No. 441.—IN THE HIGH COURT OF JUSTICE (KING'S BENCH DIVISION).—4TH, 7TH AND 25TH JUNE, 1920.

COURT OF APPEAL.—26TH, 27TH AND 30TH MAY AND 25TH JULY, 1921.

HOUSE OF LORDS.—23RD AND 27TH FEBRUARY, 1922.

F. L. SMIDTH & Co. v. F. GREENWOOD (SURVEYOR OF TAXES).[1]

Income Tax, Schedule D.—Non-resident firm—profits from trade exercised within the United Kingdom.—Income Tax Act, 1853 (16 *and* 17 *Vic. c.* 34), *Section* 2, *Schedule D.—Finance* (*No.* 2) *Act*, 1915 (5 *and* 6 *Geo.* 5, *c.* 89), *Section* 31 (2).

The Appellants carried on business at Copenhagen, Denmark, as manufacturers of and dealers in cement-making and other similar machinery. There were two partners in the firm, both of Danish nationality and both resident in Copenhagen. The Appellants rented an office in London, which was in the charge of a whole-time employee, whose duty it was to ascertain the requirements of intending purchasers, to inspect the site of any proposed installation of machinery and take samples of earth, etc., to report to the firm in Copenhagen and to forward the samples for testing, and generally to superintend important installations of the firm's products.

Negotiations in relation to contracts between the Appellants and their customers were conducted directly from Copenhagen, where the contracts were finally made. The machinery was delivered by the firm f.o.b. at Copenhagen.

During the War the Appellants purchased parts of machinery in the United Kingdom in order to complete installations or to carry out repairs, and it was admitted that there was liability to Income Tax in respect of the profits arising from the resale of the goods so purchased.

Held :—

(1) *that (except as regards goods purchased and re-sold in the United Kingdom) the evidence before the Commissioners did not justify the conclusion of fact that the firm exercised a trade within the United Kingdom within the meaning of the Income Tax Acts; and*

(2) *that Section* 31, *Subsections* (1) *and* (2) *merely extended the method provided by the antecedent law for charging persons liable to assessment under Schedule D and did not extend the charge of Income Tax under that Schedule to profits not previously within its scope.*

CASE.

At a Meeting of the Commissioners for General Purposes of the Income Tax Acts for the Division of St. Margaret and St. John in the County of Middlesex held at 17, Victoria Street, Westminster, on the 20th day of November, 1918, Messrs. F. L. Smidth & Co. (hereinafter called the Appellants) appealed

[1] Reported (K.B.D.) [1920] 3 K.B. 275, (C.A.) [1921] 3 K.B. 583, (H.L.) [1922] 1 A.C. 417.

against Assessments under Schedule "D" of the Income Tax Acts for the years ending 5th April, 1914, 1915, 1916, 1917 and 1918 in the sum of £5,000 for each year made upon them as Engineers carrying on business at 9, Bridge Street, Westminster. Copies of the Notices of Assessment sent to the Appellants are annexed to and form part of this Case. (1)

The following are the facts found or admitted :—

1. The business of F. L. Smidth & Co. is owned and carried on by two partners, P. S. H. Larsen and E. A. Foss, both of whom are Danish subjects residing and carrying on business in Copenhagen. The business is that of manufacturers of and dealers in machinery for Cement Works, Brick Works, Mortar Works and Mining Industries. They supply such Machinery to America, Africa and India and other countries as well as to the United Kingdom.

They, the partners, individually have no residence in the United Kingdom, nor do they employ an Agent or representative except as hereinafter stated.

2. The Appellants rent an office as sub-tenants from a Mr. Nash at 9, Bridge Street, Westminster. The name of the firm is on the office door and in the Post Office Directory.

3. The Appellants employ Mr. Sidney Greenwood Robinson as Consulting Engineer at their office, 9, Bridge Street aforesaid, whose duty it is to discuss with prospective Purchasers as to their requirements, to inspect the site of any proposed installation of machinery, take samples of earth, etc., and report and forward the samples to the Appellants at Copenhagen. The samples are tested in the firm's laboratory at Copenhagen and plans drawn up there.

4. All further negotiations are conducted between the Appellants at Copenhagen and the intending purchaser direct, and a draft contract is prepared. When the terms of the contract are settled two fair copies are made, one being signed by the intending purchaser in the United Kingdom, and forwarded to Copenhagen sometimes through their office in London and sometimes direct, on receipt of which the Appellants forward to the purchaser the other signed by them in Copenhagen. Occasionally the duplicate is transmitted to the purchaser through their office in London.

5. Copies of the following Contracts which were stated to be typical were placed before the Commissioners and are annexed to and form part of this case (1) :—

(1) Agreement dated July, 1913, between the Appellants and The British Portland Cement Manufacturers, Limited.

(2) Agreement dated 17th February, 1916, between the Appellants and John Reddihough.

(3) Agreement dated 12th April, 1918, between the Appellants and Thomas A. Ward, Limited.

6. Each of these Agreements is in the English language and is stated to be subject to English law, and contains the usual Arbitration clause. In two of the Agreements the consideration is required to be paid in English money.

7. In each of the Agreements it is stipulated that delivery of the machinery was to be made f.o.b. at Copenhagen.

---

(1) Omitted from the present print.

8. The provisions of the contracts with regard to payment of the consideration money have not always been strictly followed. Sometimes Bills of Exchange or drafts are sent direct to the Appellants at Copenhagen, and sometimes to their office in London, in which latter case they are received by Mr. Robinson, who forwards the same direct to the Appellants at Copenhagen, but since the war the drafts have been paid into Lloyd's Bank, as Agents for the Handels Bank at Copenhagen, to be credited to the Appellants' account at the latter Bank in Copenhagen.

9. Owing to abnormal conditions occasioned by the War, the Appellants have in certain cases purchased in the United Kingdom, parts of machinery, such as steel balls, flints, etc., necessary to complete the installation of or to carry out repairs to customers' plant in this Country.

10. Forms requiring a return of profits under Schedule D of the Income Tax Acts were served on the Appellants by being sent to them at their office in London, and were forwarded to and received by them in Denmark and there completed by the Appellants. The Appellants admitted liability as regards profits on the purchase and resale of goods in the United Kingdom, as mentioned in paragraph 9 hereof, viz. :—

Year	
1914–15	Nil.
1915–16	£130
1916–17	£107

11. *Mr. Robinson gave evidence confirming the above facts and stated :—*

(*a*) That he had been in the employment of the Appellants since 1901.

(*b*) That the principal business of the Appellants is the manufacture and supply of machinery for making cement, and that their products are supplied to manufacturers of Cement all over the World.

(*c*) That he does not act for the Appellants in any other capacity than as Engineer.

(*d*) That he has no authority to quote prices except on receiving instructions from the Appellants at Copenhagen, nor has he authority to settle the terms of or to conclude or sign a contract, and that except in the small cases mentioned in paragraph 9 hereof he had not done so.

(*e*) That no price lists or catalogues are issued by the Appellants in the United Kingdom or kept in the London Office.

(*f*) That no advertisements appear in any of the Trade papers in the United Kingdom.

(*g*) That prospective buyers are often invited to go to Copenhagen and sometimes with him in order to discuss terms of contracts with the Appellants, and their experts in Copenhagen.

(*h*) That all tests of samples are made in Copenhagen.

(*i*) That prior to 1901 it was the custom of a senior employee of the Appellants to come to England every two or three months in order to negotiate with intending purchasers, and the partners regularly visited this Country before the War every three or four months, sometimes stopping in London on their way to and from Denmark and New York, and when in London the partners would interview

prospective purchasers, but terms were only generally discussed, and were finally agreed in Copenhagen. Neither of the partners had been in London or the United Kingdom since the War.

(*j*) That it was decided by the Appellants in 1901 that business in this country would be facilitated and increased by their having a resident Engineer to act as a "go-between" between buyer and manufacturers in connection with technical matters.

(*k*) That the business of the Appellants in the United Kingdom and also elsewhere had increased considerably since he (Mr. Robinson) had been appointed. That generally intending Customers would apply direct to the firm in Copenhagen, but that they might address an enquiry to Mr. Robinson, who would refer them to the firm in Copenhagen.

(*l*) That the Appellants are sub-tenants of the offices at 9, Bridge Street, Westminster, their name being on the office door and also in the Post Office Directory as Consulting Engineers.

(*m*) That no books of account are kept in the United Kingdom.

(*n*) That office expenses are paid out of an account kept with the London County, Westminster & Parr's Bank, solely for the purpose of paying such expenses and a balance of £200 to £300 only is kept there, being supplied by remittance from Copenhagen. No other banking account is kept in the United Kingdom.

(*o*) That his (Mr. Robinson) remuneration is by salary and bonus, the amount of the bonus depending not only on contracts in the United Kingdom, but on the result of the whole of the Appellant's trading. That all the employees of the firm were employed on similar terms.

(*p*) That the Appellants sometimes supplied a supervising Engineer from Copenhagen at the purchaser's request and expense, but he (Mr. Robinson) has the general oversight of the erection of all important installations of the Appellants' machinery in the United Kingdom and explains any difficulty the erectors may have in following the plans without further charge to the purchasers.

(*q*) That the counterparts of Agreement are stamped with Danish stamp duty.

12. No question of figures or amounts was gone into before us, the same being left for subsequent adjustment if necessary.

13. Mr. Bremner (Counsel) on behalf of the Appellants contended that no trade was exercised in the United Kingdom except as a result of the abnormal conditions brought about by the War, by which the Appellants were compelled to purchase in this Country parts of machinery necessary to complete installation as herein stated. Also that there was no Agent in the United Kingdom and never had been. Mr. Robinson was an employee of the firm and is by trade a mechanical engineer, who has no authority either to negotiate or to conclude contracts with purchasers, he being only concerned with mechanical details. With regard to the Agreements it was stipulated that delivery of the machinery was in all cases made f.o.b. at Copenhagen, and that except as stated there was no banking account in the United Kingdom. He referred to the case of *Grainger and Sons* v. *Gough* (1896), App. Cases 325, 3 T.C. 462, and submitted that the essential facts in that and the present case were similar, namely, that contracts and delivery of the goods were made out

of the United Kingdom, and that if the decision in the case quoted was followed it would not be held that the Appellants exercised a trade within the United Kingdom, and Counsel further contended that no profits and gains were received in this Country, and that on this ground the Assessments could not be sustained. He further contended that as regards the assessments for the years 1913–14 and 1914–15 that the same were bad, inasmuch as neither of the partners who were non-resident had been served with the Notices of Assessment and could properly be charged only under Section 41 of the Income Tax Acts, 1842, in the name of an agent having the receipt of the profits and gains, and there had been no such agent and no agent at all, and he relied in support of this contention on *Grainger* and *Gough* and *Crookston Bros.* and *Furtado*, 5 Tax Cases 602. He further contended that all the assessments were bad and not authorised by the Income Tax Acts, inasmuch as the firm was non-resident and could be charged as provided by the Finance (No. 2) Act, 1915, Section 31, only in the name of a branch, factor, agent, receiver, or manager, and this had not been done.

14. Mr. Greenwood (Surveyor of Taxes), on behalf of the Crown, contended *inter alia* that the Appellants were liable to be assessed to Schedule D under the Income Tax Act, 1853, Section 2, and quoted the case of *Tischler* v. *Apthorpe* (2 Tax Cases 89) and *Erichsen* v. *Last* (1 Tax Cases 351 and 357 and 4 Tax Cases 422). He further contended that for the years 1915–16, 1916–17 and 1917–18 the Appellants were rightly assessed within Section 31, Subsection (2) of the Finance (No. 2) Act, 1915, in the name of their branch. He also contended that the Appellants' business constituted one whole, including the business mentioned in paragraph 9 hereof and the installing and repairing of machinery in this Country, and that part of such business constituting one whole was carried on in this Country.

15. Mr. Bremner (in reply) contended that the case of *Tischler* v. *Apthorpe* was distinguishable from the present case for the reason that Mr. Tischler resided in London for a sufficient length of time to enable Notice of Assessment to be served upon him and had been actually so served, whereas the partners in the Appellants' firm had not been served with Notices, that in the case of *Erichsen* v. *Last*, the Agent in that case had a large staff under him and contracts were made in the United Kingdom and money paid in the United Kingdom. On the question as to where the Contract was made he pointed out that the Appellants do not sign the contract until they have received at Copenhagen the purchaser's part duly signed, and he submitted that for that reason the Contract must be held to be made at Copenhagen. As regards the Finance (No. 2) Act, 1915, Section 31, he contended that that section was merely a machinery section and that the Appellants were not liable unless they exercised trade within the United Kingdom.

16. The Commissioners, after fully considering the facts and arguments of the parties, were of opinion that trade was exercised by the Appellants within the United Kingdom, and that the contentions of the Surveyor were right and dismissed the Appeal.

17. Counsel on behalf of the Appellants thereupon expressed dissatisfaction with the determination of the Commissioners as being erroneous in point of law, and duly required them to state and sign a Case for the opinion of the High Court of Justice, which we have stated and do sign accordingly.

18. Since the demand for the case it has been formally intimated to the Appellants on behalf of the Surveyor of Taxes that the Case is not contested for the years 1913–14 and 1914–15 and that an Order in Chambers in the usual way reversing the decision of the Commissioners for those years is consented to.

J. RUSSELL,
ARTHUR TAPP,
Commissioners of Taxes for the Division of St. Margaret and St. John.

J. A. WARRINGTON ROGERS,
Clerk to the Commissioners of Taxes,
17, Victoria Street, Westminster.

The case was heard before Mr. Justice Rowlatt on the 4th and 7th June, 1920, when Sir W. Finlay, K.C., and Mr. A. M. Bremner appeared as Counsel for the Appellant, and the Attorney-General (Sir Gordon Hewart, K.C., M.P.) and Mr. R. P. Hills as Counsel for the Respondent.

Judgment was delivered on the 25th June, 1920, in favour of the Appellant with costs.

JUDGMENT.

Rowlatt, J.—In this case the main question is whether the Appellants, who are a Danish firm manufacturing and dealing in cement-making and other similar machinery which they export all over the world, are assessable to Income Tax in respect of a trade exercised in the United Kingdom. The facts may be very shortly summarised. The Appellant firm is resident in Copenhagen, but they have an office in London in charge of a representative with engineering qualifications who is their whole-time servant. He receives enquiries for machinery such as the Appellants can supply, sends to Denmark particulars of the work which the machinery is required to do, including samples of material to be dealt with, and, when the machinery is supplied, he is available to give the English purchasers the benefit of his experience in erecting it. The contracts, however, between the Appellants and their customers are made in Copenhagen and the goods are shipped f.o.b. Under these circumstances the Commissioners have held that the Appellants exercised a trade within the United Kingdom, and it is contended on behalf of the Crown that the acts done by or on behalf of the Appellants in the United Kingdom, together with their maintenance of an office and representative here, is evidence sufficient to justify that finding.

It seems to me that in these cases the question is whether the trade which it is sought to tax is exercised in the United Kingdom, or outside of it in the sense that it is supposed to have a single situation, and the question is what that situation is. I do not think the exercise of a trade as mentioned in Schedule D can be said to be in the United Kingdom with the reservation that it may also perhaps take place outside of it. The scheme of this part of the Income Tax is to tax a foreign resident in respect of a source of income in the United Kingdom. The exercise of a trade produces a profit once, but not twice, and if that exercise takes place in the United Kingdom it cannot, in respect of the same profits and gains, also take place elsewhere. The question in this case is, therefore, between the United Kingdom to the exclusion of Denmark and Denmark to the exclusion of the United Kingdom.

Upon the argument, the principal cases cited were the well-known decisions of *Sulley* v. *Att. Gen.* (1) ([1860] 5 H. and N., 711); *Erichsen* v. *Last* (2) ([1881] 8 Q.B.D. 414), and *Grainger and Son* v. *Gough* (3) ([1896] A.C. 325). In the first-named, an American firm had a buying branch in England through which goods were purchased, which were sold abroad and profit thereby secured. It was held that they did not exercise a trade within the United Kingdom. In *Erichsen* v. *Last*, a telegraph company possessing a world-wide system of cables offered at its offices in this country the means of telegraphic communication with the rest of the world and, for the services so rendered here, was paid here under contracts made here. It was held that they did exercise a trade in the United Kingdom. *Grainger* v. *Gough* was the well-known case of a foreign champagne grower and merchant. He was represented in this country by a firm who were not his servants but independent agents, and they merely obtained and transmitted to him offers for his goods which he accepted or declined abroad. It was held that he did not exercise a trade in this country through such agents. The facts in none of these cases present any close resemblance to the present. In particular, in *Grainger* v. *Gough* there was no branch establishment of the foreign trader in the United Kingdom and it was a question of treating a commission agent, whose functions were practically limited to solicitation, as a person exercising a trade on behalf of a foreign principal. But I cannot read the judgments in those cases without being driven to the conclusion, notwithstanding some remarks of the Master of the Rolls in *Erichsen* v. *Last*, that the real place where the trade is exercised is the place where the transactions forming the alleged business are closed, in the case of a selling business, by the sale of the commodity and the profit thereby realised. It seems to me that is a clear and definite principle. Until the sale is effected the trade is incomplete. Trading is buying or making and selling, and, if I am right in supposing that one single place has to be treated as the place where the trade is exercised, it seems to me that it must be where the profit-bearing transactions are closed. After all, this is a much more satisfactory principle than to leave it as a question of fact in each case whether there has been a sufficient volume of activity in connection with the business in any particular place to afford evidence to support a finding that the trade was exercised there.

A further point was taken by the Attorney-General, though not very elaborately argued. It was that the effect of Section 31 (2) of the Finance (No. 2) Act, 1915, was to make the profits which the Appellants make by trading with this country assessable because such profits were made directly or indirectly through their London office, which it was said is a "branch" within the meaning of the Sub-section. The scope of this Sub-section is not very clear, but I am not prepared to hold that its effect is to bring into taxation profits made by non-residents from a trade not exercised in the United Kingdom. To make an extension in the scheme of taxation of that magnitude and importance the Court is entitled to look for words of clear and direct enactment.

In the result the appeal is allowed with costs.

Notice of appeal having been given against the decision of Mr. Justice Rowlatt, the case was heard in the Court of Appeal before the Master of the Rolls (Lord Sterndale) and Atkin and Younger, L.JJ., on the 26th, 27th and 30th May, 1921, when Sir W. Finlay, K.C., and Mr. A. M. Bremner appeared for the Respondents and the Attorney-General (Sir Gordon Hewart, K.C., M.P.) and Mr. R. P. Hills for the Appellant.

---

(1) 2 T.C. 149. (2) 4 T.C. 422. (3) 3 T.C. 462.

Judgment was delivered on the 25th July, 1921, in favour of the Respondent, with costs, confirming the decision of the Court below, their Lordships holding—

(1) that (except as regards goods purchased and re-sold in the United Kingdom) the evidence before the Commissioners did not justify the conclusion of fact that the firm exercised a trade within the United Kingdom within the meaning of the Income Tax Acts; and

(2) that Section 31, Sub-sections (1) and (2) merely extended the method provided by the antecedent law for charging persons liable to assessment under Schedule D and did not extend the charge of Income Tax under that Schedule to profits not previously within its scope.

JUDGMENT.

The Master of the Rolls.—In this case the Crown appeals against the decision of Mr. Justice Rowlatt by which the learned Judge held that the Respondents are not liable to be assessed for Income Tax. I think I may take the facts as stated by Mr. Justice Rowlatt in these words:—"The Appellant firm is "resident in Copenhagen, but they have an office in London in charge of "a representative with engineering qualifications who is their whole-time "servant. He receives enquiries for machinery such as the Appellants can "supply, sends to Denmark particulars of the work which the machinery is "required to do, including samples of material to be dealt with, and when the "machinery is supplied he is available to give the English purchasers the "benefit of his experience in erecting it. The contracts, however, between "the Appellants and their customers are made in Copenhagen and the goods "are shipped f.o.b. Under these circumstances the Commissioners have held "that the Appellants exercised a trade within the United Kingdom and it "is contended on behalf of the Crown that the acts done by or on behalf of "the Appellants in the United Kingdom, together with their maintenance of "an office and representative here, is evidence sufficient to justify that find-"ing." But I wish to add to this statement the following paragraphs from the Case Stated by the Commissioners. "The Appellants rent an office as "sub-tenants from a Mr. Nash at 9, Bridge Street, Westminster. The name "of the firm is on the office door and in the Post Office Directory." "The "Appellants"—the Appellants of course in this case were the firm and not the Crown—"The Appellants employ Mr. Sidney Greenwood Robinson as "consulting engineer at their office, 9, Bridge Street aforesaid, whose duty it "is to discuss with prospective purchasers as to their requirements, to inspect "the site of any proposed installation of machinery, take samples of earth, "etc., and report and forward the samples to the Appellants at Copenhagen. "The samples are tested in the firm's laboratory at Copenhagen and plans "drawn up there." "It was decided by the Appellants in 1901 that business "in this country would be facilitated and increased by their having a resident "engineer to act as a 'go-between' between buyer and manufacturers in "connection with technical matters. The business of the Appellants in the "United Kingdom and also elsewhere had increased considerably since he "(Mr. Robinson) had been appointed. That, generally, intending customers "would apply direct to the firm in Copenhagen but that they might address "an enquiry to Mr. Robinson who would refer them to the firm in Copenhagen." "The Appellants sometimes supplied a supervising engineer from Copenhagen "at the purchaser's request and expense, but he (Mr. Robinson) has the general

" oversight of the erection of all important installations of the Appellant's " machinery in the United Kingdom and explains any difficulty the erectors " may have in following the plans without further charge to the purchasers."

It clearly appears from this that Mr. Greenwood Robinson gives substantial help in the carrying out of the Respondents' contracts and has something material to do with the preliminary negotiations, but he does not and cannot conclude any contracts. In these circumstances the Crown contended that the Respondents exercised a trade within the United Kingdom within the meaning of Schedule D of the Income Tax Act, 1842, while the Respondents contended that the facts of the contracts being made and the goods delivered without the United Kingdom was conclusive to show that the Respondents did not exercise a trade within the United Kingdom. In support of this contention they relied chiefly upon *Grainger* v. *Gough* (1) (1896) A.C. 325, and *Sulley* v. *Attorney-General*(2), 5 Hurlstone and Norman 711. I am not prepared to say that these cases, in which the circumstances were quite different from the present, support the Respondents' contention to its fullest extent, but I do think that they establish that the facts mentioned above are very important, perhaps the most important matters which have to be considered in a case of this kind, and I think that, taking them as a guide, such help as was given here in the negotiation of contracts and their execution by Mr. Robinson is not enough to justify a finding that the Respondents exercised a trade within the United Kingdom within the meaning of the Income Tax Acts. I doubt if it is possible, and in any case I do not think that it is necessary, to lay down any exact definition of what constitutes such an exercise of trade, but I think in their finding against the Respondents on this point the Commissioners have not been guided by the principles of law as laid down in the decided cases, and therefore their finding cannot be upheld. I think Mr. Justice Rowlatt was right in so holding, and on that point the appeal fails.

The Crown, however, relied upon another contention, and a most important one, for, if it be correct, it enables the Revenue authorities to assess persons resident abroad upon certain profits although they do not exercise a trade within the United Kingdom and therefore materially alters the basis of taxation. This argument is founded on Section 31 (1) (*a*), (*b*), and (2) of the Finance (No. 2) Act, 1915, which are in these terms :—

" 31.—(1) Section forty-one of the Income Tax Act, 1842 (which relates " to the charge of income tax in special cases), shall, so far as it relates to the " taxation of non-residents, be extended—

" (*a*) so as to make non-resident persons chargeable to income tax in the " name of any branch or manager as well as in the name of any " factor, agent, or receiver ; and

" (*b*) so as to make non-resident persons so chargeable, although the " branch, factor, agent, receiver, or manager may not have the " receipt of the profits or gains of the non-resident.

" (2) A non-resident person shall be chargeable in respect of any profits " or gains arising, whether directly or indirectly, through or from any branch, " factorship, agency, receivership, or management, and shall be so chargeable " under section forty-one of the Income Tax Act, 1842, as amended by this " section, in the name of the branch, factor, agent, receiver, or manager."

---

(1) Grainger and Son *v* Gough, 3 T.C. 462. (2) 2 T.C. 149.

It is said that the office which Mr. Robinson attends is a branch of the Respondents' business and that the effect of Section 31, Sub-section (2), is to make them liable for Income Tax upon any profits or gains arising whether directly or indirectly through or from that branch although they did not exercise a trade within the United Kingdom according to Schedule D. The language of the sub-section at first sight seems to support this argument, but it is necessary to consider its context and the objects of Section 31. Section 31 is only for the purpose of extending the operations of Section 41 of the Income Tax Act, 1842. That section is not a charging section and only relates to the method of charging persons who are made chargeable under Schedule D. The duties mentioned in that are the duties charged by Schedule D. It has been called only a machinery section, *i.e.*, a section which provides a method of carrying out the charge imposed by Schedule D. I think this is its effect and the expression " machinery " has no doubt often been used, and is convenient, but I think it has also often been used in a wider sense than was intended by those who first used it, and may be fallacious, and I prefer not to use it. Section 31, Subsection (1), I think clearly does nothing more than extend the method provided by Section 41 of carrying out the charge imposed by Schedule D, and it would be very strange if another subsection of the same section imposed an entirely new charge not within the Schedule at all. I agree with Mr. Justice Rowlatt that such a thing, if intended, should be carried out with the greatest clearness, and that, if a reasonable meaning can be given to the subsection without producing that effect, it should be done. I think this meaning can be given to it by adopting the construction suggested by the Respondents, namely, that it merely points out or, so to speak, sums up the effect of Section 41 of the Act of 1842, as extended by Section 31 of the Act of 1915, still keeping within the limits of the charge of Schedule D. It is true that, looked at from this point of view, Subsection (2) is not of much use and might have been left out without much, if any, loss of effect, but redundancy is not unknown in legislation. I think it is better to impute such redundancy than to hold that such an important alteration has been made in the basis of taxation as the abolition of the condition of exercise of trade within the United Kingdom before a person not there resident can be taxed. To take the latter course would, I think, be to violate the well-known canon of construction of taxing Acts, that no one is to be taxed except by express words.

I think this interpretation of Subsection (2) is strongly supported by the Income Tax Act, 1918. It was decided, whether wisely or not, to retain the old form of legislation by Schedules and Cases, and Schedule D, for the purposes of this case, stands as it was. To this Schedule and others there are enacted General Rules and those General Rules to Schedules A, B, C, D, and E embody (in Rules 5 and 6) Subsections (1) and (2) of Section 31 of the Finance (No. 2) Act, 1915, except that the expression " assessable and chargeable " is used instead of only " chargeable ". The natural result of this legislation is I think to show that the provisions of these subsections embodied in the rules of 1918 are intended only as a means of carrying out the charge imposed by the Schedule and not as an extremely important alteration of the charge imposed by the Schedule itself. I think that subsequent legislation dealing with previous enactments may be considered with reference to those enactments, and, although I should have come to the same conclusion apart from the Act of 1918, it does in my opinion strongly support that conclusion.

Assuming, therefore, that the office in London was a branch of the Defendants' business, as to which I express no opinion, I think that they are not liable to assessment, as they do not exercise a trade within the United Kingdom.

The appeal fails also on this latter point and must be dismissed, with costs.

Atkin. L.J.—This case arises upon an assessment to Income Tax made upon the Respondents for the years 1914, 1915, 1916, 1917 and 1918. The Commissioners held all the assessments to be good, subject to a Case. Before the hearing of the case it was admitted by the Crown that the assessments for 1914 and 1915 could not be supported, as, until the Finance Act (No. 2) of 1915, there was no machinery for assessing the Respondents who were non-residents in the firm-name or at all. The only assessments we have to deal with are those for 1916, 1917 and 1918.

I do not propose to re-state the facts as found in the Special Case. The material facts that emerge are that the Respondents are a Danish firm resident in Denmark and manufacture there machinery for cement and brickworks and other similar industries. They rent an office in London in their own name which is occupied by a Mr. Robinson, an engineer, who is paid by the Respondents by salary and bonus on similar terms to those under which all the Respondents' employees are paid. Mr. Robinson advises prospective purchasers here, takes samples of earth, etc., which he forwards to Copenhagen. Contracts are finally negotiated in Denmark and made there. The goods are delivered f.o.b. Copenhagen, the Respondents as a rule undertaking to arrange the necessary shipping. Terms of payment appear to vary. Agreements said to be typical are annexed to the Case. Two of them, dated in 1913 and 1916, provide that all moneys are to be paid in England in English currency. The third, dated in 1918, has no such provision. The Case finds that since the war (a period which covers all the assessments now in question) drafts have been paid into a London bank as agents for the Danish bank who hold in Denmark the Respondents' account. Provision is made in the contracts for the supply by the Respondents of an engineer to supervise the erection of the machinery at the purchasers' expense; but, whether the purchasers avail themselves of this stipulation or not, Mr. Robinson has a general oversight of all important installations and advises purchasers as to any difficulties in erection.

The question is whether the profits brought into charge are "profits arising or accruing" to the Respondents "from any trade . . . exercised within "the United Kingdom" within the meaning of Schedule D of the Income Tax Act, 1853. The question is not whether the Respondents carry on business in this country. It is whether they exercise a trade in this country so that profits accrue to them from the trade so exercised.

We have the guidance of the House of Lords on this subject in *Grainger* v. *Gough*[1] [1896] Appeal Cases at page 325. Lord Herschell, after pointing out that there is a difference between trading in a country and trading with a country, says:—"How does a wine merchant exercise his trade? I take it, "by making or buying wine and selling it again with a view to a profit." Similarly a manufacturer of machinery exercises his trade by making the machinery and selling it again with a view to a profit. There are indications in the case cited and other cases that it is sufficient to consider only where it is that the sale contracts are made which result in a profit. It is obviously a very important element in the enquiry, and, if it is the only element, the assessments are clearly bad. The contracts in this case were made abroad. But I am not prepared to hold that this test is decisive. I can imagine cases

(1) Grainger and Son *v.* Gough, 3 T.C. at p. 467.

where the contract of re-sale is made abroad, and yet the manufacture of the goods, some negotiation of the terms, and complete execution of the contract take place here under such circumstances that the trade was in truth exercised here. I think that the question is, where do the operations take place from which the profits in substance arise? To my mind there is no evidence in the present case of any other place than Denmark. No doubt operations of importance take place here, orders are solicited, and the successful adapting of the goods bought for the purposes of the buyer's business is supervised here. But in the words of Lord Watson in the case cited, at page 340(1):—"there "may, in my opinion, be transactions by or on behalf of a foreign merchant "in this country so intimately connected with his business abroad that with-"out them it could not be successfully carried on, which are nevertheless "insufficient to constitute an exercise of his trade here within the meaning "of Schedule D," and he instances the case of the purchase of goods here for the purpose of sale abroad. *Sulley* v. *The Attorney General*,(2) which is reported in 5 Hurlstone and Norman at page 711, is a case to which I shall have to refer on the second point. In the words of Lord Herschell at page 336(3): "What is done there" that is, soliciting orders, "is only ancillary to the "exercise of his trade in the country where he buys or makes, stores, and sells "his goods." On this part of the case I think the learned Judge came to the right conclusion in law.

But an alternative contention of great importance was advanced by the Attorney-General. He relied on Section 31, Subsection (2), of the Finance (No. 2) Act of 1915 which has been read by the Master of the Rolls. In this case, he says, the office conducted in the name of the Respondents by Mr. Robinson was, though not an agency, a branch, and the profits arose indirectly through it; hence the Respondents are chargeable in the name of the branch. It cannot be doubted that such a contention, if sound, makes grave changes in Income Tax law as it existed up to the date of the Act. "The Income Tax Acts . . . impose a territorial limit, either that from which "the taxable income is derived must be situate in the United Kingdom or "the person whose income is to be taxed must be resident there." See Lord Herschell in *Colquhoun* v. *Brooks*(4) in 14 Appeal Cases at page 504. One of the early cases on the Income Tax Act, *Sulley* v. *The Attorney-General*,(2) which is reported in 5 Hurlstone and Norman at page 711, in 1860, was a case where a New York firm of merchants had a partner resident in this country with an office and staff of employees at Nottingham, engaged on the business of the firm, who bought goods here and despatched them to New York for sale by the firm there. The special verdict found in 4 Hurlstone and Norman, page 772, was that the firm "have a place of business in Nottingham occupied "by the Defendant, the resident partner, and clerks employed on behalf "of the partnership for the purpose of carrying on the business of the partner-"ship in England." It is immaterial whether this organisation would be an "agency" or a "branch". Chief Justice Cockburn calls it "a branch "establishment". It would clearly come within Section 31, Subsection (2). The decision in that case was that there was no trade exercised in this country from which taxable profits arose. From that date it is common knowledge that British and foreign firms of merchants having their principal places of business abroad have established in this country agencies and branches for the purpose of buying products of the United Kingdom and shipping them to

(1) 3 T.C. at p. 471. (2) 2 T.C., 149. (3) 3 T.C. at p. 467.
(4) 2 T.C. at p. 499.

their houses abroad. This Section would sweep away the whole of the protection hitherto afforded such firms and would make them chargeable with a tax on all profits made from the sale of such goods. It is true that there is a further subsection, Subsection (7), the precise meaning of which no one in the course of the argument was prepared to state, which might be said to be intended to meet the difficulty put. But giving the full effect to Subsection (7), Subsection (2) still would have remarkable results. A French firm of motor car manufacturers have an agency here. The agent gives to an English resident visiting Paris an introduction to the Paris house, as a direct result of which the Paris house in Paris agree to sell and do sell and deliver in France to the purchaser a French motor car. It can hardly be suggested that it would not be a serious breach of hitherto recognised legal principles to tax the French firm in England on such profits.

Personally I cannot read the subsection as a charging section at all. It is plain that in any view of it the words have to be cut down. They do not limit the words "branch, factorship, agency, receivership or management" to a branch, etc., in this country, nor state that the branch, etc., must be a branch, etc., of or for the resident person, nor provide that the profits or gains arising and so on are to be the profits and gains of the non-resident person. The subsection has to be read in close connection with Section 41 of the Income Tax Act, 1842, which has been amended by the previous subsection. So read, the omissions I have referred to are filled up, and the subsection assumes its proper place as part of the provisions made for assessing and collecting the duties charged under the charging sections which incorporate Schedules A to E. In other words, the non-resident person is still only charged on profits "situate within the United Kingdom," and the profits or gains referred to in the subsection must be taken to be so qualified, following the principle adopted by Lord Herschell in *Colquhoun* v. *Brooks*(1), which I have already cited. Even if the subsection added nothing to the effect of Subsection (1), I should have thought it more likely to be redundant than revolutionary; but it seems at any rate to have the effect of making the profits or gains arising through a branch, etc., chargeable only in the name of that branch, a result which would not appear to follow from Section 41 amended by Subsection (1) alone.

I think that this construction of the section is confirmed by reference to the Income Tax Act of 1918, where the corresponding words are enacted as the sixth of the General Rules applicable to Schedules A, B, C, D and E, the charge on the non-resident person under Schedule D being still expressed in the old form of words in respect to profits or gains arising from any trade exercised within the United Kingdom.

I entirely agree with the view expressed by Mr. Justice Rowlatt on this part of the case.

I agree that this appeal should be dismissed, with costs.

The Master of the Rolls.—Lord Justice Younger asked me to say that he agrees with these judgments.

An appeal having been entered against the decision of the Court of Appeal, the case was heard in the House of Lords before Lords Buckmaster, Atkinson, Sumner, Wrenbury and Carson on the 23rd and 27th February, 1922, when

(1) 2 T.C., 490.

the Attorney-General (Sir Gordon Hewart, K.C., M.P.) and Mr. R. P. Hills appeared as Counsel for the Appellant and Sir W. Finlay, K.C., and Mr. A. M. Bremner for the Respondent.

Judgment was delivered on the 27th February, 1922, against the Crown, with costs, confirming the decision of the Court below.

JUDGMENT.

Lord Buckmaster.—My Lords, the facts of this case are fully set out in the Special Case stated by the Commissioners for General Purposes of the Income Tax Acts upon hearing the dispute as to the assessment the subject of the present Appeal.

Upon the facts so found I entertain no doubt that according to the decision of *Grainger* v. *Gough* (1), in [1896] Appeal Cases, page 325, there was no material before the Commissioners to support their finding that the Respondents exercised a trade within the United Kingdom. I do not think it is necessary for the purpose of supporting this view to repeat the reasoning expressed in the judgment of the Master of the Rolls. I desire to adopt all that he said, for with it I am in complete agreement.

There remains, however, a further point which arises upon the construction of Section 31 of the Finance (No. 2) Act of 1915. The Appellants argued that the effect of that sub-section is to extend the operation of Schedule D of the Act of 1853 and to render the Respondents liable to be assessed for Income Tax, even though upon the facts they did not exercise trade within the United Kingdom. I am unable to accept the argument that the sub-section has that effect. It is, I think, important to remember the rule, which the Courts ought to obey, that, where it is desired to impose a new burden by way of taxation, it is essential that this intention should be stated in plain terms. The Courts cannot assent to the view that, if a section in a taxing statute is of doubtful and ambiguous meaning, it is possible out of that ambiguity to extract a new and added obligation not formerly cast upon the taxpayer. Sub-section (2) here is at the best a sub-section of an extremely doubtful character, and I think there is very great weight in the argument that has been placed before your Lordships by Sir William Finlay and Mr. Bremner that, as the original charging power of the earlier Statutes was derived from their Schedules, if it were desired to affect and alter the operation of those Schedules some clearer and better reference should have been made to their terms than the obscure and indirect reference that must be found in the section under consideration. Upon this point also I find myself in agreement with the views that have been expressed both by the Master of the Rolls and by Lord Justice Atkin and I do not think any advantage can be gained from repeating in other words the arguments which I think are sufficient to overthrow this Appeal. It is, therefore, unnecessary to consider whether the consolidating Act of 1918 might be brought into consideration for the purpose of determining what the real meaning of the earlier section was. I pass no opinion upon that point, and it is important to observe that both the Master of the Rolls and Lord Justice Atkin only refer to its operation not by way of supporting the principal argument upon which their judgment depends but by way of confirmation of a conclusion which has been independently reached.

---

(1) Grainger & Son *v.* Gough **3 T.C. 462.**

Lord Atkinson.—My Lords, I concur.

Lord Sumner.—My Lords, I concur.

Lord Wrenbury.—My Lords, I agree. I wish only to add that I particularly asked the Counsel for the Crown to point, if they could, to any provision elsewhere in Sections 20 to 37 of the Act of 1915 (being that part of the Statute which refers to Income Tax) which is a charging section. They were not able to do so. I have looked through the sections. There are sections imposing new rates of charge on persons already charged, but I find none that creates a new charge. Under those circumstances I am quite unable to adopt the view that Sub-section (2) of Section 31 has that effect. I fail to find any plain and unmistakable language to impose a charge. On the contrary, I can give full effect to Sub-section (2) by saying that it is intended to give effect to the extension which Sub-section (1) says " shall be " made.

Lord Carson.—My Lords, I concur.

Questions put :—

That the judgment appealed from be reversed.

The Not Contents have it.

That the judgment appealed from be affirmed and this Appeal dismissed with costs.

The Contents have it.