becomes vested. Whether the money is paid to the child or to the guardian of the child or to the schoolmaster or to the tailor or other person who supplies the wants of the child, it is paid to or to the use of the child and is income of the child.

It is, however, contended that the case is not within the fifth case of the Act of 1842 for that this is not a foreign possession. This argument, if I rightly understand it, is that property—*e.g.*, income derived from assets in another country—is not a foreign possession unless the person taxed owns the corpus of the foreign possession. If this were true, no life tenant or other person having a limited interest in property abroad would be assessable under the fifth case. The test is not, I think, whether there is an absolute interest in a foreign possession, but whether there is such an interest in a foreign possession that the party assessed derives income from it. The case is, I think, within the fifth case, and whether this is so or not it is, I think, within Schedule D of the Act of 1853. The income is annual profits arising to a person residing in the United Kingdom from property situate elsewhere than in the United Kingdom. For these reasons I submit to your Lordships that the remittances are income subject to income tax.

Then is the appellant a party assessable? I think she is. She is trustee of the fund for the child and guardian of the child, and has the direction, control, or management of the income being property of the child. The language of section 41 of the Act of 1842 meets the case.

I agree that the appeal fails and should be dismissed.

Appeal dismissed.

Counsel for the Appellant—Sir R. Finlay, K.C.—P. O. Laurence, K.C.—G. A. Scott. Agents—Boodle, Hatfield, & Co., Solicitors.

Counsel for the Respondent—Sir E. Carson (A.-G.)—Sir F. E. Smith (S.-G.)—W. Finlay, K.C.—T. H. Parr. Agent—H. Bertram Cox, Solicitor for Inland Revenue.

HOUSE OF LORDS.

Thursday, October 14, 1915.

(Before the Lord Chancellor (Buckmaster), Earl Loreburn, Lords Atkinson, Parker, Sumner, and Parmoor.)

BARNSLEY BRITISH CO-OPERATIVE SOCIETY, LIMITED *v.* WORSBOROUGH URBAN DISTRICT COUNCIL.

(On Appeal from the Court of Appeal in England.)

Road—Public Road—Extraordinary Traffic — Highways and Locomotives (Amendment) Act 1878 (41 *and* 42 *Vict. cap.* 77, *sec.* 23) — *Use of a Country Road by a Tractor Owing to Danger upon the Main Road.*

The appellants were a firm using traction engines for the transport of their wares to neighbouring branches. Owing to a certain part of the main road being rendered unsafe for this traffic, the appellants used, and thereby destroyed, a country road unsuited for the support of such heavy traffic. The respondents claimed damages under section 23 of the Highways and Locomotives (Amendment) Act 1878.

Held that the question whether traffic was extraordinary was one of fact. Further, that constant use of the road by the appellants' traction engine from 1909 to 1911 was not in itself sufficient to render by the end of that period such traffic ordinary.

The *facts* are apparent from their Lordships' judgment, delivered by

Lord Chancellor (Buckmaster) — In this case the appellants are the Barnsley British Co-operative Society, against whom Rowlatt, J., has entered judgment for the sum of £150 in favour of the respondents the Worsborough Urban District Council, that sum being the amount of damage that he assessed as the damage caused by the appellants owing to their extraordinary use of certain roads within the respondents' district. The Court of Appeal affirmed the judgment of Rowlatt, J., and from that judgment the appellants appeal to your Lordships' House. They base their appeal upon two grounds. They say (1) that the action ought not to have been brought except in accordance with the strict conditions of section 23 of the Highways and Locomotives Act 1878, and that those conditions were not complied with; and (2) that even if all those conditions were satisfied, yet none the less the traffic which was the subject of complaint was not extraordinary, having regard to all the circumstances of the case.

Now the first point appears to have been urged with some determination before

Rowlatt, J., and the Court of Appeal, but with less resolution before your Lordships. As I understand it, it is this—that section 23 provides that a claim in respect of excessive damage can only be made where the local authority is moved by a certificate of their surveyor from which it appears that there has been certain damage caused, having regard to certain comparisons prescribed by the section. In this case it is said that no such certificate was given to the local authority in the first instance, but that the local authority themselves stimulated the surveyor into making the certificate, and that consequently the exact condition prescribed by the section of the statute has not been satisfied, and that the action ought never to have been entertained.

The circumstances relating to that are to be found by referring to three documents in the appendix to the present case. It appears that a special committee had been appointed by the local authority for the purpose of considering the damage caused to these roads, and on the 23rd August 1912 a meeting of that special committee was held, and a resolution was come to that, subject to a formal written certificate of the surveyor, a claim should be made. Upon that, on the 26th August, a certificate was given in due course by the surveyor, and it is not stated, and not suggested, that that certificate does not satisfy every one of the conditions of the Act of Parliament, nor is it said that the certificate was not given in perfect honesty and good faith. Following upon that, on the 9th September the Urban District Council themselves met and received the report of the meeting of the special committee to which I have called your Lordships' attention, and the Council approved the decision of that committee and these proceedings were taken.

I fail to understand in these circumstances how it can be successfully urged that the certificate was not given before the resolution was come to by the respondents here that these proceedings should be set on foot, and it appears to me to be immaterial whether the certificate was given at the sole instance of the surveyor or at the request of the Council.

Now the proceedings themselves relate to a claim for damage caused by the use of a certain road within the respondents' jurisdiction for the period between the 23rd September 1911 and the 23rd August 1912, and in order to consider and do justice to the appellants' arguments it is necessary to investigate a little in detail how it was that that claim arose. It appears that there was a road, which is called the Sheffield main road, also within the jurisdiction of the respondents, which was a heavily paved and substantial road occupied by tramway lines along which heavy traffic had for some time past been in the habit of passing. The appellants themselves in particular, who are a very large co-operative society at Barnsley, used that road frequently for the purpose of conveying their goods to and from their depots and distributing them among their customers by the use of a heavy traction engine and two or three trucks following behind. That traffic had been in the habit of going along this main road, and it may be assumed for the purposes of this case to be traffic which was not extraordinary traffic upon that road. But in 1909 a piece of that road which was on a curve where the road sloped with a heavy incline—a piece that had formerly been macadamised — was covered by the local authority with granite setts, and from that moment the appellants say it became dangerous to use that road for the purposes of such a traffic as I have described. Evidence of this fact was not accepted by the learned Judge who tried the case—he held that it was irrelevant; but for the purpose of considering the arguments raised here I will for the moment assume that the fact upon which they rely could have been established if the evidence had been furnished, and that it is accepted here that in those circumstances the appellants were acting wisely and prudently and quite properly in removing their traffic from the road where it was unsafe to travel to another road by which they could without risk reach their desired terminus. It is that circumstance which is the chief circumstance upon which the appellants rely for the purpose of saying that the traffic so transposed and transmitted to this other road was not extraordinary.

Now the road to which it was transferred is a road which may be described in the words of one of the appellants' own witnesses (I am referring to the evidence of Mr Silcock) as a road the ordinary traffic of which was town carts and tradesmen's carts and the ordinary traffic of a country road. What this witness says in cross-examination is this. He is asked, "Have you seen the character of the things that use it?"—meaning thereby the traffic that uses the road. His answer is, "Yes." "(Q) What are they?—(A) The ordinary traffic one sees on such a road. (Q) Country carts, are not they?—(A) Yes, and town carts as well. (Q) Tradesmen's carts?—(A) Yes, that is the ordinary traffic of such a road." It is therefore quite plain that before the road was used under the circumstances that I have stated traffic of the description which was put upon it by the appellants would not have been the ordinary traffic of the road; but this is circumstantially a question of fact, and a question of fact which I think must be determined at the time and under all the circumstances existing when the complaint was made. I do not think it is necessary in this case to consider how long the road may be the subject of extraordinary traffic before such extraordinary traffic becomes ordinary. What the learned Judge who tried this case himself said with regard to that matter appears to me to be perfectly sound—that extraordinary traffic is not the traffic which is due to the slow and normal increase of the development of traffic owing to the development of the district; the learned Judge carefully disregarded that in coming to the conclusion he did in this case. But in this case the only previous user of

this road by the excessive traffic of which complaint is made, apart from cases where the appellants had used it, and had discontinued such user and paid for the damage they had caused, was user which began in October 1909, and was the subject of complaint in January 1911. I cannot think that the user during that period can enable the appellants to say that in September of 1911 the traffic which would have been extraordinary in October 1909 had become ordinary because during that period they had been constantly using the road.

My view is, as I have stated, that the question of ordinary and extraordinary traffic above all questions is a simple question of fact. The learned Judge must determine, having regard to all the circumstances, what was the ordinary traffic of the road, and he must then settle whether or no the traffic complained of was not that ordinary traffic but was extraordinary traffic which the road was not accustomed to bear. And then of course there comes the question whether the extraordinary traffic has caused damage. In determining those questions of fact it appears to me that the motive which influences the person who is charged with making an extraordinary use of the road, in using that road in preference to any other, can have no part at all. He may use it because it is shorter, he may use it because it is safer, he may use it because a road he formerly used has become obstructed, or for any reason that he pleases, and his user will be perfectly lawful and may be wise, but the reason that leads him to use the road cannot possibly affect the determination of the question of fact as to whether his user be the ordinary or an extraordinary use of the road.

I am unable to find that the learned Judge who considered this judgment and gave a long and careful judgment has in any respect whatever misdirected himself in forming the opinion which he expressed as to this user complained of having been extraordinary and excessive.

For these reasons therefore I think the appeal should fail.

EARL LOREBURN—I am of the same opinion and I have very little to add.

The main point here is, was this ordinary traffic or was it extraordinary traffic on this road and at that time when the complaint arose and the damage was done? That is purely a question of fact. I can understand cases in which it might be properly thought that it was extraordinary by reason of the purpose, or the occasion, or the quality, or the quantity, or the method of use. Bowen, L.J., gave what is called a definition of what is meant by the Act, but it is not a definition, though it is a valuable commentary, which describes, perhaps not exhaustively, some classes of cases which may arise. But just as this House, in the case of the Workmen's Compensation Act, pointed out that the words of the Act are what binds us, so here it is the words of the Act and not the gloss upon them that binds us. And precedents are useful to illustrate, but they do not exclude the Act or qualify it. I think, however, that what Bowen, L.J., said is very helpful in applying the words of this Act. Still it remains a question of fact. The learned Judge has decided it after hearing witnesses, and I think there was ample evidence to justify him in coming to the conclusion at which he arrived.

One more point is made, and that is, that the use of this road by these lorries was necessary; it became a *via necessitatis* because the only alternative road had been shut up. I do not think that is a relevant consideration upon the point of fact whether the traffic was or was not extraordinary. I prefer to say nothing as to whether there might be in this or in other cases a right in law by counter-claim or by action against the authority which made the road impassable. I say nothing about that except that I do not propose to encourage or invite the litigants to take that course in this case.

LORD ATKINSON—I concur, and I have nothing to add except this, that it appears to me that if traffic on a particular road be ordinary traffic, and that traffic be diverted to another road by some obstruction or alteration of the surface of that road, it by no means follows that by reason of that diversion the traffic should still be ordinary traffic on the road to which it is diverted. I think you must consider the whole circumstances of the diversion. You must consider the nature of the road to which it is diverted, the structure of that road, and the traffic that it has hitherto borne.

I have nothing to add on the other points which have been already made by my noble and learned friends who have preceded me, but I wish emphatically to state my opinion that the circumstances of the necessity of diversion is really irrelevant.

LORD PARKER—I agree, and I have nothing very material to add; but it appears to me to be absolutely indisputable that the question under section 23 of the Act of 1878 as to whether traffic is ordinary or extraordinary is entirely a question of fact, and it appears to me to be equally indisputable that in considering this question of fact all the circumstances must be taken into account, including in particular the nature of the road along which the traffic has been taken.

Now in the present case the learned Judge has decided that the traffic in question was extraordinary traffic, having regard to the nature of the road, and there is undoubtedly quite sufficient evidence to justify a reasonable man in coming to that conclusion. The only objection to his finding taken by counsel appears to be that he excluded certain evidence which was said to be relevant. The persons who are responsible for the traffic in question proposed at the trial to prove that their reason for taking that particular traffic over the road in question was that the main road had been rendered unfit to carry such traffic by the action of the local authority, who were complaining of what had been done. It was, however, alleged that the same argument ought to prevail even if the

road had been rendered so unfit, not by the action of the local authority who complained of the traffic in question, but by anybody else. The argument therefore amounts to this, that no traffic on any road can be extraordinary if that is the only road which could possibly be used for the traffic in question. Any such construction of the Act would in effect render the application of the section extremely limited, and in my opinion no such construction can be adopted. The learned Judge therefore was right in holding that even if what was proposed to be proved had been proved it could not have been relevant under the circumstances.

The only other question to which I desire to refer is the argument based upon what happened between the end of 1909 and the beginning of 1911. The traffic in question was diverted to this road at the end of 1909, and the first complaint with regard to it was at the beginning of 1911. I fully agree that there may be circumstances under which continued user of the road for the purpose complained of prior to the date of complaint may make the traffic complained of ordinary traffic; but in the present case I am at a loss to see how the user, which extended a little over one year, can affect the question, more especially as the local authority had in 1905, I think it was, an admission from the persons responsible for the user that the user in question was extraordinary, inasmuch as they had already paid for it on complaint of the local authority. In other respects I entirely agree with the judgments which have been already delivered.

LORD SUMNER—I have nothing at all to add. I concur.

LORD PARMOOR—I concur.

Appeal dismissed.

Counsel for the Appellants — Charles, K.C. — Sutcliffe. Agents — Joynson-Hicks, Hunt, Moore, & Cardew, for Bury & Walkers, Barnsley, Solicitors.

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