FOR OFFICIAL USE.

VOL. XIII.—PART II.

No. 634.—High Court of Justice (King's Bench Division).—10th March, 1926.

Court of Appeal.—8th and 9th July, 1926.

House of Lords.—12th and 14th July, and 7th November, 1927.

(1) Nielsen, Andersen & Company *v.* Collins (H.M. Inspector of Taxes).[1]

(2) Tarn *v.* Scanlan (H.M. Inspector of Taxes).[1]

Income Tax, Schedule D—Non-resident company—Exercise of trade within the United Kingdom—Income Tax Act, 1853 (16 & 17 *Vict.*, *c.* 34), *Section* 2, *Schedule D—Income Tax Act*, 1842 (5 & 6 *Vict.*, *c.* 35), *Section* 41—*Finance* (*No.* 2) *Act*, 1915 (5 & 6 *Geo.* V, *c.* 89), *Section* 31.

Two English companies of general shipping agents and ship-brokers acted, under written agreements, as the agents at Newcastle and Hull respectively for a Danish steamship company running a regular service of ships between England and Denmark in conjunction with certain other companies. The passenger traffic was small in amount.

The agents quoted rates for freight and accepted goods from English consignors for shipment to Danish ports. The consignors did not know by whose ships the goods would be carried.

At Newcastle the agents put the goods on board ship directly from the quay by cranes belonging jointly to themselves and the Danish company, while at Hull the goods were taken alongside the ship by the agents, and then put on board by stevedores employed and paid by the agents who were reimbursed by the Danish company at a flat rate per ton.

In all cases the bills of lading were signed " for the Master " of the ship by an employee of the agents lent to the Master for the purpose. The agents did not sign bills of lading on their own account as agents for the Danish company, and no written contracts were usually entered into prior to the bill of lading. At Hull the agents' name was formerly put in the bills of lading, but on the outbreak of the War in 1914 *the names of the actual consignors were inserted.*

The agents at both Newcastle and Hull collected the freights on outward traffic, and also on inward traffic where not paid in Denmark (the contracts in such cases were not made here), and were responsible to the Danish company for all freights payable here.

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(1) Reported (K.B.D. and C.A.) 135 L.T. 744; and (H.L.) [1928] A.C. 34.

The Danish company remunerated the agents for their services in collecting freights and in berthing, unloading and loading its ships, clearing the Customs, supplying coal, etc.

The Danish company had another agent in Newcastle dealing with its less important traffic, but had no other agent in Hull who collected freights for it.

Assessments to Income Tax under Schedule D, Case I, *were made upon the Newcastle company for the years* 1913-14, 1914–15, *and* 1915–16, *and on the Hull company for the years* 1912–13 *to* 1915–16 *inclusive, in respect of the profits arising from a trade exercised within the United Kingdom by the Danish company through them as agents.*

Held—

(i) *that the Danish company was exercising a trade within the United Kingdom to the extent to which goods were taken on board its ships here ;*

(ii) *that the English companies at Newcastle and Hull must be regarded as authorised persons carrying on its regular agency, and as having the receipt of profits arising from such trade ;*

and (iii) *that the Danish company was accordingly assessable to Income Tax in the names of the said agents in respect of the profits resulting from cargoes shipped from this country through the agents* (a) *as regards the years prior to the 6th April,* 1915, *so far as the agents received the freights, and* (b) *as regards the year* 1915–16, *whether the agents received the freights or not.*

CASES.

(1) *Nielsen, Andersen & Company* v. *Collins.*

CASE

Stated under the Taxes Management Act, 1880, Section 59, 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.—At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 17th July, 1919, for the purpose of hearing appeals, Messrs Nielsen, Andersen & Company, hereinafter called the Appellants, appealed against assessments to Income Tax in the sum of £10,000 for each of the years ending 5th April, 1914, 1915 and 1916, made upon them as agents for Det Forenede Dampskibs Selskab, by the Additional Commissioners of Income Tax for the City of Newcastle-upon-Tyne under the provisions of the Income Tax Acts.

2.—The assessments for the years ending 5th April, 1914, and 5th April, 1915, were made under Section 41 of the Income Tax Act, 1842, and the assessment for the year ending 5th April, 1916, was made under Section 41 of the Income Tax Act, 1842, as amended by Section 31 of the Finance (No. 2) Act, 1915. The profits intended to be brought into charge were the profits arising from a trade alleged to be carried on within the United Kingdom by Det Forenede Dampskibs Selskab through the agency of the Appellants.

3.—Det Forenede Dampskibs Selskab, or the United Steamship Company (hereinafter referred to as " Det Forenede "), is a company incorporated in Denmark, having its registered office at Copenhagen, and carrying on the business of shipowners.

4.—The Appellants have for many years carried on business at Newcastle-upon-Tyne as general steamship agents, coal exporters and shipbrokers, &c. The largest part of their business consists in the export of coal, and they supply coal to many foreign steamship companies, including Det Forenede. The ships of the companies other than Det Forenede usually come to Newcastle in ballast and take in coal purchased from the Appellants. In addition to the coal business, the Appellants have an extensive business as forwarding agents, mainly in connection with the ships of Det Forenede and the Ellerman-Wilson Line, Limited.

5.—In March, 1879, the Appellants entered into an agreement with the Kjobenhaven-Newcastle Steamship Company of Copenhagen, a translation of which is attached hereto and forms part of this Case. Under this agreement the Appellants undertook as agents of the Steamship Company in the best possible manner to look after and promote the interest of the Company, and were authorised to make the customary arrangements for the discharge and loading of the Company's vessels in Newcastle, and to collect the freights due to the steamers, receiving by way of agency commission one and half per cent. of the inward and outward net freights, to include all forwarding commission both on through goods carried by the Company's ships and on goods that have arrived by the Company's ships and are forwarded after a short or long lapse of time as also on goods addressed to the Appellants for forwarding by the Company's steamers. The Appellants undertook in consideration of payments on a specified scale to defray all wages for discharging and loading the ships, this to comprise the cost of management and superintendence, delivery of goods on the quay, superintendence and loading and unloading of goods despatched and arriving by rail, delivery of dutiable goods to the " Queens Warehouse ", receiving and stowing of all outgoing goods, and finally the cost of keeping the accounts and supervision of the warehouse on the quay. The Steamship Company, however, undertook to provide the necessary requisites for loading and discharging at Newcastle and to bear the expenses for keeping the same in repair.

(31634) Wt. 27964/569/1965 4,750 7/28 Harrow G.14 A 2

6.—Since the Agreement of March, 1879, was entered into the conditions have substantially changed and some of the provisions of the agreement are no longer applicable. The business of the Kjobenhaven-Newcastle Steamship Company has been acquired by Det Forenede, the business of the Appellants has passed into the ownership of Mr. A. W. Carrall, who was not connected with that business at the time when the agreement was entered into, and the carriage of live cattle, for which the ships were then principally used, has long been discontinued. Mr. Carrall regarded the agreement as entirely obsolete. It has, however, never been formally determined, and the Appellants still carry out the duties which they undertook to perform so far as the present conditions of trade require, and are paid commission at the rate specified in the agreement. The warehouse mentioned in the agreement is still in existence, and is used solely for the purposes of Det Forenede. This warehouse is a shed on the quay belonging to the Corporation of Newcastle, and is leased by the Corporation to the Appellants, who are reimbursed by Det Forenede for the rent and the cost of repairs. The ships of Det Forenede alone are berthed at the quay opposite the warehouse. The cranes and tackle used in loading and unloading the ships belong in part to Det Forenede and in part to the Appellants.

7.—In normal times Det Forenede have a regular service of steamers running between Newcastle and six of the principal ports in Denmark in conjunction with the ships of the Ellerman-Wilson Line, Ltd. Ordinarily the ships of Det Forenede and the Ellerman-Wilson Line run alternately, and goods delivered to the Appellants for shipment from Newcastle to the Danish ports are put on a ship of either line indiscriminately as may be convenient. These goods mainly originate in Newcastle and are brought to the quay by the consignors, who do not know by whose ship the goods will be carried. The Appellants remove the goods from cart to quay if necessary and in all cases put them on board the ship. A clerk in employ of the Appellants (who is lent to the Master of the ship for this purpose) prepares the manifest and signs the bill of lading " for the Master ". The Appellants do not sign bills of lading on their own account as agents for Det Forenede, and as a rule no written contract is entered into prior to the bill of lading, but the Appellants would answer any enquiries as to freight rates. Since the outbreak of War all outward freights have been collected at Newcastle by the Appellants, but before the War the practice varied, and in some cases outward freights were collected in Denmark and inward freights were collected by the Appellants in Newcastle. The Appellants are responsible to Det Forenede for freights payable here, and if the freight were not paid in any instance they would threaten proceedings for its recovery, but the question of the proper name in which to sue has not arisen. The Appellants know beforehand when the ships of Det Forenede will arrive at Newcastle, and make all arrangements for berthing them, unloading and loading them, clearing the Customs, supplying

bunker coal, and generally doing what is required in connection with the ships while they are at Newcastle. For these services and for the collection of freights they are remunerated by a commission from Det Forenede. For any service rendered to the consignors before the goods are placed on board they charge the consignors.

8.—The passenger traffic by the Det Forenede boats from Newcastle is negligible. A few passengers are booked direct by the Appellants, and others by Thomas Cook & Son, who for this purpose communicate with the Appellants and remit the fares to them on behalf of Det Forenede.

9.—Det Forenede have a number of other agents acting for them in a similar manner to the Appellants in different parts of the world, including 13 in England. There is another agent in Newcastle who deals with their traffic to and from the smaller ports in Denmark other than those served by the boats for which the Appellants act. A list of the agents of Det Forenede,(1) together with a specimen of the Appellants' notepaper, which describes their business generally and refers particularly to their agency for Det Forenede and the Ellerman-Wilson Line, is attached hereto and forms part of this Case.

10.—It was contended on behalf of the Appellants that Det Forenede did not carry on any trade within the United Kingdom, that the Appellants were not agents having the receipt of profits or gains within the meaning of Section 41 of the Income Tax Act, 1842, that the Appellants were not authorised persons carrying on Det Forenede's regular agency, that they were general agents and brokers, and that neither before nor after the passing of the Finance (No. 2) Act, 1915, was Det Forenede chargeable to Income Tax in the name of the Appellants, and that the assessments ought to be discharged ; alternately, that the assessments ought to be restricted to the profits arising from freights collected by the Appellants in respect of goods shipped from this country.

11.—It was contended on behalf of the Crown (*inter alia*):—

1. That Det Forenede exercised a trade within the United Kingdom.
2. That the Appellants were factors, agents, or receivers of Det Forenede for the purpose of such trade.
3. That the Appellants were authorised persons carrying on Det Forenede's regular agency or persons chargeable as if they were agents in pursuance of Section 31 of the Finance (No. 2) Act, 1915.
4. That in each of the years ended 5th April, 1914, 1915 and 1916, respectively, the Appellants had the receipt of part of the profits or gains of Det Forenede arising from the said trade.

(1) Not included in the present print.

5. That for the purpose of assessment to Income Tax for each of the years ended 5th April, 1914, 1915 and 1916, respectively, Det Forenede were chargeable in the name of the Appellants in respect of the whole of the profits or gains arising to Det Forenede from the said trade carried on through the agency of the Appellants and not merely in respect of so much thereof as was received by the Appellants.
6. That the said assessments were properly made and (subject to any necessary adjustment of figures) should be confirmed.

12.—We, the Commissioners who heard the appeal, after considering the facts and arguments put before us, held that a trade was carried on by Det Forenede in the United Kingdom to the extent to which goods were taken on board its ships at Newcastle for carriage to Denmark, and that the Appellants were its agents in whose name it was assessable to Income Tax for the years 1913–14 and 1914–15 in respect of the profits arising from such trade so far as regards freights collected by the Appellants in respect of such goods, and for the year 1915–16 in respect of all the profits arising from such trade whether the freights were collected by the Appellants or otherwise. In accordance with this view we reduced the assessments to £82 subject to an allowance of £82 for wear and tear for the year ending 5th April, 1914, £94 subject to an allowance of £94 for wear and tear for the year ending 5th April, 1915, and £602 subject to an allowance of £602 for wear and tear for the year ending 5th April, 1916.

13.—The Appellants, immediately upon the determination of the appeal, declared to us their 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 Taxes Management Act, 1880, Section 59, which Case we have stated and do sign accordingly.

P. WILLIAMSON, N. ANDERSON, } Commissioners for the Special purposes of the Income Tax Acts.

YORK HOUSE,
23, KINGSWAY,
LONDON, W.C.2.

21st March, 1924.

JOHN VENN & SONS.

[Translated from the Danish.]

Duplicate

Stamp Kr.12.65 ore.

Between the " Kjobenhavn-Newcastle " Steamship Company of Copenhagen acting through its undersigned business manager Charles Moller and Messrs. Nielsen Andersen & Co. of Newcastle-upon-Tyne the following agreement has been entered into with regard to the settlement of the position of the said Messrs. Nielsen Andersen & Co. as agents of the Steamship Company in Newcastle.

1.—Nielsen Andersen & Co. as agents of the Steamship Company in Newcastle shall in the best possible manner look after and promote the interests of the Company and shall be authorised to make the customary arrangements for the discharge and loading of the Steamship Company's vessels in Newcastle. They shall follow the instructions that may be given to them by the Company's business manager either generally or for special cases. Should they in consequence of instructions given effect purchases for the Company's account they shall obtain the best possible terms and every advantage that may be obtained shall accrue to the Company. When making payments of accounts and such like for the account of the Company every discount rebate and the like that may be obtained shall be for the benefit of the Company. Likewise they shall make every effort and see to it that the dues and other outgoings which are borne direct by the Company (as for example those in respect of goods customs warehouse rent telegrams etc.) are kept as low as possible.

2.—Nielsen Andersen & Co. are authorised to collect the freights due to the steamers but shall guarantee all amounts of freight. Whenever one of the Company's steamers is cleared from Newcastle they shall forward as expeditiously as possible a complete statement in which in particular the whole amount of freight is credited to the Company even though the same shall not yet have been received.

It shall be their duty to meet the drafts (short in Sterling) which the Company may draw against the freight for the respective steamer's voyages and shall forward with their statement remittance for the balance shown by the statement in the Company's favour. Simultaneously with the return voyage of the ship concerned they shall make a report on claims for compensation that may possibly arise in respect of damage to goods shipped by the steamer concerned.

3.—Nielsen Andersen & Co. are allowed by way of agency Commission one and a half per cent. of the inward and outward net freights (*i.e.* the freights according to the manifests less distance freights if any). Further they are allowed one moiety of the customary " entries " which are :—six pence each for horned cattle, one penny for sheep two pence for pigs one shilling for horses three pence for calves. In the above commission is included all forwarding commission on both through goods carried by the Company's ships

and on goods that have arrived by the Company's ships and are "forwarded" after a short or long lapse of time as also on goods addressed to Nielsen Andersen & Co. for forwarding by the Company's steamers. In the freight accounts to be collected in respect of the Company's steamers no other amounts may be included than those stated in the Bill of Lading; errors and Local "dues" to be collected for the Company are excepted.

4.—For the consideration mentioned below Nielsen Andersen & Co. undertake to defray all wages for discharging and loading the ships this to comprise the cost of management and superintendence delivery of the goods on the quay superintendence and loading and unloading of goods despatched and arriving by rail delivery of dutiable goods to the "Queens Warehouse" receiving and stowing of all outgoing goods and finally the cost of keeping the accounts and supervision of the warehouse on the quay in accordance with the Power of Attorney granted to the Steamship Company by Mr. E. H. Hambro of London. The Steamship Company shall however provide the necessary requisities for loading and discharging at Newcastle and bear the expenses for keeping the same in repair; the Company shall likewise pay the New Year's gratuities to the staff at the dock coal shoot and such like places and in respect to which Nielsen Andersen & Co. shall at the end of each year submit to the Company their suggestions.

The consideration above referred to is :—

For discharging from a steamer the cattle pigs sheep and horses into the health station 10 (ten) shillings per hundred large animals (4 sheep or pigs to be equal to one large animal). For cleaning and limewashing the steamer in accordance with the Privy Council's Order £2 10*s*. for a cargo of less than 250 animals and £4 for a cargo of more than 250 animals. For cartage of dung from the steamer 10 shillings per 250 animals and £1 for more than 250 animals. For discharging all general goods and flour one shilling per ton. For discharging all grain 1 shilling and 8 pence per load of 10 quarters. For loading all outgoing goods 1 shilling per ton. For loading coal the trimming rates allowed by the Tyne Commissioners.

5.—This agreement may be terminated by either side by six months' written notice but the Steamship Company reserves to itself the right to cancel the agreement immediately and without notice and appoint another agent in the event of Nielsen Andersen & Co. failing to fulfil their obligations under the present agreement or of Nielsen Andersen & Co. undertaking the agency for another line of steamers competing with the line of steamers of the "K.N." Steamship Company with the exception however of all the Jutland Companies now running steamers to Newcastle and for whom Nielsen Andersen & Co. are now agents. And the Steamship Company shall not be bound unto Nielsen Andersen & Co. as agents in case any of the firm's present members should cease to be responsible for the firm.

6.—In the event of any disagreement or dispute arising between the Kjobenhavn-Newcastle and Nielsen Andersen & Co. the same shall be settled by arbitration the Court of arbitration shall consist of two persons one to be chosen by each party the arbitrators shall prior to the commencement of the arbitration proceedings appoint an Umpire whose award shall be final for both parties if the two arbitrators fail to agree. Messrs. Nielsen Andersen & Co. agree to such arbitration taking place at Copenhagen and to the arbitrators being chosen from amongst honourable men resident at Copenhagen. Whenever arbitration is demanded by one party notice in writing shall be given to the other party who shall appoint its arbitrator not later than eight days after receipt of such written demand for arbitration and the arbitrators shall immediately appoint their Umpire and meet for the arbitration proceedings not later than three days after such appointment.

7.—As regards the stamping of this agreement it is observed that the consideration stipulated in Article 3 is assumed not to exceed 14,500 Kronor per annum.

Newcastle, 10th March 1879.

Copenhagen, 28th March 1879.
Dampsk. Selsk.

Kjobenhavn-Newcastle
Charles Moller
Business Manager.

Permission to charge dues given in letter dated 22/11/78.

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(2) *Tarn* v. *Scanlan.*

CASE

Stated under the Taxes Management Act, 1880, Section 59, 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.—At meetings of the Commissioners for the Special Purposes of the Income Tax Acts held on 1st June, 1917, and 15th May, 1919, for the purpose of hearing appeals, Mr. W. J. Tarn appealed against assessments to Income Tax (Schedule D) in the sums of £20,000 for each of the years ended 5th April, 1913 and 1914, and of £50,000 for the year ended 5th April, 1915, and of £60,000 for the year ended 5th April, 1916, made upon him as Secretary to Thomas Wilson, Sons & Company, Limited, for Det Forenede Dampskibs Selskab, by the Additional Commissioners of Income Tax for the Division of Hull in the County of Yorkshire, under the provisions of the Income Tax Acts.

2.—The profits intended to be brought into charge by these assessments, which were made pursuant to Section 41 of the Income Tax Act, 1842, were the profits (if any) arising and accruing within the United Kingdom to Det Forenede Dampskibs Selskab (a Danish shipping company, having its registered office at Copenhagen, and hereinafter referred to as " Det Forenede ") through or by means of the agency of Thomas Wilson, Sons and Company, Limited (an English shipping company, also carrying on business as forwarding agents and general agents and shipbrokers and as underwriters, having its registered office at Hull, and hereinafter referred to as " Wilsons "). No question was raised at the hearing as to the form of the assessments, it being agreed by both sides that the profits intended to be charged were as set out above.

3.—The following facts were admitted or proved at the hearing :—

(*a*) An agreement was made on the 29th day of November, 1910, between Wilsons and Det Forenede, Clause 10 of which provides that " Wilsons shall be the exclusive " Agents for Det Forenede at Hull during the continuance " of this Agreement ". This clause was operative during the years under appeal and under it Wilsons have earned remuneration by buying coal for or rendering other services to any ship of Det Forenede that might require coal or other services whether belonging to the regular line hereinafter mentioned or not.

(*b*) Another agreement was made on the 29th day of November, 1910, and supplemental agreements on 14th June, 1911, and 3rd May, 1912, between Wilsons, Det Forenede, and two other foreign shipping companies.

The effect of these agreements was to establish a regular service of steamers belonging separately to the several contracting parties between England and certain foreign ports upon terms mutually advantageous to the contracting parties. Wilsons act as English agents of each of the three foreign shipping companies.

The above-mentioned agreements may be referred to for the purposes of this Case.[1]

(*c*) Wilsons act as forwarding agents for English consignors of goods to be forwarded from Hull to the foreign ports above referred to. The consignors apply to Wilsons for particulars of rates of freight and Wilsons quote rates and arrange room on the steamers. The consignors do not know by whose ships the goods will be sent. As forwarding agents Wilsons charge the consignors for the services they render to them. Wilsons put goods alongside the outward-bound vessel. On the vessel are stevedores who put the goods on board. These stevedores are employed and paid by Wilsons, who, in the case of a Det Forenede boat, are recouped by Det Forenede on the basis of an agreed flat rate per ton. Wilsons draw up the manifests and charge Det Forenede an agreed sum for this work and for getting the ship through the Custom House. The bills of lading are signed " for the Master " by one of Wilsons' employees who is lent to the Master of the ship for this purpose. Before the War the name of Wilsons was put in the bills of lading as the nominal consignors, but after the outbreak of the War the names of the actual consignors were inserted. Wilsons do not sign bills of lading on their own account as agents to Det Forenede, and do not on behalf of Det Forenede sign contracts for the carriage of outward-bound goods, no written contract being usually entered into prior to bill of lading. Wilsons are held responsible by Det Forenede for the freight of goods shipped " c.i.f." by them on outward-bound Det Forenede boats. Wilsons collect the freights and other moneys due from the consignors and remit what is due to Det Forenede at fortnightly or monthly intervals. If it were necessary to sue for payment Wilsons would sue in their own name.

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[1] Not included in the present print.

(*d*) Wilsons are not the only forwarding agents acting in connection with this traffic, but no other agents occupy the same position as Wilsons in regard to collection of moneys due to Det Forenede.

(*e*) Freightage rates are practically controlled at this end by Wilsons and at the other end by Det Forenede.

(*f*) As regards passenger traffic, which is small in amount, tickets are mostly obtained through the United Shipping Company, Dean and Dawson, and Cook's Agencies. The fares collected by these agencies are paid direct to Det Forenede at Copenhagen. The plans of passenger cabins are, however, kept by Wilsons, and the agencies aforesaid would have to apply to them for information as to what berths were vacant. As a rule the several agencies would not sell any particular berth ; that matter would be settled with the Steward when the passenger reached the vessel.

(*g*) Wilsons collect the freight on inward traffic where, as is generally the case, such freight is not paid on the other side, but the contracts for carriage in such cases are not made here.

(*h*) After the outbreak of the War goods were forwarded under the following arrangements :—

(a) The consignors requested Wilsons to get permission from the railway companies concerned to move the goods.

(b) Wilsons requested the railway companies to move the goods.

(c) Wilsons informed the consignors that this had been done.

(d) The consignors informed Wilsons that the goods had been despatched and forwarded the export licence.

(e) Wilsons made a pre-entry with the Customs authorities of the goods to be despatched and deposited with them the export licence.

Copies of the forms used for these five several operations are annexed to and form part of this Case.[1]

(*i*) The ships of Det Forenede for which Wilsons act are not tramp steamships, but part of a regular service of steamships which is maintained under the arrangements above set out, and which is advertised by Wilsons to possible consignors in the United Kingdom. It was stated to us at the hearing of the appeal that during the later part at any rate of the War, the steamships used for the purpose were those of Det Forenede only.

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[1] These forms, except the first mentioned, are omitted from the present print.

4.—On the foregoing facts Counsel for the Appellant contended that Wilsons are not agents carrying on the business of Det Forenede in the United Kingdom but are general agents and shipbrokers; that Det Forenede did not carry on business within the United Kingdom; that the assessments under appeal should be discharged; and that in the alternative with regard to the years ending April 5th 1913, 1914 and 1915, Wilsons were not in receipt of the profits of the trade or alternatively at most only to the extent to which they collected moneys on goods shipped "c.i.f." from this country.

5.—It was contended on behalf of the Crown (*inter alia*)—

1. That Det Forenede exercised a trade within the United Kingdom.
2. That T. Wilson Sons & Company, Limited, were factors agents or receivers of Det Forenede for the purpose of such trade.
3. That T. Wilson, Sons & Company, Limited, were authorised persons carrying on Det Forenede's regular agency or persons chargeable as if they were agents in pursuance of Section 31 of the Finance (No. 2) Act, 1915.
4. That in each of the years ended 5th April 1913, 1914, 1915 and 1916 respectively, T. Wilson, Sons & Company, Limited, had the receipt of part of the profits or gains of Det Forenede arising from the said trade.
5. That for the purpose of assessment to Income Tax for each of the years ended 5th April 1913, 1914, 1915 and 1916 respectively, Det Forenede were chargeable in the name of T. Wilson, Sons & Company, Limited, in respect of the whole of the profits or gains arising to Det Forenede for the said trade carried on through the agency of T. Wilson, Sons & Company, Limited, and not merely in respect of so much thereof as was received by T. Wilson, Sons & Company, Limited.
6. That the said assessments were properly made and (subject to any necessary adjustment of figures) should be confirmed.

6.—Having carefully considered the matter we determined that a trade was carried on in the United Kingdom by the Det Forenede Company to the extent to which goods were taken on board their ships at Hull for carriage elsewhere, and that T. Wilson Sons & Company, Limited, were their agents having the receipt of the profits arising therefrom so far as regards freights collected by them in respect of such goods and we accordingly decided that for the three years ended 5th April, 1915, the assessments should be restricted to the profits on goods shipped "c.i.f." from the United Kingdom, whilst for the subsequent year the profits on all goods shipped from the United Kingdom must be included in the assessments.

7.—The parties to the appeal, having gone into the figures, subsequently agreed that on the lines indicated the liability would be :—

5th April, 1913—£1,513 less £377
wear and tear of machinery and plant.

5th April, 1914—£1,513 less £377
wear and tear of machinery and plant.

5th April, 1915—£1,750 less £535
wear and tear of machinery and plant.

5th April, 1916—£6,996 less £2,176
wear and tear of machinery and plant,

and we reduced the assessments accordingly.

8.—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 Taxes Management Act, 1880, Section 59, which Case we have stated and do sign accordingly.

W. J. BRAITHWAITE,
P. WILLIAMSON, } Commissioners for the Special purposes of the Income Tax Acts.

YORK HOUSE,
23, KINGSWAY,
LONDON, W.C.2.

21st March, 1924.

This form to be used for traffic CONSIGNED TO DENMARK ONLY.

To

ELLERMAN'S WILSON LINE LIMITED,

DANISH DEPT.,

HULL. *Address*

Please quote
Our ref. DANISH.
Your ref.

.....1917.

We shall be glad if you will order the under-mentioned traffic forward at the earliest moment.

Pkgs.	Goods	WEIGHT T. C. Q. L.	C. Ft.	From whom we are to receive the Goods	Consignees	* Lic. date and extended dates (State whether General, Ordinary or Special Licence)

* Quantities for each Licence to be shown separately.

Please state date of Merchants Guild Certificate when Licence is not required.....1917.

Please state by what Railway Co. the traffic is to be forwarded—

We undertake to forward all necessary documents along with our Shipping advices at the time of despatch.

Signature.....

SHIPMENT OF GOODS.—In view of the present abnormal position caused by the War, it may happen that Cargo cannot be shipped or is outshipped by one steamer and is shipped by a later opportunity, or owing to unavoidable causes goods may be loaded on board an earlier steamer than expected, and be impossible for us to notify shippers of any alterations before steamers sail.

As we are unable to accept any liability in this connection, we respectfully suggest that shippers, in making their Fire, Air-Craft War, Marine, and other Insurance arrangements, should provide against possible loss arising from the contingencies referred to.

CONDITIONS OF CONVEYANCE.—All goods awaiting shipment are received and carried subject to the conditions of the "Ellerman's Wilson Line" Bills of Lading and also to the conditions and/or regulations of any Steamboat, Railway or Canal Co. or persons by whom the goods may be conveyed, and ALL GOODS ARE AT THE RISK OF SENDER until actually shipped on board the steamer. We cannot hold ourselves liable for Demurrage either on Railway Trucks, or Lighters, or for Rail, or Dock Charges, or Rent, or in regard to the short shipment of such goods, or delay arising from any cause, or Risk of Fire, Aerial Craft (Hostile or otherwise) &c. or other causes, nor for any extra charges incurred.

FREIGHT, COST OF INSURANCE AND ALL OTHER CHARGES TO BE PAID IN HULL, SHIP LOST OR NOT LOST.

ELLERMAN'S WILSON LINE LIMITED,

Steamship Owners, Forwarding Agents & Underwriters,
Hull, Grimsby, Leeds, Sheffield, Stoke-on-Trent,
Birmingham and Manchester.

The cases came before Rowlatt, *J.*, in the King's Bench Division on the 10th March, 1926, when judgment was given in favour of the Crown with costs.

Mr. Latter, K.C., and Mr. Cyril King appeared as Counsel for the Appellants, and the Attorney-General (Sir Douglas Hogg, K.C.) and Mr. R. P. Hills for the Crown.

JUDGMENT.

Rowlatt, J.—These two cases relate to claims for taxation for the years 1914 up to 1916, and it is obvious that there has been very great delay in bringing them forward. I said something the other day about the delay in these cases, which seems to have attracted a great deal of attention, and the position put—and it is repeated this morning in a very prominent journal—is that the taxpayer, having won his case before the Commissioners, is subjected to appeal on the part of the Inland Revenue, and then that appeal is delayed, to the prejudice of the taxpayer. Now I wish to point out that that is not an accurate statement of fact, and is not an accurate report of what I said, and it is not quite fair. As a matter of fact, the delays in the appeals which come to this Court are just as often on the part of the taxpayer as they are on the part of the Revenue, and in these present cases that I have before me now, and in the two cases which I had yesterday, the taxpayer was the appellant, and the delay was even worse than in the case in which I made the remarks of which so much notice has been taken. I do think it is a great pity that these delays occur. It is very prejudicial to the public, and it defeats what is the object of the tax, that the tax for the year should be collected in the year for which it is imposed, but I do not know whether these delays are the fault of the appellant (whether the Crown or the subject), or whether they are the fault of the respondent (whether the Crown or the subject), or whether they are the fault of both put together, or whether they are purely the fault of the Commissioners, who are probably very greatly overworked. Therefore, whatever remarks anybody may make about delay, I hope they will not cite me as an authority for saying that it is a matter for which the Crown is solely and obviously to blame. I think it is only fair to make that clear.

The materiality of the antiquity of the controversy in these cases is that part of the cases relate to the time before 1915, when a change in the law was made. The Appellants in both cases are firms who have been assessed on behalf of non-residents who are said to exercise a trade in the United Kingdom. The non-resident in each case is a Danish shipping company, and it has been running, in the years in question, a line of steamships to this country, not calling here as tramp steamers, but it has established a line of steamers which come regularly and habitually here, and, in respect of the goods which are shipped in this country for carriage away by these steamers, this Danish company has habitually made contracts in this country ; whoever it has made them by, it has made contracts in this country by taking the goods and giving bills of lading for them for carriage abroad, and as such it has been exercising a trade in this country. I do not see how that conclusion can be avoided, after the

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decision even of *Erichsen* v. *Last*(1), which is some time ago. But the question arises whether the Appellants in these two cases can be assessed as agents, and first of all their position has to be considered in respect of the years before 1915. At that time an agent could not be assessed unless he was in receipt of the profits taxed, to put it shortly (Section 41 of the Income Tax Act, 1842). Now what are these agents ? I use that word " agent " for the moment, without, of course, begging the question in any way, because it is said they are not agents within the meaning of the Section at all, and they are not in receipt of profits. But what are they ? Each of them is a permanent agent, whatever that may mean ; each of them holds his position permanently ; they are not employed for each ship as it comes in, or anything of that kind ; they have gone on for years ; and what is their position ? They are the people, undoubtedly, of whom inquiries are made if any shipper is thinking of putting goods on board these steamers. There cannot be any doubt about that. They will quote the rates. The rates are the rates of the line, but they will tell intending shippers what the rates are. They will take the goods to the ship's side. According to a statement in one of the Cases, if not in both, goods are sent to them to take to the ship's side, and for taking the goods to the ship's side they apparently charge the owners of the goods. When they get to the ship's side, the goods are lifted on board, in one case by stevedores, who are paid by the Appellants in that case, at Hull, and they are reimbursed on a flat rate ; whether it comes to exactly the same as, or more than the rate, or leaves them with a profit, I do not know. At the other place there are cranes, which are the joint property of the agents and the steamship company themselves. Then the goods get put on board, and the Master signs a bill of lading, or, rather, a clerk lent by the Appellants signs a bill of lading for the Master. They do various other works for the ship—attending to berthing and Customs and coal and so on, for which they are paid. They are paid a percentage commission on the freight.

Mr. Latter says that these people were not agents under the Act of 1842 at all, and that they had not the receipt of the profits. As regards their being agents, he says they did not do the act which is the crucial act upon which the proposition depends that this steamship company did exercise a trade in the United Kingdom, namely, make the contract or sign the bill of lading. Upon that I think I must take my stand upon what was said in *Grainger* v. *Gough*(2). According to Lord Herschell, the only limitation on the word " agent "—I am ruling out an agent who has really nothing to do with the business at all, like an advertising agent—in those days was that he was in receipt of moneys which included trade profits. Lord

(1) 1 T.C. 351 and 4 T.C. 422. (2) 3 T.C. 462.

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Davey did not go quite so far, because he thought the agent must be in receipt not of the sum out of which the profits came, but of the profits taxed, and he did not say anything as to whether the alleged agent in that case was an agent within the Act. But it seems to me that the position which has been acted upon ever since, and which I certainly think I ought to act upon, is that if the agent is in receipt of profits he is an agent within the Act of 1842 by virtue of that fact, if he is an agent at all. But if there is some qualification such as Mr. Latter has contended for in that Act, I think the facts here are very strong against him, because it may be that the actual act of signing the bill of lading was done in the name of the Master, but when the goods are put on board they are put on board upon an understanding that a bill of lading will come forward, and whenever the goods are accepted for carriage, really, the contract is made in these cases. I cannot think that if, as might be worth while, as taxation is so high, the Master and the representative of the consignor were to take a tug or steamer three miles outside the territorial waters, and sign a bill of lading there, that would make any difference in this case at all. The substance of the matter, namely, getting the goods, arranging for them, collecting them, assembling them, finding the consignors, finding the Customs of the ship and bringing the goods to the ship's side, is all done, so far as it is done by anybody in England, by these people, and that, I think, is the substance of the act which constitutes a contract in this country.

Now were they in receipt of the profits ? I have said that Lord Herschell put it that, if they were in receipt of the moneys out of which the profits came, that was enough. Lord Davey, I think, said the same. Now here they collect the freights. It is said that they do not really collect freights, but that in many cases they are the consignors upon the bill of lading, and therefore they are paying freights as principals, receiving them in turn as principals from the real shippers. I do not think there is any substance in that at all. If they did in any case, or in all the cases, sign the bill of lading as consignors, I do not think there is any significance in it. They were not here as speculators in freight ; they were here as agents, for this purpose, at any rate, of the ship. They had to tell the public in England the true freights for which the ship would carry ; they could not make a speculation in it. They had to be content with their commission as their reward, and they guaranteed the freights, so that they were responsible in any case to the shipowner for the amount. Under those circumstances I do not think the fact that they put their names on the bill of lading, instead of the names of all sorts of consignors, makes any difference at all. I think the freights are, for this purpose, the freights of the shipowner, and they are collecting them and getting a commission upon them. Therefore I think, from every point of view, the Act of 1842 is satisfied.

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Now I come to the case which depends upon Section 31 of the Finance (No. 2) Act, 1915. I have thought many things about this Section ; I daresay I have said several ; I do not know whether they are all consistent even, let alone right. But the Act of 1915 said that in the case of a factor, agent, receiver or manager he should be chargeable, although he may not have receipt of the profits or gains of the non-resident. Now that appears at first sight to sweep away the only limitation which Lord Herschell imposed upon the word " agent ", and to leave any agent—not an irrelevant agent, of course —liable to be taxed. But it seems to me that, in sweeping that away, Section 31, by Sub-section (6), has introduced a different sort of limitation ; some limitation, I suppose, is necessary, and it does seem to me that in the first place, as I said yesterday, those who drafted Sub-section (6) assumed that nobody would dream of charging an agent in respect of profits or gains that did not arise from sales or transactions carried out through him. I should think that it is assumed that you start with this, that you only charge the agent for profits or gains on transactions carried out through him, and then you only charge him if he is an authorised person carrying on a non-resident's regular agency—not the person doing the business, but carrying on the regular agency—but, it seems to me, it must be in respect of profits or gains on sales or transactions carried out through him. In this case one has to look somewhat broadly, I think, at the position of these people. They are, I think, clearly carrying on the regular agency. A steamship line that has a line of steamers coming here, waiting for general cargo or passengers—general cargo that has to be picked up somewhere—must have some agency here. If it is one of the big lines, as we know, and as Mr. Latter says, it has great offices of its own, and no question arises. But it must have something ; it cannot be unrepresented during the time when the ship is not in the port ; it must have something, and it must have something regular—a regular agency—and the only people this steamship line has here are these two Appellants in these two cases, and I think they carry on their regular agency, and they are, I should have thought, " authorised persons ", whatever that may mean, but I think they are authorised persons carrying on the regular agency, for the simple reason that they are the people the shipowners know are there and whom everybody else knows are there in order to deal with the business that is coming forward for the shipowner. That is all that can be said about the matter, and the profits or gains in respect of which they are taxed are the profits or gains which result from the cargo which has been put on the ship through them, in respect of the years before 1915, if they received the freights, and, in respect of the years after 1915, whether they received the freights or not, but it must be in respect of cargo put on board through them.

Under these circumstances I think both of these appeals must be dismissed with costs.

Appeals were entered in both cases against this decision, and the cases came before the Court of Appeal (Lord Hanworth, *M.R.*, Scrutton, *L.J.*, and Romer, *J.*) on the 8th and 9th July, 1926. On the latter day judgment was given unanimously in favour of the Crown with costs, confirming the decision of the Court below.

Mr. Latter, K.C., and Mr Cyril King appeared as Counsel for the Appellants, and the Attorney-General (Sir Douglas Hogg, K.C.,) and Mr. R. P. Hills for the Crown.

JUDGMENT.

Lord Hanworth, M.R.—These two cases are appeals from a decision of Mr. Justice Rowlatt who affirmed the decisions of the Commissioners for Special Purposes who had held the assessments good. The two cases raise some important and rather difficult matters and it is necessary to consider the facts in each case, which are for the most part closely alike, but there is a slight differentiation in the case of one from the other.

Messrs. Nielsen, Andersen and Company is the firm name under which a man carries on a business at Newcastle. This business has been carried on in this firm name for a great number of years and the business that is carried on is that of general steamship agents, coal exporters, ship-brokers and so on. They have acted as ships' brokers to a Danish shipping line, which we have called for short Det Forenede. It appears that Det Forenede have a regular service of steamers running between Newcastle and six of the principal ports of Denmark. They run these ships in conjunction with the ships of the Ellerman-Wilson Line. Messrs. Nielsen, Andersen and Company act as ship-brokers to vessels calling at the ports, and it is quite plain that in carrying on their business they act for the ships in a manner which would be described as ship's brokers or ship's agents, and no doubt, they receive reward for the services they so render to the ship and in respect of that business carried on by them they are assessable to Income Tax. That is what I may call their own home and proper business. But in addition to that it is said that they act for Det Forenede as agents and act for the steamship company. Such is the close association between Det Forenede and the Ellerman-Wilson Line that, as a rule, ships of one or other line run alternately, and it appears that goods are delivered to Nielsen, Andersen and Company for shipment from Newcastle to the Danish ports and they put them on board vessels of one or other of the lines as may be convenient. The goods, it appears, originate in most cases in Newcastle and are brought down to the quay by the consignors who do not know by whose ship the goods will be carried. It appears that there is a clerk in the

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employ of Nielsen, Andersen and Company who is lent to the master, and he prepares the manifest and signs the bills of lading. Messrs. Nielsen, Andersen and Company do not sign the bills of lading on their own account as agents for Det Forenede, but they do this: Enquiries are made as to the freight rates for the goods which are to be carried, and it appears that the Appellants undertake to answer and would answer definitely as to the rate of freight to be charged. It also appears that the Appellants collect the freight at Newcastle, and since the War—that is since 1914—they collect all the freights, not merely those in respect of goods which are put on board at Newcastle, but also inward freights. More than that, the Appellants are responsible to Det Forenede for the freights which are payable at Newcastle and, if the freight were not paid, they themselves would, acting for and on behalf of Det Forenede, threaten proceedings, although at present they have not had to take proceedings actually in the Courts. There is an agreement which is attached to the Case and that agreement recites that it is made between Det Forenede and Messrs. Nielsen, Andersen and Company, who are described as agents of the steamship company in Newcastle. That description of course, is not a definitive determination of the question, but it is a matter which is not to be overlooked in the evidence as to whether or not Det Forenede are carrying on business in this country.

I think I have taken the leading facts, although I have not recounted all the facts which appear in the Case. The conduct of the business of Det Forenede has been in the hands of Nielsen, Andersen and Company for a number of years and, unless it is through Nielsen, Andersen and Company, Det Forenede have got no office of their own or place of business and, if they had to collect the freight, there is no office from which a demand could be made. This collection of the freight appears to me something beyond what would be the ordinary duties of a ship-broker or ship's agent carrying on business independently of and apart from the shipping line for whose ships the ship-broker rendered the usual services.

Upon these facts the Commissioners held, after considering the matter, that a trade was carried on by Det Forenede in the United Kingdom to the extent to which goods were taken on board their ships at Newcastle for carriage to Denmark.

In the other case of W. J. Tarn and Company the facts are a little stronger to show that the business is carried on by Det Forenede at Hull through Mr. Tarn. It appears that the consignors apply to Tarn for particulars of the freight, and, though

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rates are collected by this agent for them, Tarn is the Secretary to Thomas Wilson, Sons and Company, Limited, and Wilsons collect the freight. The freightage rates are practically controlled at this end by Wilsons and at the other end by Det Forenede, and there are various agreements which are attached to the Case which show that Wilsons have for a long time acted for and with Det Forenede, and, indeed, I think they are described as the agents of Det Forenede in one or more of the agreements.

These are the facts which are relied upon in each case as showing that there was a trade carried on by Det Forenede in this country. We have had a number of cases referred to, but I find it necessary only to refer to a few. In the case of *Erichsen* v. *Last*(1) the question arose whether a foreign company domiciled at Copenhagen which had three marine cables in connection with Aberdeen and Newcastle communicating with the telegraph lines of the Post Office in the United Kingdom, carried on business or exercised a trade in the United Kingdom; it was held that they did. Incidentally in the course of his judgment Sir George Jessel said this, on page 417, 8 Q.B.D.(2): "A company in this country who regularly undertake the carriage "of goods abroad for money as part of their ordinary business, "carry on trade in this country, although the whole of the "carriage is done abroad. The mere fact that they enter into "contracts in this country with English subjects for the right of "carriage, appears to me to be the same thing as if they were "to make similar contracts for the sale of goods. Whether it "is the right of carriage or the right to transmit a message, "appears to me to make no difference. Again, if a railway "company with a station at Dover and a station at Calais were "to carry passengers from Dover to Calais as a regular practice, "that, I think, would be a trading in Dover, so far as regarded "the passengers carried from Dover to Calais". He says at an earlier portion of his judgment(3): "There is not, I think, any "principle of law which lays down what carrying on trade is. "There are a multitude of things which together make up the "carrying on of trade, but I know no one distinguishing incident, "for it is a compound fact made up of a variety of things." However, consonantly with the judgment he gave in that case, he did give the illustration of a contract of carriage made over here for goods or passengers to be carried by sea from a port in this country to a port in a foreign country.

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(1) 4 T.C. 422. (2) *Ibid.* at pp. 423 and 424.
(3) *Ibid.* at p. 423.

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If one were to apply the judgment in *Erichsen* v. *Last*(1) which is a case binding upon this Court, there would appear to be no difficulty in saying that the Commissioners have applied a right test and, upon the facts before them, have come to a right conclusion that Det Forenede does carry on a business in this country; but it is said that there are other cases in which foreign companies or foreign traders have succeeded in showing that they do not carry on a trade or business in this country. In *Grainger* v. *Gough*(2) in [1896] A.C. 325, it was held that a foreign merchant who canvassed through agents in the United Kingdom for orders for the sale of his merchandise to customers in the United Kingdom does not exercise a trade in the United Kingdom so long as all contracts for sale and all deliveries of the merchandise to customers are made in a foreign country. It is important to observe, however, that the reason why the foreign trader was not held liable was because the contracts were not made in this country; the agents over here submitted offers to the trader abroad, but it was not until the trader abroad had exercised his volition that there came to be a contract which was to be carried out, and the contract in many cases was carried out by delivery of the goods abroad.

On the other side you have the case of *Werle and Company* v. *Colquhoun*(3) which illustrates the dividing line. There the Appellants, a firm of wine merchants in Rheims, employed a London firm to obtain orders for their wine in England. The wine was advertised in England. The Appellants kept no wine in England, but all orders were forwarded to Rheims and the wines were invoiced in the Appellants' name, packed and sent direct from there at the customer's expense and risk. Payments were made either to the Appellants or to the London firm, who remitted the amounts to the foreigner abroad without carrying them to any current account. But in that case the contracts were made in England and the agents who were conducting the business had authority to enter into the contracts. It was held that the foreigners were carrying on a business in this country.

Lastly I will refer to the case of *Smidth* v. *Greenwood*(4), [1921] 3 K.B. 583, where in his judgment Lord Justice Atkin said this: "I think the question is, where do the operations "take place from which the profits in substance arise?" Applying that test, and not overlooking the decisions which have been given in *Grainger* v. *Gough* and *Werle* v. *Colquhoun*, it appears to me that there was a business—the business of securing freight for their ships—which was carried on in this

(1) 4 T.C. 422. (2) 3 T.C. 462. (3) 2 T.C. 402.
(4) 8 T.C. 193, at p. 204.

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country; that in addition to the ordinary ship-broker's business the Appellants in both these cases were acting as agents for the foreign company for the purpose of entering into contracts and securing business for the foreign company, the business of filling their vessels with goods and thus securing freight to be paid to the shipping company. These cases that I have referred to indicate the principles on which the matter ought to be considered. There was abundant evidence before the Commissioners, who correctly advised themselves according to these cases, and it appears to me, therefore, that upon the facts found by the Commissioners the Appellants were liable, the assessments were correctly made, the judgment of Mr. Justice Rowlatt who confirmed the Commissioners was right, and the appeal fails on this ground.

There is a second point which has to be considered. If there is a trade carried on in this country, by virtue of Section 2 of the Act of 1853 it becomes liable to taxation. Section 2 grants the duties, and under Section 2 the duties are to be charged in respect of trade under Schedule D. I am dealing now with the business which is as old as 1914, 1915 and 1916, and which has to be dealt with under the Income Tax Acts as they stood before the Consolidating Act of 1918 became effective. Under that charging Section 2, and the Schedules, there is a charge "for and in respect of the annual profits or gains arising or "accruing to any person whatever, whether a subject of Her "Majesty or not, although not resident within the United "Kingdom from" any trade or employment "exercised within "the United Kingdom". As there is a trade, as I have already said, found to be exercised within the United Kingdom, prima facie it is chargeable; but where it is trade exercised by a company or person not resident within the United Kingdom the assessment is to be made and the tax has to be recovered through the machinery which is provided under Section 41 for that purpose, and there under Section 41 the tax is chargeable in the name of a "factor, agent or receiver having the receipt of any profits or "gains arising as herein mentioned". It is said that the meaning of these words "receipt of any profits or gains arising as herein "mentioned" must indicate the net profits or gains on which the tax would actually be imposed, and does not include gross profits or gains which on examination and when proper deductions have been made fade away and leave nothing upon which the tax itself can be payable. But I do not think that is the right interpretation to be put upon these words. I think it is made plain by what was said by Lord Justice Fry, as affirmed in the case of *Grainger* v. *Gough*(1), that the meaning of these words "factor or agent having the receipt of any profits or gains" is

(1) 3 T.C. 462.

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gross profits or gains in which there may be wrapped up some net profits or gains ultimately to be found chargeable to Income Tax. Lord Justice Fry said in *Werle* v. *Colquhoun*, 20 Q.B.D., at page 763(1): "It is obvious, that whatever profits and gains "there may be from the business exercised within this country, "they must be part of the sums which are received by the agents, "and I think they are not the less in receipt of profits and "gains because they are in receipt of something else as well". Lord Herschell, I think, definitely accepted that interpretation of the words, because in *Grainger* v. *Gough*, [1896] A.C., at page 337, he said(2): "At the same time I am not disposed to put so "narrow a construction on the Section as was contended for "by the Appellants. In the case of a trade exercised in this "country, I think any agent who received, for the foreigner "exercising such trade, moneys which included trade profit "would be within the provisions of Section 41". To the same effect, I think, is the opinion of Lord Morris, and I do not take Lord Davey's observation to be more than words of caution upon a point which he found it unnecessary to decide, and, indeed, unnecessary to come to a definite conclusion upon.

Now, holding that view of Section 41, it appears that both these agents can be assessed, because upon the very statement of the Case they do receive sums in the way of freight which will include, may include, or probably do include profits or gains in respect of their business of ship owners arising out of their business as ship owners, namely, the carriage of goods from which these freights arise. It is, however, said that these agents, inasmuch as they are ship brokers and in that sense have a great deal to do with the shipping, are not persons who are to be treated as the agents because, by Section 31 of the Finance (No. 2) Act, 1915, although there is an extension of Section 41 to make a non-resident person liable in the name of an agent whether that agent has, in fact, received profits or gains of the non-resident person or not, yet that Section is not to be held, and Section 41 is not to be held, to render a non-resident person chargeable in the name of a broker or commission agent unless the agent is the non-resident's regular agent, and that in the present case such offices as are rendered to Det Forenede are rendered sporadically in the case of Nielsen, Andersen and Company and uncertainly, because they do not exclude their shipping goods by the Wilson Line rather than Det Forenede and, therefore, that the exception preventing the extension of Section 41 of the Act of 1842 applies. It appears to me upon the facts that the two Appellants do not escape under Sub-section (6) of Section

(1) 2 T.C. at p. 415. (2) 3 T.C. at p. 468.

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31 of the Act of 1915. I think the Section must be read, as was suggested by Lord Justice Scrutton in the course of the argument, so that it means this: "Nothing shall render a non-resident "person chargeable in the name of a broker or general com- "mission agent or in the name of an agent" and the words "not "being an authorised person carrying on the non-resident's "regular agency" apply to all the three categories that have gone before—broker, general commission agent or agent. I think that is so, because it is made plain by the last words of the Section "through such a broker or agent" which mean a broker or an agent, which is the broad characteristic referred to in the Section, namely "being an authorised person carrying on the "non-resident's regular agency". In the present case it appears to me that both these agents were persons who were abundantly proved from the evidence to be persons carrying on a regular agency, and they are chargeable.

Now, applying these decisions to the cases before us, it stands in this way: In the case of Nielsen, Andersen and Company so far as the years 1913–14 and 1914–15 the Commissioners have rightly said that they are chargeable in respect of the profits arising from such trade so far as regards freights collected by the Appellants in respect of such goods, that is to say, they have accurately carried out Section 41, because the agent, as the law stood then, has to be in receipt of any profits or gains. With regard to the later year to which the extension of Section 31 of the Act of 1915 applies, they have correctly applied it because they have said that they are to be liable in respect of the profits arising from such trade whether the freights were collected by the Appellants or otherwise; in other words, in respect of goods which started from Newcastle, goods which were put on board and in respect of which contracts were made whereby freight inured to Det Forenede, there was a carrying on of business in this country, and although, in fact, freights were not collected by the Appellants they still remained, however, within the extended terms of Section 31, which makes the foreign trader liable whether the actual profit or gains are received in this country by the agent or not.

With regard to Tarn's case I think there is nothing to vary in it, because the Commissioners have dealt with it on the same lines. The figures are agreed, and no question arises. It appears to me upon the argument presented on behalf of the Appellants, after close examination of the cases, this foreign shipping company remains liable, and is properly assessed in the name of these agents in respect of the profits or gains which are received in this country to the extent I have indicated before 1915 and after 1915 respectively.

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For these reasons, I think both appeals must be dismissed with costs.

Scrutton, L.J.—These two cases are two of a group of four, which raise, no doubt, questions of importance as to the effect of Section 41 of the Act of 1842 and Section 31 of the Finance (No. 2) Act, 1915, on a trade carried on, wherever it is carried on, by foreign shipowners. We have reserved judgment in two cases(1) which raise some complications as to the question of agency in England, and which also raise the exact effect of the judgments of the House of Lords in *Maclaine* v. *Eccott*(2) on Sub-section (7) of Section 31. These cases are free from those complications, and I feel able, as my Lord feels able, to give judgment at once in them.

But I should like to say, before I say anything about the merits, that I am startled at the dates in this case. The assessments being considered in 1926 are assessments for taxes for the years ending 5th April, 1914, 5th April, 1915, and 5th April, 1916, and it has somehow taken twelve years to get into the Court of Appeal, to decide whether a tax for the year 1914 is payable; and there are still possibilities in the House of Lords. Now I cannot help thinking there is something wrong about a system which has those results. I do not wish to be understood, as Mr. Justice Rowlatt did not wish to be understood, as saying who is at fault in this case. I am not saying whether it is the Crown, or whether it is the Appellants, or whether it is the Commissioners, but there is something wrong in a system which takes twelve years to settle what tax is payable to the State by a person supposed to be liable for tax.

The dates in this case do suggest one thing. I have looked at them. The case first came before the Special Commissioners, in respect of the Hull matter, in 1917. It first came before the Commissioners, in respect of the Newcastle matter in 1919. There was another sitting of the Special Commissioners in the Hull case in 1919—and I make all due allowance for the fact that from 1914 to 1919 there was war, and I make all allowance for the fact that after war it may have taken a year or two to settle down—but the next thing that happens is that from the date of the Commissioners dealing with the appeal in 1919, and each party expressing dissatisfaction with it, to the date when the Special Case was stated, is five years: July, 1919, the date of the decision of the Special Commissioners: date of the Special Case Stated, March, 1924—five years—and I do know, from my

(1) Muller & Co. (London), Ltd. *v.* Lethem, and *v.* Commissioners of Inland Revenue. See p. 126.
(2) 10 T.C. 481.

(Scrutton, L.J.)

practice at the Bar and from what I have seen as a Judge, that there is frequently very great delay in getting the Special Case stated, and my opinion is that the delay is due to the fact that the Commissioners do not state the Case themselves, as commercial arbitrators do, but the Case is sent backwards and forwards between the two litigants, each making suggestions, taking a long while before they return it with suggestions, and nobody hurries them up; and my personal feeling is that there is something thoroughly wrong with that system, and that the Commissioners ought to drop the system of consulting the parties as to what the Special Case shall be, and take the responsibility, as commercial arbitrators do, of stating the Case themselves. Five years it has taken to get this Special Case stated. Stated in March, 1924, it does not get to Mr. Justice Rowlatt till March, 1926. I cannot understand why it should have taken two years, when it was stated, to bring it before Mr. Justice Rowlatt; and the only dates that cause me any satisfaction are: It came before Mr. Justice Rowlatt in March, 1926; it is in this Court in July, 1926, which I think is not a date of which one need complain. I have seen this sort of set of dates in a number of other cases, and in my view there is something wrong with the whole Inland Revenue system, so far as appeals are concerned, and everybody concerned ought to look into it to see whether justice cannot be made more effective. It ought to take much less than twelve years to get a decision in the Court of Appeal on a Revenue question. The finances of the country must be entirely upset if you do not know what taxes are to be levied or received until twelve years after they ought to have been received, and I hope that some attention may be paid by those concerned with the Inland Revenue to put their house in order—and appellants, too; I am not talking of one side more than the other—and to get a more efficient system of deciding whether a man is or is not liable to tax. That is all I wish to say about that.

Now this case, as I have said, raises the question as to the taxability of foreign shipowners. Section 41 of the Act of 1842 allowed the non-resident person, if liable to tax, to be assessed through an agent in receipt of the profits on which the foreign non-resident was to be taxed, and the Finance (No. 2) Act of 1915 increased the machinery for assessment by removing the restriction that the agent should be in receipt of profits. We have had two cases, one of which has gone to the House of Lords, since then, as to the applicability of that to foreigners who sell goods in England—contracts for sale of goods—and I do not propose to repeat what I said in *Pinto's* case(1) as to the applicability of

(1) Wilcock *v.* Pinto and Co., 9 T.C. 111.

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the rules about exercising trade to cases where goods are sold. This group of cases applies, not to sale of goods, but to rendering of services. The shipowner carries goods for reward; he renders services for reward; he carries goods either from a foreign country to England or from England to a foreign country. How do the rules about taxing him through an agent apply to such a transaction?

The first question is: Is the foreign shipowner exercising a trade in England? It is said that he is not exercising a trade in England, but trading with England; he is rendering services by bringing goods to England, and that is not trading in England, but is trading with England. Now in my view we are prevented from giving effect to that argument, even if I thought it was right, (which I do not) by the decision in this Court of *Erichsen* v. *Last*(1). The person to be taxed in *Erichsen* v. *Last* was a foreign cable company which took money in England for sending messages by its cable abroad, and took money abroad for sending messages by its cable to England, and it was held, so far as it made contracts in England and received messages and started to send them abroad, to be exercising a trade in England, and Sir George Jessel, in giving that judgment, *obiter* took the very case of a shipowner(2). "A company "in this country who regularly undertake the carriage of "goods abroad for money as part of their ordinary business, "carry on trade in this country, although the whole of "the carriage is done abroad. The mere fact that they "enter into contracts in this country with English subjects "for the right of carriage, appears to me to be the same thing "as if they were to make similar contracts for the sale of goods. "Whether it is the right of carriage or the right to transmit "a message, appears to me to make no difference. Again, if "a railway company with a station at Dover and a station at "Calais were to carry passengers from Dover to Calais as a "regular practice, that, I think, would be a trading in Dover, "so far as regarded the passengers carried from Dover to Calais. "Therefore, in the present case, there is a trading within the "meaning of the statute." The principle laid down in *Erichsen* v. *Last* and the *obiter dictum* (it is true) of Sir George Jessel as to carriers, appear to me, the *obiter dictum* to be in accordance with the decision, and the decision to conclude us in this case to say that where, as in this case, you get a foreign shipping company making contracts for carriage from England to the Continent, executing part of that contract by putting goods on board their ship in England, and carrying them to a certain

(1) 4 T.C. 422. (2) *Ibid.* at p. 423.

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substantial extent through English territory—because both the goods that are put on board at Newcastle and the goods that are put on board at Hull come down a river and through territorial waters for a certain extent within the jurisdiction—and, thirdly, receiving money for carriage in the United Kingdom, such a company exercises a trade in the United Kingdom. That disposes of the first point.

Then the second point is this: Of the three years of assessment, ending 5th April, 1914, 5th April, 1915, and 5th April, 1916, the first two years were before the Finance (No. 2) Act of 1915 came into operation, and at that time, in order to make an agent taxable, he must have been in receipt of profits. Were the two companies in this case, Nielsen, Andersen and Company at Newcastle, and Messrs. Wilson at Hull, in receipt of profits?

I am not quite sure that I exactly followed the argument that Mr. Latter addressed to us, but in this case it seems that in each case they were in receipt of profits, because the Commissioners have found that there were profits made, and they received the money. It is not that they received gross receipts which were swallowed up by expenses so that there was no balance of profits. In each case there was a balance of profits, which in the Newcastle case is cancelled by an allowance made under the Act of 1878 for depreciation, and, in the Hull case, a very large amount, comparatively, of profits, which is not cancelled by the allowance made for depreciation; so that in each case there seems to have been an agent in receipt of profits. As regards the third year, that restriction does not apply, and of course it is not necessary, therefore, to see whether the agent was in receipt of profits.

The next point that is taken is, as I follow it, that it is said that the person you are trying to tax is merely a broker; he is doing just what an ordinary ship broker does—that, of course, puts in "ship" for the first time; a ship broker is a very different thing from a broker—and consequently, under Sub-section (6) of Section 31 of the Finance (No. 2) Act of 1915, the non-resident person is not chargeable in the name of a broker or general commission agent. Now the language is: "Nothing . . . shall "render a non-resident person chargeable in the name of a "broker or general commission agent, or in the name of an agent, "not being an authorised person carrying on the non-resident's "regular agency." In my view the words "not being an author-"ised person carrying on the non-resident's regular agency" apply to the whole of the preceding descriptions, and the contrast intended to be drawn is between casual employment, temporary employment, for a transaction or few transactions, and regular

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appointment of a permanent agent who is there as representing the foreigner. Though it was not necessary for Lord Cave to say so, I think what Lord Cave says in the *Maclaine* and *Eccott* case(1) as to the meaning of Sub-section (6) expresses what I mean to express, and is correct: "A non-resident instructing a "broker or other casual agent in this country shall not be charge-"able". I think the distinction is between the casual agent and the authorised person carrying on the non-resident's regular agency. It is odd language, of course, because how you can carry on agency if you are not authorised, I do not quite understand, and what was the object of putting in the word "authorised" I do not follow. The emphasis I lay on the term "regular". If that is the proper construction of Sub-section (6) were Nielsen, Andersen and Company at Newcastle and Wilsons at Hull authorised persons carrying on the non-resident's regular agency? On that, I have no doubt whatever that the Commissioners were right on the facts. Nielsen, Andersen and Company described themselves as agents for the United Steamship Company, Copenhagen, on their letter paper. They are the people who carry out the shipping of goods, the unshipping of goods, the turning round of the steamer on which the foreign company are performing the services for which freight is receivable, and they collect all the outward freights. It appears to me there is abundant evidence on which the Commissioners could come to the view that they are authorised persons carrying on the non-resident's regular agency.

When I turn to Messrs. Wilson, of Hull, I find a clause in their agreement with the foreign company, that "Wilsons shall "be the exclusive agents for Det Forenede at Hull during the "continuance of this agreement", and I find them doing almost exactly the same sort of thing as Nielsen, Andersen and Company, and therefore I have no doubt on that point that they are within the language of "authorised persons carrying on the non-resident's "regular agency", and the assessment on them as representing the foreigner, is therefore correct.

Questions may arise as to amount. I do not think we have to consider them in this case, because the amounts are stated to be agreed. I do not understand, myself, why the cases have been run on the lines of shipments f.o.b. and shipments c.i.f. Those alphabetical terms, which are easier to state alphabetically than to explain, have in my view nothing to do with the carrier performance of the services by a ship owner. They are only relevant to the relations between the purchaser and the seller of

(1) 10 T.C. at p. 577.

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goods. You may extract from them the ingredients which are relevant to considering what Income Tax shall be paid, but not because the ship owner carries f.o.b. or the ship owner carries c.i.f. The ship owner does not carry f.o.b. or c.i.f.; he carries for freight; and the question "Who makes the contract with him?" and the question of where he receives the freight may be very relevant to the question whether he is liable to Income Tax on a particular shipment or not, but it is not because of any carriage f.o.b. or c.i.f. There is not such a thing. It may follow indirectly from the contract of sale the vendor has made with the purchaser, but to start as though the contract f.o.b. or c.i.f. were the important matter seems to me completely to misunderstand what those expressions mean.

In my view the agent is assessable, on behalf of his foreign principal on the profits of business carried on either wholly or in a substantial part through the agent, though he does not receive the profits. I think that is probably the principle that the Commissioners have tried to apply in this case; but I do not regard these cases as raising any question of amount. It may be necessary to say something about the amount in the judgment which we have reserved(1), and, if so, one would refer to that judgment for any details on the matter.

For the reasons I have given, in this case, in my view, both the appeals should be dismissed, with the usual consequences.

Romer, J.—I am of the same opinion.

In the first of these cases the Special Commissioners have held that a trade was carried on by a company known as Det Forenede in the United Kingdom, to the extent to which goods were taken on board their ships at Newcastle for carriage to Denmark; and in the second case they have held that a trade was carried on in the United Kingdom by that company to the extent to which goods were taken on board their ships at Hull for carriage elsewhere. In my opinion, in both cases the findings of the Special Commissioners were abundantly justified by the evidence. As Lord Cave said in *Maclaine* v. *Eccott*(2): "The "question whether a trade is exercised in the United Kingdom "is a question of fact, and it is undesirable to attempt to lay "down any exhaustive test of what constitutes such an exercise "of trade; but I think it must now be taken as established "that in the case of a merchant's business, the primary object "of which is to sell goods at a profit, the trade is (speaking "generally) exercised or carried on (I do not myself see much

(1) Muller & Co. (London), Ltd. *v.* Lethem. See p. 126.
(2) 10 T.C. at p. 574.

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" difference between the two expressions) at the place where the " contracts are made. No doubt reference has sometimes been " made to the place where payment is made for the goods sold " or to the place where the goods are delivered, and it may be " that in certain circumstances these are material considerations ; " but the most important, and indeed the crucial, question is, " where are the contracts of sale made ?" Now a shipowner's business has for its primary object the carrying of goods and passengers at a profit, and where I find, as I find here, that the contracts for that carriage are made in this country, the goods and passengers are taken on board in this country, that, to the extent pointed out by the Lord Justice, goods and passengers are carried in this country, and that, in general, the payments made for that carriage are made in this country, I cannot myself but come to the conclusion that Det Forenede are exercising their trade in the United Kingdom to the extent referred to by the Special Commissioners.

On the question as to whether the Appellants are the agents of Det Forenede, again I find no difficulty in coming to the conclusion that they are. I need not refer to the evidence upon that point, for both the Master of the Rolls and Lord Justice Scrutton have themselves referred to it in detail. I come to the conclusion that they are agents of Det Forenede, and, in the words of Sub-section (6) of Section 31 of the Finance (No. 2) Act of 1915, that they are the authorised persons " carrying on the non-resident's regular agency ", in Newcastle and Hull respectively.

The matter does not, however, rest there, because the Court has to be satisfied, so far as regards the years 1913–14 and 1914–15, that the Appellants had the receipt of profits or gains from the trade. Now it is said that all the Appellants received in those years were the freights and other payments made for the carriage in question. But, assuming the carriage of the passengers and goods was a profitable transaction the profit, such as it is, is obviously included in the freights or other payments received in this country by the Appellants, and, that being so, inasmuch as they have received the whole, they have necessarily received the part ; that is to say, the part of the whole which consists of the profits and gains ; and, as Lord Justice Fry said in *Werle and Company* v. *Colquhoun*(1) " they are not the less in receipt " of profits and gains because they are in receipt of something " else as well ".

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(1) 2 T.C. 402, at p. 415.

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There is one other point, and that relates to the year 1915–16. As regards that year, it is said that the Appellants were brokers, and that, once it can be seen that they are brokers, they are entitled to escape from assessment by virtue of Sub-section (6) of Section 31 of the Finance (No. 2) Act, 1915. In my opinion, according to the true construction of that Sub-section, where you find "an authorised person carrying on the non-resident's "regular agency" he is assessable, notwithstanding the fact that he may not improperly be described as a broker. I think that that construction is justified by the words, to which the Master of the Rolls drew attention, at the end of the Sub-section. The words being "carried out through such a broker or agent" indicates that the broker or general commission agent referred to in the Sub-section is a broker or general commission agent not being an authorised person carrying on the non-resident's regular agency. I think further that that was the view of Lord Cave when delivering the judgment in *Maclaine and Company* v. *Eccott*. He regarded the broker or agent referred to in the earlier part of that Sub-section as being merely a broker or other casual agent in this country.

I agree that both appeals should be dismissed with costs.

Appeals were entered in both cases against the decision in the Court of Appeal and the cases came before the House of Lords on the 14th July, 1927. Judgment was given on the 7th November, 1927, at the same time as in the case of *W. H. Muller and Company (London), Limited* v. *Lethem*.

The judgment is printed below at page 158.
