Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Commissioner of Taxes for the Colony of New Zealand v. The Eastern Extension Australasia and China Telegraph Company, Limited, from the Court of Appeal of New Zealand; delivered the 25th July 1906.

Present at the Hearing:

THE EARL OF HALSBURY.
LORD DAVEY.
SIR ARTHUR WILSON.
SIR ALFRED WILLS.

[*Delivered by Lord Davey.*]

This is an Appeal from a Judgment of the Court of Appeal of New Zealand varying the Judgment pronounced by the Supreme Court in favour of the Appellant. Stated shortly the question involved in the Appeal is whether the Respondent Company is liable to be assessed for Income Tax in respect of all the profits made by it in relation to the transmission of telegraphic messages from New Zealand to places outside the Australasian Colonies, or only upon so much of such profits as is attributable to the transmission of such messages over its cable between New Zealand and Australia.

The Respondent Company is an incorporated company, having its head office in London, but carrying on business at Wakapuaka, in the District of Nelson in the Colony of New Zealand, and at various places in Australia and elsewhere, and is the owner of submarine cables from Wakapuaka to La Perouse, near Sydney, in the

Colony of New South Wales, and from Port Darwin, in South Australia, and Roebuck Bay, in Western Australia, to Madras. It is also the owner of other submarine cables, and the business of the Respondent Company is to transmit telegraphic messages between various parts of the world.

The Act regulating the assessment of Income Tax in the Colony of New Zealand is the Land and Income Assessment Act No. 49 of 1900, the material sections of which for the present purpose are the following :—

" Section 51. Where the taxpayer is a Company, its income " derived from business shall . . . . be deemed to include " all profits derived from or received in New Zealand from " such business in each year ending at the close of the thirty- " first day of March, including therein all profits falling within " the definitions of 'income derived from business' and " 'income derived from employment or emolument,' in " Sections fifty-nine and sixty hereof, . . and Income Tax " shall be assessed and levied on all such income accordingly."

" Section 59. 'Income derived from business' includes, " but without limiting the meaning of the words, the profits " derived from or received in New Zealand by any taxpayer, " in or out of New Zealand, in each year ending the thirty-first " day of March from the following sources :"—(*inter alia*) " (1) From any business."

" Section 65. For the purposes of this Act a taxpayer " (whether a company or not) shall be deemed to have " derived income although the same has not been actually paid " to or received by him, but has been credited in account, or " reinvested, or accumulated, or capitalised, or carried to any " reserve, sinking, or insurance fund, however designated, or " otherwise dealt with in his name or interest or on his " behalf."

The telegraph lines in New Zealand belong to the Government, and no person other than the Government is allowed to receive a message for transmission to any place in or out of the Colony. The Government telegraphic station at Wakapuaka and the Respondent Company's station at that place are under one roof, and are connected by a wicket or internal window. The present claim relates to the period of eleven months ending the 31st March 1901. During

that period the ordinary course of business in transmission of telegrams from New Zealand to places beyond Australia was as follows: The Government received the message from the sender together with the entire charge (being at the rate of 5*s*. 2*d*. a word) and transmitted it over their own line to Wakapuaka, the charge for which was 1*d*. a word. It was there handed to the Respondent Company and transmitted by it to La Perouse (the charge for which was 3*d*. a word) and handed to the Government of New South Wales. The Government of New Zealand deducted 1*d*. and (by arrangement with the Respondent Company) 3*d*. and credited the New South Wales Government with the balance of 4*s*. 10*d*. New South Wales in its turn transmitted the message to Adelaide, the charge for which was 1*d*., and credited the South Australian Government with the balance of 4*s*. 9*d*. The South Australian Government transmitted the message to Port Darwin (say), the charge for which was 7*d*., and credited the Respondent Company with the balance of 4*s*. 2*d*. The Company sent the message over their cable to Madras where the Indian Government took charge of it, receiving the balance of the charge. It is unnecessary to pursue the message further.

This course of business was in accordance with the rules contained in the St. Petersburg International Telegraphic Convention of 1875 and the regulations made by the contracting parties for carrying the Convention into effect. By Rules 2 and 3 of the Convention the parties to it undertake to adopt all necessary measures to ensure the secrecy and prompt despatch of the correspondence, but declare that they accept no responsibility on account of the service of international telegraphy. In the

"Conditions" under which telegrams are transmitted to places beyond the Colony made and published by the New Zealand Government it is declared that "No responsibility is accepted "for any delay or errors in the transmission of "telegrams nor for the non-transmission or non-"delivery of telegrams from whatever cause "arising."

The Appellant seeks to charge the Respondent Company with income tax on the profits derived by it from transmitting messages from Port Darwin to Madras. No part of these profits was ever received by the Respondent Company in New Zealand. The only question therefore is whether they are profits derived from New Zealand within the meaning of Section 59 of the Act of 1900. The Appellant maintains the affirmative on three alternative grounds (1) that the Respondent Company contracted in New Zealand with the New Zealand Government to carry the message to its ultimate destination; (2) that the Government contracted with the sender to transmit the telegram to its destination as agent for and on behalf of the Respondent Company; and (3) that the message was carried at any rate from Port Darwin or Roebuck Bay in performance of an obligation undertaken by the Respondent Company in New Zealand. There is no evidence to support the first suggestion. The Government did not even treat the Respondent Company as a "limitrophic State" within the meaning of the Convention, and no part of the total charge was paid or credited to the Respondent Company by the New Zealand Government beyond the *3d.* per word for transmission to La Perouse. The second suggestion is equally lacking in foundation. Indeed their Lordships, looking to the

terms of the Convention and regulations and the published conditions of the business, have great doubt whether the Government itself entered into any obligation to do more than start the telegram on its journey and hand it over to the owners of the next stage. This observation applies equally to the Appellant's third mode of putting his case, but independently of any considerations of that kind their Lordships cannot find any evidence from which to infer or imply any such contract as suggested. In the result they think that the profits of transmitting the telegram from Port Darwin or Roebuck Bay were derived from South Australia or Western Australia, as the case might be, and not from New Zealand, or business done there.

The learned Counsel for the Appellant relied on the case of *Erichsen* v. *Last* (L.R. 7 Q.B.D. 12, and 8 Q.B.D. 414.) The English Income Tax Act differs in its language from the New Zealand Act, which their Lordships have to construe, but it may be assumed that the principle on which that case was decided in the Court of Appeal is equally applicable to the New Zealand Act. The learned Chief Justice in his Judgment in the present case quotes copious extracts from the Judgments of the Master of the Rolls and the Lord Justices in *Erichsen* v. *Last*, and he sums up his remarks in the following passage, with which their Lordships agree:—

"It will be observed that in all these judgments the *ratio* " *decidendi* is that the Company has made contracts in the " United Kingdom for the transmission of telegrams to their " destination. If the Company had received the full amount " of the telegraph charge, less the cost of transmission from " the office where it was received to Wakapuaka, and had " undertaken with the New Zealand Government to transmit " the message to its destination, then I should have been of " opinion that the case of *Erichsen* v. *Last* was directly in " point, and that the tax was properly levied. But this is not " what is done. The New Zealand Government only pay for " the transmission to La Perouse, and they leave to the States

"of New South Wales and South Australia, or one of them,
"the making of the new arrangement between the Eastern
"Extension Company and the State for the transmission
"beyond Port Darwin, and the Company is paid by the South
"Australian Government for what it does. This seems to me
"to distinguish this case from that of *Erichsen* v. *Last*, and,
"reading the words literally, as an Act making a charge or a
"tax upon an individual should be read, I cannot see how it
"can be said that the profits were derived from the business
"carried on in New Zealand."

Two agreements dated the 13th December 1892 between the New Zealand Government, the Governments of certain Australian Colonies, and the Respondent Company were referred to by the learned Judges in the Court of Appeal. These agreements had been determined, and were not in force during the period in question, but they were referred to as illustrating the course of business in international telegraphy. The Appellant, however, referred to them at their Lordships' bar in support of his argument that there was a contractual relation between the Respondent Company and the New Zealand Government as to the transmission of messages over the Respondent Company's cables beyond Australia. If and so far as these agreements can be said to have added to or varied the proper inferences to be drawn as to the relations of the parties from the actual course of business and other circumstances, their Lordships think that having been determined by the parties they could not properly be used for such purpose. But their Lordships do not understand any of the agreements to have had that effect. The first agreement is between the New Zealand Government and the Respondent Company alone. It relates exclusively to messages transmitted over the Company's cables connecting New Zealand and Australia, and has nothing to do with this case.

By the second agreement which was made between the Australian Governments of the first

part, the New Zealand Government of the second part, and the Respondent Company of the third part, the provisions of a previous agreement of the 31st March 1891 made between the Australian Governments and the Respondent Company were adopted, with some variations as to rates, and the New Zealand Government became bound by, and had the benefit of, those provisions as varied, and became a party to a guarantee thereby given by the Australian Governments to the Respondent Company. These agreements appear to their Lordships to relate only to the rates to be charged by the parties to them for their services in the transmission of through messages to places beyond Australia, and do not appear to have varied the mode in which that business was conducted on the basis of the Convention. Both agreements were made in London, and the amount of the guarantee under the second agreement was payable in London.

Their Lordships will humbly advise His Majesty that the Appeal be dismissed and the Appellant will pay the costs of it.