

Thursday, July 22.

(Before Viscount Haldane, Viscount Finlay,
Viscount Cave, Lord Dunedin, and
Lord Shaw.)

NEW ZEALAND AND AUSTRALIAN
LAND COMPANY, LIMITED v. SCOT-
TISH UNION AND NATIONAL
INSURANCE COMPANY.

(In the Court of Session, October 23, 1919,
57 S.L.R. 15.)

*Revenue—Income Tax—Company—Repay-
ment in respect of Colonial Tax—Claim by
Preference Shareholders to Receive Benefit
of such Repayment—Income Tax Act 1842
(5 and 6 Vict. cap. 35), sec. 54—Finance Act
1916 (6 and 7 Geo. V, cap. 24), sec. 43.*

A Scottish company carrying on busi-
ness in various colonies paid the respec-
tive colonial income tax upon its profits
in each colony. Having also paid British
income tax, it obtained, under section 43
of the Finance Act 1916, repayment of a
portion thereof in respect of its payment
of the colonial taxes. *Held (aff. judg-
ment of the Second Division)*, in a ques-
tion with its preference shareholders,
who were entitled to a fixed preferential
dividend and no more, that the company
was entitled to deduct from such prefer-
ential dividend the full amount of the
British income tax.

Rover v. South African Breweries,
[1918] 2 Ch. 233, *disapproved.*

This case is reported *ante ut supra*.

The second party, the Scottish Union and
National Insurance Company, appealed to
the House of Lords.

VISCOUNT FINLAY—The appellants, the
Insurance Company, are the holders of
£10,000 preference stock in the capital of the
respondents, the Land Company. The Land
Company carry on business in the United
Kingdom and also in New Zealand and Aus-
tralia. It is assessed to income tax in New
Zealand and Australia on the profits made
there, as well as in the United Kingdom.
Section 43 of the Finance Act 1916 makes
provision for repayment of a portion of the
United Kingdom income tax to the person
who has paid, if he proves that he has paid,
Colonial income tax in respect of the same
part of his income. The question in the
present case is this—Does the sum so repaid,
in respect of the preference stock, form part
of the assets of the Land Company, or are
the preference stockholders entitled to it?

The section upon which the case turns (6
and 7 Geo. V, cap. 24) is as follows:—"43.
If any person who has paid, by deduction or
otherwise, United Kingdom income tax for
the current income-tax year on any part of
his income at a rate exceeding three shillings
and sixpence, proves to the satisfaction of
the Special Commissioners that he has also
paid any Colonial income tax in respect of
the same part of his income, he shall be
entitled to repayment of a part of the United
Kingdom income tax paid by him equal to

the difference between the amount so paid
and the amount he would have paid if the
tax had been charged at the rate of three
shillings and sixpence, or if that difference
exceeds the amount of tax on that part of his
income, at the rate of the Colonial income
tax equal to that amount. In this section
the expression 'United Kingdom income
tax' means income tax charged under the
Income Tax Acts; and the expression
'Colonial income tax' means income tax
charged under any law in force in any
British possession, or any tax so charged
which appears to the Special Commissioners
to correspond to United Kingdom income
tax."

The Land Company paid Colonial income
tax in the Dominion of New Zealand, in each
of the States of New South Wales, Queens-
land and Western Australia, and in the
Commonwealth of Australia. Those taxes
were paid on the profits earned in New
Zealand, the respective States, and the
Commonwealth respectively. The balance
of the profits after paying these Colonial
taxes was remitted to the United Kingdom,
and formed part of the profits of the com-
pany on which United Kingdom income tax
was charged. These profits were assessed
for the year in question at £418,161, and
United Kingdom income tax at the rate of
5s. in the £1 thereon, amounting to
£106,540, 5s., was charged upon and paid
by the Land Company. The Land Com-
pany claimed repayment under the section
above quoted of a part of the United King-
dom income tax equal to the difference
between the amount so paid at 5s. in the
£1 and the amount that would have been
paid if the tax had stood at 3s. 6d. in the
£1. They satisfied the Commissioners that
Colonial income tax had been paid at the
rate of at least 1s. 6d. in the £1 in respect
of the income earned in New Zealand and
Australia. The Commissioners admitted
the claim, and repaid to the Land Company
£28,435, 17s. 6d.

By the articles of association the holders
of the preference stock are entitled to a
dividend at the rate of 4 per cent. and no
more, cumulative. Such a dividend was
declared in November 1917. In making the
payment the Land Company deducted there-
from the United Kingdom income tax at
the rate of 5s. per £1 assessed on and paid by
the company. The Insurance Company as
holders of preference stock claim that the
sum so deducted ought to have been reduced
by the amount received by the Land Com-
pany from the Commissioners under section
43 in respect of the Insurance Company's
preference stock. In other words, they
claim that the preference stockholders, and
not the company as a whole, are entitled to
the benefit of the amount returned under
section 43 so far as it related to the prefer-
ence stock.

The terms of section 43 appear to me to be
decisive against this claim. The person, and
the only person, who can claim the repay-
ment under that section is defined by the
initial words of the section—"If any person
who has paid by deduction or otherwise
United Kingdom income tax for the current

income-tax year on any part of his income proves to the satisfaction of the Special Commissioners that he has also paid any Colonial income tax in respect of the same part of his income, he shall be entitled to repayment," &c. It is the company, and the company alone, who fulfil this requirement. It is the company who paid the Colonial tax and the United Kingdom tax. The preference stockholders have paid by deduction the United Kingdom tax, but they did not pay the Colonial tax. The Colonial tax was paid by the company, and by it only. It cannot be contended that in paying the Colonial tax the company acted as agents for the preference stockholders. The Colonial income tax had to be paid in the colony, and the profits could not be remitted to the United Kingdom without paying it. It stands exactly on the same footing with any expenses necessarily incurred in the business of the company in the colonies. The company in the conduct of its business acts as a legal person, as a corporation. The different classes of holders of stocks and shares are entitled to share in the profits in terms of the articles, but the company carries on its business itself as the principal. As such it has paid the Colonial taxes and the United Kingdom income tax, and it is the only person entitled to claim and to receive from the Commissioners the repayment provided for by section 43.

This view of the case is that on which the Second Division proceeded. It is not a mere technicality, but proceeds upon the reality of the transaction and gives effect to the rights of the parties. Payment of the Colonial income tax was part of the expense of carrying on the business in Australia or New Zealand, and the profits were necessarily diminished by the amount so paid just as by any business expenses incurred in the ordinary course. 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. The preference stockholders were entitled to their 4 per cent. and to nothing else. This 4 per cent. they have received, subject, of course, to the deduction for the United Kingdom income tax. The claim now put forward is a claim to something beyond the 4 per cent. The preference shareholders in effect demand that the sum repaid in relief of the general assets of the company which bore the Colonial taxes should be handed over to them in addition to their 4 per cent. dividend. I can see no real foundation for this claim either in law or on the merits.

The sums repaid by the Commissioners go into the assets of the company, and will fall into the dividend payable to the ordinary shareholders, whose dividends would otherwise have been diminished by the whole amount of the disbursements for the Colonial income tax. It is on the ordinary shareholders that the burden of this Colonial tax, as of all other business expenses, falls, and any relief by repayment in respect of it ought in all fairness to go into the funds of the company, and so inure for the benefit of those who

bore the burden. The preference shareholders are not entitled to anything out of the funds of the company after the 4 per cent. has been paid. The funds of the company must, of course, be applied in the first instance towards paying the interest due on the preference stock. If by any catastrophe there were not enough to pay the stipulated preferential dividend without recourse to the sums repaid by the Commissioners under section 43, these sums would, like any other assets of the company, have to be applied for this purpose. But so long as the business of the company goes on in the ordinary course the holders of the preference stock have no claim to it.

The case of *Rover v. The South African Breweries*, 1918, 2 Chancery 233, was cited to your Lordships. In that case Astbury, J., gave a decision in favour of the preference shareholders on the very point which is now under consideration in this appeal. The main ground on which that decision was rested was that the company were only entitled to charge against the preferential shareholder, by way of deduction, the sum which they actually had paid for United Kingdom income tax, and that where there is a repayment of a portion of the sum paid it comes to the same thing as if in the first instance a reduced sum had been paid. So, of course, it does as regards the effect of the transaction on the pocket of the person paying. But it by no means follows that because such a repayment has been made under section 43 the case can be dealt with on the assumption that what takes place is equivalent to a reduction of the United Kingdom income tax by the amount returned. The wording of the section shows that this is not what was meant. It is only a person who has paid the United Kingdom income tax that is entitled to apply for the repayment in respect of Colonial taxes which have been paid on the same portion of income. In the present case it was only as a person who had paid the United Kingdom income tax that the company became entitled to claim the repayment on proving that the company had also paid the Colonial tax in respect of the same portion of income. The company has, in fact, paid the United Kingdom income tax, and it is the company that is entitled to the repayment received. To treat the payment as diminishing the amount deductible in respect of United Kingdom income tax from the preferential dividend of 4 per cent. is to hand over the repayment to the preferential stockholder, who has clearly no claim to it.

I think the decision in *Rover's* case was erroneous. In that case it appears to me that the considerations adverted to in the earlier part of this judgment which show that the preferential stockholder cannot be entitled to this repayment were overlooked. The decision proceeded simply on the assumption that the repayment had the effect of diminishing *pro tanto* the United Kingdom income tax.

In my opinion this appeal should be dismissed with costs.

VISCOUNT HALDANE—[*Read by Viscount Cave*].—I have arrived without difficulty at the conclusion that the decision of the Second Division was right. It is important to be clear as to the exact nature of the question decided by that tribunal.

The question raised by the Special Case was whether the full dividend of 4 per cent. to which, and to no more than which, the appellants as holders of preference shares in the respondent company were entitled having been paid in full, the respondents were entitled to deduct the whole amount of five shillings in the pound as income tax for which they were said to be accountable under the Finance Act 1916 to the Inland Revenue Authority of the United Kingdom; or whether the appellants were entitled, in respect of the preference shares on which the whole of the possible dividend to which they were entitled had been paid, to a deduction or return to them, as between themselves and the respondent company and its ordinary shareholders, of the amount allowed by section 43 of that Act, an amount which I may for convenience treat as being eighteenpence out of the five shillings. Section 43 is in these terms—"If any person who has paid, by deduction or otherwise, United Kingdom income tax for the current income tax year on any part of his income at a rate exceeding three shillings and sixpence proves to the satisfaction of the Special Commissioners that he has also paid any Colonial income tax in respect of the same part of his income, he shall be entitled to repayment of a part of the United Kingdom income tax paid by him equal to the difference between the amounts so paid and the amount he would have paid if the tax had been charged at the rate of three shillings and sixpence, or if that difference exceed the amount of tax on that part of his income, at the rate of the Colonial income tax equal to that amount."

The respondent company carried on a large part of its business in New Zealand and Australia. It earned profits there on which Colonial income taxes were charged. The amounts of those Colonial taxes were deducted by the respondent company, just as were general expenses, and what remained as nett balance was remitted to Scotland, where the respondent company was domiciled, to be divided as profit earned along with other profit coming into general revenue account.

There is no doubt about the liability of the respondent company to United Kingdom income tax in respect of these profits, nor is there any doubt about their right to claim a repayment or allowance under the terms of section 43 which I have quoted. The question which arises is whether the preference shareholders having received their dividends in full, are entitled to claim against the respondent company, and as between themselves and the company to participate in the allowance made by the United Kingdom authorities to the latter under section 43 in respect of the Colonial taxes which had to be paid in New Zealand and Australia before the nett profits earned

there could be ascertained and sent to Scotland. Other questions might conceivably emerge if the preference shareholders had not received the full amount to which by their contract they were entitled. But as they have received all that they could possibly claim under that contract, the only question that does arise is whether they are entitled as between themselves and the respondent company to any allowance under section 43.

The answer to this question depends on the language of the section. It will be observed that the words used confer a right to claim only on a person who can show that he has paid Colonial income tax on the part of his income on which he is taxed in the United Kingdom. Speaking for myself, I am wholly unable to understand how the appellants can be truly said themselves to have paid Colonial income tax on their preference dividends. They have received those dividends in full. No doubt the respondent company paid Colonial income tax on the profits out of the residue of which the preference dividends have been paid. But that did not diminish the income of the appellants. They neither paid the tax themselves nor were indirectly subjected to it in any way. It is the ordinary shareholders alone who have lost by it, and in a question between the various bodies of shareholders and the respondent company as to how the latter, who actually paid the tax, are to account for the amount allowed them over here for having paid it, I think that as against the ordinary shareholders the appellants have no title. Neither under the language of section 43, nor indirectly, does it seem to me possible for them to substantiate a claim based on the words employed by the Legislature.

The appellants as preference shareholders are outside the legislative jurisdiction of the Dominions, and are not taxed there. It is true that profits carried by the respondent company are within that jurisdiction and are taxed. But the only income to which the appellants are entitled in respect of their preference shares has been left undiminished. It is taxed here only. So is taxed here the income of the respondent company out of which it is derived. But under the machinery of the Income Tax Acts the amount of the tax is exacted only once. The appellants have to bear the ultimate burden of the five shillings, and they can claim no allowance under section 43, because they have paid nothing either directly or indirectly in respect of which they can claim. Someone else paid, and that other person, the respondent corporation, has kept the appellants clear of all deduction from their income on that account.

The opinion which I have thus expressed is not consistent with the conclusion arrived at by Astbury, J., in *Rover v. South African Breweries*, 1918, 2 Ch. 233. But after giving attentive consideration to the reasoning of the learned Judge in that case, I am unable to satisfy myself with his construction of section 43, or to follow him in his conclusion.

I am therefore of opinion that the decision of the Court of Session in the case before us must prevail and should be affirmed.

VISCOUNT CAVE—The argument for the appellant ultimately took the following form:—Under section 54 of the Income Tax Act 1842 the company can only deduct from the preferential dividend a proportionate part of the British income tax with which it has been “charged.” No doubt it was originally charged with tax at the rate of 5s. in the £1; but of this tax 1s. 6d. in the £1 has been repaid to the company under section 43 of the Finance Act 1916. Therefore the difference only, or 3s. 6d. in the £1, is the sum ultimately “charged” upon the company and is therefore the only sum which the company is entitled, under section 54 of the earlier Act, to deduct from the preferential dividend.

It was pointed out in the course of the argument that such a construction of the statute would lead to results which cannot possibly have been intended. The purpose of section 43 is to give some relief to the taxpayer who has paid both British and Colonial income tax upon the same income. Here the double tax has been borne by the ordinary shareholders, and no part of it has fallen upon the preference shareholders, and yet it is said that the latter and not the former are entitled to the benefit of the relief. If that were so the whole purpose of the statute would be frustrated, and the ordinary shareholders would still bear the whole burden of the double tax while the preference shareholders would be relieved of a part of the single tax which they have borne. Further, it seems probable that if the appellants succeeded the preference shareholders, having borne tax at 3s. 6d. in the £1 only, would be liable to be assessed to tax for the additional 1s. 6d. in the £1, in which case the revenue would get back through those shareholders the whole of the sum paid to the company under section 43 of the Act.

I think it is impossible that a construction of the Act which would produce such results can be the correct one. I think the true effect of the statute is that while the repayment is to be made out of the amount paid for tax, the tax “charged” for the purpose of section 54 of the Act of 1842 remains the same. If so, the preference shareholders are entitled to nothing more, and the amount repaid remains in the coffers of the company.

I agree in all respects with the judgments delivered by the learned Judges in the Second Division, and think that the interlocutor appealed from should be affirmed.

LORD SHAW—I agree with the judgments delivered in this House and in the Court below.

I may be allowed, however, to express the view that I have considerable doubt as to whether the merits of the appeal in any true respect depend upon the construction of section 43 of the Finance Act of 1916. I say so for this reason, that I cannot identify the appellants with the persons who are mentioned in that section, and I therefore

cannot see how they have any title to claim benefit under it.

The section specifically provides for the case of a person who has paid income tax in the United Kingdom providing that he also has paid an Australian income tax in respect of a particular part of his income. In such a case relief is granted so as to prevent, within the limits of the section, the same taxpayer paying double income tax.

It is admitted that the appellants received their income as preference shareholders of this company in full, that is to say, subject to payment of the British income tax alone. It is further admitted that they did not discharge the double burden of paying Colonial income tax. The case accordingly, in my opinion, is at an end.

The appellants' case seems to have two defects. It mistakes the fact, and so far as law is concerned it depends upon a whole network of fallacies.

The important part of the case is that the Colonial income tax is paid by the respondents as a company on that part of its income which is earned in New Zealand, or the other Australasian Colonies mentioned in the case, and that Colonial income tax is paid and paid alone on the profits earned in the Colonies. “Said profits are arrived at after meeting the working expenses of” the company “in the said Colony.” The balance of the said profits after deducting the Colonial income tax paid is remitted to the United Kingdom and “carried to the credit of the general revenue account” of the company. In short, up to that stage the Colonial income tax is treated and is properly treated as part of the oncost of carrying on the business in these Colonies. It enters the debit charges in the same way as any other item of oncost. A balance on both sides of account is struck, and it is that net balance alone which reaches the United Kingdom.

What happens to it there? It forms part of the profits of the company upon which the United Kingdom income tax is paid. It is perfectly possible to conceive of the business of the company managed at home so excellently well that its finance might be able to yield a balance of divisible profits to the shareholders although there was nothing or very little coming in from the Colonies. On the other hand, it is perfectly possible to figure a large net balance arising from the Colonies, but, owing to loss in the home investments and otherwise no profit or very little profit being payable to the shareholders.

To apply to a position of that kind on the facts any kind of proposition such as was urged for the appellants, to the effect that the payment of income tax made by the company in the Colonies was a payment made on behalf of individual shareholders and as their agent is totally inadmissible. In the same sense it might be said that each individual shareholder was the true principal in a transaction of paying the salary of every Colonial servant of the company, and that the company itself in its corporate capacity was the mere agent or hand of the individual shareholder.

It is totally inadmissible to say that the individual shareholder has a right to an aliquot portion of the profits earned upon the transactions in the Colonies, or to an aliquot portion of relief granted in respect of items in those transactions of the company. There is no such doctrine of aliquot distribution that I am aware of that can be applied to a case such as this. The company having paid Colonial income tax, it is not challenged that the same company paying income tax in this country is entitled, under section 43 already mentioned, to the rebate which is there set forth. That has been granted. By this means the relief against double payment becomes completely operative. The taxing authority has made the proper allowance. After that, the whole question is not one for the taxing authority, but is one of distribution among the shareholders *inter socios*. That distribution is governed by the articles of association of the company. These have prescribed by section 10 that the holders of preference shares or stock shall receive 4 per cent. and no more out of the profits of each year before the other shareholders receive any dividend. This they have received. The claim preferred by the appellants in this appeal is equivalent to a demand upon their company for more, and to a demand the burden of satisfying which would fall upon the remanent shareholders in the concern. I see no justification for this.

My opinion is against the soundness of the decision of the case of *Rover*—is entirely in accord with that of your Lordships.

VISCOUNT FINLAY—I am authorised to state that my noble and learned friend LORD DUNEDIN concurs in the judgments delivered by your Lordships.

Their Lordships dismissed the appeal.

Counsel for First Party, Respondents—Sandeman, K.C.—Austen Cartmell—Douglas Jamieson—Danckwerts. Agents—Maclay, Murray, & Spens, Glasgow—J. & J. Ross, W.S., Edinburgh—Sherwood & Company, Westminster.

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Friday, July 30.

(Before Viscount Haldane, Viscount Finlay, Viscount Cave, Lord Dunedin, and Lord Shaw.)

CARMICHAEL'S EXECUTRIX v.
CARMICHAEL.

(In the Court of Session July 15, 1919, 56 S.L.R. 587, and 1919 S.C. 636.)

Jus Quæsitum Tertio—Insurance—Donation—Contract—Delivery—Assurance on Son's Life by Father Conferring Options on Son on Majority, without Delivery of Policy.

A father took on the life of his pupil

son a policy of insurance whereby up to the son's majority he, the father, might surrender, and in the event of the son's death before that event would receive repayment of the premiums paid; on the son's attaining majority he, the son, could maintain the policy by continuing payment of the premium, in which case the sum assured was payable to his executors or assignees on his death, or he might exercise certain options. The father retained the policy in his own custody. The son attained majority and died before a further premium was due. In a competition between the son's executor and the father, *held* (rev. judgment of the Court of Session) that the executor was entitled to the assured fund inasmuch as the son at his death had a *jus quæsitum* in the policy.

Stair i, 10, 5 and subsequent authorities considered.

This case is reported *ante ut supra*.

The claimant, Catherine M'Coll, Carmichael's executrix, appealed to the House of Lords.

At delivering judgment—

VISCOUNT FINLAY—In my opinion this appeal should be allowed.

In this case I have had the advantage of reading the judgment which is about to be delivered by my noble and learned friend Lord Dunedin. That judgment deals so completely with the case that it is unnecessary for me to say anything except that I agree with it, reserving my opinion on the point on which there was a difference of opinion in the Court of Session in the case of *Cameron's Trustees v. Cameron*.

I am authorised to state that my noble and learned friends VISCOUNT HALDANE and VISCOUNT CAVE agree in the judgment I have just delivered.

LORD DUNEDIN—Mr H. F. Carmichael, who is the real raiser and claimant in this multiplepointing and respondent in this appeal to your Lordships' House, received on or about 30th September 1903 in Glasgow from the English and Scottish Law Life Assurance Company, the pursuers and nominal raisers in the multiplepointing, in response to an application by letter by his wife, a pamphlet explaining the system of deferred assurances for children. The concluding words of the letter from the company which enclosed the pamphlet explain that there is a formal proposal at the end of the book which, if filled up, will receive the company's immediate attention. Thereafter a meeting took place between Mr and Mrs Carmichael and an official of the company, which was followed by the despatch of a leaflet showing the rates, which leaflet had also a proposal for assurance attached. Following this up, Mr Carmichael on 21st October 1913 filled up and signed a proposal form. The proposal bore that the application was for an insurance of £1000 on the life of Ian Carmichael his son, described as born on 29th October 1894, and then eight years of age—the sum assured to be paid