Wednesday, June 17.

SECOND DIVISION.

(EXCHEQUER CAUSE.)

OGILVIE *v.* INLAND REVENUE.

Revenue — Income Tax — Computation — Income Derived from Trade Carried on by Person Residing in United Kingdom —Income Derived from Possessions in His Majesty's Dominions out of United Kingdom—Trade or Possessions—Income Tax Act 1853 (16 *and* 17 *Vict. cap.* 34), *sec.* 2, *Schedule D – Income Tax Act* 1842 (5 *and* 6 *Vict. cap.* 35), *sec.* 100, *Schedule D, First and Fifth Cases.*

O., a British subject residing in Aberdeen, was the sole partner of a firm of woollen merchants, carrying on business at Toronto, Canada. The business was carried on by managers on behalf of O. The managers did the whole buying and selling for the business, the transactions of the business were recorded in books kept in Canada, and the accounts were audited annually and yearly balance sheets were made up by auditors in Canada. O. was the sole trader and sole owner of the business, and was alone entitled to all the profits and liable for all the losses. The managers were bound to render weekly statements of the transactions of the business to him, and had no power to act in carrying on the trade apart from the authority which they derived from him. *Held* that the case fell under the head of "trade, manufacture, adventure, or concern in the nature of trade" dealt with in the first case of Schedule D of the Income-Tax Act 1842, and not under the head of "possessions in any of Her Majesty's dominions out of Great Britain" dealt with in the fifth case, and accordingly that O. fell to be assessed for income tax on the whole profits of the business, not only on the amount of the profits received in the United Kingdom.

The Income Tax Act 1853 (16 and 17 Vict. cap. 34), section 2, enacts—"For the purpose of classifying and distinguishing the several properties, profits, and gains for and in respect of which the said duties are by this Act granted, and for the purposes of the provisions for assessing, raising, levying, and collecting such duties respectively, the said duties shall be deemed to be granted and made payable yearly for and in respect of the several properties, profits, and gains respectively described or comprised in the several schedules contained in this Act. . . .

"Schedule D—For and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere, and for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom, from any profession, trade, employment, or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere, and to be charged for every twenty shillings of the annual amount of such profits and gains. . . ."

Section 5 provides that the duties granted by the Act shall be raised, levied, and collected under the regulations and provisions of 5 and 6 Vict. cap. 35 (Income Tax Act 1842).

The Income Tax Act 1842 (5 and 6 Vict. cap. 35) provides—section 100—"The duties hereby granted contained in the schedule marked (D) shall be assessed and charged under the following rules, which rules shall be deemed and construed to be a part of this Act, and to refer to the said last-mentioned duties, as if the same had been inserted under a special enactment.

"Schedule D. . . . Rules for ascertaining the said last-mentioned duties in the particular cases herein mentioned.

"*First Case.*—Duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade not contained in any other schedule to this Act.

"Rules—First—Computation of Duty on Trade.—The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, adventure, or concern upon a fair and just average of three years ending on such day of the year immediately preceding the year of assessment on which the accounts of the said trade, manufacture, adventure, or concern shall have been usually made up. . . . . .

"*Fifth Case.*—The duty to be charged in respect of possessions . . . . in the British plantations in America or in any other of Her Majesty's dominions out of Great Britain [now the United Kingdom] and foreign possessions. The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the actual sums annually received in Great Britain [now the United Kingdom; see section 5 of the Act of 1853] . . . . computing the same on an average of the three preceding years, as directed in the first case . . . ."

This was an appeal under section 59 of the Taxes Management Act 1880 (43 and 44 Vict. cap. 19) by Thomas Ogilvie senior, residing at Kepplestone, Aberdeen, from a determination of the Commissioners for the General Purposes of the Income Tax Acts for the County of Aberdeen at meetings held at Aberdeen on 19th and 24th August and 5th September 1907. At these meetings Thomas Ogilvie senior had appealed against an assessment of £10,000 made upon him under Schedule D of the Income Tax Acts for the year ending 5th April 1907, in respect of the profits of the business of Thomas Ogilvie & Sons, woollen warehousemen, 72 and 74 Bay Street, Toronto, Canada.

The assessment was made under authority of the Finance Act 1906 (6 Edw. VII, c. 8), section 6; Income Tax Act 1853 (16 and 17 Vict. c. 34), section 2 (quoted *supra*); Income Tax Act 1842 (5 and 6 Vict. c. 35),

section 100, Schedule D, First Case (quoted *supra*). The assessment was made on estimated profits in default of a return.

The following facts were admitted:—"1. That in 1904 Thomas Ogilvie senior was then the sole partner of the business of manufacturers and wholesale warehousemen carried on at 77 Dee Street and Dee Place, Aberdeen, under the firm name or style of Thomas Ogilvie & *Son*. 2. That in 1904 the said Thomas Ogilvie senior acquired the business of woollen warehousemen carried on at 72 and 74 Bay Street, Toronto, Canada, and has since by himself, and for his own behoof, continued and carried on said business under the firm name or style of Thomas Ogilvie & *Sons*. 3. That in 1905 the said Thomas Ogilvie senior assumed as partners with him his two sons, Thomas Ogilvie junior and James Tough Ogilvie, in the said business of manufacturers and wholesale warehousemen carried on at 77 Dee Street and Dee Place, Aberdeen, under the said firm name or style of Thomas Ogilvie & Son, and said business has since been continued and carried on under the said firm name or style of Thomas Ogilvie & Son for behoof of the partners, the said Thomas Ogilvie senior, Thomas Ogilvie junior, and James Tough Ogilvie. . . . 4. That the said Thomas Ogilvie senior is the sole owner of the foresaid business of woollen warehousemen carried on under the firm name or style of Thomas Ogilvie & Sons at 72 and 74 Bay Street, Toronto, aforesaid, and is alone entitled to the profits and liable in the losses of and in connection with said business. 5. That said business of Thomas Ogilvie & Sons, woollen warehousemen, at 72 and 74 Bay Street, Toronto, aforesaid, is carried on for and on behalf of the said Thomas Ogilvie senior by managers in accordance with agreement with them produced (No. 1). Said managers report state of trade and progress of business from time to time to the said Thomas Ogilvie senior. 6. The said managers, Messrs Canavan and Hire, do the whole buying and selling for the Canadian business, sending to this country statements of sales, &c., as provided in article 3 of the agreement with them. Said buying takes place both in Canada and in Great Britain. 7. The whole transactions of the Canadian firm are recorded in books kept in Canada, and the accounts are audited annually, and yearly balance-sheets made up by auditors in Canada. No record of the Canadian business passes through the books of Thomas Ogilvie & Son in Aberdeen. 8. Occasional sales are made by the Aberdeen firm to the Canadian firm, and when this is so the Canadian firm is treated as a customer of the Aberdeen firm in the ordinary way as regards discounts, terms of credit, and in every other respect. The amount of goods bought from the Aberdeen firm for the year ending 30th November 1906 was about £650 out of total purchases by the Canadian business that year of about £31,000. 9. The whole capital of the Canadian business is supplied by Mr Ogilvie. 10. No portion of the profits of the Canadian business has been remitted to this country."

The agreement between the firm of Thomas Ogilvie & Sons and the managers Messrs Canavan and Hire so far as material was in the following terms:—"Agreement made the 9th day of May 1904 between Thomas Ogilvie & Sons of Aberdeen, Scotland, woollen merchants, hereinafter called 'The Firm,' *of the one part*, and John Birch Canavan of Toronto, and Thomas Foster Hire of Toronto, salesmen, *of the other part*—Whereas the firm of T. Ogilvie & Sons is about to carry on a branch of its business as wholesale woollen merchants at Toronto, and have agreed to employ the said Canavan and Hire under the terms herein set forth as salesmen and agents to assist in the said business, subject however to the general control of the said firm: Now, it is hereby agreed as follows, namely: — 1. The said Canavan and Hire shall enter into the service of the firm for a period of five years from this date at a salary of $2500 per annum each, payable monthly on the 10th day of every month. 2. The said Canavan and Hire shall devote the whole of their time, attention, and energies to the performance of such duties and services as may be required or imposed upon them by the firm, and shall not either, directly or indirectly, alone or in partnership, be connected with or concerned in any other business or pursuit whatsoever during said term. 3. The said Canavan and Hire shall render to the firm just and proper accounts of any and all sales, and of all sums received and paid by them in respect of the firm's business, and will keep just and true accounts in the books of the firm, and shall render a weekly statement of the transactions of the Toronto branch of the business in all its departments. 4. It is further agreed that stock shall be taken yearly on the 30th day of November in each year or oftener if required by the firm. 5. If, on the completion of the year's business, as shown by the stocktaking on the 30th day of November 1905, there shall be found a net profit of $10,000 or more after allowing six per cent. for interest on capital invested, then the said Canavan and Hire are to receive in addition to their salary a commission equal to six and a quarter per cent. each on the net profit after deducting all costs, charges, and expenses, and interest on capital invested at six per cent. as aforesaid. 6. In the event of the business, as shown by said stocktaking on the 30th day of November 1905, not showing any net profit after deducting six per cent. for interest on capital invested, it shall be optional to the firm to determine this agreement upon giving the said Canavan and Hire three months' notice. 7. The results of the business and the profits thereof upon the stocktaking in the two preceding paragraphs hereof referred to shall be determined by the report of E. R. C. Clarkson, Esquire, auditor, whose decision as to the same shall be final and conclusive as against all parties hereto. 8. It is further agreed that the firm shall have the option of terminating this agreement if so disposed on the 1st day of December

1907 on giving three months' previous notice of its intention so to do. . . . 10. Nothing herein contained shall be construed to render the said Canavan and Hire partners in the firm of T. Ogilvie & Sons, or in the branch of the firm's business to be carried on in Toronto as aforesaid."

On 5th September 1907 the Commissioners found—"1. That the undertaking or business of woollen warehousemen carried on at 72 and 74 Bay Street, Toronto, Canada, under the firm name or style of Thomas Ogilvie & Sons, is the sole property of Thomas Ogilvie senior, residing at Kepplestone, Aberdeen, Scotland. 2. That the said Thomas Ogilvie senior is by himself the sole trader carrying on business under said firm name or style of Thomas Ogilvie & Sons, and vested with the sole right to manage and control every department of its affairs, and is alone entitled to the profits and liable in the losses of and in connection with said business. 3. That the managers and other employees associated and employed in the carrying on of said business of Thomas Ogilvie & Sons have no power to act in the carrying on of the trade apart from the authority, express or implied, which they hold from the said Thomas Ogilvie senior. And 4. That the said Thomas Ogilvie & Sons and Thomas Ogilvie senior, the sole partner thereof, are bound and liable to account to the Revenue for the profits earned by them, and that said profits are liable to assessment for income tax purposes under the Income Tax Act 1842, Schedule D, Case I, and the Income Tax Act 1853, Schedule D."

Accordingly the Commissioners refused the appeal, and remitted to the parties to adjust the figures liable to assessment.

The appellant being of opinion that the decision was erroneous in point of law, appealed to the Court of Exchequer. The case came to depend before the Second Division.

Argued for the appellant—The business of Thomas Ogilvie & Sons was wholly carried on in Canada—the transactions of buying and selling were entered into there, the books were kept there, and the audit took place there. The business was thus a Canadian as distinguished from a Scotch business, and was therefore a possession in His Majesty's dominions outside of the United Kingdom. The case therefore came under the Fifth Case of Schedule D, and the appellant fell to be assessed, not on the total profits, but only on the amount of the profits received in the United Kingdom—*Colquhoun* v. *Brooks*, 1889, L.R., 14 A.C. 493. No doubt the appellant had the control of the business in the sense that he could bring it to an end. But the element of control, although important—*The San Paulo (Brazilian) Railway Company, Limited* v. *Carter*, [1896], A.C. 31; *De Beers Consolidated Mines, Limited* v. *Howe*, [1906], A.C. 455; *Apthorpe* v. *Peter Schoenhofen Brewing Company, Limited*, 1899, 80 L.T. 395—was not conclusive—*Kodak, Limited* v. *Clark*, [1903], 1 K.B. 505; *The Gramaphone and Typewriter, Limited* v. *Stanley*, [1906], 2 K.B. 856. The question was whether the business was managed in Canada or Scotland, and it was plain in the present case that the business was managed in Canada. The respondent could succeed only if he were right in saying that the fact of ownership was conclusive. That contention was unsound and was inconsistent with *Colquhoun* v. *Brooks*, *cit.* Further, the contention should be rejected because it involved the consequence that a foreigner temporarily resident in this country would be liable to assessment in respect of the whole income derived from a business carried on by him in his own country. That would not do, because under section 39 of the Act of 1842 a foreigner temporarily resident was exempt from the duties imposed by Schedule D in respect of profits derived from possessions in foreign countries. But under Schedule D income tax was payable in respect of such profits only in so far as they were received in this country. If the respondent were right the result would be that the foreigner temporarily resident would be assessed on trade profits not received in this country, and yet would escape taxation in respect of profits derived from investments which were received in this country. That was unreasonable, and a construction which involved this result should be rejected. The cases of *The San Paulo (Brazilian) Railway Company, Limited* v. *Carter*, *cit.*, and *De Beers Consolidated Mines, Limited* v. *Howe*, *cit.*, were distinguishable. In these cases it was held that the business was partially carried on in the United Kingdom. In *Lloyd* v. *Inland Revenue*, March 12, 1884, 11 R. 687, 21 S.L.R. 482, the only question raised was the question of residence. The present question did not arise.

Argued for the respondent—The appellant was resident in the United Kingdom, and was the sole owner of the business. He therefore fell under the First Case of Schedule D in the Income Tax Act 1842, and was liable to be assessed on the whole profits of the business—*Lloyd* v. *Inland Revenue*, *cit.*; *Inland Revenue* v. *Cadwalader*, November 22, 1904, 7 F. 146, 44 S.L.R. 117. In any view, the appellant could not succeed unless he showed that the business was wholly carried on outwith the United Kingdom—*San Paulo (Brazilian) Railway Company, Limited* v. *Carter*, *cit.* Now the whole capital belonged to the appellant; weekly statements and annual balance sheets were submitted to him; the managers were his servants; he could dismiss them and could bring the business to an end at any time. In these circumstances it could not be said that the business was not partially carried on by the appellant in the United Kingdom. It followed that the appellant must be assessed under the First Case and not under the Fifth Case of Schedule D—*San Paulo (Brazilian) Railway Company, Limited* v. *Carter*, *cit.*; *Grove* v. *Elliots & Parkinson*, 1896, 3 Tax Cases, 481; *Apthorpe* v. *Peter Schoenhofen Brewing Company, Limited*, *cit.*; *De Beers Consolidated Mines, Limited* v. *Howe*, *cit.* It was immaterial that the

appellant did not actually exercise his powers of control. What was important was not the powers which he exercised, but the powers which he reserved to himself. *Colquhoun* v. *Brooks*, *cit.*, was distinguishable. There the party assessed was a sleeping partner in a business which was wholly carried on in Australia. The decision turned mainly on the point that no accounts were sent to this country and that there was thus no machinery for ascertaining the profits which remained in Australia. The difficulty as to accounts did not arise in the present case. In *Kodak, Limited* v. *Clark*, *cit.*, the judgment was put on the ground that the English company was an investor in the shares of the American company. That was a case which plainly fell under the Fifth Case of Schedule D, and did not fall under the First Case. Accordingly, the judgment had no application to the present case.

At advising—

LORD STORMONTH DARLING—This case is not complicated by any question as to the trade or business carried on at Toronto being a trade or business carried on by a partnership or company, or by any question as to where the residence of the firm or company, if there were one, should be held to be. It is the case of Thomas Ogilvie senior, who is declared by the findings of the Commissioners to be "by himself the sole trader, carrying on business under the said firm, name, or style of Thomas Ogilvie & Sons, and vested with the sole right to manage and control every department of its affairs, and alone entitled to the profits and liable in the losses of and in connection with said business." That seems to me to be enough for the decision of the case in favour of the Crown, and I am therefore of opinion that the determination of the Commissioners is right, and that the appeal ought to be refused.

It is settled by the judgment of the House of Lords in *The San Paulo (Brazilian) Railway Company, Limited*, [1896] App. Cas. 31, that "where a trade is carried on either wholly in the United Kingdom, or partly within and partly outside it, and profits accrue therefrom to a person or a corporation residing in the United Kingdom" (in this case the profits accrue to a person residing in Aberdeen), "the assessment for income tax falls under the First Case of Schedule D of 5 and 6 Vict. cap. 35, section 100, and does not fall under the Fifth Case, and the duty is to be computed upon the full amount of the balance of the profits or gains of the trade, and not only upon the actual sums received in the United Kingdom." Therefore the question is whether the trade is carried on either wholly in the United Kingdom, or partly within and partly outside it. And it is enough for the view that the assessment for income tax falls under the First Case and not under the Fifth, if the necessary inference from the facts is that the trade is carried on partly in the United Kingdom and partly outside it. In the *San Paulo* case the Lord Chancellor (Halsbury) at p. 38 and Lord Watson at p. 41 both held that a great deal of the trade was carried on in Brazil, where the railway was made, and had to be managed and worked (as, indeed, the memorandum of association itself required), but both of the noble and learned Lords, while admitting that these facts determined in a sense the locality of the trade, were equally clear that they did not determine, or even aid in determining, where the "head and brain of the trading adventure" were situated, and they had no difficulty in holding that these were to be found in London, and in rejecting the contention that the particular localities in which debts were incurred to the company or were paid to its agents were of any consequence in ascertaining by whom its trade was carried on.

Now, apply this judgment to the case in hand, and what do you find? The "head and brain of the trading adventure" in Toronto are undoubtedly to be found in Aberdeen, where Mr Thomas Ogilvie senior resides, to which weekly statements of the transactions of the Toronto business in all its departments are sent, and where the sole right to manage and control every department of its affairs is centred. Mr Ogilvie senior is board of directors and company all in one, for the case states that "the managers and other employees associated and employed in the carrying on of said business of Thomas Ogilvie & Sons have no power to act in the carrying on of the trade apart from the authority, express or implied, which they hold from the said Thomas Ogilvie senior."

It is said that although all this may be true, although Mr Thomas Ogilvie senior may have in theory the absolute control of the business or trade locally situated in Toronto, since it is carried on for his sole benefit, and he could do with it what he likes, with no one to say him nay, yet not a single instance has ever occurred in which he has as matter of fact attempted to exercise his control or to give directions even about the smallest detail. Yet the right of control is there all the time and might be exercised at any moment. It is a matter, as it seems to me, of power and right, and not of the actual exercise of right or power. The necessary inference from forbearance to exercise the right of control is that the man who possesses it is content for the time with the way in which his wishes are being carried out and his interests attended to by his employees. "He cannot, according to the rule established in *Colquhoun* v. *Brooks* (14 App. Ca. 493), escape from liability under the First Case, unless he is able to show that no part of the trade is carried on within the United Kingdom, or, what comes to precisely the same thing, that the trade is exclusively carried on in a country or countries outside the United Kingdom, whether subject to Her Majesty or not"—so said Lord Watson at p. 40 of the *San Paulo* case. It is only when the trade is carried on exclusively abroad that the question so anxiously discussed about "foreign possessions" in *Colquhoun* v. *Brooks* has any significance.

It remains to notice in passing the reser-

vation (for it is no more than a reservation) contained in Lord Davey's opinion at p. 43 of the *San Paulo* case, thus—"Whether it would be possible in any case for a sole owner of a foreign business having exclusive power of control over it, but resident in this country, successfully to maintain that he did not carry on a business here, it is unnecessary to say. That question, which is probably one of fact, will be dealt with when it arises according to the circumstances of the case." The form in which the question is put rather suggests the reply. I am of opinion that the question which Lord Davey adumbrated arises for decision here, and that it should be answered for the Crown.

LORD LOW concurred.

LORD ARDWALL—I concur generally in the opinion of Lord Stormonth Darling, and propose only to touch on a ground regarding which I have some difficulty, namely, the question of whether the mere possession of "full control" by a person in this country brings the business over which such control exists within the category of "a business carried on partly in this country." I do not think it is necessary to decide this question, and desire to reserve my opinion upon it. The second finding in fact stated by the Commissioners, and which has been quoted in full by Lord Stormonth Darling, taken along with the third finding of the Commissioners, to the effect that "the managers and other employees associated and employed in the carrying on of said business of Thomas Ogilvie & Sons have no power to act in the carrying on of the trade apart from the authority express or implied which they hold from the said Thomas Ogilvie senior," and the fact that Thomas Ogilvie senior resides in Scotland, appear to me, in view of the provisions of the statutes and the decided cases, to settle the question put to us in the respondent's favour, because it appears that it is the firm of Thomas Ogilvie & Sons resident in Scotland who carry on the business in question by means of "salesmen and agents" at their "branch" (as they call it) in Canada. There is, accordingly, no such question regarding "control" as arose in the case of *Kodak Limited* v. *Clark*, (1903) 1 K.B. 505, where although a British company had in a sense the control of an American company by reason of owning 98 per cent. of the American company's shares, yet because the American company was a separate company with different interests and entirely distinct and separate management from the British company, the American company was held not to be partly carried on in this country; nor is *Colquhoun's* case an authority for the present, where the active partners were in Australia and a sleeping partner, possessing some powers of control but exercising none, lived in this country. In such cases, and in several other reported cases, it became a question of importance whether although a power of control existed to some effects, it was ever so exercised as to constitute a "carrying on" of the business in this country. In the present case, however, not the control merely but the whole command and management of the Canadian business rests with the "firm" of Thomas Ogilvie & Sons, which is resident in Scotland. The "salesmen and agents" in Canada have no powers except what are delegated to them expressly or impliedly by the said "firm," that is, by Thomas Ogilvie senior.

I am accordingly constrained to hold that the business of Thomas Ogilvie & Sons, of which the appellant is the sole partner, is partly carried on in this country, and that the present case falls under Case I of Schedule D of the Income Tax Acts.

The LORD JUSTICE-CLERK concurred in the opinion of Lord Stormonth Darling.

The Court affirmed the determination of the Commissioners.

Counsel for the Appellant—The Dean of Faculty (Campbell, K.C.)—Mitchell. Agents—J. & A. F. Adam, W.S.

Counsel for the Respondent—The Solicitor-General (Ure, K.C.)—Munro. Agent—Philip J. Hamilton Grierson, Solicitor of Inland Revenue.

Wednesday, June 17.

SECOND DIVISION.

[Sheriff Court at Glasgow.

MULLEN *v.* D. Y. STEWART & COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1—*Accident Arising Out of and in Course of Employment—Workman Injured Rescuing Fellow Workman Engaged in Horseplay.*

Some workmen, members of a squad which was working overtime in ironworks, during a necessary pause in operations, left the works at 9·40 p.m., and went to a neighbouring public-house to obtain some refreshment. The works were situated partly on one side of a street, partly on the other, and a line of rails, sunk to the street level, crossed the street from one portion of the works to another, on which laden bogies were drawn by squads of workmen by means of ropes. While three of the workmen who had gone for refreshment were returning to work, they saw a bogie being drawn from one portion of the works to the other, and one of them, in a spirit of mischief, took hold of the rope at a point between the bogie and the men who were drawing it, and proceeded to pull against them. While so doing he slipped and fell across the rope, and was in imminent danger of being crushed against the wall at the entrance to the works. Another