No. 1014—High Court of Justice (King's Bench Division)—12th and 13th December, 1934

Court of Appeal—3rd, 4th and 5th July, 1935

House of Lords—15th October, 1936

McKenna (H.M. Inspector of Taxes) v. Eaton-Turner[1]

Income Tax, Schedule E—Resident in United Kingdom employed out of the United Kingdom by a British company—Main part of remuneration paid in United Kingdom—Income Tax Act, 1918 (8 & 9 *Geo.* V, *c.* 40), *Schedule D, Paragraph* 1 (*a*) (ii), *and Schedule E*; *Finance Act*, 1922 (12 & 13 *Geo.* V, *c.* 17), *Section* 18.

The Respondent, who was resident for Income Tax purposes in the United Kingdom, was employed by a British company as a mines manager in West Africa. No part of his work or duties fell to be performed or was performed in the United Kingdom before the 7th September, 1932, *at which date a new service agreement took effect.*

The only specific provision as to the place of payment of remuneration in the Respondent's service agreements for periods before the 7th September, 1932, *was that a visitors' entertainment allowance was to be paid in West Africa, but upon each agreement he endorsed a request that the balance of his remuneration should be paid as to a small proportion to him in West Africa and as to the main part of it into banking accounts in London.*

Held, *that the Respondent's employment fell within the charge to tax under Schedule D, Paragraph* 1 (*a*) (ii), *Case* II, *and that by virtue of Section* 18, *Finance Act*, 1922, *it was brought within and under Schedule E.*

Colquhoun *v.* Brooks, 2 T.C. 490, *distinguished.*

Case

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

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held at York House, Kingsway, London, on 31st May, 1934, for the purpose of hearing appeals, Mr. G. W. Eaton-Turner of Hamlet House, North Walsham, in Norfolk,

[1] Reported (K.B.) [1935] 1 K.B. 466; (C.A.) [1936] 1 K.B. 1; (H.L.) [1937] A.C. 162.

(hereinafter called " the Respondent ") appealed against the following assessments made upon him to Income Tax for the years indicated :—

For the year	1926–27	under	Schedule	D	in the	sum	of	£2,500,
,, ,, ,,	1926–27	,,	,,	E	,, ,,	,,	,,	£2,500,
,, ,, ,,	1927–28	,,	,,	,,	,, ,,	,,	,,	£2,500,
,, ,, ,,	1928–29	,,	,,	,,	,, ,,	,,	,,	£2,500,
,, ,, ,,	1929–30	,,	,,	,,	,, ,,	,,	,,	£2,500,
,, ,, ,,	1930–31	,,	,,	,,	,, ,,	,,	,,	£2,500,
,, ,, ,,	1931–32	,,	,,	,,	,, ,,	,,	,,	£2,500,
,, ,, ,,	1932–33	,,	,,	,,	,, ,,	,,	,,	£2,500,
,, ,, ,,	1933–34	,,	,,	,,	,, ,,	,,	,,	£2,500.

The two assessments for 1926–27 are alternative assessments and the case for the Appellant was conducted before us on the footing that the relevant assessment for this year was that made under Schedule E.

1. It was admitted that the Respondent, for all the years in question except the first year, was resident in the United Kingdom, having a wife and children there and a house from and after 11th June, 1926. It was disputed whether he was a resident for the year 1926–27, but we held that he was a resident also for that year.

2. During the years in question the Respondent was employed under the Ashanti Goldfields Corporation, Limited (hereinafter called " the Company "). The Company was incorporated under the Companies Acts, 1862 to 1893, upon the 25th May, 1897, and carries on a gold-mining business in West Africa. Its registered office is situate in London. The Respondent's service under the Company is shown in the following tabulated form together with the periods spent by him in West Africa and in England.

Periods of holding positions in Corporation.	Position held.	Period spent in West Africa and on voyage to and from England.	Period spent in England.
June, 1921, to May, 1922.	Assistant to the Manager.	29th June, 1921, to 14th May, 1922.	15th May, 1922, to 27th June, 1922.
June, 1922, to April, 1923.	Assistant Manager (acting Manager August to November, 1922).	28th June, 1922, to 14th April, 1923.	15th April, 1923, to 12th June, 1923.
June, 1923, to March, 1924.	Assistant Manager (acting Manager September to December, 1923).	13th June, 1923, to 2nd March, 1924.	3rd March, 1924, to 13th May, 1924.
May, 1924, to March, 1925.	Assistant Manager (acting Manager July, 1924, to February, 1925).	14th May, 1924, to 14th March, 1925.	15th March, 1925, to 26th May, 1925.

Periods of holding positions in Corporation.	Position held.	Period spent in West Africa and on voyage to and from England.	Period spent in England.
May, 1925, to April, 1926.	Manager	27th May, 1925, to 24th April, 1926.	24th April, 1926, to 23rd June, 1926.
June, 1926, to April, 1927.	Manager	23rd June, 1926, to 22nd April, 1927.	22nd April, 1927, to 22nd June, 1927.
June, 1927, to May, 1928.	Manager	22nd June, 1927, to 5th May, 1928.	5th May, 1928, to 8th August, 1928.
August, 1928, to June, 1929.	Manager	8th August, 1928, to 11th June, 1929.	11th June, 1929, to 14th August, 1929.
August, 1929, to May, 1930.	Manager	14th August, 1929, to 12th May, 1930.	12th May, 1930, to 16th July, 1930.
July, 1930, to May, 1931.	Manager	16th July, 1930, to 10th May, 1931.	10th May, 1931, to 12th August, 1931.
August, 1931, to June, 1932.	Manager	12th August, 1931, to 26th June, 1932.	26th June, 1932, to 7th September, 1932.
September, 1932, to May, 1933.	General Mines Manager	7th September, 1932, to 13th May, 1933.	13th May, 1933, to 18th October, 1933.
October, 1933, to date.	Do.	18th October, 1933, to 30th April, 1934.	30th April, 1934, to date.

3. The agreements under which the Respondent served were executed in England. They were produced to us and, so far as relevant to the present Case, may be summarised as follows :—

Particulars of agreement.	Salary under agreement.	How remuneration to be paid.
1. Agreement dated 20th May, 1925, under which the Respondent was appointed Mines Manager for a period of three tours in Africa of 9 months each, the particulars of which appear at the head of the agreement.	(*a*) £2,700 per annum whilst at the mines. (*b*) £56 5*s*. 0*d*. for time occupied on each voyage out. (*c*) £56 5*s*. 0*d*. for time occupied on each voyage to England. (*d*) £150 per annum as a visitors' entertainment allowance payable at the mines. (*e*) £112 10*s*. 0*d*. per month as holiday pay for two months at end of each tour.	The agreement only provides for the £150 visitors' entertainment allowance to be paid at the mines, but the Respondent endorsed a request on the agreement for payments on account of his salary to be paid at the end of each month in the following manner, *viz.* :— (*a*) £25 to be paid to him at the Corporation's property (in Africa). (*b*) £20 to be paid to Bank of New Zealand, Queen Victoria Street Branch. (*c*) £180 to be paid to Westminster Bank, Limited, Bloomsbury Branch, Account:— G. W. Eaton-Turner. £225 total per month.

Particulars of agreement.	Salary under agreement.	How remuneration to be paid.
2. Agreement dated 18th July, 1928, under which the Respondent was continued as Mines Manager for a further period of 3 tours in Africa of 9 months each, the particulars of which appear at the head of the agreement.	(*a*) £2,700 per annum whilst at the mines. (*b*) £56 5*s*. 0*d*. for time occupied on each voyage out. (*c*) £56 5*s*. 0*d*. for time occupied on each voyage to England. (*d*) £150 visitors' entertainment allowance payable at the mines. (*e*) £112 10*s*. 0*d*. per month as holiday pay for 2 months at end of each tour.	This agreement also only provides that the £150 visitors' entertainment allowance should be paid at the mines, but again Respondent endorsed a request on the agreement for payment on account of his salary to be paid at the end of each month in the following manner :— (*a*) £25 to be paid to him at the Corporation's property (in Africa). (*b*) £20 to be paid to the Bank of New Zealand, 1, Queen Victoria Street Branch. (*c*) £180 to be paid to Westminster Bank, Bloomsbury Branch, High Holborn. £225 total per month.
3. Agreement dated 15th June, 1931, under which the Respondent was again appointed Mines Manager for a period of 3 tours in Africa of 9 months each, the particulars of which appear at the head of the agreement.	(*a*) £3,000 per annum whilst at the mines. (*b*) £62 10*s*. 0*d*. for time occupied on each voyage out. (*c*) £62 10*s*. 0*d*. for time occupied on each voyage to England. (*d*) £150 per annum as visitors' entertainment allowance payable at the mines. (*e*) £125 per month as holiday pay at end of each tour.	This agreement also only provides for the £150 visitors' entertainment allowance to be paid at the mines, but Respondent endorsed a request on the agreement for payment on account of his salary to be paid at the end of each month in the following manner, namely :— (*a*) £10 to be paid to him at the Corporation's property (in Africa). (*b*) £220 to be paid to Westminster Bank, Limited, Bloomsbury Branch, High Holborn. (*c*) £20 to be paid to the Bank of New Zealand, 1, Queen Victoria Street, E.C. £250 total per month.

Particulars of agreement.	Salary under agreement.	How remuneration to be paid.
4. Agreement dated 2nd September, 1932 (supplemental to the above agreement of 15th June, 1931) under which Respondent was appointed General Mines Manager upon terms which varied from the 1931 agreement. The Respondent was appointed General Mines Manager as from the 7th September, 1932, for a term of 3 years and thenceforward from year to year until the engagement was terminated. Under this agreement the Respondent was to give regular attendance during the usual business hours at the Corporation's office in London unless he was on tour in West Africa under the provisions of the agreement. The agreement provided that once in every year, or oftener as required, the Respondent should visit the Corporation's properties in West Africa, but should not be required to be absent from England for a longer period than six months in any year.	(*a*) £3,000 per annum. (*b*) Nothing extra for time occupied on voyages out and back to England. (*c*) £150 per annum visitors' entertainment allowance payable at the mines. (*d*) Nothing for holiday allowance.	The agreement only provides for the £150 visitors' entertainment allowance to be paid at the mines, and no endorsement was made on this agreement as to where salary was to be paid.

N.B.—This agreement was cancelled as from the 7th September, 1932, and the agreement of 5th July, 1933, next mentioned was substituted for it.

Particulars of agreement.	Salary under agreement.	How remuneration to be paid.
5. Agreement dated 5th July, 1933, which entirely cancelled the above agreement of 2nd September, 1932, as from the 7th September, 1932. This agreement was for a period of 3 years from the 7th September, 1932, and under it the Respondent was appointed to two offices, namely :— 1. General Mines Manager for West Africa under which the Respondent was to make one tour of approximately 8 months each year, at a salary of £2,400 per annum, commencing 7th September, 1932, together with travelling expenses. 2. For the remaining 4 months of each year the Respondent was General Mines Manager for attendance at the Corporation's offices in London at a salary of £600 per annum, commencing 15th May, 1933.	(*a*) £2,400 as General Mines Manager for West Africa, commencing 7th September, 1932. (*b*) Travelling expenses. (*c*) £600 per annum as General Mines Manager in London, commencing 15th May, 1933.	The agreement provided that the salary of £2,400 per annum as General Mines Manager in West Africa was to be paid in West Africa. The agreement also provided that the salary of £600 per annum for services to be rendered in London was to be paid in London.

Copies of the agreements are attached to and form part of this Case(1).

4. The following statement shews the amounts paid to the Respondent and how they were paid :—

Fiscal year ended.	Remittances per Westminster Bank, Ltd.	Remittances per Bank of New Zealand.	Holiday pay (paid in England).	Staff bonus (paid in England).	Cash drawings in West Africa.	Total.
	£ *s.* *d.*	£ *s.* *d.*	£	£ *s.* *d.*	£ *s.* *d.*	£ *s.* *d.*
5.4.27	1,620 0 0	180 0 0	225	214 13 3	386 3 8	2,625 16 11
5.4.28	1,710 0 0	45 0 0	225	249 12 9	385 17 10	2,615 10 7
5.4.29	1,550 0 0	55 0 0	225	438 0 11	465 14 3	2,733 15 2
5.4.30	1,852 0 0	45 0 0	225	529 14 11	176 1 7	2,827 16 6
5.4.31	1,796 5 0	165 0 0	225	1,014 11 2	187 7 3	3,388 3 5
5.4.32	1,820 0 0	160 0 0	225	1,473 10 4	30 2 10	3,708 13 2
5.4.33	2,220 7 11	170 0 0	250	1,958 6 11	—	4,598 14 10
5.4.34	2,751 12 8	250 0 0	—	1,882 4 7	134 18 8	5,018 15 11

(1) Not included in the present print.

5. The Respondent gave evidence before us. We were satisfied that before the agreement of 2nd September, 1932, no part of the Respondent's work or duties fell to be performed or was performed in the United Kingdom.

6. On behalf of the Respondent it was contended :—

(i) That he was not chargeable under Schedule E in respect of any part of the moneys paid to him under the several agreements.

(ii) That the whole of his duties under those agreements were in fact performed at the Company's property abroad and that the office of the Respondent was not an office or employment of profit within the United Kingdom for any of the years of assessment.

(iii) Alternatively, that this was the position down to the 7th September, 1932, on which date (in this alternative) the Respondent first held a separate office involving the performance of duties in the United Kingdom.

(iv) That it was irrelevant that the Respondent was a person residing in the United Kingdom in any of the years of assessment or that part of his remuneration was paid to his account here.

(v) That the assessments should be discharged.

7. On behalf of the Inspector of Taxes it was contended that the Respondent's employment came within the charge of Schedule D, 1 (*a*) (ii), Case II (as transferred to Schedule E by Section 18 of the Finance Act, 1922) inasmuch as the main part of his remuneration was payable and paid in the United Kingdom. As regards the agreement of 2nd September, 1932, and the subsequent agreement of the 5th July, 1933, it was contended that the Respondent had one employment, part of which fell to be performed in the United Kingdom, and that the division purported to be effected by the said agreement of 5th July, 1933, was unreal.

8. We, the Commissioners who heard the appeal, held that the Respondent did not fall within the charge of Case II of Schedule D (as transferred to Schedule E) before 7th September, 1932, and we discharged the assessments so far as they related to earnings for periods prior to that date.

9. Immediately upon our so determining the appeal, dissatisfaction on behalf of the Inspector of Taxes was expressed with our determination as being erroneous in point of law, and in due course

the Inspector required us to state a Case for the opinion of the High Court pursuant to the Income Tax Act, 1918, Section 149, which Case we have stated and do sign accordingly.

W. J. BRAITHWAITE, J. JACOB, } Commissioners for the Special Purposes of the Income Tax Acts.

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

17th October, 1934.

The case came before Singleton, *J.*, in the King's Bench Division on the 12th and 13th December, 1934, and on the latter date judgment was given in favour of the Crown, with costs.

The Solicitor-General (Sir Donald Somervell, K.C.) and Mr. Reginald P. Hills appeared as Counsel for the Crown, and Mr. Raymond Needham, K.C., and Mr. Cyril L. King for the Respondent.

JUDGMENT

Singleton, J.—This case has been very fully argued before me. I do not propose in the course of my judgment to set out the facts which are dealt with in the Case, but for the purposes of the Case it was admitted that the Respondent, for all the years in question except the first year, was resident in the United Kingdom, having a wife and children there and a house from and after the 11th June, 1926. It was disputed whether he was a resident for the year 1926–27, but the Commissioners held that he was also a resident for that year. So that we start with the Respondent a person resident in the United Kingdom at all material times.

During the years in question, that is, roughly from 1926 onwards, the Respondent was employed by the Ashanti Goldfields Corporation, Limited, a company which was incorporated in the year 1897, which carries on a gold-mining business in West Africa and with its registered office in London. There are a number of agreements under which the service of the Respondent was rendered to the Company, and in the Case before me the service which he rendered and the periods which he spent in England are likewise set out, as are the amounts which he received from time to time by way of salary and bonus, he being paid largely, not wholly, by means of payments to banks in London.

(Singleton, J.)

The Commissioners had the Respondent himself before them and he gave evidence. They were satisfied that before the date of the agreement of the 2nd September, 1932, no part of the Respondent's work or duties fell to be performed or was performed in the United Kingdom. The contentions of the parties are set out in paragraphs 6 and 7 of the Case. Before the Commissioners, the Respondent's contentions were these: Firstly, "That he was not "chargeable under Schedule E in respect of any part of the moneys "paid to him under the several agreements". Secondly, "That the "whole of his duties under those agreements were in fact performed "at the Company's property abroad and that the office of the "Respondent was not an office or employment of profit within the "United Kingdom for any of the years of assessment". Thirdly, and alternatively, "That this was the position down to the 7th September, "1932, on which date (in this alternative) the Respondent first held "a separate office involving the performance of duties in the United "Kingdom". Fourthly, "That it was irrelevant that the Respond-"ent was a person residing in the United Kingdom in any of the "years of assessment or that part of his remuneration was paid to "his account here". Fifthly, "That the assessments should be "discharged".

The Inspector of Taxes' contention, putting it generally, was that the Respondent's employment came within the charge of Schedule D, 1 (*a*) (ii), Case II (as transferred to Schedule E by Section 18 of the Finance Act, 1922). Then some words occur in the contention, the importance of which is not now as great as it might have been in certain events, namely, these words, "inasmuch as the main part "of his remuneration was payable and paid in the United Kingdom. "As regards the agreement of 2nd September, 1932, and the subse-"quent agreement of the 5th July, 1933, it was contended that the "Respondent had one employment, part of which fell to be per-"formed in the United Kingdom, and that the division purported "to be effected by the said agreement of 5th July, 1933, was unreal".

The finding of the Commissioners, again expressed generally, is that "the Respondent did not fall within the charge of Case II of "Schedule D (as transferred to Schedule E) before 7th September, "1932," and consequently the Commissioners discharged the assessments so far as they related to earnings for periods prior to that date. In other words, they disagreed with the submission of the Inspector of Taxes in so far as it related to any date before the 7th September, 1932.

The Inspector of Taxes appeals and the matter has been argued before me. The case for the Crown is put in this way. It is said that under Schedule D these words appear: "Tax under this Schedule "shall be charged in respect of—(*a*) The annual profits or gains arising "or accruing— . . . . (ii) to any person residing in the United "Kingdom from any trade, profession, employment, or vocation,

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" whether the same be respectively carried on in the United " Kingdom or elsewhere ; " and it is said that this case falls under Case II, which is : " Tax in respect of any . . . . employ- " ment . . . . not contained in any other Schedule ". It seems to me that the whole question which I have to decide is whether or not the circumstances of Mr. Eaton-Turner's case are covered by that portion of Schedule D of the Income Tax Act, 1918, which I have just read.

A number of authorities were cited to me. The first of those was the case of *Colquhoun* v. *Brooks*(1). I have the report in 14 App. Cas. 493, and the decision in that case is to this effect : " A person resident " in the United Kingdom and engaged in a trade carried on entirely " abroad is liable to income tax in respect of so much only of the " profits of that trade as are received in the United Kingdom. " The respondent, who resided solely in England, was a partner in " a firm which carried on business in Australia. Profits were made " by the firm, and a portion of the respondent's share thereof was " remitted to him in England and on this portion he paid income " tax under Schedule D. The larger portion of his share was not " remitted to him in England, but was placed to his credit in " Australia". It was held, affirming the decision of the Court of Appeal, for different reasons, " that the case fell under the head of " ' possessions in any of Her Majesty's dominions out of Great " ' Britain, or foreign possessions ' dealt with by the fifth case of " Schedule D . . . ; and that the respondent's portion of profits " not received in the United Kingdom was not liable to income tax ". The Solicitor-General, as I say, cited that case to me, and he pointed out to me certain words in the speeches of the learned Law Lords who expressed themselves by way of giving judgments in that case. I find that Lord FitzGerald, in dealing with Schedule D, said at page 501 (2) : " The language of 16 and 17 Vict., c. 34, s. 2, Schedule D, " is so comprehensive that I doubt whether a net of language could " be devised stronger and more apt to include the profits arising or " accruing to the respondent from a business carried on elsewhere " than in the United Kingdom, and must and ought to have full " effect, unless we can infer from the other provisions of the particular " Act or of the Code that it was not the intention of the legislature to " tax income from trade carried on wholly and solely elsewhere than " in the United Kingdom unless and until it has actually come to " the United Kingdom as the income of some person residing in the " United Kingdom ". Lord Herschell, at page 503 in the same case, said(3) : " The claim of the Crown is based upon the terms of " Schedule D, which impose the tax upon the annual profits or gains " arising or accruing to any person residing in the United Kingdom, " from any trade whether carried on in the United Kingdom or else- " where. The respondent does reside in the United Kingdom,

(1) 2 T.C. 490. (2) *Ibid.*, at p. 497. (3) *Ibid.*, at p. 498.

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" profits did arise or accrue to him from a business carried on else-
" where than in the United Kingdom ; therefore, say the learned
" Counsel for the Crown, the case is within the very terms of the Act,
" and he must be held liable to assessment ". That was the argument as put forward by the Crown in that case, and Lord Herschell, at page 506(1) in dealing with that argument, said this : " It is beyond
" dispute, too, that we are entitled and indeed bound when con-
" struing the terms of any provision found in a statute to consider
" any other parts of the Act which throw light upon the intention
" of the legislature and which may serve to show that the particular
" provision ought not to be construed as it would be if considered
" alone and apart from the rest of the Act. It is contended by the
" respondent that if we thus seek the aid to be derived from other
" provisions of the Income Tax Acts we shall be led to the conclusion
" that the view presented by the appellant is erroneous ". Lord Macnaghten, at page 515(2), referred to the same matter, and it seems to me that the effect of what those three learned Law Lords said is this : normally, the words with which we have to deal are wide enough to bring the case with which they were dealing under Case I, but if you look further, as you must, to other provisions of the Act, you gain from an examination of the Act as a whole that that which is really fitting for the circumstances of the case is Case V. If it had not been for that, I think the learned Law Lords would have said Case I would have applied ; at least, their words are wide enough to include that. It is not necessary for the purposes of this case, perhaps, to go as far as that.

Now in considering the effect of Schedule D, various other authorities were cited to me, and in particular the case of *Pickles* v. *Foulsham*(3), which was, I think, the second attempt of the Crown to obtain tax in one form or another from Mr. Pickles, because there had been the earlier case of *Pickles* v. *Foster*(4), where an attempt was made under Schedule E ; but in the case of *Pickles* v. *Foulsham*, 9 T.C. 261 : " An agent in West Africa of a British Company was
" assessed to Income Tax for the year 1919–20 under Case V of
" Schedule D of the Income Tax Act, 1918, in respect of his earnings
" as agent. His duties were wholly performed in West Africa.
" Under his agreement with the Company the commission which
" formed the bulk of his remuneration was payable by the Company
" in the United Kingdom. The whole of this remuneration was paid
" by the Company into a banking account in England on which
" his wife had the power of drawing. He rented and was the rated
" occupier of a house in the United Kingdom in which his wife and
" family resided. He spent a few days in the United Kingdom during
" the year of assessment. The Special Commissioners held on
" appeal that he was resident in the United Kingdom and that he

(1) 2 T.C. 490, at p. 500. (2) *Ibid.*, at pp. 507/8. (3) 9 T.C. 261.
(4) 6 T.C. 131.

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

In the course of that case there were a number of judgments and speeches which contain matter useful to this case. Mr. Needham pointed out to me that when that case was in the Court of Appeal, Warrington, L.J., at page 284, pointed out that the decision in *Colquhoun* v. *Brooks*(1) did not go as far as the Solicitor-General contends that it did. I read these words from the judgment of Warrington, L.J. : " That being, as we hold it to be, an incorrect " view, a very serious question arises whether, on the true construc- " tion of the judgments in *Colquhoun* v. *Brooks*, this gentleman can " be assessed at all. It is not merely a question of whether in some " minor point of detail the Commissioners have made a mistake ; it " may be that the result of the judgments in *Colquhoun* v. *Brooks* is " that unless in such a case the taxpayer or the alleged taxpayer can " be charged on the income remitted to this country from a possession " abroad, he cannot be charged at all. In fact the question raises " the very case which Lord Herschell hinted at in a passage in his " speech on page 502 of the report of *Colquhoun* v. *Brooks* in 2 Tax " Cases ".

Mr. Needham is quite right, if I may say so, in pointing that out to me, but I am bound to say that the view which I take of the speeches in *Colquhoun* v. *Brooks* encourages me to think that it went a little further than Warrington, L.J., considered in the course of giving his judgment in the case of *Pickles* v. *Foulsham*(2). The Solicitor-General cited a number of authorities, including *Colquhoun* v. *Brooks*, to me in order to show this : if you have in Schedule D or any statutory provision words which, taken by themselves, normally would cover a particular case, the only reason for going outside that is if there is some exception shown within the statutory provision itself, as the House of Lords found there was in the case of *Colquhoun* v. *Brooks*.

When I look at the speeches in the House of Lords in the case of *Pickles* v. *Foulsham*, I am bound to say that there are passages which seem to me to show that the learned Law Lords in that case thought that a case such as the present would be met by Case II. It is admitted that the facts in this case are indistinguishable for all practical purposes from the facts in *Pickles* v. *Foulsham*, and in the report of that case I find, at page 288, that the Lord Chancellor said : " Your Lordships were " asked, in the event of your holding that the Respondent was not

(1) 2 T.C. 490. (2) 9 T.C. 261.

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" taxable under Case V, to send the matter back to the Special " Commissioners with a view to their now assessing the Respondent " in respect of the same income under Case II of Schedule D. My " Lords, I am far from saying that the Respondent could not have " been assessed under that Case, or that the Court has no jurisdiction " when Commissioners have proceeded under the wrong Case to " remit the matter to them under Section 149 (2) of the Income Tax " Act, 1918, with a view to their making a proper assessment ; but " I do not think that such a course should be taken in the present " instance ". Then he gives his reasons. Lord Dunedin in the course of his speech, at page 290, said that he agreed, and that he had nothing to add to what had been said by the Lord Chancellor on that matter. Lord Buckmaster, at page 290, used these words : " The Respondent being a person " residing in the United Kingdom, it would appear that he was " liable to be taxed under Schedule D, paragraph 1 (*a*) (ii), in respect " of annual profits or gains arising from any trade, profession, " employment or vocation, whether the same be respectively carried " on in the United Kingdom or elsewhere ; but, as pointed out, he " was in fact assessed under Case V in paragraph 2 ", and Lord Buckmaster referred to the matter again in the last paragraph but one of his speech(1).

I must say that the ordinary reading of Schedule D to the Act of 1918 is, as was pointed out in at least one judgment(2) to which reference was made in the course of the argument, comprehensive in its terms, and if one reads it in the ordinary way : " Tax under this Schedule " shall be charged in respect of . . . . The annual profits or " gains arising or accruing . . . . (ii) to any person residing in the " United Kingdom from any . . . . employment . . . . , " whether the same be . . . . carried on in the United Kingdom " or elsewhere ", I ask myself why does not that cover this case ? I have read it ; it was read to me yesterday afternoon, and I could not see why it did not cover the circumstances of this case on the ordinary reading of those words as they appear ; I could not see why this was not a case under Case II. The authorities which were cited to me are, as I have said, very useful, but, entirely apart from any authority, if I had to place a construction upon those words I should find it difficult indeed to see why the case of Mr. Eaton-Turner as set forth in the Case Stated before me is not covered by the words which I have read ; I see nothing to take it out in any way at all. It is admitted that it is not a matter which comes within Case V. Mr. Needham in the course of his argument said it might come under Case VI, being : " Tax in respect of any annual profits or gains not " falling under any of the foregoing Cases, and not charged by virtue " of any other Schedule ". The reason it does not fall under Case VI in my view is that it falls under Case II.

(1) 9 T.C. 261, at p. 291. (2) Colquhoun *v.* Brooks, 2 T.C. 490, at p. 497.

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I wondered whether or not there was any complication to be found in the fact that one has not to deal with Schedule D now but, by reason of the Finance Act of 1922, one has to look at Schedule E ; and in order to see what is done it is necessary to refer to the actual words of Section 18 of the Finance Act of 1922. I leave out the words in brackets in Sub-section (1) of Section 18, because they do not affect this case directly. Section 18 (1) of the Finance Act of 1922 provides as follows : " Such profits or gains arising or accruing to any person " from an office, employment or pension as are, under the Income Tax " Act, 1918, chargeable to income tax under Schedule D . . . . shall " cease to be chargeable under that schedule and shall be chargeable " to tax under Schedule E, and the Rules applicable to that schedule " shall apply accordingly subject to the provisions of this Act ". It is to be noticed that the first words of the Sub-section are " Such " profits or gains "—" Such profits or gains arising or accruing to " any person from an office, employment or pension as are, under " the Income Tax Act, 1918, chargeable to income tax under Sche- " dule D ". Then in order to find out what matters are taken from Schedule D to Schedule E so that the Rules applicable to Schedule E shall apply thereafter as amended to some extent, one has to look back to Schedule D in order to see what Schedule D includes. One of the things which Schedule D includes is " annual profits or gains " arising or accruing . . . . to any person residing in the United " Kingdom from any . . . . employment . . . . carried on " in the United Kingdom or elsewhere ". If that be so, you then have to transfer in your mind at least that to Schedule E and apply the Rules of Schedule E accordingly. Schedule E, prior to this amendment by the Finance Act of 1922, was : " Tax under Schedule E shall be " charged in respect of every public office or employment of profit, " and in respect of every annuity, pension, or stipend payable by " the Crown or out of the public revenue of the United Kingdom, " other than annuities charged under Schedule C, for every twenty " shillings of the annual amount thereof ". Schedule E prior to the amendment covered " public office or employment of profit ", and in Rule 6 of the Rules applicable to Schedule E certain offices were named. I gather that some difficulty arose as to the position of certain employees, and after there had been litigation the amendment brought about by Section 18 of the Finance Act of 1922 was thought desirable, so that a greater evenness was given to Schedule E generally. Then it seems to me that the result of Section 18 of the Act of 1922 is to bring those of the kind mentioned in Schedule D, 1 (*a*) (ii) (the only kind with which I am concerned) within and under Schedule E.

For those reasons it seems to me that the decision of the Commissioners was wrong, because they, as I have already pointed out, find in paragraph 8 : " We, the Commissioners who heard the " appeal, held that the Respondent did not fall within the charge

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" of Case II of Schedule D (as transferred to Schedule E) before 7th " September, 1932, and we discharged the assessments so far as they " related to earnings for periods prior to that date ". I sought in the course of the argument, perhaps rather persistently, to find out whether Counsel for the Respondent could give me any guide as to what the Commissioners had in fact found or the reason for their decision. I am not quite sure at this moment what the reason for that decision was, but as I have come to a different conclusion for the reasons that I have given, all that remains is for me to say that this appeal must be allowed. I suppose, Mr. Solicitor, that means that the matter goes back to the Commissioners for the right amounts to be assessed ?

The Solicitor-General.—Yes, I think so, unless they can be agreed. As your Lordship sees, after 1932 the Commissioners, broadly speaking, were in the Crown's favour, but those figures were left over to be agreed. I think the right form of Order, subject to your Lordship's approval, would be : Appeal to be allowed with costs. The matter to be remitted to the Commissioners to assess the proper figures, unless they can be agreed. I do not know whether my learned friend can help me about that ; he has much more familiarity than I have with these matters.

Singleton, J.—Yes, I think that is right, is it not, Mr. Needham ?

Mr. Needham.—Yes, my Lord.

Singleton, J.—On the assumption that my judgment is right.

Mr. Needham.—If your Lordship pleases.

An appeal having been entered against the decision in the King's Bench Division, the case came before the Court of Appeal (Lord Hanworth, *M.R.*, and Romer and Maugham, *L.JJ.*) on the 3rd, 4th and 5th July, 1935. On the last named date judgment was given unanimously in favour of the Crown, with costs, confirming the decision of the Court below.

Mr. Raymond Needham, K.C., and Mr. Cyril L. King appeared as Counsel for Mr. Eaton-Turner, and the Solicitor-General (Sir Donald Somervell, K.C.) and Mr. Reginald P. Hills for the Crown.

JUDGMENT

Lord Hanworth, M.R.—This is an appeal from a judgment of Singleton, J., which is reported at [1935] 1 K.B. 466, and the question that has to be determined is whether or not the subject, the Appellant, Mr. Eaton-Turner, is liable to suffer taxation in accordance with certain assessments which have been made upon him.

The Case tells us that assessments were made upon him for 1926–27 and the subsequent years down to the year 1933–34 at a sum of £2,500. That represents the salary and commission—I think it was commision as well—paid to him in respect of services which he had rendered to a company called the Ashanti Goldfields Corporation, Limited. That Company was incorporated under the Companies Acts on the 25th May, 1897. It carries on a gold-mining business in West Africa. Its registered office is situate in London and the active part of the Appellant's services to the Company is carried out in West Africa. A table is given in the Stated Case showing the span of time spent by the Appellant in West Africa and on the voyage to and from England. That table shows that he was absent from England and engaged in the activities of his work in West Africa during a very considerable period of time. It was admitted that he was resident in the United Kingdom, where he has a wife and children and a house. There was some dispute as to whether in respect of one year he was resident, but upon the facts before them—and they were abundant for them to come to a decision—the Commissioners held that he was resident. The result is that he is to be treated as resident in the United Kingdom during all these years of assessment. Although what I may call his actual activities in his capacity as, I think, a manager were abroad, he was paid over here. The Case finds this: " We were satisfied that before the agreement of " 2nd September, 1932, no part of the Respondent's work or duties " fell to be performed or was performed in the United Kingdom ". But the Case shows that he received the money by payment in England, either through the Westminster Bank, or through the Bank of New Zealand; and there were certain other payments which apparently were made to him in the form of cash drawings in West Africa, but it is right to state and to repeat that during these years of assessment he was resident in England and he received a large portion of his emoluments through sums paid into a bank in England. If I may quote what was said by Lord Cave, when he was dealing with a case which is by no means dissimilar, in *Foulsham* v. *Pickles*, [1925] A.C., at page 463, he said[1]: " In " other words, while the burdens incidental to his employment were " to be borne wholly or mainly abroad, the principal benefit which " he was to derive from it could only be claimed in the United " Kingdom ".

[1] 9 T.C. 261, at p. 287.

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It is now contended on behalf of the Appellant that he is not liable to be assessed at all in respect of any portion of these sums which are included in the assessments. The grounds on which that argument is put forth are these, that he is not chargeable under Schedule E, for reasons with which I will deal later, and, primarily, " That the whole of his duties under those agreements were in fact " performed at the Company's property abroad and that the office of " the Respondent was not an office or employment of profit within " the United Kingdom for any of the years of assessment ". The real basis for that argument depends upon the decision of the House of Lords in the case of *Colquhoun* v. *Brooks*(1). It is very important to bear carefully in mind what was decided in the case of *Colquhoun* v. *Brooks*. It is also important to remember that *Colquhoun* v. *Brooks* was decided under what I may call comprehensively the old Income Tax law before that had been embodied, and to a large extent consolidated, in the Income Tax Act, 1918. The case first appears in the Reports at 19 Q.B.D. 400. There we are told the facts. Mr. Brooks was a man who had a business over here; he resided wholly in England, but he was a partner in a firm carrying on business solely in Melbourne, Australia. Large profits were made by the firm and a portion of his share of the profits was remitted to him in England. That portion was duly returned by him for assessment under the Income Tax Act, under Schedule D, but the larger portion of his share of profits in the firm was never remitted to him in England but was left in Australia and never at any time formed part of his income in this country. The two businesses—that is, the business that he carried on in England and the business which was carried on in Melbourne, Australia—were entirely distinct. Mr. Brooks returned for assessment to Income Tax and was assessed on a sum of £3,000, which represented the sum remitted to him from his Australian firm and was the entire sum received by him during the financial year in question. But there was standing to his credit in the books of the Australian firm at Melbourne a sum of £9,219 which was a profit realised and capable of being remitted; that is to say, it was an ascertained profit. No portion of this £9,219 had been received in England; it remained entirely in the hands of the firm in which he was a partner. The Surveyor of Taxes contended that Mr. Brooks ought to be assessed, not only on the sum of £3,000 which had been remitted and which he had returned as chargeable to Income Tax, but also upon the sum of £9,219 which lay in the hands of his Australian firm in Melbourne. The Commissioners of Taxes were of opinion that the assessment ought to be confined to such sums as were from time to time received by the Respondent in Great Britain, and so allowed his appeal against the assessment and reduced the amount; that is to say, they deducted from the amount assessed upon him the £9,219 which was the sum in controversy.

(1) 2 T.C. 490.

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When the matter came before the Divisional Court, as the Revenue cases did in those days, there was a difference of opinion. Stephen, J., held that the wide words of Schedule D embraced an item like this £9,219, and therefore that the subject was liable to tax in respect of it(1). Wills, J., differed(2). It is interesting to see why Stephen, J., held that there was a liability, and it is simply and broadly on this point, that Schedule D, which is contained in Section 100 of the Income Tax Act, 1842, imposed the tax in respect of " Trade, Manufacture, Adventure, " or Concern in the Nature of Trade, not contained in any other " Schedule of this Act ". Those were wide words. They are now in Schedule D, and it is more easy to be precise as to the terms one is using by turning to the form in which Schedule D is now stated in the Income Tax Act, 1918. That says : " Tax under this " Schedule shall be charged in respect of—(*a*) The annual profits " or gains arising or accruing—(i) to any person residing in the " United Kingdom from any kind of property whatever, whether " situate in the United Kingdom or elsewhere; and (ii) to any " person residing in the United Kingdom from any trade, profession, " employment, or vocation, whether the same be respectively " carried on in the United Kingdom or elsewhere ". Stephen, J., was of the opinion that those wide words which were contained in the forerunner Sections of the Income Tax Act, 1842, were wide enough to embrace this sum of £9,219 lying at the disposal of the subject at Melbourne. Wills, J., took a different view, but following the practice of those days, Wills, J., withdrew his judgment, in accordance with the old practice of the Court of Exchequer, and so judgment was given for the Crown. Mr. Brooks appealed and the matter went before the Court of Appeal(3) and they held that Mr. Brooks was not liable. They held that, although those very wide words would embrace this contested item, yet the words were not to be taken in the full significance of their terms. Fry, L.J., dissented. Perhaps it is not very useful to go through the two judgments of Lord Esher and Lopes, L.J., in that Court because, at any rate, when the matter came before the House of Lords, the House of Lords affirmed the judgment of the Court of Appeal, holding that Mr. Brooks was not liable, but stating that their reasons differed somewhat from those of the Court of Appeal, although I confess I share the view afterwards expressed in another case(4) in the Court of Appeal, that it is not quite easy to understand what the divergence was.

I turn, therefore, now to *Colquhoun* v. *Brooks* as reported in 14 App. Cas. 493 when it was before the House of Lords. It must be

(1) 19 Q.B.D., at pp. 415/8. (2) *Ibid.*, at pp. 404/15. (3) 21 Q.B.D. 52.
(4) San Paulo (Brazilian) Railway Co., Ltd. *v.* Carter, 3 T.C. 344.

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remembered that there was in the Income Tax Act, 1842, a number of what are called Cases, just as there is in the Income Tax Act, 1918. The First Case related to the duties to be charged in respect of a trade, manufacture or concern. The Second Case related to duty to be charged in respect of professions, employments or vocations. The Fourth Case related to income arising from securities out of the United Kingdom, and the Fifth Case related to income from possessions out of the United Kingdom. The argument that was presented was this. The terms of the Statute of 1842, as well as of 1918, have declared that the tax which is imposed by Schedule D is to be charged under the following Cases. There are six Cases and one or other of those Cases must fit the tax if it is exigible under Schedule D. Two Cases were relied upon in *Colquhoun* v. *Brooks*. The Court was there dealing with a trader carrying on business, and so the first case relied on was Case I, " Tax in respect of any trade ". But the Fifth Case dealt with income arising from possessions out of the United Kingdom, and it was said : " It is all very well to suppose that you may use Case I " because that would cover the trade whether it be carried " on in the United Kingdom or elsewhere; if you have " another Case which is more appropriate to the facts, the " division which is indicated in these Cases ought to be " adhered to and you ought to apply the Case which is most " appropriate to the facts ", and it is pointed out by Lord Herschell at page 505(1) that Case IV deals with income which arises from securities out of the United Kingdom but only makes chargeable such sum as has been received in the United Kingdom. Equally Case V deals with income arising from possessions outside the United Kingdom but the tax falls only on so much of the income as is received in this country, whereas, if you are dealing with it under the First Case of trade, there is no limit, as there is in the case of foreign income from securities or from trade; the whole is subject to taxation although no part of it ever reaches this country.

Is it possible to assume that that was the intention of the Act? The argument was put in this way by Lord Herschell—I am reading on page 506(2)—" It is said that although elaborate machinery is " provided for carrying out the taxing purposes of the Act, none " of it is applicable to the assessment of the profits of a trade carried " on entirely outside the United Kingdom and no part of which is " received here. If this be correct it certainly goes far to show " that the legislature cannot have intended to tax such profits ". He then goes into the discussion germane to that problem. Lord Macnaghten, at page 511, says(3) : " The question after all really " lies in a narrow compass. Does the case fall within the ' First

(1) 2 T.C., at p. 499. (2) *Ibid.*, at p. 500. (3) *Ibid.*, at pp. 504/5.

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" ' Case ' of Schedule D in the Income Tax Act of 1842, and under " the head of ' Duties to be charged in respect of any trade, manu- " ' facture, adventure, or concern in the nature of trade, not " ' contained in any other schedule of this Act ' ; or does it fall " within the ' Fifth Case ', under the head of ' The duty to be " ' charged in respect of possessions in Ireland, or in the British " ' plantations in America, or in any other of Her Majesty's " ' dominions out of Great Britain, and foreign possessions ' ? " Or, to put the question more shortly still, what is the meaning " of the term ' possessions ' in the ' Fifth Case ' of Schedule D " and in other places in the Act where it is used in " the same connection? " And Lord Macnaghten says this at page 514(1) : " The income of the respondent from " his business in Melbourne, whether he is to be charged in accord- " ance with the contention of the Attorney-General or not, " undoubtedly comes under Schedule D. Undoubtedly, the portion " of Schedule D which is contained in section 1 of the Act of 1842 " is expressed in the most comprehensive terms possible ; and, if not " restrained or limited by what follows, would operate to charge " the respondent in respect of the whole of his Melbourne income. " I do not, however, agree with the argument urged at the Bar, " that the rest of Schedule D, which is found in section 100, is mere " machinery, or a mere collection of examples, not diminishing the " generality of the earlier part of the schedule, but intended only " to furnish a guide where the particular rule applies ". At page 515 he says(1) : " Unquestionably the rules applicable to a particular " ' Case ' may cut down, and cut down very materially, the charging " words in the earlier part " of the Schedule, and on page 516 he says(2) : " There are other provisions which it is not necessary to go " through which seem to show that the ' First Case ', though " clearly applying to a trade carried on partly abroad and partly " in Great Britain, was not intended to apply to a trade carried on " exclusively abroad ". He then turns to the Fifth Case and asks what is the meaning of " possessions " and he comes to the conclusion that the business that was carried on abroad was within the ambit of the word " possessions ". The result is that he holds that the Fifth Case was more appropriate than the First Case, for, upon the facts of that case, the trade was carried on exclusively abroad. If so, it was not at the volition of the Crown to tax the subject under Case I, because there was another Case, Case V, which fitted the case and, as it fitted the case, it controlled the large embracing words of Schedule D at its outset and limited the chargeability to tax in accordance with the various Cases. He holds that the £9,219 was a profit derived from a possession abroad within the Fifth Case, and under that Case the only amount of profits that

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(1) 2 T.C., at p. 507. (2) *Ibid.*, at p. 508.

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could be made responsible or chargeable to tax was the sum which was remitted. The tax upon that amount had already been paid and there was, therefore, no chargeability under Case V in respect of the sum as contended for by the Inspector of Taxes. *Colquhoun* v. *Brooks* does, therefore, establish this, that you have to see what Case is appropriate to the facts of the case, and if the Fifth Case is appropriate it cannot be put into force to charge more than the profits which are actually received at home. It is an important case as showing that the initial general words of Schedule D may be cut down by a later portion of the Statute, because it is clearly indicated that those general words are to be made effective through certain Cases, which are more precise in their language, have certain rules applicable to them, and provide the channel through which the chargeability is to reach the subject, and if along one or other of those channels chargeability cannot be imposed, then to that extent the wide and general words with which Schedule D opens are to be treated as cut down. That is the effect of *Colquhoun* v. *Brooks*.

We are not without some guidance as to what is the effect of *Colquhoun* v. *Brooks*. Let me turn next to the case in which it was first of all discussed, *The London Bank of Mexico and South America* v. *Apthorpe*, a case in the Court of Appeal reported at [1891] 2 Q.B. 378(1). Lord Esher says this, at page 382(2): "Where a person carries on two businesses—"one which is carried on in England in the ordinary sense of the "words, and another wholly distinct business which is carried on "abroad—then you cannot join the two businesses, and charge "him in respect of them, together. You must deal with the one "in England only as a business carried on in England, and with "the other as a business carried on solely abroad, and assess him "in respect of each accordingly. As to the business carried on "abroad, he can only be assessed in respect of so much money "as he gets out of that business, and as comes into his hands in "England. That is the result of the decision in *Colquhoun* v. "*Brooks*".

Colquhoun v. *Brooks* was once more discussed in the case of the *San Paulo (Brazilian) Railway Company* v. *Carter*, [1895] 1 Q.B. 580(3). There Rigby, L.J., is discussing the effect of *Colquhoun* v. *Brooks* and he says, at page 588(4): "The House "of Lords went, it appears from the report, into a more minute "examination of the sections of the Income Tax Acts than was "made in this Court. The mode in which they arrived at the "conclusion which they adopted was as follows: They seem to

(1) 3 T.C. 143. (2) *Ibid.*, at p. 147. (3) 3 T.C. 344.
(4) *Ibid.*, at pp. 353/4.

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" have been of opinion that, although the facts of the case came " within the general words of Schedule D and the First Case, yet " such general words might be cut down in some cases by other " parts of the Act; and, not finding upon examination of the " sections of the Act any means of assessing the profits of a trade " or business, unless it was at any rate partly carried on in the " United Kingdom, they thought themselves justified, notwith- " standing the general words used, in limiting the operation of " the First Case to cases where the Act provides means of assess- " ment; and then considered the case of a business entirely carried " on abroad as one coming within the Fifth Case, under which " persons receiving profits from ' foreign possessions ' are assessable " on such profits as they actually receive in this country ". That is a statement of the effect of *Colquhoun* v. *Brooks*: you must ascertain what is the appropriate Case, and if you have one Case which is appropriate you cannot discard that and make use of another because it will give you a better result in charging the subject. When the *San Paulo* case came before the House of Lords, Lord Watson, at page 40 of [1896] A.C., said this[1]: " When it has " been ascertained that a person interested in the profits of a trade " has his residence in the United Kingdom, in such sense as to " bring him within the incidence of the Income Tax Acts, the only " question remaining for consideration is, whether the measure of " his liability is to be found in the First or in the Fifth Case of " Schedule D; in the one case, he is liable to pay duty in respect " of the net profits accruing to him from such trade; in the other, " in respect only of such part of these profits as shall have been " actually received by him in this country. But he cannot, " according to the rule established in *Colquhoun* v. *Brooks*, escape " from liability under the First Case, unless he is able to show " that no part of the trade is carried on within the United Kingdom, " or, what comes to precisely the same thing, that the trade is " exclusively carried on in a country or countries outside the " United Kingdom, whether subject to Her Majesty or not. If " he succeeds in proving that fact, his liability will be under the " Fifth Case ".

It does not, therefore, follow from *Colquhoun* v. *Brooks* that there may not be a liability in respect of a business the activities of which are carried on abroad; it has to be shown that the trade, or the employment—because we are dealing with Case II which deals with employment and not trade—is exclusively carried on in a country outside the United Kingdom.

Here we have to consider the case of a man the burden of whose duties is exercised outside the United Kingdom. But does that cover the whole of the contract under which his service was

(1) 3 T.C. 407, at p. 411.

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rendered? I think one must go back to consider the case of *Foulsham* v. *Pickles*(1) and to bear in mind the comments that were made upon that case, which is admittedly very like the present case. Lord Cave uses the words which I have already referred to. Lord Dunedin said this(2) : " When I say ' made in the United " ' Kingdom ' I am not referring to the place where the signing of " the contract took place. I am referring to the source of the " profit, which is the payment which the employers covenanted to " make. This was payable and paid in Liverpool ". Lord Buckmaster says this(3) : " He was engaged by the African Association, " Limited, to serve them in West Africa as district supervising agent " at a salary of £500 and commission, and by the terms of his " employment it was provided that he should not draw nor claim " payment in the Colony in respect of commission, but payment " thereof should only be made to him through the office of the " Company in Liverpool ", and they held upon the facts of that case that it was not a case which showed that there was exclusive employment abroad but that, having regard to the mode of payment provided by the contract, the Respondent's employment was not wholly out of the United Kingdom, and was not, therefore, a possession within Case V; and inasmuch as in that case the assessment had been imposed upon him under Case V, and only under Case V, the House of Lords agreed with the Court of Appeal in not allowing the matter to be remitted for a different Case to be made applicable, such as Case II.

Having examined those cases very carefully, I have come to the conclusion that the facts of the present case are similar to those in *Foulsham* v. *Pickles*, and that it is not established upon the facts found by the Commissioners that this employment is one wholly abroad. It is not, therefore, a case which falls within Case V and, indeed, I think in loyalty to *Foulsham* v. *Pickles* we must come to that conclusion, but independently I have come to the conclusion that this is not a case in which we must say the chargeability lies under Case V and Case V only. Case II provides that the tax can be collected in respect of any profession or employment. It has been suggested that some limitation again ought to be imposed upon that Case II by the Rules, but I do not find any grounds for saying that the ambit of Case II is so reduced, and it seems, therefore, that the general words of Schedule D apply to the case, that Case II can be made applicable, Case V does not apply, and the authority of *Colquhoun* v. *Brooks*(4), therefore, cannot be invoked to render the Appellant immune from these assessments.

A subsidiary point was made, but it is a subsidiary point, based upon the terms of Section 18 of the Finance Act, 1922, which brought certain cases which fell under Schedule D into

(1) 9 T.C. 261. (2) *Ibid.*, at p. 289. (3) *Ibid.*, at p. 290.
(4) 2 T.C. 490.

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chargeability under Schedule E. The first proposition of Mr. Needham and Mr. King was that the Appellant was not chargeable under Schedule D and therefore was not brought into charge under Schedule E. I have dealt with that point. Then it is said that although they are brought into charge by Schedule E yet you must look at the Rules of Schedule E, and when you find in the Rules relating to Schedule E, Rule 6, which says this : " The tax shall be paid in respect of all public offices " and employments of profit within the United Kingdom " and so on, once more the effect of the Section is cut down by the Rules. That argument does not appeal to me. It is stated in the very terms of Section 18 that the Rules applicable to Schedule E are to " apply accordingly subject to the provisions of this Act ". I cannot so interpret the Rules as withdrawing from the effect of Section 18 and Schedule E the very cases which it was the purpose of Section 18 to bring into chargeability under Schedule E.

For these reasons I am of opinion that the appeal fails and must be dismissed with costs.

Romer, L.J.—The first question arising upon this appeal is whether before the coming into operation of the Finance Act, 1922, the Appellant was chargeable in respect of the profits of his employment under Schedule D. For the purposes of this judgment I am going to assume that the Appellant exercised his employment wholly abroad. On that assumption I turn to Schedule D and I find that under paragraph 1 of that Schedule tax under it " shall be charged " in respect of—(*a*) "—I am only going to read the portions that are material for the present purpose—" The annual profits or gains " arising or accruing . . . . (ii) to any person residing in the " United Kingdom from any . . . . employment . . . . whether the " same be respectively carried on in the United Kingdom or else- " where ". Paragraph 2 of the Schedule says : " Tax under this " Schedule shall be charged under the following cases respectively; " that is to say . . . . Case II.—Tax in respect of any profession, " employment, or vocation not contained in any other Schedule ". Pausing there, it would seem plain that the Appellant is chargeable in respect of profits derived by him from his employment out of the United Kingdom. But it is said by the Appellant that one cannot hold that he would have been chargeable under Case II of Schedule D without entirely disregarding the reasons that were given by the members of the House of Lords in their decision in *Colquhoun* v. *Brooks*(1). In *Colquhoun* v. *Brooks* the Court was not dealing with a case of employment; it was dealing with a case of trade, and what the Court had to decide in *Colquhoun* v. *Brooks* was whether Mr. Brooks in respect of the trade carried on by him wholly in Australia was chargeable under Case I of paragraph 2 of

(1) 2 T.C. 490.

(Romer, L.J.)

the Schedule or under Case V. It is extraordinarily unlikely that the Legislature intended that a person in the position of Mr. Brooks should be chargeable under both Case I and Case V, seeing that if he were chargeable under Case I he was chargeable in respect of the whole of his profits derived from the trade, while if he were chargeable under Case V, he would be chargeable only in respect of so much of the profits as was received in the United Kingdom. So the House of Lords were confronted with the necessity of deciding under which of the two Cases Mr. Brooks was chargeable. It was pointed out that if one read paragraph 1 (*a*) (ii) of the Schedule and Case I together and stopped there, it would seem plain that Mr. Brooks was chargeable under Case I. But the learned Lords, especially Lord Herschell and Lord Macnaghten, on looking at other parts of the Act, notably, the rules relating to assessment and collection of the tax, were driven to the conclusion that the Legislature did not intend such a case as that of Mr. Brooks to come under Case I, but under Case V. Lord Macnaghten on page 515 of the report, after reading the parts of the Schedule to which I have already called attention, said this(²): " This rule " points to a business carried on out of Great Britain as well as to " one carried on in Great Britain. But then when one tries to " apply the rules and provisions of the Act relating to profits and " gains from trades to a trade carried on exclusively abroad one gets " into hopeless difficulties. If it is a partnership business, as this " is, the return is to be made by the senior partner resident in Great " Britain. But then the partner is to make the return ' on behalf " ' of himself and the other partner or partners ', and his return is " ' sufficient authority to charge such partners jointly ' and ' no " ' separate statement ' is to be allowed in any case of partnership " except for ' the purpose of the partners separately claiming an " ' exemption ' or ' of accounting for separate concerns '. Then, " again, the computation of the duty to be charged in respect of any " concern in the nature of trade is to be made exclusive of the " profits or gains arising from lands occupied for the purpose of " such concern. That rule hardly seems applicable to a foreign " mine or a sugar plantation in the West Indies. Then, again, by " section 106, every person engaged in any trade is to be chargeable " by the commissioners acting for the parish or place where the " trade is carried on, whether such trade is exercised wholly or " in part only in Great Britain. And there are other provisions " which it is not necessary to go through which seem to shew that " the ' First Case ', though clearly applying to a trade carried on " partly abroad and partly in Great Britain, was not intended to " apply to a trade carried on exclusively abroad ". It is said on behalf of the Appellant in this case that there are provisions in this Act which show that notwithstanding the clear words of paragraph 1

(¹) 2 T.C., at pp. 507/8.

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of Schedule D, the Second Case is not intended to apply to an employment exercised wholly abroad. We asked Mr. Needham in the course of his argument what other provisions in the Act ought to lead us to that conclusion, and he said Section 106 in the Income Tax Act, 1842, and that was all. He said—and said truly, if I may say so—that that Section did not provide machinery for collection of tax on emoluments arising from an employment exercised wholly abroad; and he said that that is a conclusive reason for holding that Case II does not apply to such an employment. I cannot take that view. Where there is a question whether a case falls within one charging Section or another, or within one Case of a charging Section rather than another Case of the same charging Section, it is very relevant to a solution of such a question that if the Court adopts one construction there is no means provided by the Act for the collection of the tax, whereas if the Court adopts another construction means are so provided. The matter is not at all conclusive; it is merely a relevant consideration, and where, as here, there is no question of whether these emoluments are chargeable under Case V or under Case II, I am not in the least impressed by the fact that if I hold that the case falls within Case II no machinery is provided by the Act for the collection of that tax. If the tax is clearly imposed, the omission of the Legislature to provide means for its collection must be regarded as an unfortunate omission and nothing else. It is only where a doubt arises as to whether the tax is chargeable by a certain Section that the absence of machinery for collection becomes a relevant consideration. I should therefore have been prepared to hold that even under the Income Tax Act, 1842, the Appellant's earnings in respect of his employment abroad were charged by Schedule D, notwithstanding that Section 106 of that Act provided no machinery for its collection. But in point of fact we are dealing here with the Income Tax Act, 1918, and in that Act, happily for the Crown, in such cases Rule 4 of the Miscellaneous Rules applicable to Schedule D does provide machinery for collection of tax on the emoluments payable in respect of an employment exercised wholly abroad. As I read *Colquhoun* v. *Brooks*(1), it was only because the House of Lords had to decide between Case I and Case V that Section 106 provided not only a relevant but almost a conclusive reason for the decision which the House gave.

That being so, the next question that arises on the appeal is this: Is the case now chargeable under Schedule E or is it freed from all taxation by virtue of the provisions of the Finance Act, 1922? It is plain that if, as I hold is the case, the Appellant was chargeable under Schedule D in respect of profits arising from his employment, according to the plain words of Section 18 of the

(1) 2 T.C. 490.

(Romer, L.J.)

Finance Act, 1922, those profits are no longer chargeable under that Schedule but are to be chargeable to tax under Schedule E. The Section goes on to say " and the Rules applicable to that schedule " shall apply accordingly subject to the provisions of this Act ". It is argued on behalf of the Appellant that if one looks at Rule 6 to Schedule E, it will be found that though the Finance Act, 1922, brings such cases as that of the Appellant within Schedule E, Rule 6 immediately throws them out of that Schedule again. Rule 6 is in these terms : " The tax shall be paid in respect of all public offices " and employments of profit within the United Kingdom ". I cannot think that, the Legislature having said that such a case as the Appellant's shall be chargeable under Schedule E in future, its intention is defeated by the latter part of Section 18 that " the Rules applicable to that Schedule shall apply accordingly " subject to the provisions of this Act ". As was pointed out by the Solicitor-General, if the Appellant's argument is to succeed on that point, Rule 6 would not only throw out of Schedule E such cases as the Appellant's, but it would throw out of the Schedule all cases of employment other than a public employment of profit. It would appear that Rule 6 will continue to apply to such cases as those to which it was applicable before. I cannot think that the Rule is intended to apply to such a case as the present with the result that it is thrown out of the Schedule altogether, and having been thrown out of Schedule D by the Act of 1922 is not chargeable under any Schedule at all.

For these reasons I think that the learned Judge came to the right conclusion and this appeal fails.

Maugham, L.J.—I am of the same opinion.

I should like to state the way in which I regard the matter, so far as it relates to the first point, namely, the question of the assessability of the Appellant under Case II, Schedule D, paragraph 1 (*a*) (ii), and Section 18 of the Finance Act, 1922. The facts are, of course, found in the Stated Case. The only facts that I think it necessary to mention are that the Appellant is resident here. He is employed by an English company with a registered office here. The company owns a business which is controlled from here, and the remuneration of the Appellant is for the most part received here. There is a finding in paragraph 5 of the Case which no doubt has to be borne in mind but ought not to be misunderstood. The finding is that the Commissioners " were satisfied that before the " agreement of 2nd September, 1932,"—with regard to which we are not concerned—" no part of the Respondent's work or " duties fell to be performed or was performed in the United " Kingdom ". I am accepting that to the full, but I would observe that if one looks at the agreement one will find in almost every

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clause something to show that the Appellant is not unconcerned with what the board of directors here may require him to do. He has to fulfil their instructions in many respects; he owes a duty to them; he has to render reports to them. The agreement is one which, of course, has to be construed according to English law, and in the full sense it is an English contract. In those circumstances, apart from the operation of Section 18 of the Finance Act, 1922, was the Appellant assessable and chargeable under Case II of Schedule D?

The first observation I want to make is that beyond all doubt the language of Case II does extend to and relate to the Appellant. Paragraph 1 of Schedule D of the Income Tax Act, 1918, refers to tax being charged on the annual profits or gains arising or accruing to any person residing within the United Kingdom—that is where the Appellant resides for Income Tax purposes—from any employment, whether the same be carried on in the United Kingdom or elsewhere; and when we turn to paragraph 2 we find that in Case II the tax under the Schedule has to be charged " in " respect of any profession, employment, or vocation not contained " in any other Schedule ". For the present purpose I am omitting Schedule E, because that did not apply at the date when the Income Tax Act, 1918, came into force. So that since the employment may be carried on in the United Kingdom or elsewhere, the words I have mentioned are clearly sufficient to include the case of such a resident as the Appellant who is employed abroad, and *a fortiori* if he is employed abroad by people residing in this country and employed under an English agreement. Then it is said that if you consider the case of *Colquhoun* v. *Brooks*, 14 App. Cas. 493(1), you will see that the operation of the words to which I have referred in paragraph 1 of Schedule D of the Income Tax Act, 1918, having regard to the decision of the House of Lords, must be limited or qualified in the way in which it is said they were limited or qualified by the House of Lords in *Colquhoun* v. *Brooks*, when the Income Tax Act, 1842, was under consideration.

I am not going into any elaborate consideration of what *Colquhoun* v. *Brooks* decided, having regard to the analysis of the case which the Master of the Rolls has given. I will only observe this, that I think it may be said with reasonable accuracy that *Colquhoun* v. *Brooks*, which related, as we know, to a trade carried on abroad, was decided on two considerations; firstly, the consideration that, according to the language of the Act, the taxpayer was liable to be charged under Case V in respect of income arising from a possession out of the United Kingdom; and, secondly, that there was at that time an almost insuperable difficulty in charging the alleged taxpayer except under Case V, inasmuch as the machinery

(1) 2 T.C. 490.

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specified by Section 106 of the Income Tax Act, 1842, could not be applied in respect of a trade wholly carried on in a place where there were no Commissioners, and, indeed, in a country where the Sovereignty was not the Sovereignty of Great Britain. It was also pointed out that the terms of a Section conferring certain exemptions or quasi-exemptions, namely, Section 39 of the Income Tax Act, 1842, tended strongly to show that the case of a trade carried on wholly abroad was not taxable, except as a foreign possession. There were therefore those three elements: Case V was applicable; there was no machinery except under Case V, and Section 39 tended strongly to show that Case I could not be applicable.

In the present case, having regard to the fact that the company employing the Appellant is a company situate in this country and with its registered office here, and that the source of income of the Appellant is here, it is clear (for it has now been decided by the House of Lords) that Case V is not applicable, because the Appellant is not in receipt of income arising from a possession out of the United Kingdom. *Pickles* v. *Foulsham*, 9 T.C. 261, contains a number of illuminating judgments, not all perhaps taking precisely the same view of the law, or rather of the construction of these difficult Acts. But when the matter went to the House of Lords it was held very distinctly that a man in the position of Mr. Pickles in that case and, I may say, in the same position as the Appellant in this case, is not enjoying income arising from a possession out of the United Kingdom if the source of his income is in this country, and Lord Cave observed, on page 288, that he was far from saying that Mr. Pickles could not have been assessed under Case II of Schedule D. Lord Buckmaster observed on page 290 that, Mr. Pickles being a person residing in the United Kingdom, it would appear that he was liable to be taxed under Schedule D, paragraph 1 (*a*) (ii), in respect of annual profits or gains arising from any trade, etc. But, as pointed out, he had been in fact assessed under Case V in paragraph 2.

Those observations are no doubt not any distinct guide to me in determining the position of the present Appellant, but, at any rate, they do not tend in the opposite direction, and the observations are a little difficult to explain if it is reasonably clear, as it is suggested on behalf of the Appellant, that the case of *Colquhoun* v. *Brooks*[1], which was in the minds of their Lordships and which was referred to, shows beyond doubt that Case II does not apply to a case where the person employed renders his services wholly abroad.

To my mind there are two circumstances which have to be borne in mind in coming to the conclusion at which I have arrived. The proposition that there is a means of taxing the Appellant under

(1) 2 T.C. 490.

(Maugham, L.J.)

Case V is one which, for the reasons I have given, is inapplicable in this case. The proposition that it is impossible or very inconvenient to tax him under Case II, owing to lack of machinery, does not exist since the Income Tax Act, 1918, came into force, because by Rule 4 of the Miscellaneous Rules applicable to Schedule D which forms a part of that Act, there is provision under which he can be taxed where he ordinarily resides. The Rule replaces Section 32 (1) of the Finance (No. 2) Act, 1915. The language of Rule 4 of the Miscellaneous Rules is clearly and obviously different from the language of Section 106 of the Income Tax Act, 1842, and the Court is bound to pay attention to the fact that there is now no lack of machinery for taxing a man resident in this country who receives income in respect of services rendered wholly abroad, whether in a colony or in a foreign land.

Accordingly, as I think, both the grounds which caused the House of Lords to decide that Mr. Brooks was not liable under Case I of Schedule D fail to apply to the present case, and there is no reason for holding that Case II, which in terms covers the present case, is not an applicable Case under which the Appellant may be charged, as he has been charged. For those reasons I agree with the decision of the learned Judge in the Court below and I agree with my brethren in thinking the appeal should be dismissed.

Mr. D. M. Wilson (for Mr. Hills).—The appeal will be dismissed with costs, my Lord?

Lord Hanworth, M.R.—Yes.

Maugham, L.J.—I only wanted to say that I do not think it is necessary to add anything on the point arising under the Finance Act, 1922, because I entirely agree with what has already been said on that point.

Mr. Needham.—My Lord, I am instructed to ask for leave to appeal in this case.

Lord Hanworth, M.R.—Yes, Mr. Needham, we think you ought to have leave to appeal.

Mr. Needham.—If your Lordship pleases.

An appeal having been entered against the decision in the Court of Appeal, the case came before the House of Lords (Lords Atkin, Thankerton, Russell of Killowen, Macmillan and Roche) on the 15th October, 1936, when judgment was given unanimously in favour of the Crown, with costs, confirming the decision of the Court below.

Mr. Raymond Needham, K.C., and Mr. Cyril L. King appeared as Counsel for Mr. Eaton-Turner, and the Attorney-General (Sir Donald Somervell, K.C.) and Mr. Reginald P. Hills for the Crown.

JUDGMENT

Lord Atkin.—My Lords, this is an appeal from an Order of the Court of Appeal which dismissed an appeal by the Appellant from an Order of Singleton, J. Singleton, J., had allowed an appeal by the Crown on a Case stated by the Special Commissioners, who had decided in favour of the Appellant. There are several assessments in question, in respect of years beginning with the year 1926–27 and ending with the year 1931–32.

The Appellant was employed by the Ashanti Goldfields Corporation, Limited, as their Manager. He began as Assistant Manager, and he was employed under written contracts under which his duties as far as he was concerned were, as found by the Special Commissioners, to be wholly performed outside the United Kingdom, namely, in West Africa. A condition of the contracts was that payments were to be made as he directed, and he did in fact direct that payments should be made in this country. The greater part of the payments were, therefore, in fact made by his employers to him in this country; but for the purposes of this case, in the view which your Lordships are taking of it, that, I think, is probably irrelevant.

The Appellant is assessed under Schedule E, and he is assessed under that Schedule by reason of a provision in the Finance Act, 1922, which, by Section 18, Sub-section (1), provides: " Such " profits or gains arising or accruing to any person from an office, " employment or pension as are, under the Income Tax Act, 1918, " chargeable to income tax under Schedule D " (other than certain exceptions) " shall cease to be chargeable under that schedule and " shall be chargeable to tax under Schedule E, and the Rules " applicable to that schedule shall apply accordingly subject to the " provisions of this Act ". Therefore the question which arises is whether or not these profits or gains were profits or gains which would be chargeable to Income Tax under Schedule D of the Act of 1918. Section 1 of the Act of 1918 provides: " Where any Act " enacts that income tax shall be charged for any year at any rate,

(Lord Atkin.)

" the tax at that rate shall be charged for that year in respect of all " property, profits, or gains respectively described or comprised in " the schedules marked A, B, C, D, and E, contained in the First " Schedule to this Act and in accordance with the Rules respec- " tively applicable to those Schedules ". Then one comes to Schedule D, which provides as follows, by paragraph 1: " Tax " under this Schedule shall be charged in respect of—(*a*) The annual " profits or gains arising or accruing—(i) to any person residing in " the United Kingdom from any kind of property whatever, whether " situate in the United Kingdom or elsewhere; and (ii) to any person " residing in the United Kingdom from any trade, profession, " employment, or vocation, whether the same be respectively carried " on in the United Kingdom or elsewhere ". Then by paragraph 2 it is provided that: " Tax under this Schedule shall be charged " under the following cases respectively; that is to say,— . . . . " Case II.—Tax in respect of any profession, employment, or " vocation not contained in any other Schedule ". The reference there is, no doubt, to employments of a public nature which were originally taxed under Schedule E.

The Appellant in this case has carried on his employment outside the United Kingdom, and, upon the finding of the Commissioners, exclusively outside the United Kingdom, and he says that he is not properly taxable under Schedule D, or at any rate not under Schedule D, Case II, in respect of profits or gains arising from the employment; and he says that he is not so chargeable because his employment was not an employment within the United Kingdom, but was an employment exclusively outside the United Kingdom. Now the answer to that is obvious on the plain statement of the words, because the Act says that tax shall be charged on profits or gains arising " to any person residing in the United " Kingdom from any trade, profession, employment, or vocation, " whether the same be respectively carried on in the United " Kingdom or elsewhere "; and the Appellant was, as is found, resident in the United Kingdom during the whole of this period. It would therefore look as though there were a very heavy onus on the Appellant to show why he should not be charged in accordance with what would seem to be the plain meaning of the Act. But he says he can show that, because he says that the words in paragraph 1 (*a*) (ii) of Schedule D (which relates to any person residing in the United Kingdom), " from any trade, ... whether . . . . " carried on in the United Kingdom or elsewhere ", were considered in the well-known case of *Colquhoun* v. *Brooks* in the year 1889, 14 App. Cas. 493(1). In that case Mr. Brooks resided in the United Kingdom, and he derived profits from a trade which was carried on in Australia, in which he was a partner. It was held that he could

(1) 2 T.C. 490.

(Lord Atkin.)

not be assessed upon the whole of the profits arising from that trade, but only from so much as was remitted to this Kingdom. The Appellant here says, by analogy, that inasmuch as the House of Lords, affirming the Court of Appeal, decided that you must put a limit on those extensive words in respect of trade, so you must put a limit on the words in respect of employment. That has involved a consideration of the case of *Colquhoun* v. *Brooks*.

Now when that case is looked at, it is plain from the language of the learned members of this House who delivered opinions that the principle upon which they went was this. They all of them pointed out that the Appellant was obviously within the meaning of the charging words, but they pointed out also that general words of that kind might have to be cut down, because you cannot construe general words in one part of a Section or one part of an Act without having regard to all that is contained in the Act, and they pointed to a series of considerations which led them to the view that in respect of trade these words ought to be cut down. They first of all pointed out that the machinery was defective, and hopelessly defective, for charging a person in respect of a trade which was carried on wholly abroad. Lord Macnaghten says(1) : " When one tries to " apply the rules and provisions of the Act relating to profits and " gains from trades to a trade carried on exclusively abroad one gets " into hopeless difficulties ". He then pointed out(1) that in respect of a partnership business the return had to be made by the senior partner resident in Great Britain, and that the return bound all the other partners, and no other partner could make a separate return at all. He pointed out(2) that the computation of the duty was to be exclusive of profits arising from lands occupied, a rule which would be very difficult to apply to a trade carried on abroad. He also pointed out(2) that every person engaged in trade was chargeable by the Commissioners acting for the parish or place where the trade was carried on, and that was obviously inapplicable to a case where the trade was carried on in Australia. Then, and conclusively in the view of the learned Lords, they came to the conclusion(3) that the particular profits were really charged under Case V, which deals with tax in respect of income arising from possessions out of the United Kingdom; and having found that the machinery of Case I was inapplicable to a trader who derived profits here from trade carried on abroad, and having found that there was a Case which expressly charged him in respect of his interests in that trade abroad, they came to the conclusion that there was sufficient ground, and clear ground, for cutting down those general words. That decision has been followed ever since, and neither this House nor any member of this House is likely to say anything in criticism of that decision.

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(1) 2 T.C., at p. 507. (2) *Ibid.*, at p. 508. (3) *Ibid.*, at pp. 502/3 and 508/9.

(Lord Atkin.)

But how does that reasoning apply to the present case? We have sought to extract from Counsel for the Appellant, who have, as usual, said everything that could be said on behalf of their client, some statement of what are the provisions in the present Act which would appear to be inconsistent with the intention to charge the holder of an employment in respect of an employment which was exercised abroad; and, my Lords, there are none. The provision about machinery does not apply. There was a time when it did, and when this Schedule was first passed no doubt there would have been, or might have been, a difficulty in charging a person in respect of profits derived from an employment which was carried on abroad, because the person would have to be assessed at the place where the business or employment was in fact conducted. But that was remedied as long ago as 1915, and there is now no such difficulty. And while it is perfectly true that a deficiency in the machinery for collection is an element to be taken into account when you are construing an Act of Parliament and trying to see whether you are to give words their plain meaning or whether you are to cut them down, at the same time it is by no means conclusive. There very well may be cases where there was an intention to charge but where the Legislature has failed, through some neglect or improvidence, to provide the necessary machinery. The machinery has now been provided, and in the Act of Parliament as now passed there is no difficulty at all about the machinery. But the other and conclusive element in *Colquhoun* v. *Brooks*(1) is entirely lacking. There is no Case at all to which this matter can be referred. In *Colquhoun* v. *Brooks* the existence of Case V dealing with foreign possessions induced the members of the House of Lords to say that there was a Case applicable to the matters before them, and therefore the mere general words were not to be relied on, but in the present case it is sufficient to say that by common consent this is not a case of a foreign possession.

I need not discuss the case of *Pickles* v. *Foulsham*(2), which was decided by this House, and which expressly held that an employment exactly on all fours with the employment here could not be said to be a " foreign possession "; therefore I do not discuss any difficulties that might arise from the conception of an employment being a " possession " at all. Therefore, inasmuch as there is no difficulty about the machinery and there is no alternative Case and the words are absolutely clear on the face of them and as wide as they can be, and expressly refer to employment outside this country as well as employment within the country, I for my part find insuperable difficulty in seeing that the Appellant here ought to succeed in his contention that he has shown that the wide words of the Act are necessarily to be cut down.

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(1) 2 T.C. 490. (2) 9 T.C. 261.

(Lord Atkin.)

There is one other matter that arises on the case. It is said that Section 18 of the Finance Act, 1922, which I have read, transfers the profits or gains chargeable under Schedule D to Schedule E, and says that the Rules applicable to that Schedule shall apply accordingly; and then it is said that when you look at the Rules applicable to Schedule E you will find Rule 6, which says that: " The tax shall be paid in respect of all public offices and " employments of profit within the United Kingdom ", and therefore it is said that those Rules cannot apply, and that Schedule E cannot apply, and although you may have transferred this employment from Schedule D to Schedule E, you have not found a home for it in Schedule E, and it must wander between earth and heaven because apparently it is not in Schedule D, neither is it in Schedule E.

My Lords, I think that is much too technical a view, and an incorrect view of the construction. I think the Rules of Schedule E are intended to be applied so far as they are applicable. Once you have found, as I venture to think your Lordships must find, that this particular profit was chargeable under Schedule D, then I think it is transferred to Schedule E, and the assessment is properly made in those circumstances. Therefore I think that the opinions of the learned Judges below, which I think express exactly the view which I have put before your Lordships, were right, and I suggest to your Lordships that the appeal should be dismissed.

Lord Thankerton.—My Lords, I concur in the reasons which have just been given by my noble and learned friend on the Woolsack and also in the conclusions at which he has arrived, and I have very little to add.

The main argument of the Appellant in this case is based on the decision of the case of *Colquhoun* v. *Brooks*(1), but when properly examined it appears to me that *Colquhoun* v. *Brooks* really is sufficient to decide the case against the Appellant, and for these reasons. *Colquhoun* v. *Brooks* was a case first of all of a trade, and a trade carried on exclusively in Australia. This is the case of an employment; but in that respect I doubt whether there is so much distinction as regards the argument. But, secondly, in *Colquhoun* v. *Brooks* it was held by this House that the case could possibly fall under Case V, and it is expressly conceded in the present case that it cannot fall under Case V. That is distinction number one. Further, in *Colquhoun* v. *Brooks* this House, as expressed in the opinions which were delivered, was very clearly of opinion that the language of Case I was apt to cover the case there unless on a consideration of the whole provisions of the Statute there were reasons found why the full meaning should not be

(1) 2 T.C. 490.

(Lord Thankerton.)

attributed to Case I; and their Lordships then went on to consider the other provisions. Both Lord Herschell and Lord Macnaghten gave three reasons(1), and the same three reasons, why a more limited construction should be applied to Case I, and Case V should be preferred. As my noble and learned friend has pointed out, not one of those three reasons applies in the present case. The first two reasons, which were founded on the fact that it was a trade with a partnership, do not apply to an employment at all, and the third reason, which related to the place at which the person might be assessed, has been superseded as regards the present case, not, as assumed by the judgments in the Court of Appeal(2), by the provision of Miscellaneous Rule 4 applicable to Schedule D, Sub-rule (1) (*b*), but by Rule 18, Sub-rule (5), of the Schedule E Rules. That, however, is a mere matter of detail; both these Rules were amended by the Finance (No. 2) Act, 1915, Section 32, at the same time and in the same Section.

That being the case, it does seem to me, my Lords, that the initial view of their Lordships in *Colquhoun* v. *Brooks*, namely, that you must give effect to the clear words of the Case—in this case Case II and not Case I—unless you find reasons elsewhere in the Statute for a more limited construction, applies in the present case, and that no adequate reason has been produced in the present case for applying that more limited construction. Consequently I agree with the conclusion at which my noble and learned friend on the Woolsack has arrived. On the second point, as to the construction of Section 18 of the Act of 1922, I have nothing to add.

Lord Russell of Killowen.—My Lords, I agree with the motion proposed, and I have nothing to add.

Lord Macmillan.—My Lords, I also agree.

Lord Roche.—My Lords, I also agree.

Questions put:

That the Order appealed from be reversed.

The Not Contents have it.

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

The Contents have it.

[Solicitors :—Solicitor of Inland Revenue; Dawson & Co.]

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(1) **2 T.C. 490,** at pp. 501/2 and 507/8. (2) *See* pages 591 and 595 *ante.*

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