

April 2, 1927.

OPINION No. 1421.

TAXATION; INHERITANCE TAX:

A German subject who inherited property in the United States after war was declared is only liable to pay such tax as a citizen of the United States would have paid for the same inheritance.

TREATIES:

Paragraph III of Article X of the Treaty with Germany of 1871, was not abrogated by the Declaration of War with Germany.

WAR:

Declaration of War, or a State of War does not abrogate all clauses of a treaty between the belligerent nations.

Honorable Henry C. Hapai,
Treasurer, Territory of Hawaii,
Honolulu, T. H.

Dear Sir:

You have orally requested the opinion of this department as to whether or not a subject of Germany, who inherits property after the state of war existed between Germany and the United States, was entitled to pay only such tax upon the inheritance as a citizen of the United States would have paid, or in other words, did the declaration of war fail to terminate the treaty of 1871 between the United States and Germany? The facts, as I understand them, are as follows:

A German subject residing in Norway inherited property in the Territory of Hawaii; the inheritance took place after war existed between this country and

Germany and before the treaty of peace with Germany was signed. I further understand that the taxes were paid upon the theory that the treaty was abrogated and that therefore the taxpayer came within the same category as a non-resident alien.

The third paragraph of Article 10 of the treaty with Germany reads as follows:

“In all successions to inheritance, citizens of each of the contracting parties shall pay in the country of the other such duties only as they would be liable to pay, if they were citizens of the country in which the property is situated or the judicial administration of the same may be exercised.”

If the state of war or the declaration of war did not abrogate this particular portion of the treaty, the taxpayer would have been entitled to pay only such tax as would have been paid by a citizen of the United States, upon such inheritance.

The effect of war upon existing treaties has been discussed in two recent cases.

In the case of *Techt v. Hughes*, 128 N. E. 185, the question considered was whether or not the declaration of war terminated that portion of the treaty between the United States and Austria, concerning the right of Austrian subjects to inherit real property in the United States. In disposing of the question the court said:

“Convention between United States and Austria, concluded May 8, 1848, proclaimed October 25, 1850, extended stipulations of treaty of commerce and navigation, concluded August 27, 1829, proclaimed February 10, 1831, in substance giving Austrian subjects the privilege to inherit real property, conditionally on sale within two years, held not abrogated by war between the United States and Austria-Hungary.”

This case also held that war does not abrogate all clauses of a treaty.

In the case of *State ex rel. Miner vs. Reardon*, 245 Pac. 158, the same question was raised. The treaty involved was with Germany. The effect of war on the German treaty was considered, and the court in disposing of the question said:

“It is too clear for controversy that not all treaties are annulled by a state of war. A treaty which establishes a permanent status—such for instance as one fixing a boundary—plainly is not intended to be affected, and is not affected by war. Neither will a property right of an individual already vested under the terms of an existing treaty be disturbed by it. *Society, etc., v. New Haven*, 8 Wheat. (21 U. S.) 464, 494, 5 L. Ed. 662. But the same reasoning does not apply to a treaty provision that aliens may inherit, for that is prospective in its operation, and if it is to survive a declaration of war it must be upon other grounds; that is, an inference that it is intended to be enforced notwithstanding the parties are at war must be based upon different considerations. Upon the grounds indicated in the opinion in the *Techt-Hughes Case* we regard the reciprocal privilege of inheritance as not so related to the carrying on of a war as to create a presumption of an intention it should operate only in time of peace. Practically the only important question is which way the presumption lies, for, of course, either belligerent by affirmative action may use its own pleasure as to suffering the pre-war condition to continue. We therefore hold that the right of the defendants to inherit was not cut off by the declaration of war between this country and Germany.”

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The cases cited above refer to the right to inherit but do not refer to the matter of taxation upon such inheritances.

The matter of taxation is reciprocal under the treaty, and certainly is on the same plane as the right to inherit. Furthermore, it is incidental to the right to inherit.

It is the opinion of this department and you are so advised that a German subject residing in Norway, who inherits property after the war between Germany

and the United States was declared, was entitled to inherit property in the United States and is liable to pay only such tax as a citizen of the United States would have paid for the same inheritance. You are further advised that paragraph 3 of Article 10 of the treaty with Germany was not abrogated by the declaration of war with Germany.

Very truly yours,

CHARLES B. DWIGHT,
Third Deputy Attorney General of the
Territory of Hawaii.

APPROVED :

WILLIAM B. LYMER,
Attorney General.