

VOL. IX.—PART V.

No. 509.—HIGH COURT OF JUSTICE (KING'S BENCH DIVISION).—
30TH APRIL, 1923.

COURT OF APPEAL.—20TH AND 21ST NOVEMBER, 1923.

HOUSE OF LORDS.—20TH, 22ND AND 23RD JANUARY, AND
19TH FEBRUARY, 1925.

PICKLES v. FOULSHAM (H.M. INSPECTOR OF TAXES).⁽¹⁾

Income Tax, Schedule D—Resident in the United Kingdom employed out of the United Kingdom—Foreign possessions—Income Tax Act, 1918 (8 & 9 Geo. V, c. 40), Schedule D, Case V.

An agent in West Africa of a British Company was assessed to Income Tax for the year 1919-20 under Case V of Schedule D of the Income Tax Act, 1918, in respect of his earnings as agent. His duties were wholly performed in West Africa. Under his agreement with the Company the commission which formed the bulk of his remuneration was payable by the Company in the United Kingdom. The whole of this remuneration was paid by the Company into a banking account in England on which his wife had the power of drawing. He rented and was the rated occupier of a house in the United Kingdom in which his wife and family resided. He spent a few days in the United Kingdom during the year of assessment.

The Special Commissioners held on appeal that he was resident in the United Kingdom and that he was assessable to Income Tax under Case V of Schedule D in respect of his earnings as agent.

Held, that the Special Commissioners were entitled to regard him as resident in the United Kingdom, but that the earnings were not income from a foreign possession assessable under Case V of Schedule D as the source of income was not wholly abroad.

CASE

Stated under the Income Tax Act, 1918, Section 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

⁽¹⁾ Reported K.B.D., [1923] 2 K.B. 413, C.A., [1924] 1 K.B. 323, and H.L., [1925] A.C. 458.

1. At meetings of the Commissioners for the Special Purposes of the Income Tax Acts held on the 21st September, 1920, and the 8th June, 1921, for the purposes of hearing appeals, Mr. J. A. Pickles, hereinafter called the Appellant, appealed against an assessment to Income Tax in the sum of £500 for the year ending 5th April, 1920, made upon him by the General Commissioners under the provisions of the Income Tax Acts.

2. The assessment was made under Schedule D of the Income Tax Act, 1918, in respect of the Appellant's possessions out of the United Kingdom, viz., his earnings from his employment in West Africa under the agreement hereinafter referred to. It was stated at the hearing by the representative of the Crown that the tax was charged under Case V of Schedule D.

3. The Appellant has been for many years in the employ of the African Association, Limited, now the African and Eastern Trade Corporation, Limited, and hereinafter called the Company, under agreements which have been renewed from time to time and in pursuance of these agreements, and in point of fact, has for many years past spent the greater part of his time in West Africa. The agreements for employment in the year of assessment are dated the 26th April, 1917, and the 6th May, 1919, and copies are annexed and form part of the Case. The Appellant was employed under the former agreement from the 5th April, 1919, until the 6th May, 1919. The latter agreement was entered into before the previous agreement for employment with the Company had expired.

4. Under this agreement (which cancelled all previous agreements) the Appellant agreed to serve the Company for a period of two years in West Africa as District Supervising Agent. He was to spend nine months of each year in the execution of his duties in Africa and the remaining six months interval between the two periods of nine months was to represent time occupied in voyaging from and to Africa and on furlough. The Company was to pay the Appellant a salary of £500 per annum while in Africa and voyaging and also for his board and other necessary expenses. While at home the Company was to pay him salary at the rate of £750 per annum. The Company also agreed to pay the Appellant a commission on the net profits realised on certain of their factories, the minimum commission being £500. Payment of the commission was to be made to the Appellant through the Company's Offices in Liverpool only.

5. Prior to the 6th April, 1919, the Appellant had rented a house in Blackpool, Lancashire, and he continued to rent and was rated as occupier of the house during the whole of the year of assessment. The Appellant's wife and family resided in that house during his absence in Africa. The Appellant was not in the United Kingdom between the 6th April, 1919, and some date towards the end of March, 1920. He was however in the United Kingdom between the latter date and the 5th April, 1920.

6. The whole of the salary and commission was paid by the Company into a banking account in England on which the Appellant's wife had the power of drawing.

7. On the adjournment of the meeting held on the 21st September, 1920, the Appellant's representative undertook to furnish us within one month with the amounts of the total payments by the Company into the Appellant's banking account in England for each of the 3 years ended the 5th April, 1917, 5th April, 1918, and 5th April, 1919. No particulars of these amounts were however furnished to us at that or any subsequent time, and the representative was not in a position to give us these figures at the meeting held on the 8th June, 1921. Particulars of the salary and commission paid to the Appellant for the three years ended 31st December, 1918, were furnished by the Company to the Inspector of Taxes. A copy of the letter containing these figures is annexed and forms part of the Case. The average for the three years of the aggregate salary and commission as shown by this letter amounts to £2,245.

8. On behalf of the Appellant it was contended :—

- (i) That the assessment was bad.
- (ii) That if any assessment could be made it should have been made on Mrs. Pickles in accordance with the second proviso to Rule 16 of the General Rules applicable to Schedules A, B, C, D, and E, of the Income Tax Act, 1918, but that remittances from salary were not within this proviso, which applies only to allowances or remittances from property.
- (iii) That the Appellant's absence from the United Kingdom was not voluntary but was obligatory on him under the agreement between himself and the Company.
- (iv) That except for ten days or so the Appellant was not in the United Kingdom in the year of assessment and that he was not in the United Kingdom when—
 - (a) The Church Door Notice was posted.
 - (b) The Form of Return was served at Blackpool.
 - (c) The assessment under appeal was made.
 - (d) The Notice of Assessment was issued.
 - (e) The payment of the tax was first demanded.
- (v) That the renting of a residence in the United Kingdom did not make the Appellant liable to tax as a person residing in the United Kingdom.
- (vi) That the Appellant's legal residence was in Africa, this case being distinguishable from the case of *Thomson v. Bensted* (56 S.L.R. 10; 7 T.C. 137) in respect that while Thomson was serving under a separate agreement with his Company for each journey to West Africa, and was therefore clearly resident in the United Kingdom when he was not in Africa, in this

case the employment was continuous, one agreement commencing from the date, or before the date, when the previous agreement ceased.

- (vii) That it was repugnant to the whole scheme of the Income Tax Acts that a bachelor should be treated preferentially as compared with a married man, which would be the case if this assessment were allowed to stand.
9. On behalf of the Crown it was contended (*inter alia*) :—
- (i) That the Appellant was liable to assessment and rightly assessed under Schedule D.
 - (ii) That the case was entirely covered by the decision in *Thomson v. Bensted* and that we were bound by that decision.
 - (iii) That it was not possible to differentiate this case from that of *Thomson v. Bensted* on the point of residence, and that the Appellant was resident in this country in the year of assessment within the meaning of the Income Tax Acts.
 - (iv) That, in the absence of information from the Appellant as to the amounts of salary and commission received, the assessment should be increased.

10. We, the Commissioners who heard the appeal, were of opinion that the assessments were correctly made as to form, and that the appeal was covered by the decision in the case of *Thomson v. Bensted*. As regards the amount of the liability we considered that ample time had been allowed for the purpose of producing figures but none had been supplied. We therefore accepted the figures furnished by the Company and increased the assessment to the sum of £2,245.

11. The Appellant immediately upon the determination of the appeal declared to us his dissatisfaction therewith as being erroneous in point of law and in due course required us to state a Case for the opinion of the High Court pursuant to the Income Tax Act, 1918, Section 149, which Case we have stated and do sign accordingly.

12. The point of law for the decision of the Court is whether the Appellant has been correctly assessed in respect of the amounts received in or remitted to the United Kingdom out of the earnings arising from his employment in West Africa.

J. JACOB,

Commissioner for the Special Purposes
of the Income Tax Acts.

(Mr. G. F. Howe, the other Commissioner who heard the appeal, has since retired from the Public Service.)

York House,
23, Kingsway,
London, W.C.2.

14th June, 1922.

AGREEMENT DATED 6TH MAY, 1919.

AGREEMENT entered into this 6th day of May 1919 BETWEEN AFRICAN ASSOCIATION LIMITED of Liverpool (hereinafter referred to as "the Company") of the one part and JAMES ARTHUR PICKLES of 341, Lytham Road, Blackpool (hereinafter referred to as "the Agent") of the other part.

1. The said Agent hereby agrees to proceed to the Colony of Nigeria West Africa (hereinafter called the Colony) as and when required by the Company and to serve there in the employ of the Company for a period of two years (unless the Agreement shall be previously terminated as hereinafter provided) in the capacity of District Supervising Agent over the Opobo Bonny Port Harcourt and New Calabar Districts and during the currency of this Agreement to devote his whole time talents and energies to the faithful discharge of the duties that may be required of him by the Company from time to time and that he will do all in his power to protect and further promote and extend the business and interests of the Company and of the Company solely and be scrupulous in his care and protection of its property and will at once communicate to the Company any act of misconduct dishonesty or neglect of duty on the part of any of the Company's employees which may come to his knowledge and shall not divulge any secrets or dealings in relation to the Company's business.

Further the said Agent will forthwith communicate to the Company every discovery of pecuniary value or commercial advantage made by him and all knowledge or information he may acquire in the Colony during the continuance of this Agreement whether such discovery be made or knowledge or information acquired directly or indirectly and will not in any way or at any time communicate to any other person firm or company any such discovery so made or knowledge or information so acquired as aforesaid nor do or omit any act or thing whereby the Company may be deprived of the whole benefit thereof.

2. It is agreed that the said Agent shall spend nine months of each year in the execution of his duties in Africa and that the remaining six months interval between those two periods of nine months each shall represent time occupied in voyaging to and from Africa and on furlough.

3. The said Agent agrees to be personally liable for all goods and moneys and securities entrusted to him or which shall come into his hands or power and to render from time to time when required to do so an accurate account of all transactions for or on behalf of the Company.

4. The said Agent agrees that he will not during the currency of this Agreement directly or indirectly either on his own account or on behalf of any other person firm or company trade nor

barter nor interest himself in any lands properties or undertakings in the Colony nor permit nor connive at any of the employees of the Company being engaged in such trade or barter or other undertakings on their own account or on account of others than the Company.

5. The said Agent agrees that he will not either in the Colony or in the United Kingdom or elsewhere at any time during the two years next following the termination for any reason of his employment under this Agreement directly or indirectly either alone or in partnership with or as agent manager clerk servant or director of any person or persons or company or companies or otherwise howsoever and whether for his own benefit or for the benefit of any other person or persons or company,

- (a) Assist or engage in the business of a trader or merchant competing in any way with any business at any time during his employment carried on by the Company within a radius of 50 miles from a trading station in the Colony now or during his employment established owned or managed by the Company.
- (b) Trade or deal in relation to or in connection with any such competing business with any person or persons company or companies now or at any time hereafter during his employment a customer or customers of the Company or otherwise dealing with the Company or solicit or endeavour to obtain the custom or connection of any such person or persons company or companies so far as concerns goods merchandise or produce supplied bought or dealt with in the course of the business of the Company.

PROVIDED that this Clause shall only be enforceable so long as the Company or its assigns enforcing the same shall continue to carry on or be carrying on such business or part thereof And the said Agent agrees that upon each and every breach of this Clause by him he shall pay to the Company the sum of £500 by way of liquidated damages and not by way of penalty but no such payment shall prejudice the right of the Company to restrain a continuance of such breach.

6. The Company will pay the said Agent a salary at the rate of £500 per annum during the time he is in Africa and voyaging and will also pay for his board and other recognised expenses. The Company will also pay salary during the time he is at home at the rate of £750 per annum and upon the fulfilment by the said Agent of the obligations hereby undertaken by him. Salary is not to be overdrawn by the said Agent on any account and any breach of this provision by the said Agent shall be deemed a dishonest act and breach of agreement by him.

7. The Company agrees to further remunerate the said Agent by paying him a commission of 5 per cent. upon the net profits realised over the whole of the New Calabar Port Harcourt and Bonny Factories and $2\frac{1}{2}$ per cent. upon the net profits realised

over the whole of the Opobo Factories as shewn by the books of the Company in Liverpool and it is hereby agreed and declared that in determining the profits the accounts of the Company for the financial year as certified by the Chief Accountant in England of the Company for the time being shall be taken as final and conclusive. If the period of service in respect of which commission shall be payable to the said Agent shall not correspond with the period comprised in such financial year the commission shall be calculated upon the proportion which the number of days of such service bears to the whole of such financial year.

8. The Company guarantees to the said Agent if he shall faithfully perform and observe the terms and conditions of this Agreement over and above the £500 payable as salary under Clause 6, a minimum commission at the rate of £500 per annum payable when the amount of commission due has been ascertained.

9. The said Agent shall not draw nor claim payment in the Colony in respect of commission earned by him but payment in respect thereof shall only be made to him through the office of the Company in Liverpool.

10. The Company will subject to the said Agent faithfully performing and observing the terms and conditions of this Agreement on his part to be performed and observed pay to the said Agent the cost of his first passage between England and the Colony out and the costs of his passage home on the termination of this Agreement by effluxion of time. The Company will also pay passage home and back to the Colony for the furlough granted during the period of this Agreement. The Company will pay the passage of the said Agent home to England (1) if he is obliged to leave the Colony through ill-health or sickness and if he shall obtain a proper medical certificate from the Medical Officer of the Company setting forth the necessity of his returning home or (2) if the employment of such part shall be put to an end by the Company before the completion of the terms of this Agreement from any cause other than misconduct negligence or incompetency.

11. It is agreed that should the said Agent be discharged for misconduct negligence or incompetency or return home on his own account and (in case of sickness) without obtaining the necessary medical certificate or should he exercise the power of determining this Agreement conferred by Clause 14 hereof he shall pay his own passage home.

12. The said Agent agrees that in the event of his returning home through illness the Company shall be entitled to require him as soon as he shall have recovered his health to return to the Colony there to complete the unexpired term of the present Agreement.

13. The Company agrees to provide the said Agent with furnished apartments and medical attendance as also with the cost of his board servant and other expenses in connection with his occupation free of charge in the Colony.

14. It is agreed that either party shall be at liberty at any time during the continuance of this Agreement to determine same by giving to the other party three calendar months notice in writing of such its or his intention in that behalf and the Company shall not be required to assign any reason for the giving of any such notice. In case of notice being given under this Clause the Company shall only be liable for salary and commission apportioned to the date of the determination of the Agreement.

15. Notice under the last foregoing Clause may be given by the Company to the said Agent in the Colony or in England or elsewhere. The said Agent shall be bound to give notice in writing to the Company in Liverpool.

16. If the said Agent shall at any time wilfully neglect or refuse to observe or perform any of the Agreements or stipulations aforesaid or so neglect or refuse or from illness or any other cause become or be unable to perform any of the duties devolving upon him under his engagement under this Agreement it shall be lawful for the Company to immediately terminate such engagement of the said Agent without giving any such notice as provided for in Clause 14 hereof.

17. The Company shall have the right to take proceedings against the said Agent to restrain a breach by him of Clause 5 hereof in the Supreme Court of the Colony or other Court having competent jurisdiction in the place where such breach is made but in all other cases and for all other intents and purposes whatsoever this Agreement shall be construed and take effect as a contract made and to be performed in England and subject always to the laws of England and the jurisdiction of the English Courts.

18. All previous Agreements subsisting between the Company and the said Agent are hereby cancelled.

AS WITNESS the African Association, Limited, by the hands of two Directors thereof duly authorised in that behalf, and the hand of the said Agent the day and year aforesaid.

AFRICAN ASSOCIATION, LIMITED.

Directors.

WITNESS to the Signature of the said African Association, Limited, by two Directors thereof.

Secretary.

WITNESS to the Signature of the said James Arthur Pickles.

AGREEMENT DATED 26TH APRIL, 1917.

AGREEMENT entered into this 26th day of April 1917 BETWEEN AFRICAN ASSOCIATION, LIMITED, of Liverpool (hereinafter referred to as the Employers) of the one part, and MR. J. A. PICKLES of Spring Mount, Severn Road, Blackpool (hereinafter referred to as the Agent) of the other part.

IT IS AGREED

1. That the said Agent shall proceed to Opobo, West Africa, by the Steamship _____ intended to leave Liverpool on or about the _____ day of May 1917, and there take charge of the business and property of the said Employers, at present carried on by and under the care of Mr. M. A. Woolley at Egwanga Foy, Opobo, aforesaid, and/or any other Agency to which he may from time to time be appointed by the said Employers.

2. The said Agent shall, as from the date of leaving Liverpool for Africa, become and be and continue for two (2) years, or until the date of his giving up charge, in the service and employment of the said Employers as Agent for them at Opobo, or elsewhere, on the Coast of West Africa, or the Rivers thereof, subject nevertheless to the proviso hereinafter contained for determining such employment the said Employers reserving to themselves the right to terminate this engagement at any time they may desire to do so.

3. The passage outwards shall be paid by the Employers, but the passage homewards shall be charged to the Agent's account, should the said Agent from any cause but unavoidable sickness return before the expiration of the two (2) years. Should he remain and complete the full term, his passage homewards shall be paid by the Employers.

4. The said Agent shall devote the whole of his time, attention and services, to the business and affairs of the said Employers. He shall forward monthly to their Liverpool office account sheets of trade and half yearly stock and statements of account balanced to 30th June and 31st December, or such other dates as may be ordered by the Board, and shall act in every respect according to their letters of instruction received by him from time to time. He shall not during the continuance of this Agreement absent himself from their service, nor barter or trade in any manner whatever, directly or indirectly, except on the Employers' account and in pursuance of orders given to him and any fee, emolument, or profit whatsoever received by, or accruing to him from, any source whatever during the term of this engagement, shall belong exclusively to the Employers, who may make him any or no allowance thereout as the Directors of the said African Association, Limited, may in their absolute discretion see fit.

5. The said Agent shall not sell or barter any goods belonging to the said Employers upon credit, or lend their goods or money to any person without their express consent in writing, and, in case of loss arising from any unauthorised sale, barter, or loan by the Agent, the Employers shall have power to deduct or retain the amount of such loss from any salary and/or commission due to the said Agent under this Agreement. The Agent shall hold all monies received by him in trust for the Employers, and shall under no circumstances be entitled to retain or set off the same, or any part thereof, as against any claim, or alleged claim, against them, but shall pay them over in full under all circumstances to the Employers or their Agent.

6. In consideration of his faithful service and due performance of all the conditions hereof, the Employers agree to pay the Agent a fixed salary of Four hundred and Fifty (£450) pounds per annum, commencing from the date of his sailing for Africa, as hereinbefore mentioned, and terminating on the day he shall from any cause give up charge of their Agency on the African Coast. During his continuance in their service in Africa, the Employers shall provide the Agent with board, lodging, washing, and when procurable, with medicine and medical attendance. In the event of unavoidable sickness which in the opinion of the Medical Officer of the Employers necessitates the return of the Agent to England, the Employers shall defray the cost of his homeward passage; but, on his recovery, the Employers shall have the option to require him to return to the Coast at their cost to complete the term of this Agreement.

7. The Employers agree for the aforesaid consideration to pay the Agent a further sum equal to One half share of Ten (10) per cent. of the net profits derived by the Employers from their trading business in all the stations in the Opopo River, on the West Coast of Africa. In the event of the Agent's employment terminating on any day other than one to which the Employer's statement of accounts for any year or term shall be made up, he shall be entitled to a proportion of commission in respect of the period from the date of the last such statement or date of his arrival in the River whichever shall be last to the date of his giving up charge, but such proportion shall become due only upon the accounts of the said year or term being made up by the Accountant of the Employers. The Employers shall not be liable to make any payment on account of either salary or commission until the Agent shall have rendered to them full and true accounts of all his receipts, dealings and intromissions on their account, and the same shall have been checked and passed by their Auditor. The Employers shall have an absolute lien and charge on such salary and commission for any deficiencies which the Agent may fail to account for satisfactorily, and the Agent shall be indebted to the Employers for the amount of such deficiencies as certified by the Auditor.

8. In the event of an Agent being obliged from any cause to resign his appointment or (except on the business of the Employers) absent himself from his Agency, his interest in profits shall cease as from the date of his resignation or absence, and the proportion of profits of such Agency earned during his absence, or pending the arrival of a successor, shall be disposed of as the Directors may in their absolute discretion decide.

9. The said commission shall be based upon a statement of accounts of the business transacted by the Employers in Opobo River, such statement to be made up by the Accountant of the Employers. In ascertaining the amount of the net profits of the said business, for the purpose of calculating the said commission, provision shall first be made for the following charges, viz. :—

- (a) A commission of $1\frac{1}{2}$ per cent. upon the gross amount of all invoices of goods and merchandise shipped, and the gross selling value of all produce and other returns.
- (b) Five per cent. per annum interest upon the total capital employed for the time being in the business of the said Employers in the Opobo River.
- (c) An amount to be fixed by the Employers in their absolute discretion, being not less than ten nor more than twenty per cent. per annum, for depreciation on hulks, launches, boats, and other craft used in the said business (including renewals thereof and additions thereto) and a further amount—hereby agreed to be taken at the rate of £600 per annum for the period of this Agency—as a charge for the use of buildings, plant, furniture, and utensils-in-trade of the said business (including renewals thereof and additions thereto), such charge to be regarded as including interest and annual depreciation in respect of the properties now mentioned. Ordinary repairs and the cost of keeping the property in good condition and good working order shall be considered as ordinary charges not entitled to rank as additions to the value of plant or property.
- (d) Foreign and inland telegrams and postages.
- (e) Freight, primage, and charges on receiving, warehousing, shipping and otherwise dealing with goods and produce.
- (f) Customs, dock, and town dues, and other port charges, carriages, cartage, and other like charges.
- (g) Fire and marine insurance.
- (h) Remuneration of African Agents and other employees, and of brokers and others.
- (i) All other expenditure in respect of the Employer's business in the Opobo River.
- (j) Bank commission $\frac{1}{2}$ per cent.

- (k) Payments and liabilities under any agreement for common benefit from time to time in force between the employees and any other companies or persons in the trade.

As to any of the above charges which from their nature are apportionable, the apportionment of the Directors, or of any person appointed by them, shall be binding and conclusive upon both parties.

10. It is expressly understood that the Agent shall have no right to any examination of the Employer's books or accounts, and a certificate in writing, signed by the Accountant aforesaid, and certifying the amount to which the Agent shall be finally entitled under this Agreement, shall be conclusive and binding upon both the parties to this Agreement, and the amount specified in such certificate shall be payable in one month from the date thereof, except in the contingencies hereinbefore and hereinafter provided.

11. Nothing herein contained shall be held or deemed to amount to an agreement for partnership between the parties hereto, it being the sole and true intent of the said parties to create between them the relation of master and servant only and not that of partner, and this Agreement, and every clause, matter and thing herein contained shall be read and construed accordingly.

12. If the said Agent shall make default in any of the agreements on his part herein contained, or if he shall give himself out or assume to act as a principal in the business as aforesaid, or do any act in any way inconsistent with his position as Agent and servant, the said Employers may thereafter summarily dismiss the said Agent and all current salary and remuneration shall be considered as forfeited by him.

13. The said Agent shall not within two years after the termination of his employment hereunder, directly or indirectly on his own behalf or on behalf of any person or persons other than the said Employers, trade or carry on business within a radius of thirty miles from the factory of the Employers where he has been last employed by them, nor act in any capacity with or under any person or persons so trading within such radius, nor in any way knowingly assist such person or persons without the assent of the said Employers in writing and the said Agent hereby agrees that upon each and every breach of this Clause he shall pay the said Employers the sum of £100 by way of liquidated damages and not by way of penalty, but any such payment shall not prejudice the right of the said Employers to restrain a continuance of such breach.

14. If any dispute shall arise between the parties hereto, in any manner arising out of this contract or the performance or

alleged non-performance thereof or otherwise out of the employment of the Agent, such dispute shall be referred to the arbitration of two commercial men carrying on business in Liverpool, one to be appointed by each of the parties, and a third (of like qualification) to be appointed by the two so appointed. The decision of any two of such arbitrators to be binding.

AS WITNESS the African Association, Limited, by the hands of two Directors thereof duly authorised in that behalf and the hand of the said Agent the day and year aforesaid.

WITNESS to the signature }
of the said African Associa- }
tion Limited by two }
Directors thereof }

AFRICAN ASSOCIATION, LIMITED.

Directors }
Secretary }

WITNESS to the Signature of }
the said James Arthur Pickles. }

LETTER FROM THE COMPANY TO H.M. INSPECTOR OF TAXES.

REF. :—Accountant's Dept.

African and Eastern Trade
Corporation, Limited,
formerly
African Association, Limited,
Royal Liver Buildings,
Liverpool,
June 6th, 1921.

H.M. Inspector of Taxes,
Cunard Buildings,
Water Street,
Liverpool.

Dear Sir,

Mr. J. A. PICKLES.

In reply to your telephone enquiry on Friday, we give below particulars of the salary and commission earned by Mr. Pickles during the three years ending 31st December, 1916, 1917, and 1918. This is the period that would correspond with the Income Tax years 1916-17, 1917-1918 and 1918-1919. The Company's Accounts, of course, are made up to the 31st December in every year, so that it is not possible to apportion these sums over exact years ending 5th April in any case. The amounts are :—

			<i>Salary.</i>			<i>Commission.</i>		
			£	s.	d.	£	s.	d.
1916	...	...	255	0	0	2,588	13	0
1917	...	...	263	15	0	1,281	11	3
1918	...	...	446	16	1	1,899	4	9
			<hr/>			<hr/>		
			£965	11	1	£5,769	9	0
			<hr/>			<hr/>		

Yours truly,
 AFRICAN AND EASTERN TRADE CORPORATION, LIMITED,
 (Sd.) G. W. WEBSTER,
Accountant.

The case came before Mr. Justice Rowlatt on the 30th April, 1923, when judgment was given in favour of Mr. Pickles, with costs.

Mr. A. M. Latter, K.C., and Mr. G. Blanco White appeared as Counsel for Mr. Pickles, and the Solicitor-General (Sir Thomas Inskip, K.C., M.P.) and Mr. R. P. Hills for the Crown.

JUDGMENT.

Rowlatt, J.—In this case the first point is whether Mr. Pickles was resident in the United Kingdom. If he was not, it is clear he cannot be assessed. Now the Special Commissioners on appeal have found that he was resident, and I have to say whether that can be displaced.

Now it has been often pointed out, and as soon as pointed out it has been, perhaps, forgotten, that the word "residence" must only be used as signifying an attribute of the person, and one must not confuse oneself by allowing oneself to think of "residence" in the sense of a house or place of residence. Now where a man resides is a question of fact, of course, to be determined in view of proper legal principles. I have to ask myself in this case whether I can displace the finding of the Special Commissioners.

In this case the facts are simply that this gentleman has a whole-time agreement with a company carrying on business on the West Coast of Africa, where he is bound to be—and the agreement lasts for years, as opposed to months—where he has to be for the whole time, where they have to find him a lodging accommodation (I do not want to use the word "residence") and certain expenses; and, of course, he gets home every now and then for a holiday, which is necessary from a climate of that sort. He has a wife and children, and for them he keeps a house in Blackpool, and he described himself as of that address when he signed one of these agreements. That is the position.

There have been a number of cases on the point. In the first place it has been held⁽¹⁾, and held upon obvious grounds of sense, that a sailor resides at the port where his wife and children live, and he resides there although his occupation upon the sea might keep him from coming home for more than a year; that is the residence of the sailor. It has been held⁽²⁾ that where a foreign professional man has a shooting lodge in this country, to which he comes for two months every year, although his home is in his own land where he makes his income, still he resides also in this country, because he has a place here, kept continuously for him, which he can always come to. So it was held in the case of the Italian merchant⁽³⁾ who was in a very similar position, where he had an estate in Scotland which he came to for a certain time every year, although for most of the time he lived and carried on his business in Italy. There was a case more like this, the last case, which the Commissioners have followed and said they thought they were bound by, of *Thomson v. Bensted*⁽⁴⁾, which was a stronger case from the Revenue point of view than this, because, although the man there had a house very much like this in this country, his employment abroad was not so exigent; he made separate contracts for short periods for employment, and in between he had nothing to do with things abroad; he simply was living in England at his house. That is, I believe, a stronger case than this. On the other hand there was the case of the Madras merchant⁽⁵⁾ whose wife had a house in Edinburgh, but during all the year of assessment, he had taken her and his eldest daughter, and they had gone away to live in Madras, and it was held he was not resident by reason of his wife having a house in Edinburgh.

Those are roughly the cases, but it seems to me that it is very essentially a question of fact when you get on the border line. I can understand a man who is abroad and who has, in a real sense, a residence at home, like the sailor who is not resident anywhere else, and, a step further, a man who is not on the sea, but a man who is, we will say, travelling to represent somebody, all the time, in Africa, one might say it is perfectly obvious that he was resident in England if he had a wife and family established and resident in England. It is not very far beyond that where you get a man who is in a better service, and has not to travel and camp out, but is at the establishment of his company in Africa. It seems to me that a good deal depends upon rather minute colouring in a case like this, as to which the Commissioners are proper judges, and can make the proper inferences. A man, I suppose, may keep a house for his wife and come there merely as a visitor; he may keep a house for his mother, and, when he can get away, always go

(1) *In re Young*, 1 T.C. 57, and *Rogers v. Inland Revenue*, 1 T.C. 225.

(2) *Cooper v. Cadwalader*, 5 T.C. 101. (3) *Lloyd v. Sulley*, 2 T.C. 37.

(4) 7 T.C. 137.

(5) *Turnbull v. Foster*, 6 T.C. 206.

there to see her; but it may be that it is his mother's house, even if he is paying for it, and he is going there as a visitor. He keeps the house for his wife and children; it may be that he is going there as going home; it may be that that is the centre really of his life, that he keeps many belongings there, and so on, and his time in Africa is really, in truth, a period of enforced absence from what is truly his residence. Now it may be one, or it may be the other. The Commissioners in this case, I think, were entitled to take the view—I do not say more—that this gentleman was resident in Blackpool.

Now that brings me to the second, and rather curious, point. This gentleman has been assessed as in respect of the income from a foreign possession under Case V, and Mr. Latter says that that is wrong. To that the first answer is: "But that is not the point that was taken"; and I am bound to say it does not seem to have been the point that was put in the forefront, but some little stress appears to have been put upon it, because it is quite clear, as was insisted upon, that the Commissioners stated on the face of their Case that it was Case V and the Solicitor to the Inland Revenue, curiously enough, struck it out; but it was reinstated, and the attention of the Commissioners, and the Solicitors on the other side, of course, was drawn to the fact that, if the Case was wrong, the charge was wrong; and then the Case is stated in fact, but no contentions are put very clearly upon it, and the points for argument do not certainly elaborate it, although they possibly leave it open. I think I must deal with the point as before me, and I am bound to say I think the assessment, on that ground, is plainly bad. It was argued by the Solicitor-General that this gentleman's (I can hardly state it) agreement, or his occupation, was a foreign possession. One has been familiar for many years with *Colquhoun v. Brooks*⁽¹⁾, and the statement there that "possession" is the widest possible word, and Lord Herschell said that an interest in a business might be called a possession, and Lord Macnaghten said that any interest that a man had might be called a possession; but here there is no interest in question, and he has not got anything. He really has not anything, if you use it as a word of possession. There is nothing he can sell; there is nothing he can leave; there is nothing which exists. He is *de facto* employed under a contract; he has a contractual right to keep on being employed, and I, for my part, cannot see how it is possible to say that he has got a possession; but if he has got a possession it is not a foreign one, because the only thing that is foreign is the place where his duties have to be performed. His rights are not foreign; they are as much British as anything else, if they have any locus, because it is a contract with a British company. As it seems to me, it was quite wrong to put him under Class V.

(1) 2 T.C. 490.

Now whether or not he can be charged under Case II I do not think I am called upon to say; but I observe that in the case of *Thomson v. Bensted*⁽¹⁾ the assessment was made either under Case II or under Case VI alternatively, and yet the amount that was charged upon him was only the amount that he would be charged under Case V. I am bound to say this reveals a very curious state of affairs. If it is going to be contended in these cases that a man is resident, and it is held that he is resident, then he must be taxed in full. If he is taxable under Case II it is not open to anybody to say that he is to be taxed as if it was Case V when it is not Case V. It is not right to the other taxpayers; it is a breach of duty on the part of the Commissioners who do it, and it is misleading to other people, who may establish holiday homes, or something like that in England, and then when they have come here, being persons of substance abroad, they suddenly find that the half of their income is taken if the Revenue choose to turn round and take a proper view. So really it is a matter of some seriousness affecting a very great number of people.

I am asked to send this case back, but I do not think I can. I would if I could, but I cannot; the time has lapsed. I do not think I possibly can, because if the case has to go back, if the assessment has to be put right, it may be, if he can be assessed under the other Cases, then it is a different measure, as I have already pointed out. I cannot assess him on the figures; the Special Commissioners, as I understand it, cannot possibly assess him on the figures. He has a right, which nobody can take from him, if he is going to be assessed in a different measure, to be assessed by the Commissioners at his place of residence. I think I am wholly without jurisdiction to put the matter right *nunc pro tunc*; therefore the only result is that the appeal must be allowed with costs.

I suppose, Mr. Latter, he will take his wife and family somewhere else?

Mr. Latter.—Yes, my Lord; I am told the Isle of Man is very handy to Blackpool.

Notice of appeal having been given on behalf of the Crown, the case came on for hearing before the Court of Appeal (Pollock, *M.R.*, Warrington, *L.J.*, and Astbury, *J.*) on the 20th and 21st November, 1923.

The Solicitor-General (Sir Thomas Inskip, *K.C.*, *M.P.*) and Mr. R. P. Hills appeared as Counsel for the Crown, and Mr. A. M. Latter, *K.C.*, and Mr. G. Blanco White for Mr. Pickles.

Judgment was delivered on the latter day unanimously in favour of Mr. Pickles, with costs, confirming the decision of the Court below.

⁽¹⁾ 7 T.C. 137.

JUDGMENT.

Pollock, M.R.—We need not trouble you, Mr. Latter.

This is an appeal from a decision of Mr. Justice Rowlatt given on the 30th April of this year upon a Special Case stated under the Income Tax Act, 1918, Section 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice. Mr. Justice Rowlatt heard the case and gave a decision which was adverse to the Inland Revenue and from that decision the Inland Revenue now appeal.

Now it seems to me that the point that we have got to decide is an extremely narrow one arising upon the decision which was given by Mr. Justice Rowlatt. We have to determine whether his decision on this particular point was right or wrong, and we have come to the conclusion that, in our judgment, Mr. Justice Rowlatt was right.

I will say very little about the facts because they are quite sufficiently set out in the Case, but the question that comes before us for decision arises in this way. Mr. Pickles, the Appellant before the Commissioners and before Mr. Justice Rowlatt, was employed by, or I will say had a contract with, the African Association, Limited, of Liverpool, whereby under the terms of that agreement he was to serve the Association in the Colony of Nigeria in the employ of the Company for the period stated in the agreement, and in return for that he was to receive under clause 6 a salary. His employment is not limited, as I understand it, to employment in which he would be engaged while he is out of the United Kingdom, but he is employed for the purposes stated in the agreement, and, under clause 6 of the agreement, the Association are to pay Mr. Pickles a salary at the rate of £500 per annum during the time he is in Africa and voyaging, and will also pay for his board and other recognised expenses. Then, further, the Company will also pay salary during the time he is at home at the rate of £750 per annum. So that, as one may well understand, although his chief duties are to be given to the Company in their service while he is in the Colony of Nigeria, he is not unemployed when he comes over here because no doubt he would have to clear up business with his employers and during such time as he is kept over here for purposes legitimate and in accordance with the agreement he is to receive a different salary, a higher salary because he is not given his board and recognised expenses which he receives while he is absent from the United Kingdom. He is also to receive commission on business done. Mr. Pickles, therefore, was employed by the Company and enjoyed with them certain contractual rights. Whatever duties the Association called upon

him to fulfil were defined by the contract he had entered into with them; whatever rights Mr. Pickles had as against the Association were defined by the contract which they had entered into with him and the position that Mr. Pickles held was one defined by the contract the terms of which I have in part referred to.

Now the assessment that was made upon Mr. Pickles was made under Schedule D and under Case V, that is to say, he received a notice of assessment asking him to pay tax in respect of income arising from possessions out of the United Kingdom. Before Mr. Justice Rowlatt two points were argued. The first was whether or not Mr. Pickles was resident in the United Kingdom so as to be liable to Income Tax, and it was held by Mr. Justice Rowlatt that he was resident in Blackpool, and so was properly the subject for assessment to Income Tax. Upon that point, it having been decided in favour of the Crown, there is no appeal. Mr. Justice Rowlatt had then a second point to consider. The second point arose because in the Case Stated the Commissioners defined the point of law for the decision of the Court as being "whether the Appellant has been correctly assessed in respect of the amounts received in or remitted to the United Kingdom out of the earnings arising from his employment in West Africa."

Now anyone with some experience of the workings of the Income Tax Acts, when they find that the point of law relates only to sums received in or remitted to the United Kingdom arising from an employment outside the United Kingdom, would, I think, have their attention drawn to Case V under Schedule D because it is in respect of a liability under that Case, the liability to Income Tax being limited to the sums received over here. The second Rule applicable to Case V is as follows: "The tax in respect of income arising from possessions out of the United Kingdom, other than stocks, shares or rents, shall be computed on the full amount of the actual sums annually received in the United Kingdom from remittances payable in the United Kingdom, or from property imported, or from money or value arising from property not imported," and so on, that is to say, on the basis of the money which is received in the United Kingdom arising from the source (I may use that broad expression) abroad. Mr. Justice Rowlatt allowed full argument before him as to whether or not Mr. Pickles had been properly assessed under Case V because he was satisfied, not without some doubt, that the matter had been sufficiently raised. That was the point which was argued before him and he has given his decision upon it. Mr. Justice Rowlatt having allowed, and I think, rightly allowed, that the point had been taken and was properly argued before him, and having given his decision upon it, we have to deal with that point, for it is upon that point, and really that point only, that the appeal is brought to this Court.

Mr. Justice Rowlatt held that Case V was not applicable to the circumstances which it was contended on behalf of the Inland Revenue made Mr. Pickles liable for the tax which they sought to collect from him, and I put it in that general way for a reason which I will state in a moment. Mr. Justice Rowlatt held that the assessment so made was plainly bad, and he determined that the interest that Mr. Pickles held under the contract which I have referred to, the contract which is dated 6th May, 1919, did not bring Mr. Pickles within Case V under Schedule D. That Case makes the subject liable to pay a tax in respect of income arising from possessions out of the United Kingdom. Mr. Justice Rowlatt held that it was not possible to say that what Mr. Pickles had got was a "possession"; he had got a contract but it was not within the meaning of the words "possessions out of the United Kingdom." I agree with Mr. Justice Rowlatt. It has been strenuously argued by Mr. Hills for the Inland Revenue that the word "possessions" really covers any kind of property including whatever it may be that Mr. Pickles holds under the agreement, and, in support of that argument, he relies upon the well-known case of *Colquhoun v. Brooks* in the House of Lords (2 T.C. 490), and he says that both Lord Herschell and Lord Macnaghten in their speeches treat the word "possessions" as being the widest and most embracing term and that to cut it down so as to exclude employment which is a source of income is to go contrary to the reasoning, if not decision, of that particular case. Having read the speeches of the two Noble Lords, as I have done, very carefully, I am satisfied that, although, as Lord Macnaghten says, the word "possession" is to be taken in the widest sense possible as denoting everything that a person has as a source of income, he has in his mind some form of what could be broadly called "property" as a source of income, property not only in the sense of physical possessions, but something which would include business, trade, and so on, in which capital is employed, but I do not think he intended to include in that a mere contract. There are fundamental differences between contractual rights and rights which arise out of property. Constant illustrations are arising of that and a distinction is drawn to which I will only refer as illustrating what I have in my mind; for instance, the difference between the circumstances which appertain to a man who owns a ship and a man who is merely the charterer of the ship—well-defined results arise from the difference between ownership and the contractual rights of a charterer. It seems to me that it would be twisting the words of Lord Herschell and Lord Macnaghten into a sense which they never intended if you were to say that a man who has a contract under which he is to render services, has then a "possession" because under the contract in proper circumstances he is to be paid a certain salary.

Now Mr. Justice Rowlatt took the same view of *Colquhoun v. Brooks*. He pointed out that Mr. Pickles is *de facto*

employed under a contract, but he took the same view that I do, that although the contract is a source of income, it is not a "possession."

I will add one or two words about Schedule D itself. Schedule D as it now stands in the Act of 1918 is divided first of all into two limbs. It deals with the profits or gains arising from any kind of property whatever, wherever situate, in the United Kingdom or elsewhere, and profits or gains arising or accruing to any person residing in the United Kingdom from any trade, profession, employment or vocation. It is to be remarked that these two limbs are specifically divided: you have on the one side property and on the other side you have trade, profession, employment or vocation, and when you come to the Cases or rules which are more specific and under which you are to deal with the taxation of persons who fall under either the one limb or the other, you find the same distinction connoted. You find Case I or Case II deals with trade, profession, employment or vocation, while Case IV and Case V deal with what is more commonly called property, namely securities out of the United Kingdom and taxing special income arising from possessions out of the United Kingdom, and I think you may say that under Schedule D there is, if not a very clear line drawn, certainly a demarcation intended to be indicated between cases which fall within the words "property of any kind whatever" and cases which fall within the words "any trade, profession, employment or vocation."

For the reasons which I have given, I do not think that *Colquhoun v. Brooks*⁽¹⁾ applies to this case. I do not think that Case V is the right Case to apply to the circumstances which attach to Mr. Pickles' position under the contract—that in effect there is an antithesis between matters which fall under Case II of Schedule D and matters which fall under Case V. If that be so, it seems to me that, having regard to the nature of the contract, Mr. Pickles has had invoked against him the wrong Case for the purpose of making him liable to pay tax in respect of the amounts received in or remitted to the United Kingdom out of the earnings arising from his employment in West Africa. That is the real point on which the appeal is taken before us from Mr. Justice Rowlatt, and that is the sole point which Mr. Justice Rowlatt decided against the Inland Revenue. I say sole point for this reason. It has been pointed out to us by Mr. Hills that there is a power under Section 149 of the Act of 1918 to send the case back to the Commissioners with an indication that the assessment may be right although it may have been imposed or started under the wrong Case, but, as I have pointed out, the assessment which is made is one which seems to indicate that Case V was the Case which was invoked and to deal only

(¹) 2 T.C. 490.

with profits which would be within that Case, that is to say, profits received in this country. I think it would be very unfortunate if this decision were taken to be of anything like a wide-reaching nature. We are dealing specifically with the point decided by Mr. Justice Rowlatt, the point which he held to be argued before him and the point which alone arises for our decision. What the liability of Mr. Pickles may be when there is a fresh assessment, if a fresh assessment can be made, I do not know. Certainly, for my part, I am not going to suggest or to indicate that there is either an enlarging or a narrowing of the liability to which Mr. Pickles is subject. When the matter has been considered and dealt with, it may be that he may be liable to assessment for quite a different quantum of profits or gains received. I do not know. I express no opinion. All that I do say is that I think Case V does not embrace this case, that the reasoning of Mr. Justice Rowlatt was quite sound, that I agree with it, and therefore this appeal must be dismissed and dismissed with costs.

Warrington, L.J.—I am of the same opinion. Besides the particular question of law which we have to decide, there arose incidentally, in fact at the fresh opening of the case, the question whether the Respondent, Mr. Pickles, was liable to be taxed to Income Tax at all, inasmuch as it was contended he was not resident in the United Kingdom. That question was decided by Mr. Justice Rowlatt in favour of the present Appellants, the Inland Revenue, and against the contention of the Respondent. In the view we take of the point of law to which I shall refer directly, it is unnecessary to deal with that question as to the residence of the Respondent, and accordingly I assume, without any expression of my own opinion as we have not heard Mr. Latter, that the Respondent was resident in the United Kingdom.

Now starting from that, I proceed to consider whether the decision of Mr. Justice Rowlatt, which in effect discharged the assessment which had been made upon the Respondent, was correct. I take the statement in the Special Case as describing what the assessment was and on what the Respondent was charged. The statement is this, in paragraph 2: "The assessment was made under Schedule D of the Income Tax Act, 1918, in respect of the Appellant's possessions out of the United Kingdom, viz., his earnings from his employment in West Africa under the agreement hereinafter referred to." I will just read that part of Schedule D which is material. Schedule D provides in the second paragraph of Sub-section (a) of Section 1, that "tax shall be charged in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any trade, profession, employment, or vocation, whether the same be respectively carried on in the United Kingdom or elsewhere"; and then as we know, that general statement of what the tax is to be charged upon is

governed by certain rules and, amongst others, by what is called Case V and the Rules made in respect of it. Case V is this: "Tax in respect of income arising from possessions out of the United Kingdom."

Now the Commissioners have deliberately chosen to assess the Respondent here in respect of income arising from possessions out of the United Kingdom, and they have done so in reliance upon the decision in the case of *Colquhoun v. Brooks* (2 T.C. 490) which, while expressing the opinion of the House of Lords that a person carrying on business abroad was on the true construction of the Act not liable to be assessed to Income Tax on the whole of his profits, arrived at the conclusion that he was liable to be assessed on so much of his profits as were remitted to this country but on the ground that those profits arose from a possession out of the United Kingdom. The Commissioners, therefore, have deliberately adopted the view that Mr. Pickles is not liable to be assessed on the whole of the remuneration or profits or gains, to use the statutory words, derived from his employment, but he is only liable on so much thereof as is remitted to this country, and they have, therefore, chosen deliberately to assess him as on income arising from a possession out of the United Kingdom. The question submitted to the Court by the Commissioners is thus stated: "The point of law for the decision of the Court is whether the Appellant has been correctly assessed in respect of the amounts received in or remitted to the United Kingdom out of the earnings arising from his employment in West Africa." That only states in other words that the question which we have to determine is whether the Commissioners were right or wrong in point of law in treating him as assessable in respect of income arising from a possession out of the United Kingdom because it is only if he is so assessable that the tax would be limited to that part of his earnings which is remitted from abroad. Is that view of the Commissioners the right one, namely, that he is deriving income from a possession abroad? The nature of his employment is quite sufficiently stated in paragraph 4 of the Special Case stated by the Special Commissioners:—"The Appellant agreed to serve the Company for a period of two years in West Africa as District Supervising Agent. He was to spend nine months of each year in the execution of his duties in Africa, and the remaining six months interval between the two periods of nine months was to represent time occupied in voyaging from and to Africa and on furlough. The Company was to pay the Appellant a salary of £500 per annum while in Africa and voyaging, and also for his board and other necessary expenses. While at home the Company was to pay him salary at the rate of £750 per annum. The Company also agreed to pay the Appellant a commission on the net profits realised on certain of their factories, the minimum commission

“ being £500. Payment of the commission was to be made to the Appellant through the Company's Offices in Liverpool only.”

It appears, therefore, that the Respondent's right to salary, commission and so forth and his obligations to his employers all arose under an English contract made with an English company, and the only foreign element in the matter is found in the fact that the main part of his duties is to be performed abroad.

In my opinion the rights and duties of the Respondent under this contract cannot by the widest stretch of language be described as a “ possession out of the United Kingdom.” Mr. Justice Rowlatt has gone further and has expressed the opinion that his rights under this contract are not even a “ possession ” at all even in the wide sense attributed to that word by the learned Lords who dealt with the case of *Colquhoun v. Brooks*.⁽¹⁾ It is unnecessary to express any concluded opinion upon this point, though in saying so, I must not be supposed to express dissent from the view taken by Mr. Justice Rowlatt; but having regard to what I have said and the necessity of the Crown's establishing that this is a possession abroad, it is unnecessary to say whether it is a possession in a more abstract sense. I think, therefore, that the decision of Mr. Justice Rowlatt was right, and that the appeal ought to be dismissed.

But then it is said that we ought not to simply dismiss the appeal, but that we ought to remit the case to the Commissioners in order that they may amend the assessment and charge the Respondent, Mr. Pickles, in some other way and under some other of the Cases under Schedule D. No doubt we have power to do that—I will assume under the provisions of Section 149 that we have power to take that course—but, in my opinion, this is not a case in which we ought to do that. Here the Commissioners have deliberately assumed, and acted on the assumption, that this Respondent can be assessed and assessed only under Case V and the Rules under Case V which would confine the assessment to being made on the amount of the earnings remitted to this country. That being, as we hold it to be, an incorrect view, a very serious question arises whether, on the true construction of the judgments in *Colquhoun v. Brooks*⁽¹⁾, this gentleman can be assessed at all. It is not merely a question of whether in some minor point of detail the Commissioners have made a mistake; it may be that the result of the judgments in *Colquhoun v. Brooks* is that unless in such a case the taxpayer or the alleged taxpayer can be charged on the income remitted to this country from a possession abroad, he cannot be charged at all. In fact the question raises the very case which Lord Herschell hinted at in a passage in his speech on page 502 of the report of *Colquhoun v. Brooks* in 2 Tax Cases. It is a passage

⁽¹⁾ 2 T.C. 490.

I referred Mr. Hills to in the course of his argument. It is this: "If the result of rejecting the argument presented on behalf of the Crown were to land your Lordships in the conclusion that profits arising from a business carried on abroad, even though received here, were not subject to the tax, it would present a formidable obstacle to yielding to the argument of the respondent though I am not sure that the difficulties you would have to encounter in refusing your assent to it"—that is the argument of the respondent, the taxpayer,—"would not even then be greater." It seems to me, therefore, that there is here a very serious question, not merely a mere minor question of detail.

Under these circumstances, it seems to me that the proper course for this Court to take is simply to dismiss the appeal, the effect of which will be to discharge the existing assessment, and if the Crown are advised to proceed to attempt to charge Mr. Pickles under some other part of the Act, they had better begin afresh.

Astbury, J.—I entirely agree.

The Crown having appealed against the decision in the Court of Appeal, the case was heard in the House of Lords before Viscount Cave (Lord Chancellor) and Lords Dunedin, Atkinson, Sumner and Buckmaster on the 20th, 22nd and 23rd January, 1925, when judgment was reserved.

The Attorney-General (Sir Douglas Hogg, K.C., M.P.), the Solicitor-General (Sir Thomas Inskip, K.C., M.P.) and Mr. R. P. Hills appeared as Counsel for the Crown, and Mr. A. M. Latter, K.C., and Mr. G. Blanco White for Mr. Pickles.

On the 19th February, 1925, judgment was delivered unanimously in favour of Mr. Pickles, with costs, confirming the decision of the Court below.

JUDGMENT.

Cave, L.C.—My Lords, the question to be determined on this appeal is whether the Respondent (Mr. Pickles) was correctly assessed to Income Tax in respect of the earnings received from his employment in the financial year 1919 20.

During the period of assessment the Respondent was employed by the African Association, Limited (an English Company), as a district supervising agent in the Colony of Nigeria on the terms contained in two agreements, of which the more important was dated the 6th May, 1919. Under this agreement he was to serve the Company for a period of two years, and was to spend nine months of each year in the execution of his duties in Africa, and the remaining six months interval between the two periods

of nine months was to represent time occupied in voyaging to and from Africa and on furlough. The Company was to pay the Respondent a salary of £500 per annum while in Africa and voyaging, and was also to pay for his board and other recognised expenses. While at home the Company was to pay him salary at the rate of £750 per annum upon the fulfilment by him of his obligations. The Company also agreed to pay to the Respondent a commission on the net profits realised on certain of their factories, the minimum commission being £500. It was provided by the agreement that the Respondent should not draw or claim payment in the Colony in respect of commission earned by him, but payment in respect thereof was only to be made to him through the office of the Company in Liverpool.

Throughout the year of assessment, the Respondent rented a house at Blackpool, in Lancashire, and was rated as the occupier of the house. His wife and family resided there, but he was not himself in the United Kingdom except for a few days towards the end of the year. The whole of his salary and commission was paid by the Company into a banking account in England on which his wife had power to draw.

On these facts the General Commissioners assessed the Respondent to Income Tax in respect of his possessions out of the United Kingdom, namely, his earnings from his employment in West Africa. The notice of assessment is not forthcoming, but on the hearing of an appeal to the Special Commissioners it was stated by the representative of the Crown that the tax was charged under Case V of Schedule D. The Special Commissioners held that the Respondent was a person residing in the United Kingdom during the year of assessment, and confirmed the assessment, increasing the amount, subject to a Case Stated for the opinion of the High Court. On the argument of the Case Stated, Mr. Justice Rowlatt discharged the assessment on the ground that the Respondent had no possession out of the United Kingdom in respect of which he could be assessed to tax under Case V, and declined to send the matter back to the Commissioners in order that they might make an assessment under Case II. On an appeal to the Court of Appeal, that Court confirmed the Order of Mr. Justice Rowlatt, and the Revenue authorities have now appealed to this House.

My Lords, the greater part of the arguments on behalf of the Crown was directed to establishing the proposition that an employment could be a "possession" within the meaning of Case V of Schedule D to the Income Tax Act, 1918; and for myself I assent to that proposition. It was decided by this House in *Colquhoun v. Brooks*⁽¹⁾, (1889) 14 A.C. 493, that a trade carried on wholly in Australia was such a possession, and accordingly that a person resident in the United Kingdom was assessable to tax in respect of so much of his share of the profits

(¹) 2 T C. 490.

of that trade as had been remitted to this country; and it appears to me that the reasoning which led the learned Lords who heard that case to their decision applies not only to a trade but to each of the other sources of income which in paragraph 1 (a) of Schedule D are coupled with trades, that is to say, to a profession, employment or vocation. In the case cited, Lord Macnaghten stated his conclusion as follows⁽¹⁾:—"The word 'possessions' is not a technical word. It seems to me that it 'is the widest and most comprehensive word that could be used. 'Why, for instance, should not 'possessions in Ireland' mean 'everything, every source of income that the person chargeable has in Ireland, whatever it may be? Why should not 'profits from possessions out of Great Britain,' which is to be found in Schedule G, No. XI, and recalls the expression 'income out of Great Britain' in the Act of 1799, mean profits from every source of income abroad? I use the expression 'source of income' because it is as a source of income that the Act contemplates and deals with property and everything else that a person chargeable under the Act may have, and the Act itself, in Section 52, uses the expressions 'sources chargeable under the Act' and 'all the sources contained in the said several schedules' as describing everything in respect of which the tax is imposed." This conclusion appears to me to apply to an employment out of the United Kingdom which (like a trade) is a source of income, and I do not doubt that (to take two simple instances) a doctor residing in England and practising in France only, or a mining engineer having a residence here and wholly employed by a Spanish mining company in Spain, might be held to have a foreign possession and to be assessable under Case V.

But, assuming this to be so, it does not follow that the Appellant is entitled to succeed in his appeal. For that purpose it is necessary for him to show that the Respondent's employment was wholly out of the United Kingdom, and that (to use Lord Macnaghten's expression) the whole source of his income was overseas; and this, in my opinion, he has not shown. I will assume—although I feel some doubt on the point—that the Respondent's services to the Company were to be rendered in West Africa only, and that he had no duties to his employers while he was in England; but it remains true that the commission, which was the principal remuneration for his services, was, under the terms of his employment, payable in England only, and that he was precluded by the express terms of his agreement from drawing or claiming payment of that commission in the Colony. In other words, while the burdens incidental to his employment were to be borne wholly or mainly abroad, the principal benefit which he was to derive from it could only be claimed in the United Kingdom. In these circumstances I do

(1) 2 T.C. at p. 508.

not think it can be said that his source of income was wholly outside this country, so as to bring him within Case V.

There is a further difficulty which stands in the Appellant's way, namely, that the whole of the Respondent's remuneration was in fact paid to him here and not in Nigeria. The second of the Rules applicable to Case V is as follows:—" 2. The tax " in respect of income arising from possessions out of the United " Kingdom, other than stocks, shares or rents, shall be computed " on the full amount of the actual sums annually received in the " United Kingdom from remittances payable in the United " Kingdom, or from property imported, or from money or value " arising from property not imported, or from money or value so " received on credit or on account in respect of any such " remittances, property, money, or value brought or to be " brought into the United Kingdom, on an average of the three " preceding years as directed in Case I, without any deduction " or abatement other than is therein allowed." From this Rule it follows that, in order to be taxable under Case V, an income arising from possessions out of the United Kingdom must be received in the United Kingdom either (a) from remittances payable in the United Kingdom, or (b) from property imported into the United Kingdom, or (c) from money or value arising from property not imported, or (d) from money or value received on credit or on account of remittances, property, money, or value brought or to be brought into the United Kingdom. The word " remittances " (which recalls the expression " remittances " from thence " in the corresponding Rule contained in the Act of 1842) clearly refers to money remitted into the United Kingdom from outside. The other branches of the Rule all refer to property, money or value imported or brought into the United Kingdom, and there are no words in the Rule which can comprise money arising and payable here. If so, the inference is that money so arising and payable is outside the Rule, and so is not taxable under Case V at all.

In my opinion, therefore, the appeal fails on the main point.

Your Lordships were asked, in the event of your holding that the Respondent was not taxable under Case V, to send the matter back to the Special Commissioners with a view to their now assessing the Respondent in respect of the same income under Case II of Schedule D. My Lords, I am far from saying that the Respondent could not have been assessed under that Case, or that the Court has no jurisdiction when Commissioners have proceeded under the wrong Case to remit the matter to them under Section 149 (2) of the Income Tax Act, 1918, with a view to their making a proper assessment; but I do not think that such a course should be taken in the present instance. The Revenue authorities have chosen deliberately to assess the Respondent under Case V, as on income arising from a possession out of the United Kingdom, and have persisted in that course notwithstanding the Respondent's objections. The time for

assessing him under Case II has now expired, and I do not think that it would be right now to require the Commissioners to make an assessment under that Case. In my opinion this appeal should be dismissed with costs.

Lord Dunedin.—My Lords, however much it may have been open, either in the original assessment or before the Commissioners, to rest the liability on alternative Cases under Schedule D, it is distinctly stated in this Case that the present demand was based on Case V alone. It is not therefore, I think, possible for your Lordships to consider whether upon the facts as set forth an assessment might not be based on some other Case.

The question for decision is accordingly whether the sum of £2,245, received by the Respondent in respect of his salary and commission is, to quote the wording of paragraph 2 of Schedule D of the Income Tax Act, liable to be charged with a tax in respect of income arising from possessions out of the United Kingdom.

Two propositions are here involved; this income must be income from a possession, and the possession must be out of the United Kingdom.

My Lords, I think it is not doubtful that in the ordinary use of language one would not be apt to describe a man who gets a salary and commission on sales as enjoying a possession. But I think none the less that the case of *Colquhoun v. Brooks*⁽¹⁾ has settled the matter. No doubt what was then being considered was a business or trade. But the Schedule itself groups employment along with trade; and the arguments which prevailed in *Colquhoun's* case to determine that the business was a possession are equally applicable to an employment.

Upon this point, therefore, I prefer the view of Lord Justice Warrington to that expressed by the other learned Judges of the Court of Appeal. When, however, I come to the second proposition I find myself unable to affirm that this is income arising from a possession out of the United Kingdom. This income comes from the contract of employment made in the United Kingdom. When I say "made in the United Kingdom," I am not referring to the place where the signing of the contract took place. I am referring to the source of the profit, which is the payment which the employers covenanted to make. This was payable and paid in Liverpool.

I am fortified in this view by a consideration of the terms of Rule 2 of the Fifth Case, which is the rule which would apply if this were a possession out of the United Kingdom. The tax is to be computed "on the full amount of the actual sums annually received in the United Kingdom from remittances payable in the United Kingdom, or from money or value arising from property not imported, or from money or value so received on credit or on account in respect of any such remittances,

(1) 2 T.C. 490.

“ property, money, or value brought or to be brought into the “ United Kingdom on an average of three years,” &c. It will be seen at once how entirely inappropriate all these expressions are to the case of Respondent's salary and commission paid as aforesaid. I am therefore of opinion that on the sole question stated and argued as to the Respondent's liability the Crown fail.

As to the application to remit the Case in order that the assessment may be altered to an assessment founded on some other Case I have nothing to add to what has been said by the Lord Chancellor.

Lord Atkinson.—My Lords, I concur in the judgment which has just been delivered by my noble and learned friend Lord Dunedin.

Lord Sumner.—My Lords, I have had the advantage of reading and considering the judgment delivered by the Lord Chancellor. I quite agree with it.

Lord Buckmaster.—My Lords, Mr. James Arthur Pickles, the Respondent in this Case has been found to be a person residing in the United Kingdom. He was engaged by the African Association, Limited, to serve them in West Africa as district supervising agent at a salary of £500 and commission, and by the terms of his employment it was provided that he should not draw nor claim payment in the Colony in respect of commission, but payment thereof should only be made to him through the office of the Company in Liverpool. It is also found as a fact by the Special Commissioners that the whole of his salary was also paid into a banking account in England upon which his wife had the right to draw. He was assessed to Income Tax in the sum of £500, for the year ending the 5th April, 1920, the basis of the assessment being under Schedule D, paragraph 2, Case V, that is, “ in respect of income arising from possessions out of the “ United Kingdom.” The amount of this assessment was increased by the General Commissioners, but amounts are not important for the purposes of this appeal.

The Respondent being a person residing in the United Kingdom, it would appear that he was liable to be taxed under Schedule D, paragraph 1 (a) (ii), in respect of annual profits or gains arising from any trade, profession, employment or vocation, whether the same be respectively carried on in the United Kingdom or elsewhere; but, as pointed out, he was in fact assessed under Case V in paragraph 2.

The first question is whether that assessment was rightly made.

Now the case of *Colquhoun v. Brooks*⁽¹⁾, 14 A.C. 493, has shown that, however inapt the word “ possessions ” may be in Case V, it must in fact embrace the trade, profession, employment, or vocation mentioned under paragraph 1 (a) (ii), and in that particular case it was plain that this House regarded the

(1) 2 T.C. 490.

provision as a modification of the earlier clauses and intended to limit the amount of tax in cases where the income arose from possessions out of the United Kingdom to the amount of income actually received from those possessions, see Lord Macnaghten at pp. 514 and 515⁽¹⁾. The real test that was laid down by Lord Herschell and Lord Macnaghten was that you were to ascertain what was the source of income, and, if the source of income was a trade, profession, employment or vocation carried on outside the United Kingdom, only the amount of income actually received in the United Kingdom would be taxed.

In the present case I do not think that the source of income was the employment of the Respondent in West Africa. The source of his income was the money paid by an English company into an English bank in pursuance of an agreement for service made in this country. This view is emphasised by the fact that the Rules themselves provide by Rule 2, applicable to Case V, that the tax in respect of income arising from possessions out of the United Kingdom shall be computed on "the actual sums" "annually received in the United Kingdom from remittances" "payable in the United Kingdom, or from property imported or" "from money or value arising from property not imported," which points to the fact that the money is to be received here from a source abroad. I therefore think the Court of Appeal and Mr. Justice Rowlatt were right in deciding that the tax could not be properly levied under Case V.

It was then urged that, if this be so, since the Respondent was resident here and would consequently be liable under the earlier Rule, the matter should be remitted in order that the assessment might be altered in that respect. I am unable to accede to this request. Remission is not a matter of right but of discretion, and discretion to be carefully exercised in each case and dependent upon the special circumstances in which it stands. The Court of Appeal has decided here against remission and I see no reason to interfere with their action.

I desire to add that I am not satisfied that the ground upon which Mr. Justice Rowlatt based his refusal to remit was well founded.

Questions Put :

That the Order appealed from be reversed.

The Not Contents have it.

That the Order appealed from be affirmed and this Appeal dismissed with costs.

The Contents have it.

⁽¹⁾ 2 T.C. at p. 507.