to pay a stated sum of money also failed. The Court was concerned not with form but with substance, and if it could properly be said that the defendant made an agreement it was simply an agreement to pay taxes which by the laws of the foreign State she was obligated to pay.

Neither the foreign judgment nor the agreement did more than make certain the fact and the amount of the defendant's liability to the plaintiff. The nature of the liabiliy was not altered. It was a liability to pay income tax.

As to the argument that the judge of first instance ought not to have set aside the writ but should have directed that the action proceed to trial, the Court agreed with the view of the judge that it was clear that all the relevant facts were before the Court and nothing

*PRESENT: Cartwright, Fauteux, Martland, Judson and Ritchie JJ.

would have been gained by directing that the action proceed to trial.

Government of India, Ministry of Finance (Revenue Division) v. Taylor, [1955] A.C. 491; *Peter Buchanan Ld. & Macharg v. McVey*, [1955] A.C. 516, applied.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], dismissing an appeal from an order of Maclean J. Appeal dismissed.

J. J. Robinette, Q.C., and *J. G. Alley*, for the plaintiff, appellant.

J. W. de B. Farris, Q.C., and *J. M. Giles*, for the defendant, respondent.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for British Columbia[1] dismissing an appeal from an order of Maclean J. which set aside the writ of summons issued by the appellant against the respondent and all subsequent proceedings.

The writ was issued in the Supreme Court of British Columbia on March 20, 1961. It was specially endorsed. The claim was "upon a judgment of the United States District Court for the Southern District of California, Central Division, in the United States of America dated and filed the 10th day of March, 1961, and entered the 13th day of March, 1961". The amount claimed in Canadian currency was $602,919.10.

By order dated May 4, 1961, Collins J. gave leave to the respondent to enter a conditional appearance. This order provided that any appearance entered by the respondent should be unconditional unless application were made within ten days to set aside the writ of summons. A motion to set aside the writ and all subsequent proceedings was made within the time limited. On the return of the motion affidavits were read on behalf of both parties and there is no dispute as to the relevant facts.

On June 10, 1957, an action was commenced in the United States District Court for the Southern District of California, alleging that the respondent was indebted for taxes

[1] (1962), 40 W.W.R. 428, 36 D.L.R. (2d) 602.

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for the year 1945 in the sum of $264,117.23 and for the year 1946 in the sum of $603,844.78. The respondent through her attorney-at-law filed an answer alleging that the deficiency for income tax for the year 1945 was the sum of $96,040.27 and denying that there was any liability for tax for the year 1946.

As a result of pre-trial hearings before a district judge it was stipulated that judgment might be entered against the respondent for the sum of $200,037.28 in respect of the year 1945 being the sum of $96,040.27 and interest to March 10, 1961, and for the sum of $439,462.87 in respect of the year 1946 being $219,557.96 and interest to March 10, 1961.

Pursuant to this stipulation judgment was signed on March 10, 1961, and entered on March 13, 1961; an exemplification is produced as Exhibit "A" to an affidavit filed on behalf of the appellant. It consists of a single document headed "Stipulation for Judgment and Judgment" and shews on its face that it is for taxes assessed upon the income of the respondent for the years 1945 and 1946 for which the respondent is indebted to the appellant, together with interest thereon to the date of the judgment. The judgment as signed orders that the plaintiff recover against the defendant $609,500.15. The obvious error in addition was corrected by a subsequent "Stipulation and order re amendment of judgment" to make the judgment read $639,500.15 in place of $609,500.15.

The respondent has paid nothing on account of the judgment and is now resident in the Province of British Columbia.

The ground set up in the notice of motion to set aside the writ reads: "that this Court has no jurisdiction to entertain the claim endorsed thereon".

At the conclusion of the argument of the motion before Maclean J., which occupied three days, that learned judge gave judgment orally setting aside the writ on the ground that the action was an attempt to enforce the revenue laws of a foreign State; he later delivered written reasons examining in detail the arguments of counsel for the appellant and a number of authorities. His judgment was upheld by a unanimous judgment of the Court of Appeal the reasons for which were delivered by Sheppard J.A.

Counsel inform us that there is a mistake of fact in the reasons of Sheppard J.A. when, speaking of the proceedings before Maclean J., he says: "After preliminary objection, it was agreed that the motion be dealt with as a motion for judgment", and that what actually occurred is correctly stated in the following passage in the reasons of Maclean J.:

> During the hearing of the preliminary objection counsel for the plaintiff offered to agree to proceed with this motion as a motion for judgment upon a point of law if the defendant would consent to file an unconditional appearance. This offer was not accepted.

It is suggested that this is relevant to the third point argued before us on behalf of the appellant, to which reference will be made later.

Neither in this Court nor in the Courts below did counsel for the appellant question the well-established general rules (i) that a foreign State is precluded from suing in this country for taxes due under the law of the foreign State, and (ii) that in a foreign judgment there is no merger of the original cause of action. Ample authority for both of these propositions is to be found in the reasons of Sheppard J.A.

Three arguments were put forward in support of the appeal.

First, it was submitted that although a claim for taxes made by a foreign State would not be entertained in the courts of this country a judgment for payment of those taxes obtained in the courts of the foreign State will be enforced here.

Secondly, it was submitted that the courts of this country will enforce an agreement by way of compromise made for valuable consideration to pay an amount of money in satisfaction of a claim for foreign taxes.

Thirdly, it was submitted that, in any event, the learned judge of first instance ought not to have set aside the writ but should have directed that the action proceed to trial.

In my opinion all these submissions were rightly rejected by the Courts below.

The rule that the courts of this country will not entertain a suit by a foreign State to recover a tax has been restated recently by the House of Lords in *Government of India,*

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Ministry of Finance (Revenue Division) v. Taylor[1]. At p. 503, Viscount Simonds adopted the following passage from the judgment of Rowlatt J. in *The King of the Hellenes v. Brostron*[2]:

> It is perfectly elementary that a foreign government cannot come here—nor will the courts of other countries allow our Government to go there—and sue a person found in that jurisdiction for taxes levied and which he is declared to be liable to in the country to which he belongs.

At p. 504, Viscount Simonds also adopted the following from the judgment of Tomlin J., as he then was, in *In re Visser, The Queen of Holland v. Drukker*[3]:

> My own opinion is that there is a well-recognized rule, which has been enforced for at least 200 years or thereabouts, under which these courts will not collect the taxes of foreign States for the benefit of the sovereigns of those foreign States; and this is one of those actions which these courts will not entertain.

Various reasons have been suggested for this ancient rule. In his speech in *Government of India, Ministry of Finance (Revenue Division) v. Taylor, supra,* Lord Keith of Avonholm having approved of the judgment of Kingsmill Moore J. in the High Court of Eire in *Peter Buchanan Ld. & Macharg v. McVey,* reported as a note in [1955] A.C. 516, and particularly of the proposition "that in no circumstances will the courts directly or indirectly enforce the revenue laws of another country", goes on at pp. 511 and 512 to suggest two explanations, as follows:

> One explanation of the rule thus illustrated may be thought to be that enforcement of a claim for taxes is but an extension of the sovereign power which imposed the taxes, and that an assertion of sovereign authority by one State within the territory of another, as distinct from a patrimonial claim by a foreign sovereign, is (treaty or convention apart) contrary to all concepts of independent sovereignties. Another explanation has been given by an eminent American judge, Judge Learned Hand, in the case of *Moore v. Mitchell,* in a passage, quoted also by Kingsmill Moore J. in the case of *Peter Buchanan Ld* as follows: 'While the origin of the exception in the case of penal liabilities does not appear in the books, a sound basis for it exists, in my judgment, which includes liabilities for taxes as well. Even in the case of ordinary municipal liabilities, a court will not recognize those arising in a foreign State, if they run counter to the "settled public policy" of its own. Thus a scrutiny of the liability is necessarily always in reserve, and the possibility that it will be found not to accord with the policy of the domestic State. This is not a troublesome or delicate inquiry when the question arises between private persons, but it takes on quite another face when it concerns the relations between the foreign State and its own citizens

[1] [1955] A.C. 491. [2] (1923), 16 Ll. L. Rep. 190 at 193.
[3] [1928] Ch. 877 at 884.

or even those who may be temporarily within its borders. To pass upon the provisions for the public order of another State is, or at any rate should be, beyond the powers of the court; it involves the relations between the States themselves, with which courts are incompetent to deal, and which are intrusted to other authorities. It may commit the domestic State to a position which would seriously embarrass its neighbour. Revenue laws fall within the same reasoning; they affect a State in matters as vital to its existence as its criminal laws. No court ought to undertake an inquiry which it cannot prosecute without determining whether those laws are consonant with its own notions of what is proper.'

On either of the explanations which I have just stated I find a solid basis of principle for a rule which has long been recognized and which has been applied by a consistent train of decisions. It may be possible to find reasons for modifying the rule as between States of a federal union. But that consideration, in my opinion, has no relevance to this case.

In the same case, at p. 515, Lord Somervell of Harrow recognizes and applies "the special principle that foreign States cannot directly or indirectly enforce their tax claims here".

In my opinion, a foreign State cannot escape the application of this rule, which is one of public policy, by taking a judgment in its own courts and bringing suit here on that judgment. The claim asserted remains a claim for taxes. It has not, in our courts, merged in the judgment; enforcement of the judgment would be enforcement of the tax claim.

Similarly, in my opinion, the argument that the claim asserted is simply for the performance of an agreement, made for good consideration, to pay a stated sum of money must also fail. We are concerned not with form but with substance, and if it can properly be said that the respondent made an agreement it was simply an agreement to pay taxes which by the laws of the foreign State she was obligated to pay.

Neither the foreign judgment nor the agreement does more than make certain the fact and the amount of the respondent's liability to the appellant. The nature of the liability is not altered. It is a liability to pay income tax.

The views, (i) that the application of the rule that foreign States cannot directly or indirectly enforce their tax claims in our courts is not affected by the taking of a judgment in the foreign State, and (ii) that the liability to pay tax does not become converted into a contractual obligation, both appear to me to be supported by the following passage in the speech of Lord Somervell of Harrow in *Government of*

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India, Ministry of Finance (Revenue Division) v. Taylor, supra, at pp. 514 and 515:

> If one State could collect its taxes through the courts of another, it would have arisen through what is described, vaguely perhaps, as comity or the general practice of nations inter se. The appellant was therefore in a difficulty from the outset in that after considerable research no case of any country could be found in which taxes due to State A had been enforced in the courts of State B. Apart from the comparatively recent English, Scotch and Irish cases there is no authority. There are, however, many propositions for which no express authority can be found because they have been regarded as self-evident to all concerned. There must have been many potential defendants.
>
> Tax gathering is an administrative act, though in settling the quantum as well as in the final act of collection judicial process may be involved. Our courts will apply foreign law if it is the proper law of a contract, the subject of a suit. Tax gathering is not a matter of contract but of authority and administration as between the State and those within its jurisdiction. If one considers the initial stages of the process, which may, as the records of your Lordships' House show, be intricate and prolonged, it would be remarkable comity if State B allowed the time of its courts to be expended in assisting in this regard the tax gatherers of State A. Once a judgment has been obtained and it is a question only of its enforcement the factor of time and expense will normally have disappeared. The principle remains. The claim is one for a tax.
>
> The fact, I think, itself justifies what has been clearly the practice of States. They have not in the past thought it appropriate to seek to use legal process abroad against debtor taxpayers. They assumed, rightly, that the courts would object to being so used. The position in the United States of America has been referred to, and I agree that the position as between member States of a federation, wherever the reserve of sovereignty may be, does not help.

That it is the duty of our courts to go behind the foreign judgment to ascertain the substance of the claim on which it is based is made plain by the reasons of Sheppard J.A. and the authorities to which he refers.

For the reasons given by Sheppard J.A. and those I have stated above I would reject the first two arguments urged in support of the appeal.

As to the third argument, I agree with the view of Maclean J. that it is clear that all the relevant facts were before the Court and nothing would have been gained by directing that the action proceed to trial. On this point I would adopt the reasoning of Kingsmill Moore J. in *Peter Buchanan Ld & Macharg v. McVey, supra,* at p. 529 where he says:

> For the purpose of this case it is sufficient to say that when it appears to the court that the whole object of the suit is to collect tax for a foreign

revenue, and that this will be the sole result of a decision in favour of the plaintiff, then a court is entitled to reject the claim by refusing jurisdiction.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Davis, Hossie, Campbell, Brazier & McLorg, Vancouver.

Solicitors for the defendant, respondent: Farris, Stultz, Bull & Farris, Vancouver.