FEDERAL HIGH COURT

Governor-General in Council

Vs

Raleigh Investment Co. Ltd

(Spens, C.J.)

27.03.1944

JUDGMENT

Spens, C.J.

1. This is an appeal, by the Governor-General in Council, from a decree passed by a Special Bench of the Calcutta High Court exercising its ordinary original civil jurisdiction. The decree declared that the words "or, are deemed to accrue or arise" in Section 4. (1) (C) of the Income Tax Act and Expln. 3 to Section 4 (1) of the Act were beyond the lawmaking powers of the Indian Legislature and were therefore void and had no legal effect, and it directed refund to the plaintiff of a sum of ₹ 4 lakhs and odd paid under protest. The provisions taken objection to by the High Court represent change introduced in 1939 into the Income Tax law of India. It was contended on behalf of the Government (i) that the suit was not maintainable, and (ii) that the impugned provisions of the Incometax Act were intra vires the Indian Legislature.

2. The plaintiffthe Raleigh Investment Co. Ltd is a jointstock company incorporated under the English Companies Act, having its registered office at 13, Athol street; Douglas, in the Isle of Man, and its main office at Egham, Surrey, England. It has no business premises in India, but holds the bulk of the shares in eleven companies which carry on the business of manufacturing and selling tobacco and cigarettes in India. Two of these companies, referred to in the judgments of the High Court as "rupee companies," are incorporated in India under the Indian Companies Act and have their registered office and business head-quarters at Calcutta. The nine remaining companies referred to as the "sterling companies," are companies registered under the English Companies Act. They are controlled in London, where the Boards of Directors sit, the share registers are situate and dividends are declared. The Boards in London have constituted Boards which are situate in India. The business in India, where all profits are made, is managed by the local Boards. The ultimate control lies with the London Boards. No share registers are kept| in India. The financial policy of the companies is controlled by the London Boards and in all important matters of business the London Boards are consulted. All the general meetings of the companies are held in England. The registered offices of six of the sterling companies are in the Isle of Man and of three others in London; but all the sterling companies have offices in London.

3. The eleven companies were assessed to income tax and to super-tax on their income during the year 1938-1939 and these taxes have been paid. Dividends were declared by the eleven

companies; and, according to statements filed by the plaintiff-company, it received, for the year 1938-1939, a sum of ₹ 75,45,197 as dividend from the eleven companies. Dividends from the two "rupee companies" were paid to a representative of the plaintiff-company in Calcutta. The dividends of the nine "sterling companies" were declared by them in England and paid by them in England to the plaintiff-company in England. The dispute in this case relates to the claim of the Indian Government to levy Income Tax and super-tax on the dividends paid to the plaintiff by the "sterling companies."

4. A brief reference to the scheme of the relevant provisions of the Income Tax Act will help to bring out the points at issue. As is well-known, a large number of companies not registered in British India are doing business in this country and the Indian administration has had to face certain difficult questions in attempting to assess to Income Tax and super-tax the profits made by such companies, especially when they carry on their business through the mechanism of another foreign company. The difficulty has been greater in respect of super-tax. In the case of companies, super-tax has, under the Constitution Act, to be regarded as being in the nature of corporation tax. Companies are not assessed to super-tax on a graduated scale like individuals or unregistered firms. The administration accordingly seeks to levy super-tax (properly so-called) on the recipients of the dividends. In the case of income tax, Section 49-B, Income Tax Act, provides for the recipient of the dividend being entitled to a proportionate deduction of income tax with reference to the amount of income tax paid by the company. But as the basis of the levy of super-tax on the company is, as stated above, different from the basis of the levy of super-tax on individuals, no such deduction as is contained in Section 49-B is provided for in respect of supertax payable on dividends received from companies. Where the recipient of the dividend was resident outside British India, it was held by the Bombay High Court in 1931 in *Commissioner of Income Tax v. Goldie*[1] that dividends received by him outside British India from companies doing business in British India but registered in the United Kingdom and having their share register there could not be assessed to incometax in British India, under the Indian Incometax Act, as it then stood. To meet this situation, certain amendments were inserted in the Act in 1939 and these are the provisions now impugned. It having been enacted by Section 3 that the shall be charged in respect of "the total income" of the previous year, Section 4 proceeds to define "the total income." In respect of income not "received or deemed to be received in British India" by or on behalf of the assessee, the Act creates a category of "income accruing or arising or deemed to accrue or arise in British India"; and, drawing a distinction in this connexion between persons resident in British India and persons not resident in British India, it provides by Clause (C) of Sub-section (1) of Section 4 that the total assessable income of a non-resident shall include income which accrues or arises or is deemed to accrue or arise to him in British India. By way of amplification of this provision, Explanation 3 to Sub-section (1) enacts, that a dividend paid without British India shall be deemed to be income accruing and arising in British India to the extent to which it has been paid out of profits subjected to Income Tax in British India.

5. On the basis of the provisions above referred to, the Income Tax Officer proposed to assess the plaintiff-company to Income Tax and super-tax for the year 1939-40 on the sum of ₹ 75 lakhs and odd received by it as dividend for the year 1938-39 from the eleven companies doing business in India. To this proposal the plaintiff took exception, on the ground that dividends declared outside British India could not be regarded as income accruing or arising in British India and added that if the Income Tax Act attempted to impose a liability on such dividends, its

provisions would to that extent be invalid. The Income Tax Officer overruled the objection and assessed the plaintiff according to the provisions of the Act. He gave credit to the plaintiff for the sum of about ₹ 11 lakhs already paid by the companies as Income Tax and charged under this head a further sum of only ₹ 72,047 (due apparently to a small difference in the rates applicable). Under "super-tax" the plaintiff-company was called upon to pay Rupees 8,73,155-18-0, at a flat rate of one anna per rupee, (the graduated scale not being applicable, as the plaintiff was also a company). Under the Act, the plaintiff could have appealed against this order and asked for questions of law being referred to the High Court (vide Section 66). But the company preferred to pay under protest and filed this suit on the original side of the High Court, asking for a declaration in the terms now granted by the decree appealed against and for consequential relief. The Government filed a written statement, objecting to the maintainability of the suit and insisting that the assessment was valid. On both points, the High Court over-ruled the defendant's contentions, on the first point, by a majority and on the second point, unanimously. There were other pleas raised, but it is unnecessary to refer to them here, as they have not been argued before this Court.

6. The only objection to the maintainability of the suit urged before us was based on Section 226, Constitution Act, which runs as follows:

> Until otherwise provided by the Act of the appropriate legislature, no High. Court shall have any original jurisdiction in any matter concerning the revenue, or concerning any act ordered or done in the collection thereof according to the usage and practice of the country or the law for the time being in force.

7. It was contended on behalf of the Government that the present suit fell within the description "matter concerning the revenue" in the above provision. Lodge J. was of the opinion that this objection should prevail; but the Chief Justice and Mitter J. held that a matter could be held to concern revenue only when the law under which the revenue was claimed was itself valid; and as they came to the conclusion that the relevant provisions of the law were in this case invalid, they were of the opinion that the suit must be held to relate not to revenue, but to an illegal exaction. The learned Chief Justice said:

> In order to decide whether the money has been demanded and paid legally, the Court must first determine whether the impugned legislation is valid or not. The Court is bound to enquire into and decide this matter to ascertain whether it has jurisdiction or not.
>
> Dealing with the relevant provisions of the Income Tax Act, he said that they constituted a case of the Legislature of British India, without specific or apparent authority, stretching out its legislative arm and fiscal hand beyond British India into other countries in an attempt to tax persons and property there not subject to its laws.
>
> Mitter J. described them as a "piece of extraterritorial legislation, not by a supreme or paramount legislature, but by a subordinate legislature." Lodge J. has not discussed this question, but he expressed his concurrence in the opinion of the other two learned Judges on this point. The correctness of the conclusions of the High Court on both the points has

been questioned before us in the appeal.

8. Taking up first the plea based on Section 226, Constitution Act, we are, with all respect, unable to concur in the view taken by Derbyshire C.J., and Mitter J. on this question. It is true that this section corresponds to a provision enacted more than 150 years ago, in very different circumstances; and it is anomalous to deny to the High Court in its original jurisdiction power to try questions which a subordinate Court and the High Court itself in its appellate jurisdiction are not precluded from trying. When framing the Constitution Act of 1935, it was open to Parliament to omit or change this provision. But it has not done so. The opening words of Section 226 indicate that the attention of Parliament was directed to the question of the expediency of retaining the prohibition in the old form, but Parliament preferred to leave it to the authorities in India to decide the time when and the form in which the provision should be recast. So long as the provision is there, it is duty of the Court to give due effect to the natural meaning of the words employed. A plea under Section 226 is in the nature of a demurrer and it seems to us anomalous to hold that the decision of such a plea should be postponed till after and be made to depend upon the decision of the case on the merits.

9. The learned Judges say that where the law imposing the revenue is itself illegal, a dispute in relation to it cannot be said to concern the "revenue." This argument, if pursued to its logical limits, will prove too much. If even under a valid revenue law a person who is not liable to be assessed is sought to be assessed to revenue, that claim may well be described as an "illegal" claim against him. Again, there may be a dispute between a taxpayer and the revenue authorities as to whether the tax-payer has or has not paid what was due from him and if on investigation it should be found that he had paid what was claimed as still due, the claim as against him for further payment might well be described as "illegal." If in such cases the Court should be called upon to decide whether the claim was well founded in law before applying the bar under Section 226, the provision would be practically rendered nugatory. In *Spooner v. Tuddow*[2] the Judicial Committee held that the section would apply to all cases in which "parties bona fide and not absurdly believed that they are acting in pursuance of statutes and according to law." This language will, in our opinion, apply as much to the Indian Legislature acting in the belief that its enactment is authorized by the Constitution Act as to a subordinate authority in India acting in the belief that his or its action is authorized by the Indian law. Section 226 is obviously not limited to steps taken in the collection of revenue. It equally applies to the demand or assessment.

10. It is true that in *Spooner v. Tuddow* [3]no question was raised as to the legality of the revenue claim. But the principle enunciated by their Lordships is of general application. Mitter J. thinks that as their Lordships permitted argument on the question whether the quit-rent which was sought to be recovered in *Spooner v. Tuddow (1846-51) 4 M.I.A. 353(Supra)* was "revenue" or not within the meaning of the section, it is open to the Court, when dealing with a plea under the section, to decide whether the law imposing the revenue is valid or not. With all respect, we think that this inference is not justified. What was argued before their Lordships was a question of interpretation of words and not the very question of right which was in dispute in the proceeding. If, for instance, it could be con tended that income tax could not be included in the meaning of the word "revenue" in the section, the argument would be similar. It might perhaps even be that if the assessment imposed on the plaintiff in this case could not bona fide have been regarded or spoken of as Income Tax, the limitation imposed by their Lordships on the application of the section could be invoked. The arguments in the case have certainly shown that the dispute

between the parties as to the legality of the claim cannot be regarded as other than bona fide.

11. Some reliance seems to have been placed by the learned Judges of the High Court on the decision in *Alcook Ashdown and Co. v. Chief Revenue Authority, Bombay*[4] It is not clear how exactly the learned Judges have used that pronouncement to support their conclusion in the present case; it does not seem to us to throw any light on the question now arising for decision. It turned on the special nature of the relief claimed in that proceeding and there is certainly nothing in that judgment to qualify the principle laid down by their Lordships in *Spooner v. Tuddow (1846-51) 4 M.I.A. 353(supra)* In the only reported ease where the application of Section 226 had to be considered on an allegation that the revenue law itself was illegal, a Special Bench of the Bombay High Court held that "before the section can apply, we must determine that the tax which is challenged is legal." See *Byratniee Jeeiibhoy v. Province of Bombay* [5]There is no discussion of the question in that judgment, apparently because the point "was not seriously contested by the Advocate-General" in that case. The authority of that pronouncement does not in any event carry us farther than the considered judgment of the Calcutta High Court in the present case. Mitter J. refers to the analogy of cases where a Court has power to determine what are called jurisdictional facts, if the jurisdiction of the Court depends on the existence of certain facts. In such cases, the jurisdictional or exclusionary provisions will ordinarily be of a qualified character and indicate what facts must be found before the jurisdiction can attach or be excluded. But as we read Section 226, the bar is absolute, if the dispute concerns revenue, taking the word "revenue" in its ordinary sense.

12. The above conclusion as to the effect of Section 226, Constitution Act, would by itself suffice to justify the appellant's contention that the suit should be dismissed. As the case has however been fully argued before us on the merits and we have come to the conclusion that the appellant's contention must succeed even on the point as to the legality of the assessment, we proceed to deal with it, as it would be embarrassing to the Government in the administration of the Income Tax law if we should at this stage dispose of the suit merely on the preliminary ground.

13. The appellant's argument as to the validity of the impugned provisions of the Income Tax Act comprised two contentions: It was first argued that these provisions were not extra-territorial in their operation. It was also argued that even if they should be found in any degree to operate extra-territorially, that would be no ground for holding them to be invalid, so far as municipal Courts called upon to deal with them were concerned. We are of the opinion that both these contentions are well-founded and must prevail. A third argument was advanced, that in any event so much of the provisions as may seem to operate extra-territorially must be held to be valid on the ground that they were ancillary or incidental to the authorized portion of the legislation and were required to make its exercise effective. This last contention, based upon the authority of the decisions in *Attorney-General for Canada v. Cain*[6] and *Croft v. Dunphy* [7]may be briefly disposed of. The purpose of the impugned provisions is obviously to increase the extent of the income which is to be taxed for the benefit of the Indian Exchequer. If such extension should by itself be held to be unauthorized, it is difficult to see how the extension could be held to be necessary for the effective exercise of the power to tax so much of the income as might fall within the authorized limits. The cases relied on bear no true analogy.

14. In support of the first contention, namely, that the impugned provisions are not extraterritorial, reliance was placed upon the words in Expln. 3 to Section 4 (1) limiting the

assessabi-lity of a dividend paid without British India "to the extent to which it has been paid out of profits subjected to income tax in British India." It was contended that the Legislature had thus attempted to tax only such income as had its source in British India and that this was clearly within the territorial jurisdiction of the British Indian Legislature. Our attention was drawn to the observations of Lord Hershell in *Colquhoun v. Brook*[8] where the existence within any particular country of "that from which the taxable income is derived" is spoken of as a "territorial limitation" quite as much as the residence there of the person whose income is to be taxed. Strong reliance was also placed on certain decisions of the High Court of Australia, where dealing with provisions similar to the impugned provisions of the Indian Act or provisions of even wider import, the High Court of Australia has held that they were not invalid on the ground of extra-territorial operation. On behalf of the respondent, it was contended that in a case like the present, the source of income to the plaintiff-company could not be regarded as situate in British India. It was argued that though the sterling companies might earn their profits by business carried on by them in British India, there was no connexion between the plaintiff-company and the earning of these profits and that the plaintiff-company derived its income only in England where the dividends were declared by the sterling companies. In support of this contention, reliance was placed on some of the observations of Tomlin J. (as he then was) in *London and South American Investment Trust v. British Tobacco Co. (Australia*[9]*)* The judgment of the High Court seems to be mainly based upon these observations. The learned Chief Justice states that the effect of the impugned provisions is to make liable to tax in British. India foreign money measured in a foreign currency paid in a foreign country by one foreign company to another foreign company in discharge of a debt which arose and was payable in that foreign country.

> Mitter J. also emphasises the position that the dividend which accrues to a share-holder of a company is income which is quite distinct from the income of the company in which the shares are held, even when the whole of the share capital of the company is held by that share-holder. The Australian decisions have not been discussed by the Chief Justice, possibly because the reports and the relevant statutes were not available in Calcutta. Mitter J. observes that in two of them, there appears to have been no attempt to tax the non-resident foreigner directly and he adds that in any event the tests laid down in those decisions cannot be followed here, because "the Indian Constitution is materially different from the Australian Constitution."

15. The question, in its present form, does not appear to have arisen directly for decision in England; in view of the difference between the Indian and the English Income Tax laws in their basic scheme, it is scarcely likely to arise. In *London and South American Investment Trust v. British Tobacco Co. (Australia)* [10]a certain aspect of it had to be considered incidentally and even that only with reference to certain provisions of the Australian Income Tax law. The question has, however, been considered in several decisions of the High Court of Australia where, conditions of business being in some respects similar to the conditions obtaining in this country, the provisions of the Income Tax law also bear some resemblance to the provisions with which we are concerned here. Two of the *Australian decisions, Nathan v. Federal Com. missioner of Taxation*[11] and *Murray v. Federal Commissioner of Taxation* [32]are practically on all fours with the present case. In both the cases, the Court was confronted with the very argument that has been advanced on behalf of the plaintiff here, namely, that though the source of the company's income was Australian, that of the share-holder's was not, because, in the words of Fletcher Moulton L. J.

in *Gramaphone and Typewriter Ltd. v. Stanley*[13] the share-holder did not carry on the business of the company, but was only entitled to the profits of the business to a certain extent fixed and ascertained in a certain way dependent on the constitution of the corporation. This argument was overruled by all the learned Judges.

16. In *Nathan v. Federal Com. missioner of Taxation*[14] Isaacs J., delivering the judgment of the Court, observed that the question as to the source of the shareholder's income was a question of fact to be determined on practical grounds. In both the cases, the Court held that though no individual corporator could lay claim to any portion of the profits made by the company, every corporator had an interest in them. The very observation of Fletcher Moulton L. J. in *Gramaphone and Typewriter Ltd. v. Stanley*[15] quoted above recognizes that the shareholder "is entitled to the profits of that business to a certain extent." The language used by Brett and Cotton L. JJ. in *Gilbertson v. Ferguson*[16] shows that dividends are paid out of profitsand in that sense must have the same sourceand this is not affected by the remarks made on that case in *Barnes v. Hely Hutchinson*[17] It is true that the profits of a company may not materialise into a dividend for the shareholder till a dividend is declared, but that is different from jsaying that when the dividend is declared the "source" of the dividend is not the same as the source of the profits made by the company.

17. In *Bradbury v. English Sewing Cotton Co*[18] to which Mitter J. has referred, the American Thread Co. had itself been declared by an earlier decision of the House to be assessable to Income Tax on the footing that it carried on business in England, because the business in America was controlled from England; and the question subsequently arose, whether dividends declared in America by the American company, but received in England by an English company which held almost all the ordinary shares in and controlled the American company could (for certain other Income Tax purposes) be regarded as "profits received from a foreign possession." This was answered in the negative on the ground that for the purposes of the English Income Tax Acts "the locality of the shares or stock of a company was to be determined by its place of residence and trading". On the question of "source", the following observations of Lord Wrenbury (at pp. 767, 768) are worth noting:

> The possession of the English company was of shares which (if a dividend was declared) entitled them to receive from a company resident here a dividend whose source was the differential sum remaining in the hands of the company resident here after that company resident here had paid Income Tax upon all its profits.

With these we may take the remarks of Viscount Cave in *Swedish Central Ry. Co. v. Thompson*[19] where, referring to *Bradbury v. English Sewing Cotton Co*[20] the Lord Chancellor said:

> The Crown, having established in *Joyce's case American Thread Co. v. Joyce*[21] that the profits of the company during the period in question were for the purpose of taxing the company to be treated as earned here, could not now be heard to say that for the purpose of taxing the share-holders they were earned abroad. The source of income was the same in both cases.

(The italics are ours.) Here, the Lord Chancellor clearly treats the income of the company and the

dividend income of the shareholders as derived from the same "source". In *Scottish Union and National Insurance Co. v. New Zealand and Australian Land Co*[22] Viscount Haldane, dealing with a Scottish company doing business in Australia and New Zealand, says "what remained as nett balance was remitted to Scotland to be divided as profit" and in the same case (on page 182) Viscount Finlay states:

> If this colonial tax had not existed, so much more would have been available as profits from the business in the Colonies for division among the shareholders of the company.
>
> True, when a dividend is declared it becomes a "debt" for which the shareholder can sue the company, but that is not a picture of the whole transaction. The company can declare dividends only when it has earned profits; the real question, therefore, is where has the money out of which the dividends are declared been earned ? How exactly this question is to be answered when the dividends have passed through more than one company will depend upon the circumstances of each case. No such difficulty arises here.

18. In *Colonial Gas Association Ltd. v. Federal Commissioner of Taxation*[23] and *Broken Hill South Ltd. v. Commissioner of Taxation (N.S.W.*[24]*)* the Australian High Court went even further than in the earlier cases and held that interest paid to a non-resident foreigner on debentures raised in a foreign country might be said to have its " source " in Australia, if the moneys borrowed had been used by the borrowing company for carrying on business in Australia or had been secured by the mortgage of any property in Australia. It is not necessary for the purpose of this case to go so far as the Australian High Court has gone in these later cases. The connexion between "interest" payable by the company to its creditors and the "profits" made by the company in its own business is not so direct as that between "dividends" and "profits", and what is more important, the interest due to the creditor will be payable whether profits are made or not. In *Inland Revenue Commissioners v. National Mortgage and Agency Co. of New Zealand*[25] the Lord Chancellor observed (in passing) the holders(of the debentures) or most of them reside in Great Britain and they could not therefore be directly liable to pay Income Tax under a New Zealand statute which is necessarily subject to well known territorial limitations (page 544).

There are however certain observations in the later Australian decisions which seem to us justified in principle and their appositeness to the present case is not affected by the circumstance that under the Australian legislation the tax payable in respect of the interest was assessed upon the company itself, giving a right to the company to deduct the amount thus paid from the amount payable to the creditor or debenture-holder. In *Wanganui-Rangitikei Electric Power Board v. Australian Mutual Provident Society*[26] Dixon J. said:

> So long as the statute selected some fact or circumstance which provided some relation or connexion with New South Wales and adopted this as the ground of its interference, the validity of an enactment would not be open to challenge.

The question was more fully discussed in *Broken Hill South Ltd. v. Commissioner of Taxation (N.S.W*[27]*.)* Latham C.J. recognized that the case was perhaps an extreme one. It is sufficient for our present purpose to take the principles accepted by Rich J. in his dissenting judgment. The learned Judge observed (on page 361):

> I do not deny that once any connexion with New South Wales appears, the Legislature of that State may make that connexion the occasion or subject of the imposition of a liability. But," he added, "the connexion with New South Wales must be a real one and the liability sought to be imposed must be pertinent to that connexion.

On the facts of the particular case, he dissented from the conclusion of his brethren because he thought that in respect of the interest sought to be assessed in that case, there was no necessary relation between it and the existence in New South Wales of some item of property comprised in a security to which directly or indirectly the tax-payer might resort if the interest was not paid. As he said on p. 362, the tax was there laid upon income which was not necessarily derived from or was affected by the New South Wales connexion. One other point was emphasized by Dixon J. on p. 375:

> If a connexion exists, it is for the Legislature to decide how far it should go in the exercise of its powers. As in other matters of jurisdiction or authority, Courts must be exact in distinguishing between ascertaining that the circumstances over which the power extends exist and examining the mode in which the power has been exercised. No doubt there must be some relevance to the circumstances in the exercise of the power. But it is of no importance upon the question of validity that the liability imposed is, or may be, altogether disproportionate to the territorial connexion.
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> If some connexion exists, the Legislature is not compelled to measure the taxation by the degree of benefit received in particular eases by the taxpayer. This affects the policy and not the validity of the legislation. In the High Court, Derbyshire C.J. has stated that on the wording of Expln 3 to Section 4 (1), Income-tax-Act, the money has been already subjected to tax in British India and therefore was received by foreign dividend paying company free from liability to tax in British India.
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> It is difficult to follow the learned Chief Justice. The qualifying words were inserted in the explanation to indicate that the "source" was in British India. They carry no implication of "freedom from liability to tax in British India." If, in the circumstances of this case, the dividends had been declared and paid in British India, the recipients thereof would be liable to Income Tax and super-tax, notwithstanding payment of Income Tax and super-tax by the company, subject, of course, to the benefit of Section 49B which has also been allowed to the plaintiff. The learned Judges have laid great stress upon the circumstance that the situs of the shares held by the plaintiff-company must, according to a long course of authority, be held to be English. This may be material in respect of any attempt to levy a tax like estate duty or legacy duty on the corpus of the shares. *Cf Blackwood v. The Queen Brassard v. Smith* [28]*Provincial Treasurer of Alberta v. Kerr* [29]and *Provincial Treasurer of Alberta v. Kerr (1933) 1933 A.C. 710* But when the attempt is to tax income and not the corpus and the question to be considered is the source of that "income," it seems to us legitimate to take into account the place where the business from which the income is derived is in fact carried on and not to treat the situs of the shares in the eye of

the law as concluding the matter.

19. In *London and South American Investment Trust v. British Tobacco Co. (Australia) (1927) 1 Ch. 107* the learned Judge had to deal with a very limited question, namely, the effect which a provision in an Australian enactment could have on the rights and liabilities of parties in respect of a debt arising under an English contract. On this point, the learned Judge said:

> If the debt arises under an English contract and is an English debt, I do not think (1) that it is property in respect of which the Commonwealth Legislature has power to impose taxation upon the plaintiff-company or (2) that it is property, the incidence of which can be altered by the Commonwealth Legislature (p. 119).

> The effect and the implications of this pronouncement have been variously interpreted. (See Ratcliffe and McGrath, "Australian Income Tax Law" at pp. 62, 176, 177, and Shaw and Barker, "The Law of Income Tax," at pp. 12, 240, 284.) If its effect is only to lay down that Courts in one country will not feel bound by the revenue laws of another country or that a foreign Legislature cannot affect the rights inter se of the parties to an English contract (cf. observation of Lord Macmillan in *Inland Revenue Commissioners v. National Mortgage and Agency Co. of New Zealand*[30]); the case will have little bearing upon the present question. If the observations of the learned Judge are however to be relied on as bearing on the question whether an Australian Court could hold against the validity of an Australian law assessing to Income Tax the dividend paid to an English share-holder by an English company deriving its revenue from the shares it held in other companies which carried on business in Australia, the decision must be read in the light of certain facts on which the learned Judge himself has laid stress. The plaintiff in that case held shares in two companies, namely, the defendant-company and the Australian Pastoral Company. The plaintiff was a trust investment company and the defendant-company too was not a trading company, but derived its revenue from its holdings of shares in other companies. The defendant-company had declared a dividend of 12 per cent, on its ordinary shares for the year ending 30th June 1922, and the amount payable to the plaintiff-company in respect thereof had in due course been paid to the plaintiff-company. The Income Tax authorities in Australia assessed the plaintiff to Income Tax in respect of these dividends; but, in view of the difficulty of collecting the tax from the plaintiff, they purported to make the defendant-company their agent as well as the plaintiff's agent and asked it to pay the amount of the tax payable by the plaintiff and deduct it from any amounts which it might have to pay to the plaintiff. The defendant company paid the amount and deducted it from the dividend payable to the plaintiff for the next year. The plaintiff-company claimed that it was entitled to payment of the full amount of the dividend without this deduction and contended that the Australian Legislature had no power to assess it to income tax in respect of the dividends; it further said, whether the legislation is ultra vires or not, as between itself and the defendant-company, the contract which regulates their relations is an English contract and the dividend payable to it by the defendant-company is a debt recoverable and locally situate

in England and that it is no answer to the claim for the dividend that the defendant-company has been compelled by Australian law to make certain payments to the Federal Government of Australia.

Dealing with the powers of the Australian Legislature, the learned Judge said that its powers of taxation do not extend to authorize the imposition of taxation upon a person who is not resident or domiciled within the Commonwealth, in respect of property which is not situate within the Commonwealth.

(The italics are ours.) To the proposition thus stated, no exception can be taken; the learned Judge did not purport to deal with the question of the source of the income at all. It is important to see how the learned Judge applied the proposition stated by him. His differentiation between dividends received from the Australian Pastoral Co., and dividends received from the defendant-company is significant, in the light of the circumstance stressed by him in the course of the argument on p. 110 and repeated by him in the course of his judgment, that the defendant-company did not actually carry on business in Australia, but was a purely holding company. As we understand the judgment, it was because there was no evidence to show whether the same was the case even as regards the. Australian Pastoral Company that the learned Judge said (on page 118):

In the absence of evidence, I will assume that it (plaintiff-company) was taxable in respect of its dividends received from the Australian Pastoral Company, Ltd.

Where the company in which the non-resident shareholder holds shares is not carrying on business in the taxing country, it may be possible to say that the connexion between the non-resident shareholder of the first company and the profits arising out of the trade carried on by another company in which the first company held shares is too remote to justify the imposition of Income Tax on that shareholder or on dividends received by him from the first company, by the State in which the trading company carried on business. On the facts of that case, the importance attached by the learned Judge to the situs of the plaintiffs' shares is understandable. In the circumstances of the present case, we are of the opinion that the "source" of the dividends paid to the plaintiff-company by the sterling companies was British Indian and that in making them liable to Income Tax on that basis the Indian Legislature is not giving its law any extraterritorial operation.

20. Proceeding next to the appellant's alternative contention, that the extra-territorial operation, even if there was any, of the impugned provisions is no ground for holding them to be ultra vires the Indian Legislature, it will be convenient at the outset to advert to the distinction in this respect between sovereign Legislatures and non-sovereign or subordinate Legislatures. In the ease of the former, the possible extra-territorial operation of a statute can furnish no argument in the Courts of that country for holding that statute to be pro tanto invalid. Arguments as to the territorial limits of legislative jurisdiction and to the accepted rules of international law in this behalf will be relevant only as furnishing a presumption or rule of construction against an intention to exceed the territorial jurisdiction or to violate the rules of international law, if and when the

language of the statute is general. Where, however, the meaning and intent are plain, the presumption or rule of construction must give way. Even in the case of enactments passed by a non-sovereign Legislature, the rule of presumption or construction is equally relevant, where the language of the enactment is general. But where the language is plainly extra-territorial in its operation, the question becomes one as to the authority of the Legislature and the validity of the law. *Ashbury v. Ellis* [31]establishes that even in the case of a non-sovereign Legislature, nothing turns on the question whether or not the Courts of another country will give effect to a law passed by that Legislature or to decisions given under that law. So far as revenue laws are concerned, it is a well-established rule of Private International Law that the revenue laws of one country will not be enforced by the Courts of another country. Likewise, the practical difficulties that may arise in enforcing the extra-territorial provisions of a taxing statute are not by themselves a ground for invalidating them. The pertinent question is whether the particular legislation is authorized by the Constitution Act creating the subordinate Legislature and defining its powers.

21. If the language of the Constitution Act clearly indicates that the legislative power of the subordinate Legislature is subject to specified territorial limitations or if, on the other hand, the language authorizes expressly or by necessary implication extra-territorial legislation by the subordinate Legislature, the position is simple enough. Where, however, the language of the Constitution Act does not contain a sufficiently clear indication one way or the other, two views are possible: One is that the language of that statute should be coustrued conformably to a general presumption against authorizing extra-territorial legislation, and the other view is that the statute should be construed on the basis that there is no such presumption or limitation. The one view or the other seems to have been taken according as a restricted or unrestricted view was taken of the sovereignty of the Dominions The views that prevailed prior to 1916 have been discussed at some length in Clements' Canadian Constitution, pp. 85 et seq.: see also Jennings' Constitutional Laws of the British Empire, pp. 34 and 110, Dicey's Law of the Constitution, Edn. 8, p. 99, and Edn. 9, Note on page 103. There can be little doubt that the earlier view was that subordinate Legislatures should not be held "to possess any extra-territorial jurisdiction unless it is conferred upon them expressly or by necessary implication.": see the observations in *Macleod v. Attorney-General for New South Wales (1891) 1891 A.C. 455(Supra)* and *Commercial Cable Co. v. Attorney-General for Newfoundland (1912) 1912 A.C. 820(Supra).* The criticisms against this view have been referred to in the judgment of Evatt J. in *Trustees, Executors and Agency Co. Ltd. v. Federal Commissioner of Taxation (1933) 49 C.L.R. 220 at pp. 232-33(Supra)*. The question was considered by a Sub-Committee of the Imperial Conference of 1926, which reported that the subject was full of obscurity and there was conflict in legal opinion as expressed in the Courts and in the writings of jurists both as to the existence of the limitation itself and as to its extent. These doubts and difficulties were set at rest by Section 3 of the Statute of Westminster of 1931. The matter was considered independently of this statute in *Croft v. Dunphy*[32] Their Lordships' judgment in this case emphasised the doctrine laid down as early as *Trustees, Executors and Agency Co. Ltd. v. Federal Commissioner of Taxation* [33]and *Hodge v. The Queen (1884) 9 A.C. 117(Supra)* namely, once it is found that a particular topic of legislation is among those upon "which the Dominion Parliament may competently legislate an being for the peace, order and good government of Canada or as being one of the subjects enumerated in Section 91, British North America Act, their Lordships see no reason to restrict the permitted scope of such legislation by any other consideration than is applicable to the legislation of a fully sovereign State.

In *British Coal Corporation v. The King* [34]reference was again made to *Hodge v. The Queen*[35] and it was added:

> In interpreting a constituent or organic statute, that construction most beneficial to the widest possible amplitude of its powers must be adopted.
>
> Speaking of the limitation imposed "by the doctrine forbidding extra-territorial legislation," the Lord Chancellor observed that that was a "doctrine of somewhat obscure extent."

22. Though the Statute of Westminster is not applicable to India, the Constitution Act of 1935 has to be interpreted in the light of the discussions on this subject that had been taking place between 1926 and 1985. From this point of view, a comparison of the provisions of Section 65, Government of India Act of 1915, with the provisions of Section 99 of the present Act is instructive. The earlier provision (which reproduced the language of still earlier statutes) conferred on the Indian Legislature power to make laws (a) for all persons, for all Courts and for all places and things within British India, (b) for all subjects of His Majesty and servants of the Crown within other parts of India, and (c) for all native Indian subjects of His Majesty without and beyond as well as within British India, etc. etc.

> The expression "places and things within British India" in Clause (a), interpreted in the light of the decision in *Blackwood v. The Queen (1882) 8 A.C. 82(Supra)* and *Provincial Treasurer of Alberta v. Kerr (1933) 1933 A.C. 710(supra)* would have imposed a strict territorial limitation upon the powers of the Indian Legislature. The extra-territorial power contemplated by cls. (b) and (c) is conferred in specific terms and is not assumed to be included in the power conferred by Clause (a). In the Act of 1935, Sub-section (1) of Section 99 does not use the expression "things within British India," but empowers the Federal Legislature to make laws "for the whole or any part of British India" and the "topics" on which it can legislate are specified in Lists I and III of Schedule 7. This way of dealing with the matter is significant in the light of the observations above quoted from *Croft v. Dunphy ('33) 20 A.I.R. 1933 P.C. 16(Supra).* The lines on which Sub-section (2) of Section 99 has been framed are even more significant. In the High Court, the learned Judges have read this sub-section as conferring power upon the Federal Legislature to exceed the territorial limits in certain cases and they accordingly limit this power to the five cases specified in that sub-section. This seems to us, with all respect, to be a misreading of the section. Unlike cls. (b) and (c) of Section 65, Government of India Act of 1915, Sub-section (2) of Section 99 is worded not as a provision "conferring power to make laws," but as a provision which assumes that the preceding sub-section is capable of being read as including the power to make laws even in respect of the matters specified in the five cases dealt with in Sub-section (2). This is made clear both by the opening words of Sub-section (2), namely, "without prejudice to the generality of the powers conferred by the preceding Sub-section" and also by the tenor of the sub-section which only purports to obviate objection on the ground of extra-territorial operation. If it should be asked what necessity there was, in this view, for specifying particular cases in that sub-

> section, the answer would be that it was probably thought that the simple omission of the corresponding provisions found in the Act of 1915 might lead to the impression that the power to deal with those matters had been taken away from the Federal Legislature. Even the language of Section 99 (1) involves some limitation and it might have been considered safer to avoid all risk of any difference of opinion as to its scope, so far as the topics specified in Sub-section (2) were concerned. That the Federal Legislature's power of extra-territorial legislation is not limited to the cases specified in cls. (a) to (e) of Sub-section (2) of Section 99 appears clearly from entry No. 23 of List I of Schedule 7, relating to "fishing and fisheries beyond territorial waters." It would not be right to derive the power to legislate on this topic merely from the reference to it in the list, because the purpose of the lists was not to create or confer powers, but only to distribute between the Federal and the Provincial Legislatures the powers which had been conferred by Sections 99 and 100 of the Act. Nor can the power be inferred from the doctrine of accessory or necessary powers, for, it cannot be said that the other powers conferred on the Federal Legislature cannot be made effective without the right to legislate in respect of fisheries beyond territorial waters. The power so to legislate was obviously understood to have been conferred by Sub-section (1) of Section 99.

23. The only limitation that now exists is that which is involved in the connexion implicit in the expression "laws for British India." The words of Evatt J. in *Trustees, Executors and Agency Co. Ltd. v. Federal Commissioner of Taxation (1933) 49 C.L.R. 220 at p. 236(Supra)* where he was dealing with the position of the Australian Legislature independently of Section 3 of the Statute of West-minster, are, in our opinion, equally true of the legal position in India, whatever the differences between the two countries in political conditions may be. The learned Judge said:

> The Constitution requires that it must be possible to predicate of every valid law that it is for the peace, order and good government of the Dominion with respect to a granted subject, e. g., customs, taxation, external affairs. In such cases, the presence of non-territorial elements in the challenged law has to be considered upon a slightly different footing and those affirming its validity have to show not only that the Dominion has some real concern or interest in the matter, thing or circumstance dealt with by the legislation, but that the concern or interest is of such a nature that the challenged law is truly one with respect to an enumerated subject-matter.
>
> In our judgment therefore the extent, if any, of extra-territorial operation which is to be found in the impugned provisions is within the legislative powers given to the Indian Legislature by the Constitution Act.

24. The appeal is accordingly allowed". The ease is remitted to the High Court at Calcutta with a declaration that for the decree of the High Court, dated 9th April 1943, there shall be substituted a decree dismissing the action with costs in the High Court. The respondent will pay the costs of the appellant here.

Cases Referred.

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2(1846-51) 4 M.I.A. 353
3(1846-51) 4 M.I.A. 353
4('23) 10.A.I.R. 1923 P.C. 138
5('40) 27 A.I.R. 1940 Bom. 65
6(1906) 1906 A.C. 542
7('33) 20 A.I.R. 1933 P.C. 16
8(1889) 14 A.C. 493 at p. 504
9(1927) 1 Ch. 107
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11(1918) 25 C.L.B. 183
12(1921) 29 C.L.E. 134
13(1908) 2 K.B. 89 at page 98
14(1918) 25 C.L.B. 183
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16(1881) 7 Q.B.D. 562
17(1940) 1940 A.C. 81
18(1923) 1923 A.C. 744
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20(1923) 1923 A.C. 744
21(1913) 6 Tax. Cas. 1, 163
22(1921) 1 A.C. 172 at page 178
23(1934) 51 C.L.R. 172
24(1937) 56 C.L.R.337
25(1938) 1938 A.C. 524
26(1934) 50 C.L.R. 581 at p. 600
27(1937) 56 C.L.R.337
28(1925) 1925 A.C. 371
29(1933) 1933 A.C. 710
30(1938) 1938 A.C. 524 at page 555
31(1893) 1893 A.C. 339
32('33) 20 A.I.R. 1933 P.C. 16
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34('35) 22 A.I.R. 1935 P.C. 158
35(1884) 9 A.C. 117