this is probably unnecessary, that such refusal is to be taken as without prejudice to any rights that the intending plaintiff may have under s. 28.

The application is dismissed, and the intended defendant is allowed ten guineas costs and its disbursements.

Application dismissed.

Solicitors for the intending plaintiff: *Rothwell, Gibson, Page, and Marshall* (Lower Hutt).

Solicitors for the intended defendant: *Hogg, Gillespie, Carter, and Oakley* (Wellington).

[IN THE SUPREME COURT AND COURT OF APPEAL.]

COMMISSIONER OF INLAND REVENUE *v.* N. V. PHILIPS' GLOEILAMPENFABRIEKEN.

SUPREME COURT. Wellington. 1954. February 19, 22; March 10. BARROWCLOUGH, C.J.

COURT OF APPEAL. Wellington. 1954. June 16-18; November 25. GRESSON, J.; HAY, J.; NORTH, J.; TURNER, J.

Public Revenue—Income Tax—Funds made Available to Borrower in New Zealand by Lender in Netherlands—Moneys applied in Discharge of Debt in That Country—Interest paid in New Zealand on Such Loan not "income derived from money lent in New Zealand"—Loan Transaction, not taking place in New Zealand, but in Netherlands—Credit made available by Way of Loan in that Country in Course of Lender's Business there—Interest on Such Loan not "income derived directly or indirectly from any . . . source in New Zealand"—Land and Income Tax Act, 1923, s. 87 (j), (n).

The provisions of s. 87 (*j*) of the Land and Income Tax Act, 1923, apply to loan transactions entered into in New Zealand. In order to render assessable for income-tax interest received in the Netherlands from a company in New Zealand, as "income derived from money lent in New Zealand" within s. 87 (*j*), it is insufficient to establish that a lender in the Netherlands had made available, on loan to the New Zealand company, funds which the borrower applied in discharge of a debt to a creditor in the Netherlands under a contract made there, and under which the arrangements were concluded there.

Canadian Eagle Oil Co., Ltd. v. *The King* ([1946] A.C. 119; [1945] 2 All E.R. 499) and *In re Harmony and Montague Tin and Copper Mining Co., Spargo's Case* ((1873) L.R. 8 Ch. 407) applied.

Commissioner for Inland Revenue v. *Lever Brothers and Unilever, Ltd.* ((1946) 14 S. Af. Tax Cas. 1) referred to.

The interest which the lender received from the New Zealand company was not "income derived directly or indirectly from any other source in New Zealand", within the meaning of s. 87 (*n*) of the Land and Income Tax Act, 1923, as the actual source of the income was a business transaction, which did not take place in New Zealand, but was carried out in the Netherlands, whereby the credit was made available by way of a loan in the Netherlands in the course of the lender's business in that country.

So held by the Court of Appeal, dismissing an appeal from the judgment of *Barrowclough*, C. J., (*post* p. 871).

CASE STATED pursuant to s. 30 of the Land and Income Tax Act, 1923, and s. 109 of the Social Security Act, 1938.

The respondent was a foreign company incorporated and domiciled in Holland. Its registered office was in Holland, and it carried on the business of manufacturing electric lamps and other equipment. It exported some of its products to New Zealand, and, no doubt, to other parts of the world. (It is hereinafter referred to as "the Dutch company".)

There was registered in New Zealand a private company called Philips Electrical Industries of New Zealand, Ltd. (hereinafter called "the New Zealand company"). It was a subsidiary of an Australian company, with a somewhat similar name, which held all but two of the 60,000 shares in the ordinary capital of the New Zealand company. There was no evidence, however, that either the Australian company or the New Zealand company was a subsidiary of the Dutch company, though that might be suspected from the common use of the word "Philips" in the names of all three companies, and from the business relations hereinafter to be described.

Since the commencement of its business in New Zealand in 1927, the New Zealand company had, in each year, imported goods from the Dutch company. Such goods were imported on terms that the New Zealand company should pay for the same in English sterling currency in Holland, within three months of the close of the month in which the goods were invoiced and despatched to New Zealand. There was no provision for payment by the New Zealand company of interest on any unpaid balances of purchase money, if the before-mentioned period of credit were exceeded.

In July, 1948, there was owing by the New Zealand company to the Dutch company a sum of £80,000 (English sterling currency), being a balance of unpaid purchase money for goods supplied, and in respect of which the agreed period of credit had been exceeded. Owing to insufficiency of working capital, the New Zealand company was unable to discharge this debt, and it therefore requested its creditor to extend the time for payment of the debt. It was part of the Case Stated that the Dutch company

> refused to allow the debt to continue owing to it as a debt for goods supplied or to give extended time for payment thereof, and stated that it was precluded from doing so by regulations in force in Holland.

(The regulations referred to were not in evidence.) In the course of negotiations which followed, the Dutch company finally agreed to convert the debt into a loan which was evidenced by an agreement executed by, or on behalf of, the parties, and which was in the following terms:

Netherland 50 Coat C of Arms 's Gr. 1948

New Zealand Postage and Revenue 1/3d stamp

An Agreement made this first day of December nineteen hundred and forty-eight between:

N.V. Philips' Gloeilampenfabrieken of Eindhoven, the Netherlands (hereinafter referred to as "Philips") of one part, and Philips Electrical Industries of New Zealand Limited of Wellington, New Zealand (hereinafter referred to as "the Company") of the other part.

WHEREAS Philips have granted to the Company a loan and the Company have accepted such loan on the terms and conditions as hereinafter set forth

NOW IT IS HEREBY AGREED AS FOLLOWS:

Article 1.

Philips hereby declare to have granted to the Company and the Company hereby declare to have received from Philips a loan of £ Sterling 80,000 (eighty thousand Pounds Sterling), hereinafter referred to as "the loan".

Article 2.

The balance of the loan shall bear interest at a rate per annum of 3 per cent. The interest shall be paid by the Company to Philips half yearly on May 31st and November 30th of each year and for the first time on May 31st, 1949. On total repayment of the loan the interest payable concerning the period from the date of the last payment thereof to the date of the total repayment of the loan as aforesaid shall be payable simultaneously with such total repayment.

The loan shall be repaid by the Company to Philips after 5 years in ten equal yearly instalments, the first of which shall be paid on November 30th 1953, and each further instalment shall be paid a year later so that the total amount ot the loan shall be repaid on November 30th 1962.

T.G.M. J. C. de V.

Article 3.

The Company shall use their best endeavours to obtain from the competent authorities all permits etc. necessary for the transfer of the payments of interest or principal forthwith upon their becoming due under the provisions hereof.

Article 4.

All payments to be made by the Company to Philips pursuant to this Agreement shall be made in pounds sterling in the Netherlands.

Article 5.

All taxes, stamp duties and other costs resulting from this Agreement or the execution thereof shall be borne exclusively by the Company.

Article 6.

Philips shall be entitled at any time to assign all or part of the benefits of the present Agreement to any third party of their selection and the Company hereby accept any such assignment as lawful and binding upon them.

Article 7.

This Agreement shall be construed and have effect in accordance with the laws of the Netherlands and as a contract made in the Netherlands.

IN WITNESS WHEREOF the parties hereto have executed this Agreement in the manner legally binding upon them.

N. V. Philips' Glocilampenfabrieken:

J. C. de Vries

The common seal of Philips Electrical Industries of New Zealand Limited was hereunto affixed pursuant to resolution of the Directors in the presence of:

Philips Electrical Industries of New Zealand Limited.

H. A. L. Lord, T. G. Morgan } Directors

H. C. McNeil, Secretary.

There was some argument and some evidence of Dutch law on the question as to whether the above-quoted document was or was not a deed. In the view which the learned Chief Justice took of the matter, it was unnecessary for him to determine that question.

The loan evidenced by the agreement (whether or not it could be described as a deed) was effected in the following manner:

After the agreement had been executed, the Dutch company sent to the New Zealand company a cheque for £80,000 drawn by the Dutch company upon the Midland Bank in London, and made payable at that

Bank to the order of the New Zealand company. Upon receipt of the cheque, the New Zealand company endorsed it payable to the Dutch company, and returned it to that company in payment of its debt for £80,000 for goods supplied. It also sent the Dutch company a receipt for the loan of £80,000 and made appropriate entries in its books of account showing the sum of £80,000 (New Zealand currency) as a loan owing by it to the Dutch company, and also showing that the balance of £80,000 for goods sold had been paid.

The New Zealand company, having paid interest on the loan, deducted in each year the amount of such interest in making returns of its assessable income. The Commissioner of Inland Revenue thereupon assessed the New Zealand company (as agent for the Dutch company) for income-tax and social security charge in respect of the interest received by the Dutch company in terms of the loan agreement. The matter was complicated by the fact that the Dutch company was also assessable in respect of royalties received by it from New Zealand. How these royalties became payable was not disclosed in the Case Stated, and was immaterial.

The substantial question for consideration was the question as to whether the Dutch company could properly be assessed for New Zealand income-tax and social security charge, in respect of the interest it received from the New Zealand company on the above-mentioned loan of £80,000.

That question was, in the first instance, heard and determined in the Magistrates' Court, where the learned Magistrate held that the interest was not "income derived from . . . New Zealand", and that the assessments made by the Commissioner in respect of the years ending March 31, 1949, and 1950, were, therefore, not authorized by law. The Commissioner, having given notice of appeal, a Case was stated by the learned Magistrate under s. 30 of the Land and Income Tax Act, 1923, and the matter so came before the Supreme Court for determination.

D. R. Wood, for the Commissioner of Inland Revenue.

J. F. B. Stevenson, for the company.

Cur. adv. vult.

BARROWCLOUGH, C.J. [After stating the facts, as above:] It was stated, on behalf of the Commissioner, that the case was regarded as important, because many overseas companies with under-capitalized subsidiaries in New Zealand were providing loan accommodation for such subsidiaries in New Zealand—often by transforming amounts, owing by the subsidiaries to their parent companies for goods supplied, into loans of amounts equal to the amounts so owing. It was said that, if the learned Magistrate's decision were allowed to stand, overseas companies could earn profits from investment of their capital in such loans without incurring a liability for New Zealand income-tax in respect of the interest received from such loans, even though that interest was paid out of the earnings derived from business operations carried on in New Zealand, and even though the lenders enjoyed the protection of New Zealand law in obtaining recognition of their rights. On these grounds, it was submitted that there were good reasons for taxing such interest in New Zealand.

The Court is not concerned with the question whether or not good reasons exist for taxing such interest, and must inquire only whether, in fact, the Legislature has imposed such a tax. Furthermore, it must

be reiterated that in this case it has not been established that the New Zealand company is in any way a subsidiary of the Dutch company, or that the latter has any sort of control over the former. Notwithstanding the common element in the names of the Dutch, Australian, and New Zealand companies, this case must be decided on the footing that the Dutch company and the New Zealand company are complete strangers to each other, except to the extent that the one sells and the other buys goods which are ultimately sold in New Zealand.

Mr. *Wood*, for the Commissioner, relies primarily on s. 84 of the Land and Income Tax Act, 1923, which is as follows:

84. (1) Subject to the provisions of this Act, all income derived by any person who is resident in New Zealand at the time when he derives that income shall be assessable for income-tax, whether it is derived from New Zealand or from elsewhere.

(2) Subject to the provisions of this Act, all income derived from New Zealand shall be assessable for income-tax, whether the person deriving that income is resident in New Zealand or elsewhere.

(3) Subject to the provisions of this Act, no income which is neither derived from New Zealand nor derived by a person then resident in New Zealand shall be assessable for income-tax.

Mr. *Wood* admits that the Dutch company is not resident in New Zealand, but he claims that the interest referred to is "income derived "from New Zealand". It was not disputed, and it could not be disputed, that the interest, in the hands of the Dutch company, is "income". The contest was as to whether it was "derived" from New Zealand.

There is, in New Zealand, a rather surprising absence of authority on this section, and on the two paragraphs of s. 87 to which reference will afterwards be made. The only reported judgment which the researches of counsel revealed was a judgment of Mr. *Page* in the Magistrates' Court in *X* v. *Commissioner of Taxes* ([1934] 29 M.C.R. 22). In Australia particularly, and elsewhere, however, there are a number of decisions on legislative provisions so similar to our own, that they can properly be looked at for help and guidance in construing our own Act. In applying to an Act of the New Zealand Parliament the decisions of Courts in other jurisdictions, great care must be exercised because even though the section of the foreign Act may be identical with the section in our own Act, there is always the possibility that, elsewhere in the foreign Act, there may be other legislative provisions which do not appear in our own Act, and which, on examination, may serve to show that a phrase in our own Act may call for an interpretation differing from the interpretation given to an identical phrase in a foreign Act.

Keeping this warning steadily in mind, I observe, nevertheless, that there is one line of inquiry which has been very extensively followed in determining what is the source, or derivation, of any given income, and which, I think, ought to be applied in interpreting s. 84 (2) and also (to anticipate what will be said later) s. 87 (*n*) of our own Land and Income Tax Act, 1923. Parenthetically, I ought to say now that s. 87 (*n*) declares that "income derived directly or indirectly from any "other source in New Zealand", is deemed to be income "derived "from New Zealand". I draw attention to the words "directly or "indirectly" and "source", because these words appear in some of the cases about to be mentioned.

The line of inquiry to which I have referred was first expressly

described in a judgment of the High Court of Australia delivered by *Isaacs*, J., in *Nathan* v. *Federal Commissioner of Taxation* ((1918) 25 C.L.R. 183). In that case, the income sought to be taxed was not interest payable under a loan, but consisted of dividends received by a shareholder in three companies all of which were incorporated in England, had their registered offices there, and were controlled and managed there. Each of these companies carried on business and made profits in Australia, and also carried on business and made profits in England. It so happened that the shareholder was resident in Australia, but that fact was immaterial in that case for it was only the source of the income which was relevant. The facts in *Nathan's* case were, therefore, quite different from the facts of this present case; and the actual decision of the High Court on those facts has little interest for us. What is of interest is that the High Court had to consider what meaning should be attached to the phrase "derived in Australia" as it was only income "derived in Australia" that was taxed. Furthermore, there was in Australia an amending Act, which was to be read with the principal Act, which declared that income-tax should be levied upon the taxable income "derived directly or indirectly by every taxpayer from sources within Australia". Our s. 84 must be read along with and in the light of our s. 87 (*n*); and the similarity, if not the identity, of the legislative provisions in Australia and New Zealand, is at once apparent. In those circumstances, *Isaacs*, J., said in *Nathan* v. *Federal Commissioner of Taxation*, ((1918) 25 C.L.R. 183): "The Legislature in using the word "'source' meant, not a legal concept, but something which a practical "man would regard as a real source of income . . . But the ascertain-"ment of the actual source of a given income is a practical, hard matter "of fact" (*ibid.*, 189, 190). There follows an exhaustive examination of general considerations of law, and the judgment concludes with this passage: "We have referred to these general considerations of law, "not because we think they are at all necessary in the construction "of the Act, for we do not think so—it is plain enough; we refer to "them only to explain why, in our opinion, the arguments advanced "on behalf of the appellant are insufficient to alter what, apart from "them, is in our view the true meaning of the enactment read *according "to the ordinary and primary signification of its language*" (*ibid.*, 198). The italics are my own and indicate, I think, that the real inquiry undertaken by the High Court was an inquiry as to what was the source or derivation of a given income as a "practical, hard matter of "fact".

In *Nathan's* case the High Court was construing an Act relating to federal taxation. In *Studebaker Corporation of Australasia, Ltd.*, v. *Commissioner of Taxation for New South Wales* ((1921) 29 C.L.R. 225), the same Court had to consider a State enactment which levied tax on "income derived from any source in the State or earned in the "State". Again, it embarked on a "practical, hard matter of fact" inquiry (*ibid.*, 233). In *Federal Commissioner of Taxation* v. *United Aircraft Corporation* (1)1943) 68 C.L.R. 525), the phrase calling for interpretation was "derived directly or indirectly from . . . . "sources in Australia" (*ibid.*, 533). Two of the Judges (*Rich* and *Williams*, JJ.) expressly quoted *Nathan's* case, and determined the matter from a hard, practical point of view. The same test for determining the source or derivation of income was adopted in other Australian cases. It received the sanction of the Privy Council in *Liquidator, Rhodesia Metals, Ltd* (*In Liqdn.*) v. *Commissioner of Taxes*

([1940] A.C. 774; [1940] 3 All E.R. 422), a case from Southern Rhodesia, where the relevant statute referred to income "derived or "deemed to be derived from any source within the Territory".

For myself, I cannot see any practical difference between the phrases "derived from New Zealand" or "derived from a source in New "Zealand". The concept of derivation seems necessarily to imply the concept of a source. I think that the practical, hard, matter-of-fact approach ought to be adopted in determining what income is, under our New Zealand statute, derived from New Zealand or from a source in New Zealand. I think it is also a proper approach in determining what is "derived directly or indirectly from [a] source in New "Zealand". Whether it is the only approach, calls for further consideration. In some cases, a different line of inquiry seems to have been followed.

In *Commissioners of Taxation* v. *Armstrong* ((1901) 1 N.S.W.S.R. 48), a case decided before *Nathan* v. *Federal Commissioner of Taxation* ((1918) 25 C.L.R. 183), the New South Wales Court of Appeal had to consider whether interest payable on a mortgage of lands in New South Wales was income arising or accruing to the mortgagee from a source in New South Wales. The mortgagee was a company incorporated in England, having its registered office there, but having branches in Melbourne and Sydney. The mortgage was executed in Melbourne, and the deed was kept in Melbourne. The interest was payable in Melbourne or Sydney, but was, in fact, always paid in Melbourne. *Owen*, J., delivering the judgment of himself and of the Chief Justice, said that the interest was payable under the covenant in the mortgage: that it was, therefore, a specialty debt, and, as such, it would be localized in Melbourne where the specialty was kept. *Cohen*, J., came to the same conclusion on the same reasoning. The Court was applying a rule which first arose for the purposes of estate and probate duty and which, in *English Scottish and Australian Bank, Ltd.* v. *Commissioners of Inland Revenue* ([1932] A.C. 238), *Lord Buckmaster* described as "established by a long series of authorities that stretch far back into "the mists of antiquity" (*ibid.*, 242). The rule was that, if a debt could be said to have a local situation, it was located, in the case of a specialty debt, where the specialty was to be found, and, in the case of a simple contract debt, where the debtor was to be found. The rule was no doubt "somewhat artificial in character"; but *Lord Buckmaster* thought that, in the absence of authority to the contrary, "when the local situation of a debt had been recognized for two such "important purposes as probate and gift by will, the local situation so "attributed would be that referred to in the section of the statute" (*ibid.*, 243). *Lord Buckmaster* was referring to a Stamp Act. He held that it was a fair assumption that the statute he was considering was passed with a knowledge of the well-established law relating to probate, and the phrases then used would be perfectly proper to cover debts where the debtors were out of the United Kingdom.

It may well be argued that *Lord Buckmaster's* conclusion would be equally applicable in the interpretation of an Income Tax Act, and that, in the case of income received by way of interest on a loan, the locality of the source or derivation of that income would be, when the income was payable under a deed, the place where the deed was kept, and, when it was payable under a simple contract, the place where the debtor resided. Such a rule would have the merit of simplicity, but would involve some startling consequences. An alleged taxpayer's liability

for tax would depend on whether the instrument under which his interest was payable was a deed, or a simple contract. In this case, the Dutch company would be free if the document set out earlier in this judgment is a deed, but would be liable if it is merely a simple agreement. If it is the latter, the Dutch company could escape liability for tax if it could persuade the New Zealand company to cancel the existing agreement, and replace it with another document which was undoubtedly a deed. Finally, a foreign recipient of income payable under a deed which he had deposited with his solicitors or bankers in New Zealand, could escape taxation by the simple expedient of having the deed sent to a depositary outside New Zealand. It seems unlikely that the New Zealand Legislature intended any such thing (except, perhaps, when no other means of determining the locality of the debt is available). The current of authority is against it.

The scheme of taxation in England is so different from the New Zealand scheme that an examination of English cases is not very profitable. But, in Australia and South Africa, where the legislative provisions more closely resemble our own, there are many cases which show that, since *Nathan* v. *Federal Commissioner of Taxation* ((1918) 25 C.L.R. 183) at all events, the artificial rule referred to by *Lord Buckmaster* has certainly not been regarded as a sole and sufficient test. In fact, some of those cases were decided otherwise than they would have been decided if that rule had been applied. Thus, in *The King* v. *McCaughey* ([1906] Q.S.R. 257) the defendant, who was a member of a partnership carrying on a grazing business in Queensland, and who resided in New South Wales, lent the partnership a considerable sum in addition to his capital investment in the business. Under the partnership deed, the defendant was entitled to receive from the partnership interest on the money so lent. The deed was always kept in Melbourne, Victoria. If the artificial rule had governed the matter, the source of the interest would have been in Melbourne, and this was argued on behalf of the defendant. The Full Court rejected that contention. *Cooper*, C.J., said that the cases in which it was held that tax was payable in the country where the deed was kept were cases where a man lent money secured by a deed under which he was entitled to get interest and principal, but cared not how or where the money was obtained. But, in that case, under the deed of partnership the interest was expressly made payable out of the profits of the partnership business. They were made in Queensland, and the income was derived from Queensland. This case was decided long before *Nathan's* case, and I cite it only to show that even then the artificial rule was not a hard and unyielding rule.

In *Studebaker Corporation of Australasia, Ltd.* v. *Commissioner of Taxation for New South Wales* ((1921) 29 C.L.R. 225) interest was payable by a debtor company, which was incorporated in New South Wales. The creditor company was incorporated in America, and its right to interest arose from a simple contract. I need not further describe the contract. I cite the case, at this stage, only to show that if the artificial rule were followed (the debtor being in New South Wales), the income would have been held to be derived from a source in New South Wales. The High Court of Australia thought otherwise. It rejected the argument that the source of the income was the debt, and that the debt was localized in New South Wales, and held that the income was not derived from any source within New South Wales. Once again the artificial rule yielded to the rule laid down, three years

before, in *Nathan* v. *Federal Commissioner of Taxation* ((1918) 25 C.L.R. 183). The High Court sought the real source of the income as a practical, hard matter of fact, unfettered by any artificial or arbitrary rule.

If the strictly artificial rule were an unyielding one, then the decision in *Federal Commissioner of Taxation* v. *United Aircraft Corporation* ((1943) 68 C.L.R. 525) would have been the other way, and in *Commissioner for Inland Revenue* v. *Lever Brothers and Unilever, Ltd.* ((1946) 14 S.Af. Tax Cas. 1) (where the agreement in question was apparently not a deed) the majority of the Court would have come to the opposite conclusion on the ground that the debtor was resident in the Union. *Schreiner*, J.A., who dissented from the majority, appears to have founded his judgment on that rule. I do not want to be understood as having decided that the old-established artificial rule no longer has any force or validity. It may well be capable of being called in aid of cases where the source of income may be difficult to determine without reference to it. There is an interesting discussion in the judgment of *Williams*, J., in the *United Aircraft* case ((1943) 68 C.L.R. 525, 545) just referred to, on the relative importance of the contract element in the derivation of any particular set of receipts. All that I am deciding, and all that I am called upon to decide, is that, on the facts of this case, I do not consider that the situation of the contract document is at all important in determining what is the *locus* of the source of the income which is the subject of the assessments now disputed. I, therefore, find it unnecessary and unhelpful to consider whether the agreement between the Dutch company and the New Zealand company is, in fact, a deed or merely a simple parol contract.

What, then, are the facts which are relevant to the present inquiry? The New Zealand company owed £80,000 in English sterling currency to the Dutch company, and the debt was clearly payable in Holland. It paid that debt by borrowing abroad an equivalent sum. The proceeds of the loan never came to New Zealand. It is true that a cheque was sent to the New Zealand company, but that cheque was drawn on a bank in London, and no steps were taken by the New Zealand company to present the cheque in London and have the proceeds of it remitted to New Zealand. The arrangements between the two companies made it quite clear that the loan was to be applied in liquidating an antecedent debt payable in Holland, and for no other purpose. The proceeds of the loan never reached this country—the cheque being merely endorsed to the order of the Dutch company and returned to that company. The Dutch company owns no property in New Zealand, and it has done nothing in New Zealand. It has no servants or agents in New Zealand, and, therefore, cannot do anything here. As was said by *Sir John Latham*, C.J., in *Federal Commissioner of Taxation* v. *United Aircraft Corporation* ((1943) 68 C.L.R. 525): "a person who neither owns "anything in a country nor does nor has done anything in that country "cannot, in my opinion, derive income from that country" (*ibid.*, 536). And be it noted that the learned Chief Justice made those remarks in reference to an Act which, like ours, contained references to "source" and "directly or indirectly". It must always be remembered that we are concerned with the source of the Dutch company's income—not with the source of its debtor's earnings. The interest on this loan is no doubt paid by the debtor out of moneys it receives from carrying on its business in New Zealand. But that is no concern of the lender. It had not stipulated (as was the case in *The King* v. *McCaughey* ([1906] Q.S.R. 257) that the interest was to be paid out of moneys earned in New Zealand. It would have accepted, and, indeed, would have been bound to accept, its interest from whatever source it came. On this aspect of the matter, *Rich*, J., said in the *United Aircraft* case ((1943) 68 C.L.R. 525) just referred to: "There would be no more justification "for saying that their source was of Australian origin than for saying "that an American shopkeeper who sells an Australian tourist an article "in New York derives income from a source in Australia because the "tourist paid for it out of income which he had received in Australia. "It would make no difference if the shopkeeper gave him credit and "he remitted the price from Australia" (*ibid.*, 539).

I cannot think that the source of the debtor's ability to pay interest on his borrowed money is intended, in our Land and Income Tax Act, 1923, to be regarded as the source of the lender's income. If I am to inquire what "a practical man would regard as the real source", of so much of the Dutch company's income as is represented by interest on this loan, I must have regard to the fact that the loan-moneys were supplied from a company abroad; that they were used to pay off a debt which was payable abroad; that that debt arose from business carried on abroad (at least as far as the Dutch company was concerned); that both principal and interest of the loan were payable abroad; and that the Dutch company would be bound to accept both principal and interest from whatever funds the debtor might command, whether or not they were obtained from New Zealand. "With so many circumstances connecting the transaction with a place outside New Zealand", I have little hesitation in concluding that the interest received by the Dutch company is not "income derived from New Zealand" within the meaning of s. 84 (2) of the Land and Income Tax Act, 1923: *cf.*, per *Dixon*, J., in *Broken Hill South, Ltd.* v. *Commissioner of Taxation for New South Wales*, (1937) 1 A.I.T.R. 106, 124.

Nor do I think that interest is derived "directly or indirectly from "[a] source in New Zealand", within the meaning of s. 87 (*n*). The words "directly" or "indirectly" are, of course, important. That was recognized in *Nathan* v. *Federal Commissioner of Taxation* ((1918) 25 C.L.R. 183, 188); but it is to be noted that they refer to the word "derived" and not to the word "source". They were similarly used in the enactments in question in several of the cases I have already cited, and I am unable to find that the interest payable to the Dutch company is derived either "directly or indirectly" from a New Zealand source. I am fortified in that view by the fact that in *X* v. *Commissioner of Taxes* ((1934) 29 M.C.R. 22), income received by depositors in England, who lent money to a company which carried on business in Australia and New Zealand, was held, as long ago as the year 1933 or 1934, not to be derived "directly or indirectly from any . . . . "source in New Zealand", even though the interest was paid out of moneys earned in New Zealand. The report appears in that part of the *1934 Magistrates' Court Reports* which is dated March 31, 1934, and all the other judgments in that part (save one dated January 29, 1934) were delivered before the end of the year 1933. It seems reasonable to assume that in the year 1933 the Commissioner of Taxes had knowledge of the disputed assessment in the *X* case, and that s. 6 of the Land and Income Tax Amendment Act, 1933, which is dated December 22, 1933, was expressly enacted to enable the Commissioner to levy income-tax in respect of income received in respect of loans from persons abroad to a company carrying on business in New Zealand. Subsection

4 of that section contained the usual provision that nothing in the foregoing provisions of that section should apply to any assessment of income-tax in respect of which proceedings had been instituted in any Court before the passing of that Act. The *X* case was obviously such a proceeding; or, alternatively, the judgment was given before the passing of the Act. For one or other of those reasons the Land and Income Tax Amendment Act, 1933, did not apply in the *X* case, and it was not mentioned in the judgment. Had that amendment been applicable, the income, which was the subject of those proceedings, would have been taxable—though not as "income derived . . . "from New Zealand", but under the special provisions of s. 6 of the Amendment Act, 1933. That amendment was twice subsequently further amended; and, whilst it remained in the statute-book, income of the kind considered in the *X* case, and income of the kind received in this case by the Dutch company, were clearly subject to taxation under the provisions of s. 6 of the Amendment Act, 1933.

In 1946, however, s. 6 of the Land and Income Tax Amendment Act, 1933, was repealed, and it must be assumed that the Legislature then intended to restore the law as it was declared by the Magistrate who decided the *X* case. The facts in that case were very similar to the facts in the case I have now to consider. The relevant legislative provisions were exactly the same. I, therefore, have no hesitation in concluding that the interest received by the Dutch company, and included in the assessment now in dispute, is not "derived from New "Zealand" and is not "derived directly or indirectly from any . . . "source in New Zealand".

I might have arrived at this conclusion solely on the decision of the learned Magistrate who decided the *X* case, coupled with the statutory amendments which were made in the light of that decision, or of the disputed assessment which was the subject of that decision. In view of the arguments addressed to me, I thought it proper, first, to examine the Act independently of the judgment in the Magistrates' Court, and to endeavour to interpret it with the help of the more authoritative decisions of the superior Courts in States having comparable statutory provisions. In the result, the conclusion was the same by either approach to the problem.

Before concluding this judgment, I ought to say that Mr. *Wood*, for the appellant Commissioner, relied on one other, and on only one other provision in the Land and Income Tax Act, 1923, to justify the disputed assessment. He submitted that the interest received by the Dutch company was "income derived from money lent in New "Zealand" and was, therefore, "deemed to be derived from New "Zealand" by virtue of para (*j*) of s. 87 of that Act. If this submission were sound, it would have been conclusive in favour of the Commissioner in the *X* case, but it does not appear to have been advanced by the experienced counsel who then appeared for the Commissioner. If it were sound, there would have been no necessity whatever to enact s. 6 of the Land and Income Tax Amendment Act, 1933. Section 87 (*j*) so interpreted would have spread a wider net than was spread by s. 6 of the Amendment Act, 1933, for s. 87 (*j*) would then have applied to interest on money lent to any person in New Zealand, and not only to interest on money lent to a company carrying on business in New Zealand. If Parliament did intend by s. 87 (*j*) to tax interest on money lent to a person in New Zealand, wherever the lender might be resident, and from whatever source the loaned money might come, then one would have expected it to say so in much clearer terms than it has thought fit to use. It would have been a simple matter to have worded that paragraph as "income derived from money lent to any person in "New Zealand". As the paragraph stands, it is by no means clear that money lent, as in this case, by a foreign company out of its foreign assets is money "lent in New Zealand". The other paragraphs of s. 87 certainly do not support the suggestion that the mere presence of the borrower in New Zealand, would, in all cases, make a lender abroad of funds which came from abroad subject to New Zealand tax on the interest he receives for his loan. If the Legislature has left the matter in doubt, this being a taxing statute, the doubt must be resolved in favour of the person whom it is sought to tax.

In my view, the appeal fails. The respondent is entitled to costs as per scale. The costs appear to be fixed at £35 under Item 29 of Table C of the Third Schedule to the Code of Civil Procedure; and I make a further allowance of twelve guineas in respect of the second day of the argument.

The Commissioner of Inland Revenue appealed from the whole of the foregoing judgment, on the ground that such judgment was erroneous in law.

In the Court of Appeal,

The argument is sufficiently indicated in their Honours' judgments.

Byrne and *D. R. Wood*, for the appellant.
J. F. B. Stevenson, for the respondent.

Cur. adv. vult.

GRESSON, J. The respondent (hereinafter called "the Dutch "company") is a foreign company incorporated and domiciled in Holland with its registered office in that country. It is not registered in New Zealand as a foreign company under the Companies Act, 1908, nor is it "resident" in New Zealand. The appellant assessed Philips Electrical Industries of New Zealand, Ltd., a private company incorporated in New Zealand, having its registered office in Wellington, and carrying on business in New Zealand (hereinafter called "the New "Zealand company") as agent for the respondent, for income-tax on interest which had been paid by the New Zealand company in respect of the indebtedness of the latter company to the respondent and which amount had been deducted by the New Zealand company when calculating its assessable and chargeable income. The assessment made by the appellant was pursuant to s. 123 of the Land and Income Tax Act, 1923, which permits the Commissioner, after due notice, to require any person, who transmits from New Zealand to any creditor who is an absentee any interest or other moneys "being income derived by "that absentee from New Zealand", to make returns and be assessable and liable for income-tax as agent for that absentee. The whole question is whether the moneys which the New Zealand company remitted to the respondent were "income derived . . . from New "Zealand". The relevant sections of the Act are s. 84—which provides:

> 84. (1) Subject to the provisions of this Act, all income derived by any person who is resident in New Zealand at the time when he derives that income shall be assessable for income-tax, whether it is derived from New Zealand or from elsewhere.

(2) Subject to the provisions of this Act, all income derived from New Zealand shall be assessable for income-tax, whether the person deriving that income is resident in New Zealand or elsewhere.

(3) Subject to the provisions of this Act, no income which is neither derived from New Zealand nor derived by a person then resident in New Zealand shall be assessable for income-tax.

and s. 87 which, in an enumeration of classes of income-tax, includes:

87. (*j*) Income derived from money lent in New Zealand:

and finally:

(*n*) Income derived directly or indirectly from any other source in New Zealand.

The appellant's claim was, therefore, shortly, that: the Dutch company derived income from money lent in New Zealand, or, if that were not so, derived income which could be said to be so derived "directly or "indirectly from any other source in New Zealand".

The relevant facts are contained in the Case Stated and are summarized in the judgment appealed from (*ante*, p. 869, l. 1 *et seq.*), and it is not necessary further to recapitulate them.

In considering the first contention of the appellant—that the Dutch company derived income from money lent in New Zealand—the question is simply, whether what was transacted between the Dutch company and the New Zealand company amounted to a lending of money in New Zealand. The Dutch company had expressed itself as unwilling to give extended time for payment of the £80,000 which was owing to it for goods purchased, but it was willing to convert it into a loan with a term of fifteen years. The New Zealand company desired the conversion of the debt into loan to be effected simply by book entries, but the Dutch company insisted that the proposed loan, if made, must be one duly evidenced by, and subject to, the terms of a proper document formally executed by the parties, and that a proper receipt should be duly given by the New Zealand company for the loan moneys when they were received; thereafter they might be applied in payment of the debt. Accordingly, a formal document (set out in the Case Stated) was executed by the New Zealand company under seal. The Dutch company then sent to the New Zealand company a cheque for £80,000 sterling English currency, drawn by it on the Midland Bank, London, and payable at that bank in London to the order of the New Zealand company. Upon receipt of the cheque, it was endorsed by the New Zealand company, and returned to the Dutch company as payment of the debt of £80,000 sterling owing for the goods supplied. Appropriate book entries were made recording the discharge of the debt and £80,000 as owing in New Zealand currency by the New Zealand company to the Dutch company in respect of the loan. The cheque was not negotiated or dealt with by the New Zealand company in any other way, and it is not stated that it was ever presented to the bank: the inference is that it was not.

What has to be determined is whether this amounted to the lending of money in New Zealand. To "lend" is, as regards money, "to grant "for temporary use on condition of return with interest" (*Webster's New International Dictionary*, 2nd Ed. 1234) or, to adopt the definition similarly expressed, from *1 Funk and Wagnalls New Standard Dictionary*, (1923) p. 1415—"to grant for temporary use, on condition of receiving a "compensation at certain periods for the use of the thing and ultimately "the thing itself . . .; as, to lend money at interest". What was to be lent was money. Money was provided, or must be deemed to have been provided—at the Midland Bank in London. The New Zealand company was sent (after it had executed the formal document evidencing the loan) an order enabling it to collect those moneys. It could have brought them to New Zealand, but it did not. It endorsed the cheque, and returned it to the lender, thereby extinguishing its debt for the goods. The moneys, which were the subject of the loan, never left London.

The most that can be said is that the New Zealand company, having received the means of bringing money then in London to New Zealand, can be regarded as notionally having had the money. It had, in fact, a document of title to moneys in England. The Legislature says plainly, "money lent in New Zealand", not money deemed to have been lent in New Zealand. The New Zealand company left the money in London and used it to repay its debt, effecting this by the simple means of endorsing the cheque and returning it. I do not think that any such "constructive" receipt of the money in New Zealand warrants regarding the loan as having been made in New Zealand. It is open to doubt whether there was an actual sum of £80,000 lying in the Midland Bank, but it must be assumed that there was, or that arrangements had been made with the bank to provide it. Counsel for the appellant invoked the authority of *In re Harmony and Montague Tin and Copper Mining Co., Spargo's Case* ((1873) L.R. 8 Ch. 407) and of *Marreco* v. *Richardson* ([1908] 2 K.B. 584) in support of his contention that the money was lent in New Zealand. The former case decides no more than that where a company was indebted to a shareholder for the price of a property, and the shareholder was liable to pay in cash for his shares, there might be a set-off of the one against the other, and that, thereby, the requirements of the Companies Act, 1908, of making payment in cash, would be satisfied. It was said by *Sir George Mellish*, L.J., in *Spargo's Case* ((1873) L.R. 8 Ch. 407): "Nothing is clearer than that "if parties account with each other, and sums are stated to be due on "one side, and sums to an equal amount due on the other side of that "account, and those accounts are settled by both parties, it is exactly "the same thing as if the sums due on both sides had been paid. "Indeed, it is a general rule of law, that in every case where a trans-"action resolves itself into paying money by A. to B., and then handing "it back again by B. to A., if the parties meet together and agree to set "one demand against the other, they need not go through the form "and ceremony of handing the money backwards and forwards" (*ibid.*, 414).

But the discharge of the trade debt in this case was only effected after the loan had been made, and the question is as to the manner in which the loan was effected, viewing it as a separate transaction. Can the moneys be regarded as having been lent in New Zealand? *Marreco* v. *Richardson* ([1908] 2 K.B. 584) recognizes, to adopt the language of *Farwell*, L.J., that for the purpose of the Statute of Limitations, a cheque or bill of exchange operates as a conditional payment; on the condition being performed by actual payment, it will then relate back to the time when the cheque or bill was given. But the case was one relating to discharge of a debt, and *Farwell*, L.J., was careful to say that the giving of a cheque for a debt, was "payment conditional "on the cheque being met, that is, subject to a condition subsequent, "and if the cheque is met it is an actual payment *ab initio* and not a "conditional one" (*ibid.*, 593). Apart altogether from the fact that there is no evidence here that the cheque was ever presented or met, this case is one of loan, and the principle is, that when a cheque is given, not in payment of a debt, but as a loan in such a case for the purposes

of the Statute of Limitations, time begins to run against the lender from the time when the cheque was cashed. In *Garden* v. *Bruce* ((1868) 17 L.T. 545) all four Judges who heard that case recognized that where a cheque was given, it operated as a conditional payment and, if subsequently honoured, operated as payment from the day it was accepted as such, but that this was so only where there was a pre-existing debt, the rule having no application to the case of a loan.

The subject of the lending in this case was a sum of money actually lying in a London bank, or, at any rate, available at a London bank. The cheque which passed between the parties may, perhaps, be fictionally treated as money, but when it becomes necessary, as in this case, to fix the locality of the loan, regard has to be had to the fact that though the cheque may notionally be regarded as money because it was a document of title to money, yet the money itself was in London. Even if the cheque was to be regarded as equivalent to money, it represented English currency, *i.e.*, money in England. The loan was acknowledged as " a loan of £ Sterling 80,000 ".

Where, as here, borrower and lender were in different countries and the locality of the loan has to be fixed, it is, I think, a governing consideration that the subject of the loan was a sum of money lying in England. It is insufficient, I think, to constitute a lending in New Zealand that a borrower in New Zealand had funds in London made available to him by a lender in Holland, which funds the borrower applied in discharge of a debt to a creditor in Holland. There is no nexus between New Zealand and the lender, save that the borrower resided and carried on business in New Zealand, and there received the document vesting in him the ownership of the London funds.

It was said by *Viscount Simon*, L.C., in *Canadian Eagle Oil Co., Ltd.* v. *The King* ([1946] A.C. 119 ; [1945] 2 All E.R. 499, quoting with approval a statement of *Rowlatt*, J., in *Cape Brandy Syndicate* v. *Inland Revenue Commissioners* ([1921] 1 K.B. 64, 71)) : " . . . in a taxing " Act one has to look merely at what is clearly said. There is no " room for any intendment. There is no equity about a tax. There " is no presumption as to a tax. Nothing is to be read in, nothing is " to be implied. One can only look fairly at the language used." (*ibid.*, 140 ; 507).

I do not think that the loan can, in the circumstances of this case, fairly be said to have been money lent in New Zealand. The money never came to New Zealand, and the most that can be said is that the document of title to the moneys was sent to the borrower in New Zealand, but was returned in order that the moneys might, *from London*, be applied in satisfaction of a trade debt. It appears to me to be a strained and unnatural construction to treat this particular loan as " money " lent in New Zealand ". In my opinion, therefore, the Commissioner's action in taxing the interest payable in respect of the loan, upon the basis that it was derived from money lent in New Zealand, was not warranted.

It remains to consider whether the interest which the Dutch company received from the New Zealand company was income derived directly or indirectly from a source in New Zealand. Inasmuch as the section speaks of income derived " from any *other* source in New Zealand ", following upon an enumeration of classes of income which shall be deemed to be derived from New Zealand, guidance should be sought from this enumeration in deciding in what sense the Legislature used the words. It will be seen that the Legislature imposed the qualification " in New Zealand " in regard both to services rendered and to various

types of property, the ownership of which normally yields an income. Either the services must be rendered in New Zealand, or the property in respect of which income is derived, must be in New Zealand, or the transaction which provides the income must have a New Zealand environment. It is not enough that it has some connection with New Zealand. Can it be said that interest paid by a New Zealand resident on money borrowed abroad, is, in the hands of the recipient, income derived directly or indirectly from " a source " in New Zealand ?

The ordinary meaning of " source " is the starting-point which, when used in relation to physical things, *e.g.*, a river, is a matter of location. But it is a word of flexible meaning, especially when used of something non-material or abstract. It can, and often does, mean the chief or prime cause of something. What has to be determined is the sense in which the Legislature used the word in s. 87 (*n*). The test—what a practical man would regard as the real source as a practical, hard matter of fact—which was formulated in *Nathan* v. *Federal Commissioner of Taxation* ((1918) 25 C.L.R. 183), approved as it has been by the Privy Council in *Liquidator, Rhodesia Metals, Ltd.* (*In Liqdn.*) v. *Commissioner of Taxes* ([1940] A.C. 774 ; [1940] 3 All E.R. 422), must be adopted. The answer which I should expect the " practical " man " to make to a question—What was the source of the money which was received by the Dutch company ?—would be the loan it made which means, in effect, the lending of the money—the transaction. The money was paid because the New Zealand company had contracted to pay it; so that, in some sense, it can be said the obligation which had been entered into was the source of the payment made. But one must look behind that. It is seldom that a person makes a payment except under an obligation to do so, and it is, I think, unreal and incompatible with a practical approach to regard the obligation as the source. It is what produced the obligation that is important. A lessee pays rent because he has entered into an obligation to do so, but he has only done this on terms that land is made available to him. An obligation is seldom, if ever, accepted *in vacuo* : it requires some transaction to give it birth. The obligation arises from something which has been, or will be, done to warrant it, *e.g.*, rendering services, making land or other property available. The practical man, in regarding the loan as the source of the payment, would mean, I think, the conduct or the action which was the reason for the obligation being accepted. The document executed stated that the loan had been made, and that was the originating cause of the payment of interest. That was the view taken by *Watermeyer*, C.J., in the South African case of *Commissioner for Inland Revenue* v. *Lever Brothers and Unilever, Ltd.* ((1946) 14 S. Af. Tax Cas. 1)—that " source " does not mean the quarter whence the moneys come, but the originating cause of the payment being made—the *quid pro quo* which the recipient of the money gave to entitle him to receive payments from time to time ; that in the case of a loan, the lender provides money for the borrower, who, in return, pays interest until such time as he makes repayment : " The lender either gives credit to " the borrower or transfers to him certain rights of obtaining credit " which had previously belonged to the lender, and this supply of credit " is the service which the lender performs for the borrower, in return " for which the borrower pays him interest. Consequently this provision " of credit is the originating cause or source of the interest received by " the lender. Although, colloquially, one speaks of a debt carrying " interest, or interest on a debt, as though interest were a sort of growth

" sprouting from the debt, the language used means no more than that " the borrower pays interest, if that is the agreement between borrower " and lender, as consideration for the benefits allowed to him by the " lender " (*ibid.*, 10). *Davis*, A.J.A., in agreement with *Watermeyer*, C.J., said: " The practical man would say that the source of Levers' " income was the provision by it of assets in America and the giving " of credit in England " (*ibid.*, 23). *Schreiner*, J.A., disagreed, his view being that when income is derived by a person from another who is using that person's property, and that property happens to be money, the interest is derived from the loan, the local situation of which must be ascertained. I think the decision of the majority is to be preferred. It appears to me that in interpreting s. 87 (*n*), proper regard must be paid to the word " derived "; it should not be read as " received ". The word " derived " means more than received; it connotes the source or origin, rather than the fund or place, from which the income was taken. It means flowing, springing, emanating from, or, as was said in *Commissioners of Taxation* v. *Kirk* ([1900] A.C. 588, 592), arising from or accruing. To be a " source " of the income within the meaning of the subsection, it is necessary, I think, to look to the originating cause. It is not sufficient to ascertain the fund out of which the income was in fact paid, which is no more than the reservoir from which it was drawn. It is not whence it was paid, but why it was paid, that is the determining factor. The emphasis is not upon the receipt, but upon the derivation of the income. Consequently, it does not constitute the source within the meaning of the section that the money was drawn from or provided by the trading profits in New Zealand. The New Zealand company was free to obtain the funds with which to perform its obligation anywhere it chose, from deposits in England, if it had any, or from borrowing in England, or from the profits of its trading in New Zealand. That was a domestic matter. The money could " come from " any of these " sources ", but none of them would be the source from which the Dutch company derived what it received as income. The combination of the words " derived " and " source " import, I think, some causative link. In my view, therefore, the originating cause being that the Dutch company had lent moneys or provided a credit in London, from which sprang the obligation to pay interest, the " source " of the Dutch company's income, was not in New Zealand, even though the borrower resorted to its New Zealand funds to pay the interest. Where it got the money with which it in fact paid the interest is, I think, irrelevant. In a physical sense the money came from the trading activities in New Zealand; but that was a domestic matter. Looking at the real substance of the facts with the eyes of a practical man, it was from the provision of the loan moneys that the income was derived; the title to the money paid as income sprang from the loan. The money, in fact, came from New Zealand. But the statute does not say " received from a source in New Zealand ", but " derived ". . . from [a] source in New Zealand ": s. 87 (*n*). In my opinion, the appeal fails.

The appeal is dismissed accordingly.

The respondent is allowed costs on the highest scale with an additional allowance of twenty guineas for each of two additional days.

HAY, J. On the argument of this appeal, I was impressed by the submissions of Mr. *Byrne* in support of his contention that the income in question was " income derived from money lent in New Zealand ".

My subsequent consideration of the matter leaves it, in my opinion, one of grave doubt; but as each of the other members of the Court has come to a definite conclusion that the appeal should be dismissed, I do not feel strongly enough on the question to express a contrary view. I, therefore, propose to concur in the conclusions arrived at by each of my brethren on each branch of the case, and, in particular, I associate myself with the reasoning contained in the judgment of *North*, J. (*infra*).

NORTH, J. This is an appeal from the judgment of the Chief Justice on a Case Stated pursuant to s. 30 of the Land and Income Tax Act, 1923, and s. 109 of the Social Security Act, 1938. The relevant facts appear to be these. The respondent is a company incorporated in the Netherlands where it carries on the business of manufacturing electric lamps and other electrical equipment. In the ordinary course of its business it supplied to a New Zealand company, known as Philips Electrical Industries of New Zealand, Ltd., certain goods, on terms that the New Zealand company paid for such goods in English sterling currency within three months of the close of the month in which the goods were invoiced.

Over a period extending from February, 1947, to July, 1948, the New Zealand company purchased, in all, goods to the value of £115,000, but at the end of this period found itself unable to pay the respondent a balance of £80,000 English sterling currency. In this situation, the New Zealand company asked for additional credit terms, but the respondent stated that it was precluded from giving extended time for payment by reason of certain regulations in force in the Netherlands. The respondent, however, said that it would be prepared to convert the debt of £80,000 into a loan, repayment of which would extend over a period of fifteen years. The New Zealand company suggested that the conversion of the debt into a loan should be effected by the respondent making the necessary book entries in the Netherlands in order to obviate the necessity of the loan moneys actually being paid to the New Zealand company, and then used by it to repay the respondent the trade debt. The respondent, however, would not agree to this proposal and insisted that the suggested loan, if made, must be a loan duly evidenced by, and subject to, a proper document formally executed by the parties, and that a proper receipt should be given by the New Zealand company to the respondent for the loan moneys when they were received by the New Zealand company.

The respondent accordingly forwarded to the New Zealand company a formal agreement of loan which provided for repayment of the loan in ten equal yearly instalments commencing after five years, interest being payable, in the meantime, at the rate of 3 per cent. The agreement made no reference to the earlier transaction, Article 1 reading,

> " Philips hereby declare to have granted to the Company and the Company hereby declare to have received from Philips a loan of £ Sterling 80,000 (eighty thousand Pounds Sterling), hereinafter referred to as 'the loan' ".

The agreement further provided that all payments were to be made by the New Zealand company in pounds sterling in the Netherlands, and it was expressly declared that the agreement should be construed and have effect in accordance with the laws of the Netherlands, and as a contract made in the Netherlands.

The New Zealand company duly executed this agreement under its seal and then returned the agreement to the respondent for execution

and retention by it. After the respondent had executed the agreement, it sent to the New Zealand company a cheque for £80,000 English sterling currency drawn by it upon the Midland Bank, London, England, and payable at such bank in London to the order of the New Zealand company. Upon receipt of this cheque, the New Zealand company endorsed it payable to the order of the respondent, and returned the cheque to the respondent in payment of the debt of £80,000. The New Zealand company, at the same time, sent to the respondent a receipt in due form for the loan moneys.

As the respondent is not resident in New Zealand, the Commissioner of Inland Revenue is obliged to establish that the respondent nevertheless derived income from New Zealand: s. 84 (2). It was conceded by Mr. *Byrne* that income of a non-resident is taxable in New Zealand only if it be shown to have its source in this country. He submitted that, in the present case, he obtained all the assistance he needed from the provisions of s. 87 (*j*) and (*n*). The first of these provisions provides that income shall be deemed to be derived from New Zealand if it is "income derived from money lent in New Zelaand". The second is expressed more generally, and purports to gather into the department's net all "income derived directly or indirectly from any other source "in New Zealand". We were informed by counsel that the argument in the Court below had been directed primarily to the second of these two provisions, but in this Court counsel for the Commissioner placed in the forefront of his argument the contention that the interest from this loan contract came from "money lent in New Zealand". It will be convenient, therefore, to deal with this argument first.

Mr. *Byrne* informed the Court that there was no comparable provision in the statutes of any other country, and, so far as I am aware, this provision has not previously been the subject of judicial interpretation. Comparing the two clauses, I think it is clear that the first purports to determine the question by prescribing what is purely a locality test, whereas the second requires that the actual source of the income should be first ascertained. If this be so, then, in considering the first branch of the case, the circumstance that the debtor happens to be a resident of New Zealand does not carry matters very far, for the prescribed test is not where the debtor resides, but the place where the money, in fact, is lent.

Where, then, was this money lent? Mr. *Byrne*, for the Commissioner, submitted that money acquires the quality of money lent only when it is transferred to the borrower by whatever machinery is agreed to, or is acceptable to the borrower. In result, lengthy argument was submitted for and against the view that these loan moneys reached New Zealand, the contention of counsel for the respondent being that, as the cheque was drawn on a London bank, the moneys never left England. In my opinion, however, it must be accepted that the loan moneys were duly transmitted to the New Zealand company, for I think that Mr. *Byrne* was right when he submitted that, even if the parties had carried out the transaction in the way first proposed, namely, by making the appropriate book entries, there would nevertheless still have been, in law, an actual transmission of the moneys from the lender to the borrower, for, as *Lord Wright* said in *Trinidad Lake Asphalt Operating Co., Ltd.*, v. *Commissioners of Income Tax for Trinidad and Tobago* ([1945] A.C. 1; [1945] 1 All E.R. 9): "The composite and "joint transaction in principle satisfies the description of a payment "by Mellish, L.J., in *In re Harmony and Montague Tin and Copper*

"*Mining Co., Spargo's Case* ((1873) L.R. 8 Ch. 407, 414). 'Nothing "'is clearer,' he said, 'than that if parties account with each other, "' and sums are stated to be due on the one side, and sums to an equal "' amount due on the other side of that account, and those accounts "' are settled by both parties, it is exactly the same thing as if the sums "' due on both sides had been paid. Indeed, it is a general rule of law, "' that in every case where a transaction resolves itself into paying "' money by A. to B., and then handing it back again by B. to A., "' if the parties meet together and agree to set one demand against the "' other, they need not go through the form and ceremony of handing "' the money backwards and forwards.' This statement gives a "description of what is often called a settlement in account or a set-"off, the word not being there used in the technical sense of the statutes "of set-off. *There is actual, not merely notional or constructive payment "of the indebtedness on either side. There is thus a 'transmission' of "funds whether the transmission is only across the table or is across the "ocean.* Transmission involves, indeed, an intermediate space, but "does not depend on the extent of the space. Each party receives "payment from the other. Each party having received payment in "this way makes in his turn the corresponding payment to the other. "The transaction is necessarily bilateral" (*ibid.*, 10; 12). (The italics are mine.)

In the present case, it was important that it should be manifest to all concerned that the loan arrangement was a real transaction and not merely an illegal device, and, therefore, it would seem to me that the parties did decide "to go through the form and ceremony of handing "the money backwards and forwards" and the matter must be dealt with accordingly—see *Henriksen* v. *Grafton Hotel, Ltd.* ([1942] 2 K.B. 184, 193). It is true that a cheque on a London bank was used for this purpose and not coin of the realm; but a cheque is a Bill of Exchange drawn on a banker and payable on demand, and I think it must be regarded as being the equivalent of money when it is shown that it was accepted by the borrower in satisfaction of the promised accommodation, and was, in turn, used by the borrower as the means of discharging the trade debt. But granting all this to be so, does proof of the sending of the loan money to New Zealand in the way I have mentioned, establish that the money was lent in New Zealand, or does not the Commissioner require to go further and establish that the loan contract itself was made in New Zealand?

In considering the matter, it must, moreover, be remembered that this is a taxing statute and ". . . in a taxing Act one has to look "merely at what is clearly said. There is no room for any intendment. "There is no equity about a tax. There is no presumption as to a "tax . . . . One can only look fairly at the language used": *Cape Brandy Syndicate* v. *Inland Revenue Commissioners* ([1921] 1 K.B. 64, 71). In my opinion, the Commissioner is required, by the words of the statute, to carry the matter this further stage, for as *Patteson*, J., said in *Pearce* v. *Davis* ((1834) 1 M. & Rob. 365; 174 E.R. 125): "The "production of this cheque is not evidence of any loan; if it be evidence "of anything, it is rather evidence of payment", and I fail to see how it is possible to determine whether money has been lent in New Zealand, or for that matter, whether there has been a lending at all without reference to the terms of the arrangement entered into by the parties. In my view then, the provisions of s. 87 (*j*) were intended to apply to loan transactions entered into in New Zealand, and that it is

not sufficient for the Commissioner to establish that, in performance of a loan contract made elsewhere, a cheque for the amount of the loan was sent to New Zealand.

Where, then, was this loan transaction entered into? In my opinion, it is clear that the contract was made in the Netherlands, for the arrangements were concluded in that country: see *Dicey's Conflict of Laws*, 6th Ed., 599 and *Muller and Co's Margarine, Ltd.* v. *Commissioners of Inland Revenue* ([1900] 1 Q.B. 310) and *Benaim and Co.* v. *Debono* ([1924] A.C. 514, 520). No doubt it is reasonable to suppose that the "negotiations" referred to in the statement of fact were conducted by correspondence; but it seems clear that, whatever informal arrangement may have been earlier made, the loan contract itself only became effective when the respondent signified its formal acceptance of its terms after the document had been returned to it, duly executed by the New Zealand company. This it did by itself executing the agreement and sending to the New Zealand company a cheque for the loan. In my opinion then, the Commissioner has not established that the income in question was derived "from money lent in New Zealand".

I turn, then, to the appellant's second contention. It is, I think, clear that the words "directly or indirectly" are related to the word "derived" and not to the word "source": *Federal Commissioner of Taxation* v. *W. Angliss and Co. Pty., Ltd.* ((1931) 46 C.L.R. 417, 441). Consequently, the meaning of these words does not require special consideration in the present case, the sole question being whether the interest payable under the loan agreement was income derived "from any other source in New Zealand". The way the matter must be approached is now well settled, namely, "source means not a legal concept, but something which a practical man would regard as a real source of income; the ascertaining of the actual source is a practical hard matter of fact": *Liquidator, Rhodesia Metals, Ltd.* (*In Liqdn.*) v. *Commissioner of Taxes* ([1940] A.C. 774, 789; [1940] 3 All E.R. 422, 426) and *Studebaker Corporation of Australasia, Ltd.* v. *Commissioner of Taxation for New South Wales* ((1921) 29 C.L.R. 225, 233). What, then, is to be regarded as the real source of this interest, viewing the matter in this practical way? I think it must be accepted that a practical man of business would conclude that all income had its origin either in "work" or in the ownership of "property", using both those terms in their widest sense.

Now, it is plain that the respondent did not perform any services in New Zealand, for it is an overseas company engaged in business in the Netherlands and not in New Zealand. Arising from its business transactions in that country it found it necessary, in the ordinary course of business and not with the object of making an investment, to make a loan to one of its customers. The question then is, whether the interest on this loan has its source in the quarter from which the income was received, or in the contract which I have earlier found was made in the Netherlands. Counsel for the Commissioner submitted that the source of the income was the interest-bearing debt and that, as the debt is payable by a New Zealand company, the source of the income was New Zealand, even although the interest was to be paid, and the principal repaid, in the Netherlands. A similar argument was submitted to the Court of Appeal in South Africa in *Commissioner for Inland Revenue* v. *Lever Brothers and Unilever, Ltd.* ((1946) 14 S. Af. Tax Cas. 1), but it found no favour with the majority of the Court. As the problem was so fully and, if I may respectfully say so, so clearly

discussed in the two leading judgments, and as the report is not readily available in this country, it will, I hope, be both helpful and convenient if I cite from these judgments the passages, which, in my opinion, throw into relief the opposing contentions. *Watermeyer*, C.J., who delivered the leading judgment of the majority, said: "A debt is a legal obligation, something having no corporeal existence; consequently it can have no real and actual situation in the material world. Metaphorically, however, by legal fiction it may have a situation in a place, determined by accepted legal rules. Furthermore the word 'source,' when used as it is in this Act in order to symbolise the origin of 'gross income' received by a taxpayer, is also a metaphorical expression and the sense in which it is used in the Act must be determined . . . The word 'source' has several possible meanings. In this section it is used figuratively, and when so used in relation to the receipt of money one possible meaning is the originating cause of the receipt of the money, another possible meaning is the quarter from which it is received . . . It is sometimes said colloquially, and it was argued in this case, that when money is lent at interest the source of the interest is the debt resulting from the loan of the money. But that is a misconception which arises, I think, from giving a figurative meaning to the word 'source' or to the word 'debt' . . . In the case of a loan of money the lender gives the money to the borrower, who in return incurs an obligation to repay the same amount of money at some future time and, if the loan is one which bears interest, he also incurs an obligation to pay that interest . . . As a rule the lender either gives credit to the borrower or transfers to him certain rights of obtaining credit which had previously belonged to the lender, and this supply of credit is the service which the lender performs for the borrower, in return for which the borrower pays him interest. Consequently this provision of credit is the originating cause or source of the interest received by the lender. Although, colloquially, one speaks of a debt carrying interest, or interest on a debt, as though interest were a sort of growth sprouting from the debt, the language used means no more than that the borrower pays interest, if that is the agreement between borrower and lender, as consideration for the benefits allowed to him by the lender . . . As I have pointed out above, to call the debt of £11,000,000 the source of the income is to make use of metaphor. The same may possibly be said of calling the taxpayer's activities the source; but there is a vital distinction which makes the word 'source' more appropriate as a metaphorical expression to denote the taxpayer's activities than to denote the debt resulting from them. This distinction lies in the fact that the mere existence of the debt did not entitle the taxpayer to receive money from Overseas Holdings; it was the agreement between the parties that interest should be paid, and the performance by Levers of their obligations under it, which created the right of Levers to receive the money and the corresponding obligation of Overseas Holdings to pay it. So it could more properly be said that it was the making and carrying out of the agreement relating to the £11,000,000 by the taxpayer, which earned the income for him, rather than the existence of the debt resulting from that agreement" (*ibid.*, pp. 8 *et seq.*).

Schreiner, J.A., in a dissenting judgment, took the opposite point of view distinguishing business transactions, such as the buying and selling of goods, from the lending of money saying, "Interest on a loan

" investment stands on an entirely different footing. Where the " contract of loan was made and where the interest is payable seem to " me to be no more relevant in such a case than the corresponding " questions in regard to hire of the fixed property. Where a debt " arises in the course of trading between two parties, the creditor " ordinarily wants payment as soon as possible : if interest is payable " it is intended to compensate him for the delay in making payment. " But in the case of an investment by way of loan, the creditor is leasing " his money to make an income from it ; he is, generally speaking, " not anxious to have it back so long as his debtor is sound and his " security ample . . . Essentially, therefore, the interest is the " fruit of the money and comes from where the money is, irrespective " of where the contract was made or the interest is payable . . . If " money had been sent to South Africa the presence of the debt in the " Union would perhaps have seemed more obvious but the position is, " I think, equally clear without that feature. No doubt the location " of an incorporeal in space by a rule of law carries a flavour of " artificiality but even the practical business man of the cases would " realise, when the matter was explained to him, that for certain pur- " poses it is unavoidable . . . But I am disposed to think that " a practical business man would be surprised if he were informed that " the source of interest on a long term loan was the contract, made " possibly decades ago, and not the loan debt itself " (*ibid.*, pp. 19 *et seq.*).

In my respectful view, the reasoning of the majority of the Court in that case is to be preferred. The view which found favour with *Schreiner*, J.A., seems to me to present two difficulties. In the first place, a wholly artificial distinction may require to be drawn between specialty debts and ordinary debts, for the former are said to be located where the deed is kept, and the latter where the debtor resides, and where the debt would normally be recoverable. As the learned Chief Justice has been at pains to point out in the Court below, to attempt such a distinction in income taxes seems to be unjustified. In any event, even in the case of a simple contract debt, the conception that the source of income derived by way of interest is necessarily where the debtor resides, seems to have been decisively rejected by the High Court of Australia in *Studebaker Corporation of Australasia, Ltd.* v. *Commissioner of Taxation for New South Wales* ((1921) 29 C.L.R. 225, 233) held that " the " obligation to pay and the right to receive interest flowed from the agreement made in America ".

In the second place, if it is the debt which is the source of the income, then the place in which the debt is deemed to have its existence may change from time to time. Thus, in the case of a loan by an English money-lender to a resident in New Zealand, if the debt is to be regarded as being the source of the income, then if the borrower decided to change his place of residence and go and live in Canada, the source of the income would presumably change to Canada. In my opinion, applying the " practical hard matter of fact " test, no one can really doubt that the actual source of this income was the credit made available by way of loan under the agreement made in the Netherlands in the course of the respondent's business in that country. I do not think it can be said that the respondent owned " property " in New Zealand. What it owned was a debt due under a contract made in the Netherlands, and to be performed in that country. It is true that, in order to recover its debt, the respondent probably would find it convenient to commence

proceedings in New Zealand, but it would not be obliged to do so, and presumably could sue for its debt in its own Courts ; and, if it so happened that the New Zealand company possessed assets in the Netherlands, no doubt execution could be levied against those assets. With respect, I see no reason to doubt the correctness of the statement of *Sir John Latham*, C.J., in *Federal Commissioner of Taxation* v. *United Aircraft Corporation* ((1943) 68 C.L.R. 525, 536) that " Property is one " possible source of income. The work of persons or acts done by " persons are other possible sources of income . . . If a person " by himself or by his servants or agents does work of some kind or acts " in some way, he may derive income from that work or act . . . " income derived from property means, in my opinion, income derived " from the property of the person sought to be taxed as having derived " the income. So also the income of a person derived from acts done " is income derived by that person from his own acts or from the acts " of his servants or agents. If such a person, being a company, has " no servants or agents in [New Zealand], it cannot, in my opinion, " derive income from any acts done in [New Zealand]. A person who " neither owns anything in a country nor does nor has done anything " in that country cannot, in my opinion, derive income from that " country."

In my opinion, the fallacy in the able argument presented by Mr. *Byrne*, for the Commissioner, was exposed when he felt obliged to submit (as indeed he was if he was to be consistent) that, if a New Zealand citizen, while in London, found himself in financial difficulties and had to obtain from a London money-lender a loan, which he was able to repay over a period of years only after he had returned to his own country, the London money-lender could be assessed with income tax under s. 84 (2). In my view, that is a fallacious argument which confuses the source of the London money-lender's income with the source of the debtor's income from which he normally would discharge his obligation to pay interest. In my respectful view, *Sir John Latham*, C.J., was right when he said in *Tariff Reinsurances, Ltd.* v. *Commissioner of Taxes* (*Victoria*) ((1938) 59 C.L.R. 194, 205) : " It " is not relevant to consider what another person, who is not an agent " in any sense of the taxpayer, does in order to obtain the moneys which " he uses for the purposes of making payments to the taxpayer."

In my opinion, then, the source of the income was the business transaction carried out in the Netherlands. I conclude, then, that the Commissioner has failed to establish either of his propositions ; and I would accordingly dismiss the appeal.

TURNER, J. Section 84 of the Land and Income Tax Act, 1923, provides that all income derived from New Zealand shall be assessable for income-tax whether the person deriving that income is resident in New Zealand or elsewhere. By s. 87 it is provided that the following classes of income, *inter alia*, shall be deemed to be derived from New Zealand :

(*j*) Income derived from money lent in New Zealand.

(*n*) Income derived directly or indirectly from any other source in New Zealand.

If then, in the present case, the interest in question is " income derived " from money lent in New Zealand " or is " derived directly or indirectly " from any other source in New Zealand ", the appeal will succeed : if otherwise, it will fail.

I first address myself to the question whether or not the interest is "income derived from money lent in New Zealand". I am of opinion, in the first place, that the words "in New Zealand" are adverbially attached to the verb "lent" and not to the verb "derived". The interest payable by the New Zealand company to the respondent is undoubtedly "income derived from money lent": but was the money "lent in New Zealand"? That is the first question which must be answered by this Court.

Where is money lent? I will begin by assuming that money must be lent at an ascertainable moment and at an ascertainable place. Before that ascertainable moment when the transaction is completed there is only negotiation, and perhaps an agreement to lend, till then executory. After that moment, the fund has passed into the hands of the borrower, the negotiations have ended in fruition, or the agreement has been performed. I think that in cases like the present, where it is not clear at first examination *where* the money was lent, it may be useful to decide first *when* it was lent. If that moment is fixed, then the situation of the parties, and of the fund at the crucial time, may throw some light upon the question where the loan took place.

In the present case, the New Zealand company (for I will follow the Case Stated in so describing Philips Electrical Industries of New Zealand, Ltd.) proposed that it should be granted an extension of time within which to pay its trading balance to the respondent. This request was refused, the respondent stating that it was precluded from granting an extension by regulations in force in Holland. The respondent indicated, however, that it would be prepared to convert the debt into a loan, and that extended time would, in such a case, be given for repayment of the loan moneys, which would be repayable by the New Zealand company over a period of some fifteen years. The New Zealand company then proposed that this should be effected by making book entries in Holland, "to obviate the money being actually paid to the New Zealand Company" (to use the words of the Case Stated); but the respondent refused this, and

> "insisted that the suggested loan, if made, must be one duly evidenced by and subject to the terms of a proper document formally executed by the parties, and that a proper receipt should be duly given by the New Zealand Company to the Respondent for the loan moneys when they were received by the New Zealand Company."

Up to this point in the train of events, it can hardly be contended that any loan had yet taken place: what had transpired was still mere negotiation. But, on or about December 1, 1948, a document was executed by both parties. It is set out in full in the Case Stated. I will refer to this instrument as "the document" because, although in its first words it calls itself an agreement, it has been contended in argument that it is really of the nature of a deed. I will, therefore, use a colourless word in describing it. As will be seen hereinafter, it has not been necessary for me to consider whether it is a deed or not. The document was executed under seal by the New Zealand company, and was then returned to Holland, where it was executed (according to its own terms "in the manner legally binding") by the respondent under the hand of one of its officers. It does not appear from the Case Stated upon what date it was finally executed by the respondent, and it may, therefore, be assumed that this took place on the date shown in the document—namely, December 1, 1948.

The document so executed provided in terms that

> "WHEREAS Philips have granted to the Company a loan and the Company have accepted such loan on the terms and conditions as hereinafter set forth.
>
> "NOW IT IS HEREBY AGREED AS FOLLOWS:
>
> *Article* 1.
>
> "Philips hereby declare *to have granted* to the Company and the Company hereby declare *to have received* from Philips a loan of £ Sterling 80,000 (eighty thousand Pounds Sterling), hereinafter referred to as 'the loan'".

Interest is charged at 3 per cent. on such balance as shall from time to time be outstanding, and the first half-yearly payment of interest is to be due on May 31, 1949. No payment of principal is to be made for five years, but "after five years" the loan is to be repaid by ten equal half-yearly instalments, the first of which is to be due on November 30, 1953. The document nowhere refers even obliquely to the trading debt.

Later, after the execution of the document, the respondent sent to the New Zealand company a cheque for £80,000 English sterling currency, drawn by it upon the Midland Bank, London, and payable to the order of the New Zealand company; upon receipt of this cheque (on or about February 1, 1949) the New Zealand company endorsed it payable to the order of the respondent. The New Zealand company also sent to the respondent a receipt, in due course, for the loan moneys. It does not appear whether this cheque was ever passed through the bank upon which it was drawn.

At that last point of time it is certain that the negotiations had ended in fruition, and that the loan had been made. This had happened at some time between November 30 and February 1. I have ventured to suggest that if, in this case, the time of the loan is exactly determined, its place may become obvious. I have, therefore, asked myself: (*a*) were the moneys lent when the document was executed; (*b*) when the cheque was received; (*c*) when the cheque was endorsed and returned and the receipt given?

The giving of the receipt cannot, in my opinion, affect the matter. The receipt merely acknowledged the completion at some moment already past of certain acts, some or all of which constituted the loan. The endorsement of the cheque could, in different circumstances, have been useful in fixing the time, and would have been relevant, in my opinion, if the endorsement had been necessary to the transaction; but let it be supposed for the moment that before the cheque had ever been sent to New Zealand, or during its transmission in the mail, the respondent had, at that time, changed its mind and decided that it would repudiate the agreement between the parties (if it could). The question would then have arisen—Did the document of December 1, constitute an agreement to lend money merely (which, if still executory, could not have been specifically enforced?—see, for instance, *South African Territories, Ltd.* v. *Wallington* ([1898] A.C. 309); or was it evidence of a loan already (by virtue of that document) completely made? I am of the opinion that, upon and after the completed execution of the document on or about December 1, the respondent, if it had attempted to repudiate, and if it had sued the New Zealand company for its trading balance, could have been successfully met with the defence that the trading debt had, upon the execution of the document, been already paid by the loan which the document acknowledged as having been made. It was, therefore, by no means necessary that any further step should be taken—no cheque was needed to implement the

contract—and the words of *Mellish*, L.J., in *In re Harmony and Montague Tin and Copper Mining Co., Spargo's Case* ((1873) L.R. 8 Ch. 407) seem to me as applicable to the circumstances now under consideration as they were when they were spoken. He said: "In "the present case, I am of opinion that if an action were brought at "law for the amount originally payable on these shares, there would "be a valid defence, under a plea of payment. Nothing is clearer "than that if parties account with each other, and sums are stated to "be due on the one side, and sums to an equal amount due on the other "side of that account, and those accounts are settled by both parties, "it is exactly the same thing as if the sums due on both sides had been "paid. Indeed, it is a general rule of law, that in every case where a "transaction resolves itself into paying money by A. to B., and then "handing it back again by B. to A., if the parties meet together and "agree to set one demand against the other, they need not go through "the form and ceremony of handing the money backwards and forwards" (*ibid.*, 414).

Applying the judgment of *Mellish*, L.J., to the facts in the present case, two parties accounted with each other, and a sum was due in the first instance on the one side of the account. This stage was reached when the New Zealand company acknowledged its indebtedness in an agreed amount in respect of the trading balance and asked for time to pay. But, on the execution of the document, both the New Zealand company and the respondent declared that the one *had granted* and the other *had received* a loan. I think that such a transaction brings the parties within the exact words of *Spargo's Case*; that it must be "exactly the same thing as if they had been paid"; and that from the moment when the document was executed no action could have been brought by the respondent against the New Zealand company in respect of the original trading balance as such, because the New Zealand company would, from that moment, have had a good defence, putting forward the document and pleading *Spargo's Case*.

If I am right in the above view, then, on the execution of the document on or about December 1, the respondent must be deemed to have set off one sum against the other, and this is the moment at which I think that the loan was made. The making of such an agreement, as is set out in the document, constitutes its own performance, and once it is signed nothing further need be done to perfect the loan. If, as happened here, the parties go through the ceremony of remitting money back and forth subsequently, the sending and the endorsement of the cheque and the forwarding of the receipt are still all really merely embroideries—acts of showmanship of which use may be made to demonstrate to governmental authorities or others the reality of the loan transaction, but not really necessary to that transaction, which, in my view, had already been completed. That this was the true time when the transaction of loan took place is supported by those provisions of the document which provide for interest on the loan moneys being payable half-yearly, the first payment being payable on May 31, 1949. From this it may readily be deduced that the loan was deemed to have been made on or about November 30, 1948. The provision as to the payment of principal to which I have already referred confirms the inference that the parties themselves regarded the loan as having been made on November 30, 1948.

If this was the time when the loan was made, then it seems to me to follow clearly that the money was not lent in New Zealand. For,

on November 30 and December 1, (*a*) the respondent was not in New Zealand, nor is any agent of the respondent taking any material part in this transaction shown to have been in New Zealand. (*b*) The fund lent was not in New Zealand—the only fund was in fact a notional one, a credit which the respondent made available. The respondent said, in effect: "The New Zealand company owes us a debt. This "debt is payable in Holland. We will make available a credit here "which will be used to pay this debt." What was made available, then, was a credit of such a kind that it paid off a debt in Holland, and such a credit, unless it can be shown that it had some physical situation elsewhere, must, in my view, be taken to be situated in Holland. (*c*) The New Zealand company was resident in New Zealand, but this fact alone cannot, in my view, have the consequence that the money was lent in New Zealand: otherwise all moneys wherever situate lent to a resident of New Zealand would be moneys lent in New Zealand. Merely to state this proposition is to refute it.

I am, therefore, of the opinion that this fund was not "money lent "in New Zealand".

I now turn to the provisions of s. 87 (*n*) to consider whether the interest may be said to be "derived from any other source in New "Zealand". But I first notice a comparison which, I think, may be useful between the geographical ingredients contained in paras. (*j*) and (*n*) of s. 87. In both cases, New Zealand must be the place where something is or where something happens. But, in s. 87 (*j*), New Zealand must be the place where a transaction (*i.e.*, a loan) took place; in s. 87 (*n*), New Zealand must be the place wherein the payments of interest have their source. It is the *happening of a transaction* which must *take place in New Zealand* under s. 87 (*j*); the *situation of a source* which must be *located* in New Zealand under s. 87 (*n*). This distinction imports at least one vital difference in the nature of the tests to be applied under the two paragraphs—for, in s. 87 (*j*), the happening of a transaction can take place only at one point of time, and the test can, therefore, be applied at that point of time once and for all (for a single transaction can happen only once); but, in the case of s. 87 (*n*), it would appear possible, at least at first sight, that the location of a source of payments may change from time to time. Whether this factor should influence the Court in deciding what kind of conception may be involved in the expression "source" of interest moneys, is a matter to which I will make further reference at a later stage of the judgment.

I think it indispensable to an examination of this question, that one should first endeavour to be clear, as far as possible, as to the meaning of the words used. What is meant by *source*? Its meaning in any standard dictionary is *origin*: but while a river may have a material origin observable by the senses, when the word is used, as here, in a metaphorical sense, its meaning may easily be less exact. When one speaks of a *source of information*, for instance, one may mean a person, or a book, or an observed fact; what sort of thing is to be looked for when it is sought to discover a *source of income*? This is a question less simple than it seems at first sight, and its difficulty does not seem to me to be greatly lessened by taking the "practical" approach to it first put forward in *Nathan* v. *Federal Commissioner of Taxation* ((1918) 25 C.L.R. 183). There the words under consideration were similar to those in the New Zealand statute, and *Isaacs*, J., delivering the judgment of the High Court, said: "The Legislature in using the

" word ' source ' meant, not a legal concept, but something which a " practical man would regard as a real source of income. Legal con- " cepts must, of course, enter into the question when we have to " consider to whom a given source belongs. But the ascertainment " of the actual source of a given income is a practical, hard matter of " fact " (*ibid.*, 189, 190).

This view of the method by which the source should be ascertained has since been approved by such high authority that it must be followed in this Court without question—see, for instance, the judgment of the Privy Council, per *Lord Atkin*, in *Liquidator, Rhodesia Metals Ltd.* (*In Liqdn.*) v. *Commissioner of Taxes* ([1940] A.C. 774, 789; [1940] 3 All E.R. 422, 426). A recent case in the High Court of Australia is *Federal Commissioner of Taxation* v. *United Aircraft Corporation* ((1943) 68 C.L.R. 525, 537) per *Rich*, J. As far, however, as may be permitted within this doctrine, I am attracted by an approach by which an attempt is made to state lucidly what must be meant by the word " source " in the phrase " source of income " in given circumstances. At least four possible meanings occur to me which could be put forward in the present case. (*a*) It could be said that the *income of the New Zealand company*, the fund from which the interest actually came, was the source of the interest paid by it to the respondent. (*b*) It could be said that the *capital fund or investment* in respect of which the interest is payable—the £80,000—was the source of the interest. (*c*) *The debt or chose in action*—the respondent's legal right to recover the money (principal and interest) could likewise be put forward as the source of the income. (*d*) So could the *transaction or contract* by virtue of which the chose in action arose. It seems to me that the word " source ", as used in the paragraph, must necessarily mean one of these.

I think it useful to observe at this stage that, while in the present case it appears to me that the word " source " must have one of the four meanings suggested above, other quite different meanings could be suggested where the income was a different kind of income. The location of the source of profits of a business, for instance, furnishes a kind of investigation quite different from that of the source of interest on moneys lent, and decisions on sources of one kind of income may be of little assistance when considering sources of a different kind of income. It may readily be seen that the " practical matter of fact " approach that is recommended in *Nathan* v. *Federal Commissioner of Taxation* ((1918) 25 C.L.R. 183) and the decisions following it is much more obviously appropriate in such cases as involve (for instance) the source of the profits of a business.

Moreover, I have not found myself helped, except possibly in a negative way, by a great many of the authorities cited, for a different reason. It must always be borne in mind that decisions on the words of one statute are of limited use only in construing the words of another. In the words of *Lord Atkin*, in delivering the judgment of the Privy Council in *Liquidator, Rhodesia Metals, Ltd.* (*In Liqdn.*) v. *Commissioner of Taxes* ([1940] A.C. 774; [1940] 3 All E.R. 422): " Their Lordships " have no criticisms to make of any of these decisions, but they desire " to point out that decisions on the words of one statute are seldom " of value in deciding on different words in another statute, and that " different business operations may give rise to different taxing results." (*ibid.*, 788, 425). Not only is this so, but even the same words used in different statutes may be (and often are) found on closer examination to be qualified by different contexts. This is especially so when the

statutes are those of different countries. I have, therefore, hesitated to use, as a firm foundation for my conclusion in this case, those English decisions which turn on the phrase " foreign possession " or " foreign " security "; and even the Australian decisions, some of which concern the meaning of the words " source in Australia " or some equivalent phrase, may be found to be influenced by a context in the Australian statutes.

As *Isaacs*, J., says in *Nathan* v. *Federal Commissioner of Taxation* ((1918) 25 C.L.R. 183), " This cardinal fact presents itself at the thres- " hold: when the Legislature divides all income into income derived " from (1) ' *personal exertion* ' and (2) ' *property* ' it uses language which " indicates that *it regards these two expressions to represent the two general* " ' *sources* ' *of income.* Particular sources—such as earnings, etc.— " fall within the general source denominated ' personal exertion ', and " all other particular sources fall within the general source denoted " ' property '. That the Legislature itself regards these two expressions " as representing the general ' sources ' dealt with by the Act is " demonstrated by the proviso to subsection (2) of s. 18 . . ." (*ibid.*, 189). Then again, in *Federal Commissioner of Taxation* v. *United Aircraft Corporation* ((1943) 68 C.L.R. 525), *Sir John Latham*, C.J., adverts to the same topic: " Property is one possible source of income. " The work of persons or acts done by persons are other possible sour- " ces of income. *I do not forget that in Commonwealth income tax law* " *the distinction between income from property and income from personal* " *exertion is largely a matter of terms.* Income derived from property " is defined so as to include all income which is not income derived " from personal exertion. Companies are taxed under the *Income Tax* " *Acts* upon their income with no distinction between income derived " from personal exertion and income derived from property. But I " have not been able to think of any sources of income other than " property and acts done " (*ibid.*, 536).

It is easy to see, from these extracts, how far Australian decisions as to sources in particular cases may be influenced by words appearing in Australian statutes (in other sections) furnishing a different context from that of the New Zealand provisions.

Coming now to a consideration as to which of the four meanings I have suggested above should be selected for the word " source " in the present case, I bear constantly in mind that " source " does not mean a " legal concept " but what a practical man would regard as a real source. I will also assume, however, that the practical man, whose views this Court regards, will be a practical man whose mind is not so muddled by affairs that he is incapable of lucid and incisive thought. This is the view which commended itself to *Rich*, J., in *Tariff Reinsurances, Ltd.* v. *Commissioner of Taxes* (*Victoria*) ((1938) 59 C.L.R. 194) when he said: " We are frequently told, on the authority " of judgments of this Court, that such a question is ' a hard, practical " ' matter of fact '. This means, I suppose, that every case must be " decided on its own circumstances, and that screens, pretexts, devices " and other unrealities, however fair may be the legal appearance which " on first sight they bear, are not to stand in the way of the Court " charged with the duty of deciding these questions. But it does not " mean that the question is one for a jury or that it is one for economists " set free to disregard every legal relation and penetrate into the " recesses of the causation of financial results, nor does it mean that the " Court is to treat contracts, agreements and other acts, matters and

" things existing in the law as having no significance " (*ibid.*, 208). I propose, therefore, examining how far in this case the word " source " can properly bear one or other of the meanings suggested above ; but in making this examination I will bear in mind the practical approach prescribed by the authorities I have referred to.

It seems to me clear, in the first place, that the first meaning suggested—the income or earnings of the New Zealand company out of which the interest moneys come, cannot, in the case of moneys lent, be properly designated as the source of the interest paid, for these are the income not of the lender but of the borrower. This principle appears to be the basis of the decision in *Commissioners of Taxation* v. *Armstrong* ((1901) 1 N.S.W.S.R. 48). I come, therefore, to examine the second of the suggested meanings—the capital fund or investment upon which the interest is paid. This, in my view, cannot, in circumstances like those now before the Court, be meant by the expression " a source " in New Zealand ". For the essence of the present income is the *location* of the source; how can it be said that the moneys which were lent have now any location at all ? They had a location, doubtless, at the moment of being lent, just as a cupful of water has before being poured into the sea ; but after the loan was made when the moneys were mixed with other moneys of the borrower, can it be said, any more than of the cup of water, that these moneys have any longer any separate existence or identity, or even less, any distinct location ? It might be quickly said that " this money " will be repaid. This, however, is loose thinking ; not this money, but other equivalent money will be repaid. The money, or fund, or investment, in such a case as this ceases, I think, to have a location as such ; the debt which represents them may, for some purposes at least, be regarded as having location, but the fund itself is merged in the general funds of the company. It might perhaps be argued in this case that the New Zealand company is admitted (by the terms of para. 2 of the Case Stated) to have no assets save in New Zealand alone, and that all its funds must therefore necessarily be in this country. I do not think that this test, which can be applicable only in a very restricted class of cases, is a satisfactory one to prescribe for deciding the locating of a source, and I reject it as the proper test to apply.

This reasoning leads me to the conclusion that in a case like the present, the source of the income must be found either in the debt or chose in action, or in the transaction which gave rise to the debt. Where the debt is a secured one, it is possible that the application of the practical test may, in some cases, make it arguable that the source is where the security is ; or, where the registry is wherein the mortgage deed is registered ; but where (as here) the debt is unsecured, I am of the opinion that the better view is that the source is located where the transaction from which the debt took its origin took place, rather than where the debt itself is situated, for the reason that if the location of the debt were to be selected as the test, the source would be located differently according as whether the contract was a simple contract or a specialty ; and, in the latter case, its location would arbitrarily change with the actual situation of the deed itself. Such a test would, indeed, be far from the practical commonsense test prescribed by the authorities ; and I cannot think it proper to apply it here if some other is available. The High Court of Australia rejected the same argument for similar reasons in *Studebaker Corporation of Australasia, Ltd.* v. *Commissioner of Taxation for New South Wales* ((1921) 29 C.L.R. 225, 233).

There is still the fourth suggested meaning of the word " source "—the transaction from which the interest takes its origin. I prefer this meaning in the present case for several reasons. First, the source of the income is decided once and for all by ascertaining where that transaction took place, and the liability of the respondent for taxation is permanently determined with certainty. Second, it must be remembered that the Legislature has already, in para. (*j*), put forward one test to be applied in the case of moneys lent—interest is taxable if the moneys were lent in New Zealand. The adoption of the proposed meaning is at least consistent with para. (*j*), even if in the case of moneys lent nothing is added to the definition of statutory liability by para. (*n*). It does not follow that para. (*n*) is deprived of all meaning, for it may apply to other kinds of sources of other kinds of income. Third, I respectfully adopt the reasoning of *North*, J., whose judgment, just delivered (*ante*, p. 885), I have had the advantage of reading in advance, when he finds himself assisted by the leading judgments in *Commissioner for Inland Revenue* v. *Lever Brothers and Unilever, Ltd.* ((1946) 14 S. Af. Tax Cas. 1), and prefers the views of *Watermeyer*, C.J., in that decision to those expressed in the dissenting judgment of *Schreiner*, J. A. I would adopt the words of *Watermeyer*, C.J., when he says, in the passage quoted by *North*, J. ; " In the case of a loan of money the " lender gives the money to the borrower, who in return incurs an " obligation to repay the same amount of money at some future time " and, if the loan is one which bears interest, he also incurs an obligation " to pay that interest. Though I use the words ' gives the money ' " this must not be taken literally as the usual way of making a loan. " As a rule the lender either gives credit to the borrower or transfers to " him certain rights of obtaining credit which had previously belonged " to the lender, and this supply of credit is the service which the lender " performs for the borrower in return for which the borrower pays him " interest. Consequently this provision of credit is the originating " cause or source of the interest received by the lender " (*ibid.*, 9).

In my view then, the transaction by virtue of which the interest is payable is the source of these payments ; and, in my opinion, this transaction, for the reasons set out in the first part of this judgment, did not take place in New Zealand. I am accordingly for dismissing this appeal, with the consequences as to costs proposed by *Gresson*, J. (*ante*, p. 884, l. 45).

Appeal dismissed.

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