PART I.

No. 180.—IN THE HOUSE OF LORDS, NOVEMBER 15TH AND 18TH AND DECEMBER 17TH, 1895.

SAN PAULO (BRAZILIAN) RAILWAY COMPANY, LIMITED, *v.* CARTER (Surveyor of Taxes).(1)

SAN PAULO RAILWAY COMPANY, LIMITED, *v.* CARTER.

Income Tax.—Schedule D., First Case.—English Company. —Railway abroad.— Profits.— Remittance.— An English Company is formed for the purpose of making and working a railway in Brazil. The Company is resident in England, and the business is carried on under the control and direction of the directors here. The accounts are kept in London, where all the meetings are held, and the dividends are declared. The directors appoint a Superintendent, who resides in Brazil. He is a salaried officer of the directors, removable at their pleasure, and bound to obey and execute their orders. A portion of the profit is retained abroad and not remitted to the United Kingdom.

Held, *that the Company is chargeable under the first case of Schedule D, 5 & 6 Vict. c. 35 s. 100, upon the whole of the profits made, and not under the fifth case, upon only the amount of profits remitted to England.*

November 15th and 18th, 1895.

This was an appeal by the San Paulo (Brazilian) Railway Company against the decision of the Court of Appeal, reported *ante*, p. 344.

Sir E. Clarke, Q.C. (*Bigham, Q.C.*, and *Bremner* with him), for the Company.— This case is governed by *Colquhoun* v. *Brooks*,(2) which to an extent(3) discredited the judgments in the earlier cases of the *Cesena Sulphur Company* v. *Nicholson*(4) and the *Calcutta Jute Mills Company* v. *Nicholson*.(5) The business is carried on entirely in Brazil. The directors have a power of control, but they do not actually interfere in the carrying on of the business. The fact that the directors purchase in this country

(1) Reported,
(2) 2 T.C. 490.
(3) *See* 2 T.C., p. 503.
(4) 1 T.C. 88.
(5) 1 T.C. 83.

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material for the permanent works in Brazil, does not make them to be carrying on the business here. Otherwise, they might be liable for all their profits one year, and not liable the next. The purchasing of goods is not the carrying on of business (*Sulley* v. *The Attorney General.*)(1)

[*The Lord Chancellor.*—The profit on a transaction is the general result of the whole thing done, which includes the purchasing of the goods originally, as well as the selling of them at a higher price.]

According to Lord Macnaghten(2) the decision in *Colquhoun* v. *Brooks*(3) would have been the same if no one but Brooks had been interested in the concern. If he had taken a part in the management from here, the business would still have been held to be a "foreign possession."

[*The Lord Chancellor.*—Being "interested in the concern" is a very different question. . . . . The words "interested in the concern" and "management" convey two different ideas.]

The reasoning in *Colquhoun* v. *Brooks*(3) is equally applicable whether the business is carried on entirely abroad or not. Here the main business, at all events, is carried on in Brazil. In *Bartholomay Brewing Company* v. *Wyatt*,(4) although the stated case found that the brewing business carried on in America was, in fact, a trade carried on by the Appellant Company, whose head and seat and directing power were in London, yet the Court held that the company was chargeable only on the profits received in England. The only difference between that case and the present is that here plant, &c. is sent out from England. *London Bank of Mexico* v. *Apthorpe*(5) is distinguished by the fact that there a banking business was undoubtedly carried on in this country. A trade is carried on where the sources of income are. Here the sources of income are the receipt of certain moneys in Brazil. There are no transactions in England which earn money. The railway is a "foreign possession" under Case V.

Bremner.—This is a "foreign possession" within *Colquhoun* v. *Brooks*,(3) and the fact that there is a controlling power here does not alter the fact that the Acts which are done for the purpose of earning the profits are done abroad.

Sir R. Webster, A.G. (*Sir R. Reid, Q.C.*, and *Danckwerts* with him), for the Surveyor.—Lord Herschell's and Lord Macnaghten's judgments in *Colquhoun* v. *Brooks*(3) show that they would have attached a great deal of importance to management by Brooks if it had existed. The decision would not have been the same. In the present case a substantial part of the business which earns the profit is carried on in this country. The purchase of good engines is an important element in earning profits. Even if the engines, &c. were purchased abroad, it is the directors who are carrying on the business. There is machinery

(1) 2 T.C. 149. (2) *See* 2 T.C., p. 504. (3) 2 T.C. 490.
(4) *Ante*, p. 213. (5) *Ante*, p. 143.

in the Income Tax Acts for assessing under Case I. a trade carried on partly in this country. The Acts do not countenance the suggestion that the place where the gross revenue is received is the test of where the business is carried on. The profit is made by carrying on the business in a variety of ways.

The earlier cases of the *Cesena Sulphur Company* v. *Nicholson*,(1) the *Calcutta Jute Mills Company* v. *Nicholson*,(2) and, especially the *Imperial Continental Gas Association* v. *Nicholson*,(3) are in point, and were not overruled by *Colquhoun* v. *Brooks*,(4) which merely excluded from Case I., a trade carried on entirely abroad.

Sir R. Reid, Q.C.—With regard to a business carried on partly in this country and partly abroad, there is the authority of cases for 18 or 19 years (*i.e.*, the *Cesena*, &c.), there are the clear words of the statute (Section 100, Case I., Rule 2), and there are the expressions of Lords Fitzgerald(5) and Macnaghten(6) in *Colquhoun* v. *Brooks* showing that Case I. applies. On the question of fact whether this business is partly carried on here, the Appellants, to be successful, must say that the controlling and managing of a business is no part of the business itself.

Sir E. Clarke, Q.C., in reply.—I do not find in the judgments in *Colquhoun* v. *Brooks* a single sentence which refers to the fact that Brooks did not exercise control over the business. I rely on Lord Herschell's statement(7) that the Act has not provided the requisite machinery for assessing the duty on trade profits *arising and remaining abroad*. I submit that in the present case the business was carried on in Brazil, and that although there were rights of control on the part of the directors in this country, it comes within *Colquhoun* v. *Brooks*.

Cur. adv. vult.

JUDGMENT.

December 17th, 1895.

Lord Chancellor.—My Lords, I think one proposition has been conclusively established by the various cases that have come under your Lordships' consideration, and that is, that where the trade is wholly or partially carried on in this country, the trader is liable to pay income tax on the profits of his trade.

Now in this case, the Appellant Company is an English Company, residing (so far as that abstraction, a corporation, can reside at all) in England. It has an office in London, and I am disposed to think (though it is unnecessary for the purposes of this case to say so) that its trade, if the word "trade" is strictly construed, is wholly carried on in England. It seems to me that, as was said by Chief Justice Cockburn, and Mr. Justice Crompton in the case of *Sulley* v. *The Attorney General* (Hurlston and Norman 711), (8) "it is probably a question of

(1) 1 T.C. 88. (2) 1 T.C. 83. (3) 1 T.C. 138.
(4) 2 T.C. 490. (5) *See* 2 T.C., p. 497. (6) *See* 2 T.C., p. 508.
(7) *See* 2 T.C., p. 501. (8) 2 T.C. 149.

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"fact where the trade is carried on," and it is probably true to say that that phrase may be understood in two different senses. It may mean where the goods in respect of which trading is carried on are conveyed, made, bought, or sold; or speaking of land, where it is cultivated or used for any other purpose of profit. That makes the locality of the goods or the land which are the subjects of the trade, to be in a certain sense the place where the trade is carried on, because it is the place where the things corporeally exist or are dealt with. But there is another sense in which the conduct and management, the head and brain of the trading adventure, are situated in a place different from that in which the corporeal subjects of trading are to be found. It becomes, therefore, a question of fact, and according to the answer to be given to the question, "where is the trade in a "strict sense carried on?" will the answer be, under the Income Tax Acts, there is it liable to assessment.

My Lords, it is therefore necessary to determine upon these principles where this Appellant Company carries on its business. It deals undoubtedly with land in the Brazils. In Brazil the payments are received, and in Brazil the passengers and goods are carried, but the form of trading can make no difference. If it were a mine, as in the *Cesena* case, or a jute mill, equally with a railway, the person who governs the whole commercial adventure, the person who decides what shall be done in respect of the adventure, what capital shall be invested in the adventure, on what terms the adventure shall be carried on; in short, the person who, in the strictest sense, makes the profits by his skill or industry, however distant may be the field of his adventure, is the person who is trading. That person appears to me in this case to be the Appellant Company. Every one of the tests I have applied are applicable to its proceedings. A shipowner, or indeed a shipbroker, may not have any one of the ships, or the charter parties which he negotiates, in England; but by correspondence, or by agency, he may have both charter parties and ships, not necessarily British ships, all over the globe. But if he lives in London, and by his direction governs the whole of this commercial adventure, could it be properly said that he is not carrying on his trade in London? So it appears to me that this Appellant Company is carrying on the trade in London, from which it issues its orders, and so governs and directs the whole commercial adventure that is under its superintendence.

I am therefore of opinion that the appeal must be dismissed with costs, and I move your Lordships accordingly.

Lord Watson.—My Lords, the decision of this appeal does not involve any new controversy upon the construction of the Income Tax Acts. It depends, in my opinion, upon the answer which ought to be given to a single issue of fact.

The law which must govern the present case appears to me to be settled by the judgment of this House in *Colquhoun* v.

Brooks (14 Ap. Ca. 493).(1) It was held in that case, that the interest of a partner, resident in England, in the profits of a trade, which was exclusively carried on in Australia by the other members of the firm, was chargeable with income tax not under the first, but under the fifth case of Schedule D. The noble and learned Lords who took part in the decision were of opinion that the interest of the English partner was included in the sweeping language of the first case, but they held that it also constituted, within the meaning of the fifth case, a possession in one of Her Majesty's dominions out of the United Kingdom. The ground upon which the interest was held to be taxable in terms of the fifth case was, that the Income Tax Acts contain no machinery for assessing under the first case profits accruing from any trade which is not wholly or in part carried on within the United Kingdom, whereas they do provide machinery for assessing under the fifth case all profits arising from trade exclusively carried on outside of the United Kingdom.

In my opinion the decision in *Colquhoun* v. *Brooks*(1) directly affirms the rule, that every interest in the profits of trade belonging to a person who is within the meaning of the Acts resident in the United Kingdom, must be charged under the first case of Schedule D. if the trade is carried on either wholly or partly within Great Britain or Ireland, and is chargeable under the fifth case, if the trade is exclusively carried on in any of Her Majesty's dominions out of the United Kingdom. The considerations which are applicable to trades wholly carried on in these dominions apply with equal force to trades exclusively carried on in foreign possessions which are not subject to the British Crown, and it appears to me to be a matter of necessary implication that the interest of a resident here, in profits derived from a trade of the latter description, must also be assessed for income tax under the fifth case of Schedule D.

When it has been ascertained that a person interested in the profits of a trade has his residence in the United Kingdom in such sense as to bring him within the incidence of the Income Tax Acts, the only question remaining for determination is whether the measure of his liability is to be found in the first or in the fifth case of Schedule D. In the one case, he is liable to pay duty in respect of the net profits accruing to him from such trade, in the other in respect only of such part of these profits as shall have been actually received by him in this country. But he cannot, according to the rule established in *Colquhoun* v. *Brooks*,(1) 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 it is exclusively carried on in a country or countries outside the United Kingdom, whether subject to Her Majesty or not. If he succeeds in proving that fact, his liability will be under the fifth case.

(1) 2 T.C. 490.

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The Appellant is an English Company incorporated with limited liability under British Statutes and having its registered office in London. It is not disputed that the Company has its domicile in England, and is liable to pay income tax in respect of any profits earned in the course of its trade. The only complaint made is, that the amount of such profits has been assessed for duty under the first case, whereas the Appellant maintains that it ought to have been assessed under the fifth case, because the trade of the Company is wholly carried on beyond the limits of the United Kingdom. I have no difficulty in rejecting that contention. It is not necessary to consider whether the whole trade of the Company ought to be regarded as carried on in England. To my mind, it is perfectly clear that in point of fact, part of its trade is carried on there and that is sufficient to bring its profits within the first case of Schedule D.

It is, no doubt, true that the undertaking, in order to carry on which the Company was incorporated, consists, as its memorandum bears, in "the making, maintaining, managing, and working" of a railway in Brazil, and in "the making, main-"taining, managing, and working" of branch lines, roads, canals, and other means of communication in connexion with the main line. It is also true that the directors, as authorised by the articles of association, manage and work the railway and its connexions through a superintendent in Brazil, appointed by them, and a staff of servants in Brazil who are under his immediate supervision, and that the receipts of the Company, from which profits made by it are derived, are earned and paid in Brazil. But the substantial fact remains, that the directors, subject to any resolutions which may be passed for their guidance by the members of the Company, are vested with the sole right to manage and control every department of its affairs. Apart from the authority, express or implied, which they have from the directors, neither the superintendent nor any other servant of the Company has any power to act in the carrying on of its trade. They are in no sense traders; they are merely servants, and in that capacity are remunerated for the services which they are employed to perform. The profits of the undertaking, although they are received by these servants, do not belong to them, and are not in their disposal; their only duty, unless otherwise directed by the Company, being to transmit them to London: and the Company here is the sole judge whether they ought or ought not to be distributed among its members. The only persons who can with propriety be described as carrying on the trade of the Company, are its directors, who for all purposes of administration and management are the Company itself. I do not think that in such circumstances the particular localities in which debts are incurred to the Company or are paid to its agents, are of any consequence in ascertaining by whom its trade is carried on.

I therefore concur in the judgment which has been moved.

Lord Shand.—My Lords, having had an opportunity of reading and considering the judgments which have now been delivered by the Lord Chancellor, and by my noble and learned friend, Lord Watson, I do not propose to add anything to what has been said. I concur in thinking that the unanimous judgment of the Court of Appeal should be affirmed for the reasons which have been now assigned.

Lord Davey.—My Lords, I may content myself in this case with saying that the business of the Appellant Company is not, on the facts stated in the case, entirely or exclusively carried on abroad, and therefore that the case of *Colquhoun* v. *Brooks* (1) on which the Appellants' Counsel relied, is no sufficient authority for the proposition which they maintained. No doubt the profits of the Company are derived from the profitable use of land in Brazil and from the business of carriers carried on in that country, and in that sense it is a Brazilian business. But it is not sufficient to say that the Company are carrying on a Brazilian business (as Mr. Justice Wright thought) if the Company is carrying on that business wholly or partially in this country. It is clear to my mind that the direction and supreme control of the Appellant Company's business is vested in the board of directors in London, who appoint the agents and officials abroad, and either by general orders or by particular directions control, or may control, their duties, remuneration, and conduct, and to whom any question of policy, or any contract or other matter may, and if deemed of sufficient importance I suppose would, be referred for their decision. The business is therefore in very truth carried on in and from the United Kingdom, although the actual operations of the Company are in Brazil, and in that sense the business is also carried on in that country. I do not attach any importance to the fact of the railway and business belonging to a corporation and not to an individual, except that in the case of an English joint stock company formed for the purpose of carrying on a particular business, it is, perhaps, easier to say where is the seat of administration and direction.

In my opinion, therefore, the case is outside both the decision and the reasoning of the noble and learned Lords, who gave judgment in the case of *Colquhoun* v. *Brooks*,(1) because I find that every one of those noble and learned Lords confined his observations to a case in which the business was entirely carried on abroad. 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.

(1) 2 T.C. 490.

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I am, therefore, of opinion that the business of the San Paulo Company is not a "foreign possession" within the meaning of the fifth case of section 100, Schedule D., as interpreted in *Colquhoun* v. *Brooks*,(1) and that being so, the case undoubtedly falls within the language of the first case, and it follows that the Company has been rightly charged upon the whole of its profits or gains.

Questions put :--

That the Order appealed from be reversed--
The Not Contents have it.

That this Appeal be dismissed with costs—
The Contents have it.

(1) 2 T.C. 490.