COURT OF SESSION (FIRST DIVISION)—23RD, 24TH MAY AND 1ST JUNE, 1950
HOUSE OF LORDS—4TH, 5TH, 6TH, 7TH FEBRUARY AND 26TH MARCH, 1952

Commissioners of Inland Revenue

v.

Gordon[1]

Income Tax, Schedule D—Foreign possessions—Remittances—Loans by bank in United Kingdom transferred from time to time to borrower's account at branch abroad and satisfied by income receipts there—Income Tax Act, 1918 (8 & 9 *Geo.* V, *c.* 40), *Schedule D, Case* V, *Rule* 2.

The Respondent, a partner in a firm carrying on business in Ceylon, had an account with the Colombo branch of a bank which had its head office in London. He came to the United Kingdom in 1940 *and opened an account at the head office of his bank in London. By arrangement he was allowed to overdraw his account, the overdrafts being transferred to the Colombo branch whenever they reached* £500. *At the Colombo branch they were converted into rupees and satisfied by periodic payments into the Colombo account from the Respondent's firm, representing his share of the business profits.*

On appeal to the Special Commissioners against assessments to Income Tax under Case V *of Schedule D, the Respondent contended that there had been no remittance of income from foreign possessions to the United Kingdom, and that accordingly there was no liability to tax. For the Crown it was contended that the arrangement made with the bank was an arrangement for the remittance of money to this country from Colombo and that the sums so remitted constituted income from foreign possessions remitted to the United Kingdom ; and that the case could be distinguished from those of* Hall *v.* Marians, 19 T.C. 582, *and* Wild *v.* King Smith, 25 T.C. 86, *in that the Respondent had created no loans abroad, the proceeds of which were set against drawings in this country. The Commissioners held that the case could not be disinguished from that of* Hall *v.* Marians *and allowed the appeal.*

Held, *that the Commissioners' decision was correct.*

CASE

Stated for the opinion of the Court of Session as the Court of Exchequer in Scotland, under the Income Tax Act, 1918, Section 149.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 25th April, 1947, David Gordon (hereinafter called "the Respondent") appealed against the following assessments to Income Tax made upon him under Case V, Schedule D, Income Tax Act, 1918, to cover income chargeable under Rules 1 and 2 of the said Case V:—

1942-43 additional on the sum of £5,041.
1943-44 additional on the sum of £7,000.
1944-45 additional on the sum of £7,000.

[1] Reported [1952] 1 All E.R. 866; [1952] 1 T.L.R. 913; 1952 S.L.T. 265.

I. The following facts were admitted or proved.

(1) The Respondent is the senior partner in a firm carrying on business in Ceylon. He made periodic visits from Ceylon to this country. The Respondent came to the United Kingdom in 1940 on a visit but owing to war conditions he was unable to return to Ceylon and had to reside in this country until the termination of the war.

(2) The Respondent at all material times had a banking account with the Colombo branch of the National Bank of India, Ltd., which has its head office in London. The Respondent's bank account in Colombo is fed partly by transfers of business profits from the firm's account representing his share of such profits. These payments into the bank account are made in rupees.

(3) Sometime prior to 2nd January, 1942, the Respondent opened an account with the head office of the National Bank of India, Ltd., in London, and between that date and 4th March, 1942, the account remained in credit. On 2nd February, 1942, there was remitted to the credit of that account £1,428 12*s.* 8*d.* from the Respondent's said bank account in Colombo. No question arises in this case with regard to that sum.

(4) About March, 1942, the Respondent made a verbal arrangement with the said bank in London, whereby they allowed him without giving any security to overdraw his account with the head office, and the head office arranged to transfer portions of his overdraft to their Colombo branch. The said branch debited the Respondent's account with the equivalent in rupees of said transfers and the Respondent arranged to pay rupees into said branch account to meet said debits. The Respondent's subsequent operations on his bank account were made in accordance with this arrangement as modified later by the letter in September, 1942, hereinafter referred to. On 4th March, 1942, the Respondent's account at the head office became overdrawn. On 17th March, 1942, £5,000 of the respondent's overdraft at the head office was transferred to the Colombo account and on 20th March, 1942, the Colombo branch entered against the Respondent's account the equivalent in rupees of the said sum of £5,000. The London account remained overdrawn until 23rd May, 1942, when it became in credit by reason of a transfer to that account of £1,999 12*s.* 5*d.* from the Colombo account.

(5) The account in London remained in credit from 23rd May, 1942, to 12th September, 1942, and thereafter it continued in debit.

(6) By letters between the bank and the Respondent dated 19th, 21st and 22nd September, 1942 (copies of which are annexed hereto, marked " A," and form part of this Case[1]), it was agreed that whenever the debit balance on the London account should amount to £500 such balance should be transferred to the debit of the Respondent's Colombo account.

(7) In pursuance of these arrangements debit balances on the Respondent's London account were transferred as shown in the said account from time to time to Colombo. Copies of excerpts of the London account from 2nd January, 1942, to 10th May, 1944, and of the Colombo account from 31st December, 1941, to 10th May, 1944, are annexed hereto, and marked " B " and " C " respectively and form part of this Case[1].

[1] Not included in the present print.

(8) The effect of debiting the Colombo account with the rupee equivalent of the sums of £1,180, £3,200 and £600 was to cause the Colombo account to be in debit or overdrawn. The debits or overdrafts were extinguished soon after they had been incurred by payments into the Colombo account of sums in rupees from the Respondent's said firm.

(9) Interest was allowed by the bank on credit balances and was charged on debit balances in each of the accounts in Colombo and London.

At the hearing before us the principal question for our determination was whether the effect of the arrangement with the bank whereby the debit balances on the London account were to be reduced or extinguished out of the Colombo account (which was admitted by both parties to contain income from the Respondent's firm) was that income from foreign possessions had been remitted to the United Kingdom.

Having regard to the nature of our decision it was unnecessary for us to determine to what extent the Colombo account contained receipts of a quality other than income from foreign possessions.

II. It was contended on behalf of the Respondent;

(1) that the obtaining of an advance from the head office and the transfer of the debit so created to Colombo and the payment of rupees into the Respondent's account there did not constitute a remittance of income from foreign possessions to the United Kingdom;

(2) that the Respondent did not instruct the bank to credit his London account with sums debited against his Colombo account and that the bank's entries showing such credits are not evidence against him; and

(3) that the said assessments were wrongly made.

III. It was contended on behalf of the Commissioners of Inland Revenue;

(1) that the arrangement made with the bank whereby the Respondent was entitled to draw in London money to be set against his account in Colombo when the London drawings amounted to specified amounts, was an arrangement for the remittance of money to this country from Colombo;

(2) that the cases of *Hall* v. *Marians*[1] and *Wild* v. *King Smith*[2] were distinguishable in that the Respondent created no loans abroad the proceeds of which were set against drawings in this country;

(3) that during the periods when the Respondent had no funds to his credit in London,

(*a*) money was in effect remitted to this country from Colombo each time he drew money in London under the arrangement that it would ultimately be set against his account in Colombo; alternatively

(*b*) money was in effect remitted to this country from Colombo each time the London account was credited with money from the Colombo account;

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(1) 19 T.C. 582. (2) 24 T.C. 86.

(4) that in so far as the monies credited to the London account from the Colombo account represented income which arose abroad there was a remittance of income by the Respondent to the United Kingdom ; and

(5) that the Respondent was correctly assessed to Income Tax under Case V, Rule 2, Schedule D.

IV. We, the Commissioners who heard the appeal, gave our decision in writing in the following terms.

We have considered the case of *Hall* v. *Marians*, 19 T.C. 582, and in particular paragraph 7 of the Stated Case therein, and also the facts in the case now before us.

In principle we are unable to distinguish this case from *Hall* v. *Marians*.

We hold that in the circumstances proved before us no sums of income from possessions outside the United Kingdom have been remitted to the Appellant in the United Kingdom.

We therefore allow the appeal.

The figures of liability on the basis of this decision having subsequently been agreed, we discharged the additional assessment for the year 1942-43, and reduced the assessments for the years 1943-44 and 1944-45 to £946 and £259 respectively.

V. The Appellants immediately after the determination of the appeal expressed to us their dissatisfaction with our determination as being erroneous in point of law, and having duly required us to state and sign a Case for the opinion of the Court of Session as the Court of Exchequer in Scotland, this Case is stated and signed accordingly.

VI. The questions for the opinion of the Court are:—

(1) Were the Commissioners entitled to hold that no sums of income from possessions outside the United Kingdom were remitted to the Respondent in the United Kingdom?

(2) Whether as the facts stated the Respondent was assessable under Case V, Rule 2, of Schedule D to the extent that the sums in the Colombo account used to repay the bank consisted of income? and, if so

(3) Whether there was a remittance within the meaning of the said Rule 2—

(*a*) each time the Respondent drew money in London, or

(*b*) when the London drawings were repaid to the bank in Colombo.

H. H. C. GRAHAM
N. ANDERSON
} Commissioners for the Special Purposes of the Income Tax Acts.

Turnstile House,
94-99, High Holborn,
London, W.C.1.

28th May, 1949.

The case came before the First Division of the Court of Session (the Lord President, and Lords Carmont and Keith) on 23rd and 24th May, 1950, when judgment was reserved. On 1st June, 1950, judgment was given unanimously against the Crown, with expenses.

Mr. H. A. Shewan, K.C., and Mr. I. H. Shearer appeared as Counsel on behalf of the Crown and Mr. E. J. Keith, K.C., and Mr. D. Maxwell for the taxpayer.

The Lord President (Cooper).—The Respondent, who is the senior partner of a firm carrying on business in Ceylon, was obliged by war conditions to spend the years 1940 to 1945 in this country. Additional assessments to Income Tax for the years 1942-43, 1943-44, and 1944-45 have been made upon him under Case V of Schedule D for sums aggregating over £19,000 in respect of certain transactions executed by him through the National Bank of India whereby he contrived to finance himself while resident in the United Kingdom. The details of these transactions are set out at length in the Case. The principal question is whether the facts, properly interpreted, reveal a situation under which the liability to tax is attracted by Case V, Rule 2. The Special Commissioners found it impossible to distinguish the present case from *Hall* v. *Marians,* 19 T.C. 582, and held that no sums of income from possessions outside the United Kingdom had been remitted to the Respondent in the United Kingdom. The Commissioners of Inland Revenue now appeal.

The precise language of Rule 2 requires consideration. It is directed to prescribing the measure of liability to tax in respect of income from foreign possessions and it begins by fixing that liability at " the full amount " of the actual sums annually received in the United Kingdom ". The word " actual " qualifies the sums and not their receipt. But it is not every such receipt that satisfies the Rule. The receipts must be derived from one or other of four specified sources:—(*a*) remittances payable in the United Kingdom ; or (*b*) property imported ; or (*c*) money or value arising from property not imported ; or (*d*) money or value *so* received (*sc.* received in the United Kingdom) on credit or on account in respect of any *such* remittances, property, money or value brought or to be brought into the United Kingdom.

If the Rule is read literally—so the Respondent argued—it was plain that he had not brought himself within the mischief of it. In order to attract tax under Case V, Rule 2, it is not enough that a person resident in the United Kingdom should somehow have derived benefit from the income of a foreign possession ; that benefit must be derived in one or other of the specified methods. Having said so much the Respondent naturally asked whether he need say more. It was not the duty of the Court, he maintained, to torture a taxing statute so as to bring within its provisions a case which the language did not distinctly cover ; and there was the highest authority for the view that under not dissimilar provisions in the Act of 1842, the duty of the Court was to seek for an *actual* remittance to, and receipt in, the United Kingdom and not to be led astray by an " equivalent " to a remittance or receipt, or a " constructive receipt ". (*Gresham Life Assurance Society, Ltd.* v. *Bishop*[1], [1902] A.C. 287 per Lord Halsbury, L.C., at pages 291-2 ; Lord Macnaghten at page 292 ; Lord Brampton at page 294).

(1) 4 T.C. 464.

(The Lord President (Cooper).)

This is an impressive argument, and the line of approach is clear and highly intelligible. In the *Gresham* appeal the House had before them the earlier decision in the *New Mexico* case(1) (23 R. 322), which was described by Lord Macnaghten as "very special" and by Lord Lindley as "very "peculiar", and which was explained upon the view that the company in that case had treated the money as income received in this country and merely saved themselves the expense of cross-remittances. In the words of Lord Shand, [1902] A.C., at page 294, "the money had been really "received in this country"(2); or, as it was put by Lord Moncrieff in *Standard Life Assurance Co.* v. *Allan*(3), 3 F. at page 815, the true explanation of the judgment is "that it proceeded upon the footing of bar or "estoppel . . . the company could not be heard to plead that the interest "which was entered in their books as having been received had not been "remitted."

Down to 1902, accordingly, the authoritative view was that in cases of this type the search was for an actual remittance or actual receipt of income from a foreign possession, as distinguished from a notional or constructive remittance or receipt. Unfortunately the passage from *Gresham Life Assurance Society, Ltd.* v. *Bishop*(4) most frequently cited is not from the leading opinions of the majority of the House but from the speech of Lord Lindley in which, in language which I cannot reconcile with the views of the other learned Lords, he declared his readiness to accept as a receipt "what amongst business men is *equivalent to* a receipt of a sum of money"(5) and it is this passage which is singled out for quotation in *Trinidad Lake Asphalt Co.*, [1945] A.C. 1, at page 11. In that case it was held that mere book entries made by a company and a non-resident shareholder constituted an actual payment and receipt of the indebtedness on either side and a "transmission" of revenue from the company to the shareholder within the meaning of a local taxing act. In describing the book entries which effected the set-off, Lord Wright said: "There is actual, not merely notional "or constructive payment of the indebtedness on either side. There is thus "a 'transmission' of funds." His Lordship then appears to suggest that the *Gresham* decision has been rendered obsolete because "since 1902, the "transmission of funds has become still more divorced in the minds of "business men, and even of lawyers, from the idea of any material embodi-"ment. No document is necessary. Two companies separated by the "ocean may orally agree over the wireless telephone that the debt of one "may be set against a debt of the other and both cancelled . . . what has "happened, is, if so intended, equivalent to a receipt of money".

In such a situation those who naturally desire to conform to the method of approach approved in the House of Lords or Privy Council are left in a position of some embarrassment. It may be that the differing phraseology of the taxing statutes involved may explain the discrepancies, but there is nothing to suggest that these differences affected the overriding problem. Moreover I find it difficult with all respect to accept the suggestion pressed upon us that the improvements in long-distance communication effected since 1902, touch the core of the problem before the House of Lords in the *Gresham* case, or that the advent of wireless as a supplement to the cable, telephone, telegram and post has to any extent invalidated the *ratio* of the *Gresham* decision.

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(1) Scottish Mortgage Company of New Mexico *v.* McKelvie, 2 T.C. 165.
(2) 4 T.C. at p. 475. (3) 4 T.C. at p. 462. (4) 4 T.C. 464. (5) *Ibid.*, at p. 476.

(The Lord President (Cooper).)

In these circumstances I take the present case on two alternative bases. On the footing that our concern is with actual, as distinguished from notional or constructive, remittance and receipt, and that "equivalents" for such remittances or receipts will not suffice, it is clear, as I have already observed, that the Special Commissioners were correct in the conclusion which they reached, and I did not understand this to be disputed. On the footing that "equivalents" will suffice, it is necessary to examine the facts more narrowly.

By negotiating an overdraft from the London office of the National Bank of India the Respondent created a debt due by him to the bank. By authorising the London office to transfer the overdraft from time to time to their Colombo branch where it would be met by rupees derived from the profits earned by the Respondent's firm, the parties agreed that the debt created in London would be discharged in Ceylon out of funds in Ceylon. When the Respondent's firm in Ceylon paid rupees to the credit of the Colombo account, the debt incurred to the bank was *pro tanto* discharged in Ceylon. There the matter ends. But we can go further, and it is here that the distinctions in phraseology become important. The question for us is not whether income has been "received in" or "transmitted to" the United Kingdom, but whether the operations summarised above do or do not satisfy the detailed requirements of Rule 2. In the words of Rule 2, there was here no remittance payable in the United Kingdom, no property imported into the United Kingdom, and no receipt in the United Kingdom of sums from money or value arising from property not imported or from money or value on account or in respect of remittances, property, money or value brought or to be brought into the United Kingdom.

Unless therefore the elaborate detailed provisions of Rule 2 are to be discarded in favour of the acceptance of any series of operations whereby a resident taxpayer in substance derives benefit from the income of a foreign possession, the Respondent must succeed. I should be prepared to penetrate beneath any mere colourable device adopted to conceal what was in truth a remittance payable in the United Kingdom or any of the other transactions specified in Rule 2, but I am not prepared to re-write Rule 2. As regards the case of *Marians*[1] a single *ratio decidendi* cannot easily be disentangled from the differently expressed opinions of the three learned Lords Justices, but the facts, though not identical, could not in my view be sufficiently distinguished, and the decision, which was followed in *Wild* v. *King Smith*, 24 T.C. 86, is in point. In *Fellows-Gordon* v. *Commissioners of Inland Revenue*, 19 T.C. 683, the fact of remittance within the meaning of Rule 2 was not in controversy, the sole issue being whether the remittances were income or capital.

I am therefore for refusing the appeal and answering the questions of law as follows: (1) in the affirmative, and (2) in the negative, (3) being superseded. It is necessary to add that the accounts disclose two true remittances from Ceylon to London with regard to which it was attempted to argue that they had been made in defiance of the Respondent's instructions to the bank and should on that account be disregarded. No such point is raised by the Case and we cannot entertain it.

Lord Carmont.—I have had an opportunity of considering your Lordship's opinion and I am in complete agreement with it.

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(1) 19 T.C. 582.

Lord Keith.—I should express at once the difficulty I feel about this case. It is I think clear and is I understand common ground that unless income from foreign possessions is in some way brought into the United Kingdom the owner of the foreign possessions, although resident in the United Kingdom, cannot be asked to pay tax on such income and is liable to pay tax only on income so brought in. But the liability to tax does not necessarily depend on the receipt of the income by him. If he has obtained value on the strength of his foreign possessions from some third party who recoups himself thereafter out of income of these foreign possessions so brought in, the owner of the foreign possessions is liable to tax to the extent of the value received if the income brought in is equal to (or it may be greater than) that value. That I think follows from the words in Rule 2 of Case V referring to " money or value *so* received " (*i.e.* received in the United Kingdom) " on credit or on account in respect of any such remit- " tances, property, money, or value brought *or to be brought* into the United " Kingdom ".

In the present case there was a transaction, or rather a series of transactions, between Mr. Gordon and his bankers in London by which Mr. Gordon was allowed to operate on an overdraft account. This merely meant that his bankers granted him a series of loans. It was suggested that the running character of these banking facilities distinguished the present case from *Marians'* case(1) where the whole loan granted by the bank was discharged in a similar manner by a single transaction. But I am unable to appreciate how this introduces any real distinction leading to any different legal result. Mr. Gordon's bankers, having given him these facilities, recouped themselves by arranging from time to time for the amount of the overdraft to be debited to Mr. Gordon's account with their Colombo branch. Into this branch there were paid sums which I assume for the purposes of this case were income from his possessions in Ceylon sufficient to extinguish the amount of the overdraft. Now I have little difficulty in holding that until these overdrafts were extinguished in Ceylon Mr. Gordon was in debit to his bankers in London and I should be surprised to learn that in the bank's books of account in London Mr. Gordon's indebtedness ever disappeared until word of a discharge in Ceylon was received in London. The idea of exporting a debit from London to Ceylon is to my mind meaningless except as meaning that instructions were given to the Ceylon branch to collect the debt in Ceylon. The debt was incurred in London and could not be discharged except by payment and I can think of no way by which as a matter of accounting the debt in the bankers' books in London could disappear until advice of payment was received. The debt in London is then discharged because payment has been received in Ceylon. Does this involve remittance of the payment to the bank in London? If it did Mr. Gordon would be liable in tax because he received value from the bank in London in respect of a remittance to be brought into the United Kingdom and it would not in my opinion matter that the remittance was not to him but to the bank. I am not satisfied however that any remittance was involved in this transaction. The bank, having received payment in Ceylon, might well keep the money in Ceylon and use it there. In the absence of proof to the contrary I would be prepared to assume this. All money deposited with or earned by the bank in Ceylon is not transmitted to London. If Mr. Gordon had gone back to Ceylon and had paid his debt there, not by a remittance to London but by a payment to the bank in Ceylon out of his Ceylon income, he would not as I see it have incurred any liability to tax and in effect this is what he did by authorising payment

(1) 19 T.C. 582.

(Lord Keith.)

in Ceylon out of his foreign possessions. I agree therefore that the decision of the Special Commissioners was right and that the questions in law should be answered as proposed.

An appeal having been entered against the decision of the Court of Session the case came before the House of Lords (Lords Normand, Morton of Henryton, Tucker and Cohen) on 4th, 5th, 6th and 7th February, 1952, when judgment was reserved. On 26th March, 1952, judgment was given unanimously against the Crown with costs.

Mr. J. Millard Tucker, Q.C., Sir Reginald Hills and Mr. I. H. Shearer appeared as counsel for the Crown and Mr. E. J. Keith, Q.C., Mr. David Maxwell and Miss Margaret MacIntyre for the taxpayer.

Lord Normand.—My Lords, I have had the advantage of reading in print the opinion about to be delivered by my noble and learned friend Lord Cohen. I agree with it *in omnibus* and have nothing to add.

Lord Morton of Henryton.—My Lords, I also have had the advantage of reading in print the opinion which is about to be delivered by my noble and learned friend Lord Cohen. Subject to the reservation which I am about to mention, I entirely agree with that opinion. I desire however to reserve for a future occasion any consideration of the meaning and effect of the words " the actual sums annually received in the United King- " dom . . . from money or value arising from property not imported " which appear in Rule 2 of the Rules applicable to Case V of Schedule D of the Income Tax Act, 1918. Mr. Tucker did not rely upon these words as being applicable to the present case and consequently your Lordships did not have the advantage of hearing any argument as to their meaning. For this reason I find myself unable either to agree or to disagree with the views expressed by my noble and learned friend as to the meaning of those somewhat obscure words.

I agree with the motion proposed.

Lord Tucker.—My Lords, in this case I have had the advantage of reading in print the opinion which is to be delivered by my noble and learned friend Lord Cohen, in which the relevant facts and the words of Rule 2 of Case V of Schedule D of the Income Tax Act, 1918, are fully set out, and I therefore need not repeat them. I am in complete agreement with the reasoning by which he has arrived at the conclusion that the Crown has failed to bring this case within the first or fourth sources of income referred to in Rule 2, *viz.*, (1) " remittances payable in the United " Kingdom " and (2) " money or value so received on credit or on account " in respect of any such remittances, property, money, or value brought or " to be brought into the United Kingdom ".

In my view the transaction in the present case consisted of a loan or loans granted in London on the express terms that the debt or debts thereby created were to be repayable only in Ceylon, where they have been in fact repaid. That the loans produced " actual sums received in the United " Kingdom " is not in dispute, but such sums were not derived from remittances payable in the United Kingdom nor were they derived from money or value received in the United Kingdom on credit or on account in respect of such remittances. There was no evidence that any monies were ever

remitted from Ceylon to London in connection with the loans and, even if the Colombo branch did remit to head office in London, they would have been dealing with the bank's own monies.

My Lords, I do not question the proposition that there may be remittances within the Rule as a result of appropriate book entries without the transfer of bullion or negotiable instruments, but I share my noble friend's difficulty in following the reasoning of the judgment of the Privy Council in the case of *Trinidad Lake Asphalt Operating Co., Ltd.* v. *Commissioners of Income Tax for Trinidad and Tobago,* [1945] A.C. 1, in so far as the conclusion was reached that a settlement of cross accounts by appropriate book entries in Trinidad amounted to a transmission of money to a non-resident outside the Colony. That there was a transmission to a non-resident, which would seem to have been sufficient for the decision, is, I think, clear but that it was a transmission to New York where the non-resident resided I find difficulty in understanding, and I do not feel able to apply the reasoning in that case to the facts in the present case to the extent of holding that, each time the debt incurred in London was transferred to Colombo and satisfied by the taxpayer in that place by money standing to his credit or subsequently paid in, it resulted in law in a remittance to him in the United Kingdom.

I only desire to add a few words with regard to the third source in Rule 2, *viz.,* money or value arising from property not imported. This does not seem to have figured prominently, if at all, in argument before the Special Commissioners or the Court of Session, but it was to some extent relied upon by the Crown in your Lordships' House. I do not think that the sums received by every loan in the United Kingdom can be said to have been received from money or value arising from property not imported. I find it difficult to ascertain of what the money or value consisted, and in any event the mere fact that it was contemplated that the loans would eventually be repaid out of the profits of a business conducted in Ceylon would not in my opinion make the source money or value arising *from* property not imported. I would prefer to reserve the question whether the "money or value arising from property not imported" must itself be brought into the United Kingdom.

For these reasons I would dismiss this appeal.

Lord Cohen.—My Lords, this appeal relates to additional assessments to Income Tax made upon the Respondent under Case V, Schedule D, of the Income Tax Act, 1918, to cover income alleged to be chargeable under Rule 2 of the Rules applicable to the said Case. The facts that are alleged to give rise to this liability are as follows.

The Respondent was at all material times senior partner in a firm carrying on business in Ceylon. He had a bank account with the Colombo branch of the National Bank of India (hereinafter referred to as "the bank"), which had its head office in London. Prior to the war he made periodic visits from Ceylon to this country and he was here in 1940 on a visit. Owing to the war he was unable to return to Ceylon and had to reside in this country until the termination of the war. He thus found himself in the position in the years now in question that, being a British subject, he was unable to satisfy the Commissioners that he was not ordinarily resident in the United Kingdom : see Rule 3 of the Rules applicable to Case V.

(Lord Cohen.)

Some time prior to 2nd January, 1942, the Respondent opened an account with the head office of the bank, and between that date and 4th March, 1942, the account remained in credit. On or about that date the Respondent made a verbal arrangement with the bank in London whereby they allowed him, without giving any security, to overdraw his account with the head office, and the head office arranged to transfer portions of his overdraft to the Colombo branch. The Colombo branch debited the Respondent's account with the equivalent in rupees of the said transfers and the Respondent arranged to pay rupees into the branch account to meet such debits. Originally no arrangement was made as to when such transfers of overdraft should be made, but in September, 1942, correspondence was exchanged between the London office of the bank and the Respondent, the effect of which was to provide that whenever the figure reached £500 the overdraft should be transferred to Colombo.

The Respondent first became overdrawn on 4th March, 1942. Thereafter operations on the banking account were made in accordance with the arrangements I have stated. Excerpts of the accounts in Colombo and London are annexed to the Case. These excerpts record three transactions from Colombo to London which it is admitted are chargeable under Rule 2. They are as follows (I take the dates from the excerpts of the London account and give the amount in sterling):—

2nd February, 1942	...	...	...	£1,428	12*s.*	8*d.*
23rd May, 1942	...	...	...	£1,999	12*s.*	5*d.*
23rd November, 1943	...	...	...	£600	0*s.*	0*d.*

The excerpts also record six transfers from London to Colombo, the amounts of which it is unnecessary for me to set out in full. They represent what the parties agreed were "transfers of overdraft". They differ only in this, that, as appears from the excerpts from the Colombo account, three of them were made at a time when the balance to the credit of the Colombo account was not sufficient to wipe out the overdraft transferred. In these cases the debits appear to have been met by payments in of rupees to the Colombo account. There was, however, sufficient to the credit of the Colombo account to meet the other three transfers at the dates when they were respectively made.

Interest was allowed by the bank on credit balances and was charged on debit balances of each of the accounts in Colombo and London. The Case Stated does not state whether or not interest was allowed and charged at the same rate in Colombo and in London.

At this stage it will be convenient for me to set out the provisions of Rule 2 upon the construction of which the questions at issue between the parties depend. It provides as follows:—

> "2. The tax in respect of income arising from possessions out "of the United Kingdom, other than income to which Rule 1 applies, "shall be computed on the full amount of the actual sums annually "received in the United Kingdom from remittances payable in the "United Kingdom, or from property imported, or from money or value "arising from property not imported, or from money or value so "received on credit or on account in respect of any such remittances, "property, money, or value brought or to be brought into the United "Kingdom, on an average of the three preceding years as directed "in Case I, without any deduction or abatement other than is therein "allowed".
>
> (The three years' average basis is not now applicable.)

(Lord Cohen.)

It will be observed that to bring this Rule into operation the sums received in the United Kingdom must be derived from one of the four specified sources, *viz.*:—

(*a*) remittances payable in the United Kingdom;

(*b*) property imported;

(*c*) money or value arising from property not imported;

(*d*) money or value so received on credit or on account in respect of any such remittances, property, money or value brought or to be brought into the United Kingdom.

Before the Special Commissioners the dispute between the parties was as to whether the transactions to which I have referred amounted to an arrangement for the remittance of money to this country from Colombo. The Commissioners considered they were bound by the case of *Hall* v. *Marians*, 19 T.C. 582—the facts in which case they regarded as indistinguishable from the facts in the case before them—to hold that no sums of income from possessions outside the United Kingdom had been remitted to the Appellant in the United Kingdom. They therefore allowed the appeal and discharged the additional assessments. They stated the questions for the opinion of the Court as follows:—

"(1) Were the Commissioners entitled to hold that no sums of income "from possessions outside the United Kingdom were remitted to the "Respondent in the United Kingdom?

"(2) Whether on the facts stated the Respondent was assessable "under Case V, Rule 2, of Schedule D to the extent that the sums in "the Colombo account used to repay the bank consisted of income? "and, if so,

"(3) Whether there was a remittance within the meaning of the "said Rule 2—

"(*a*) each time the Respondent drew money in London, or

"(*b*) when the London drawings were repaid to the bank in Colombo?"

When the case came before the First Division of the Court of Session they reached the conclusion that question (1) should be answered in the affirmative and question (2) in the negative, with the result that they affirmed the decision of the Special Commissioners and question (3) did not arise.

Before us the dispute was finally concentrated on the question whether the Appellants could bring their claim within the first or fourth of the sources specified in Rule 2. It was common ground that there had been no property imported which could bring the second source into consideration. At one time Mr. Tucker, who appeared for the Appellants, suggested that it might be said that there were sums received in the United Kingdom from "money or value arising from property not imported", but I think that he ultimately recognised that it was impossible to bring this case within the third source without grossly distorting the language used and, in particular, without placing on the word "from" a meaning which it could not properly bear.

There might have been another difficulty in Mr. Tucker's way had he persisted in this argument. To succeed on it, it would have been necessary for him to satisfy us that the "money or value arising from

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" property not imported " need not itself be brought into the United Kingdom. It is plain from the wording of the Rule that sums cannot be said to be received in the United Kingdom from the first, second or fourth sources unless the source was itself payable in, imported into, or brought or to be brought into the United Kingdom. It would be strange if the sums received in the United Kingdom from the third source were within the Rule although the money or value was not imported or to be imported into the United Kingdom. It would be all the more strange since sums received in the United Kingdom from the fourth source—*i.e.*, " money or " value so received on credit or on account in respect of . . . *such* money " or value " (*i.e.*, the third source)—could not bring the Rule into operation unless *such* money or value had been brought or was to be brought into the United Kingdom. I incline therefore, to the view that to succeed under the Rule in respect of sums received from the third source the Crown must establish that the money or value had been brought or was to be brought into the United Kingdom.

Before I deal with the question whether on the facts of this case it can be said that the sums received by the Respondent in the United Kingdom were received from the first or fourth source indicated in the Rule, I may usefully mention certain matters arising on the construction of Rule 2 which, as Mr. Tucker pointed out, are clearly established by authority. Thus, (1) to attract tax, remittances must be remittances of income not capital: see *Kneen* v. *Martin*[1], [1935] 1 K.B. 499; (2) remittances may render the taxpayer liable to tax although the actual payment is not to the taxpayer but to someone by his direction: see *Timpson's Executors* v. *Yerbury*[2], [1936] 1 K.B. 645; but, (3) not if the cheque or other instrument or thing constituting the remittance has ceased to be the property of the taxpayer before it reaches this country: see *Carter* v. *Sharon*[3], [1936] 1 All E.R. 720; (4) the remittance may be a remittance of income notwithstanding that at the date of the remittance the account of the taxpayer abroad through which the remittance was passed is already overdrawn; see *Fellowes-Gordon* v. *Commissioners of Inland Revenue*, 19 T.C. 683.

With these propositions in mind I turn to the argument that was addressed to us, that the amounts in question in this appeal were received from remittances payable in the United Kingdom within the first source or from money or value received within the fourth source.

As I have already said both the Commissioners and the First Division of the Court of Session regarded the case as concluded against the Appellants by the decision of the Court of Appeal in England in *Hall* v. *Marians* (*supra*). That case came before the Commissioners and the Court on two separate occasions (see 18 T.C. 148 and 19 T.C. 582). As the facts were the same on both occasions and only the contentions differed, it will be sufficient if I refer to the second case, which, unlike the first, went to the Court of Appeal. I take the facts from the headnote:

> " The Respondent's wife, who lived with her husband in London, " was entitled to a share of the profits of a business carried on in " Colombo. Her share was paid into her current account with the " Colombo branch of a bank which was registered in the United King- " dom and had its head office in London. On her instructions these " profits were invested in Indian bonds.

(1) 19 T.C. 33. (2) 20 T.C. 155. (3) 20 T.C. 229.

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"The Respondent's wife had from time to time borrowed certain "sums from the bank in London on the security of the bonds. On "1st April, 1930, she requested the bank in London to instruct its "Colombo branch to sell sufficient securities to extinguish the loan. "On the next day the bank informed her that the amount of her loan "(with interest) was being debited to the Colombo branch which was "being instructed to realise securities to pay it off. The transfer was "effected by cross entries in the books of the two offices, the entry in "the London books being dated 3rd April, 1930. A small credit "balance in Colombo was thereupon converted into an overdraft on "which interest was chargeable. A few weeks afterwards the over-"draft and the interest accrued thereon were discharged in Colombo "out of the proceeds of the sale of Indian bonds."

On those facts the Crown claimed Income Tax in respect of the amount of the overdraft transferred from the London office of the bank to the Colombo branch. The Commissioners decided in favour of the Respondent. Finlay, J., allowed the appeal, but the Court of Appeal unanimously restored the decision of the Commissioners.

As the Lord President pointed out in the Court below, it is difficult to disentangle a single *ratio decidendi* from the judgments of the three members of the Court. Lord Hanworth, M.R., based his decision on the conclusion that there was clearly no actual remittance and, as he thought, nothing which amounted to a remittance in any form or in any value. Romer, L.J., thought that there was a remittance but that it was a remittance of capital and not income. Maugham, L.J., agreed with Romer, L.J., that if it was a remittance it was a remittance of capital but, as I read his judgment, based his conclusion primarily on his acceptance of a contention advanced on behalf of Mr. Marians and recorded in paragraph 9 (*b*) of the Case Stated as follows:—

"That the loans owing to the National Bank of India in London "had not been paid off by means of any remittances actual or con-"structive but that in substance and in fact there had been a series "of capital advances in London charged on Indian securities in Ceylon "and that the loans had been converted into a debt payable in Colombo "with different incidents from those which had attached when the debt "was payable in London."

I respectfully agree with the reasoning of Maugham, L.J. There is this difference between the facts of the two cases, that there is no evidence in the present case that there were different incidents attached to the debt in Colombo from those which attached to the debt when it was payable in London. I do not, however, think that this difference in incidents necessarily leads to a different conclusion. It merely removes one piece of evidence supporting the conclusion that the loans in London had not been paid off by remittances from Ceylon.

There was this further distinction in fact between the two cases that in *Marians'* case(1) the Respondent's husband had hoped to discharge his wife's indebtedness in London (see paragraph 7 of the Case Stated), whereas in the present case it was never contemplated that the debt should be repaid except in Colombo. I do not, however, think this affects the matter.

Mr. Tucker relied on a passage in the judgment of Romer, L.J., where he said, at page 600:

(1) 19 T.C. 582.

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> "Had the bank in this country allowed her" (Mrs. Marians) "to "draw the £440 on account or in advance or in respect of sums of "money that they were expecting to receive in the future from the "bank in Colombo, representing income from her foreign possessions, "the matter would have been different, but, as I understand it, this "money, the money that she was allowed to draw from the bank, was "a loan from the bank in its strict sense, and that is found as a fact "by the Commissioners in paragraph 7 of the Stated Case."

Mr. Tucker read this passage as meaning that if the stated hypothesis had been actual fact Romer, L.J., would have decided the case in the opposite way. Romer, L.J., does not express a concluded opinion but I think it is a fair inference that he would have done so. Even so, I do not think his observations help Mr. Tucker, since in the present case I am unable to trace any finding of fact that the bank in England ever made the loan on account of or in advance or in respect of money of the Respondent representing income which the bank were expecting to receive in England from the branch in Colombo.

We have to decide this case on its facts, but I agree with the Judges of the First Division that it is difficult to distinguish the case before us in any material respect from *Hall* v. *Marians*(1).

Mr. Tucker laid some stress on the fact that the accounts in Colombo and London were with the same bank in the case before us. So they were in *Hall* v. *Marians*. I do not think this fact can relieve the Court of the burden of deciding whether or not there was a remittance of income to London. The solution of this question depends, in my opinion, on the effect of the agreement that the London overdraft should be transferred to Colombo. I agree with Lord Keith that the only sensible meaning that can be given to that agreement is that the debt created in London was to be repaid in Colombo. If that be the correct meaning, it seems to me that when the debt was repaid, whether out of monies standing to the credit of the Colombo account at the date the entries in the book were made or out of monies subsequently paid into the Colombo account, the rupees applied in repayment became the property of the bank in Ceylon. There is no evidence whether they were remitted to London or not, but, assuming they were remitted, they had previously become the property of the bank and could not be said to be property of the Respondent. The case would therefore fall within *Carter* v. *Sharon* (2) and not within *Timpson's Executors* v. *Yerbury*(3).

Mr. Tucker says that this conclusion is inconsistent with the decision of the Privy Council in *Trinidad Lake Asphalt Operating Co., Ltd.* v. *Commissioners of Income Tax for Trinidad and Tobago*, [1945] A.C. 1. In that case the appellant company had been assessed under Section 30 of the Income Tax Ordinance, 1940, in respect of a dividend payable to the Barber Asphalt Corporation of New Jersey, U.S.A. (hereinafter called "Barber"). Barber had no office or place of business in Trinidad and never exercised or carried on any trade or business there but was the holder of almost all the shares in the appellant company. At the date of declaration of the dividend Barber were indebted to the appellant company in an amount equal to the amount of the dividend, and in pursuance of an agreement between the parties no money or cheque changed hands; the matter was settled by appropriate entries in the books of the two companies.

(1) 19 T.C. 582. (2) 20 T.C. 229. (3) 20 T.C. 155.

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In these circumstances the Crown claimed income tax from the appellant company under Section 30 of the Income Tax Ordinance, 1940, which provided as follows:—

> "Any resident agent, trustee, mortgagor, or other person who transmits rent, interest, or income derived from any other source within the Colony, to a non-resident person shall be deemed to be the agent of such non-resident person and shall be assessed and shall pay the tax accordingly."

One question that arose was whether to bring the section into operation the transmission to the non-resident person must be to him outside the limits of the Colony. There was nothing in the language of the section to necessitate such a construction, but the Board proceeded on the footing that "transmits" meant transmits to a non-resident outside the limits of the Colony.

Lord Wright delivered the judgment of the Board. He relied on *Spargo's* case (1873), 8 Ch. App. 407, as establishing that there may be payment by settlement of accounts without the necessity of money actually changing hands. He referred to some observations of Lord Lindley in *Gresham Life Assurance Society* v. *Bishop*(1), [1902] A.C. 287, at page 296, as further supporting the view that a settlement of accounts may be equivalent to a receipt of a sum of money. He said that since 1902 the transmission of funds had become still more divorced in the minds of business men and even of lawyers from the idea of any material embodiment. His conclusion may be summed up in the following passages at pages 11 and 12 of the report:—

> "In the present case, no one could say that the entries in the books of the two companies did not represent a genuine transaction and a receipt of money in the form in which money is transmitted and received as between business men . . . The only evidence or material embodiment of the transaction may consist of entries in the books on each side made in pursuance of their agreement, but what has happened is, if so intended, equivalent to a receipt of money, in Lord Lindley's words, and a receipt of anything by a person who is at a distance from the sender involves a transmission. Hence, in their Lordships' opinion, the transaction in the present case involved a transmission of 'revenue' within the meaning of s. 30 from the Appellant to Barber, with the consequence that the Appellant became liable as statutory agent for the amount of the tax."

Speaking for myself I doubt if I should have come to the conclusion that there had been a transmission outside Trinidad. I should have inclined to the view that the parties had expressly agreed that there should be no transmission outside Trinidad but that the debt should be discharged by payment by way of set-off in Trinidad. I might still have reached the same concrete result as Lord Wright for, as at present advised, I see no reason why, for the purpose of the section, the transmission to the non-resident need be outside the Island. This point does not, however, arise for decision in the present case.

Even if I were to accept the whole of Lord Wright's reasoning it would not, I think, decide the present case. Let me assume that in the *Trinidad*(2) case Barber had not been indebted to the appellant company and had had no place of business in the Colony and had never exercised or carried on

(1) 4 T.C. 464, 476. (2) [1945] A.C. 1.

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any trade or business there. Let me assume further that, before the dividend was declared, it had been agreed that payment of it should be made by a transfer by the appellant company to an account to be opened in the name of Barber with a bank in Trinidad. If this had been carried out there would no doubt have been a transmission by the appellant company to Barber, but I cannot imagine that any Court would have held that that was a transmission outside the limits of the Colony.

The hypothetical case I have put seems to me far nearer in its facts to the present case than the actual case which arose for decision in the Privy Council in 1945. True it is that in the present case the original indebtedness of the Respondent to the bank was created by a loan in London, but the parties agreed that that loan should be discharged by payment in Ceylon. In these circumstances, to hold that there was a remittance to London in the present case would, I think, be to disregard the warnings given by Lord Halsbury, L.C., and Lord Macnaghten in *Gresham Life Assurance Society* v. *Bishop*(1), to which the Lord President referred, not to be led astray by an equivalent to a remittance or receipt or a constructive receipt.

Let me conclude with a citation from the speech of Lord Simonds in the very recent case of *St. Aubyn* v. *Attorney-General,* [1952] A.C. 15, at page 32. Lord Simonds said:

"Lord Wensleydale's familiar words (as Parke B. in In *re Micklethwait*), "which were cited by Lord Halsbury, L.C. in *Tennant* v. *Smith*(2), may again "be repeated: 'It is a well-established rule, that the subject is not to be "'taxed without clear words for that purpose; and also, that every Act of "'Parliament must be read according to the natural construction of its "'words.' Lord Halsbury adds that in a taxing Act it is impossible to "assume any intention or governing purpose in the Acts to do more than "take such tax as the statute imposes: it must be seen whether the tax "is expressly imposed. This is true doctrine which I must bear in mind as "I listen to the constant refrain of learned counsel for the Crown that this "or that is just the transaction at which this or that section is aimed. The "question is not at what transaction the section is, according to some "alleged general purpose, aimed but what transaction its language, according to its natural meaning, fairly and squarely hits."

Applying this citation to the present case, it is attractive to suggest that, as the Respondent obtained and spent these loans in London and was, so far as the evidence goes, able to discharge them only from monies in Ceylon, part at any rate of which was income, and as the loan was in fact discharged, the money he received in England must have been received at least in part from remittances of income from Ceylon. Attractive though this may be it seems to me quite impossible to bring what happened within the compass of the Rule. It is plain that the income receipts of the Respondent were all received in Ceylon. It is plain that the monies he received in London were advances of capital. There is no finding that those advances were made on credit or on account in respect of income in Ceylon which it was intended should be brought to London. On the contrary, the parties expressly agreed that the debt should be discharged in Ceylon; it was so discharged and there is no evidence that the rupees which the bank received in Ceylon were ever remitted to London.

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(1) 4 T.C. 464. (2) 3 T.C. 158.

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For these reasons, which are in substance the same as those given by the Court of Session, I would dismiss the appeal. The case must be remitted to the Court of Session in order that any necessary adjustments may be made to give effect to the admissions made by Mr. Keith as to the transfers of £1,428 12*s.* 8*d.*, £1,999 12*s.* 5*d.* and £600 to which I have already referred.

Questions put:

That the Interlocutor appealed from be reversed.

The Not Contents have it.

That the Interlocutor appealed from be affirmed and the appeal dismissed with costs.

The Contents have it.

That the case be remitted to the Court of Session with a direction to make any necessary adjustments to give effect to the admissions made by Counsel for the Respondent as to the transfers of £1,428 12*s.* 8*d.*, £1,999 12*s.* 5*d.* and £600.

The Contents have it.

[Solicitors—Solicitor of Inland Revenue (England) for Solicitor of Inland Revenue (Scotland): Lawrence Jones & Co. for J. C. Muir and Barr, W. S.]