Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Lovell and Christmas, Limited, v. *The Commissioner of Taxes, from the Supreme Court of New Zealand; delivered the* 31*st October* 1907.

Present:

THE LORD CHANCELLOR.
LORD ASHBOURNE.
LORD MACNAGHTEN.
SIR ARTHUR WILSON.
SIR ALFRED WILLS.

[*Delivered by Sir Arthur Wilson.*]

This is an appeal against a judgment of the Supreme Court of New Zealand, by which it was decided that the Appellant Company was liable to pay income tax upon profits held to have been derived from New Zealand, within the meaning of the Land and Income Assessment Act, 1900.

The facts of the case are set out, clearly and concisely, in the special case stated, by consent of the parties, for the opinion of the Court. The Appellants sell goods in London on commission. The course of business is thus described:—

> The Defendant Company became the agent of the owners of the New Zealand produce for the sale of such produce in the manner and under the circumstances herein-after set forth:—
>
> (*a*) The Defendant Company carries on in London the business of provision commission agents. Dairy produce is sent to the Company in London from all parts of the world and sold by the Company on commission.

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(*b*) Mr. Harold Lovell is a salaried officer of the Defendant Company. He resides in and has no other business in New Zealand. Mr. Lovell's salary is 300*l.* per annum. The Defendant Company have established a credit at all the New Zealand banks at Hawera.

(*c*) Some time in each year Mr. Kowin, a servant of the Company, arrives in the Colony, and Mr. Harold Lovell and Mr. Kowin together attend the meetings of the different butter and cheese factories and endeavour to persuade the directors to consign their season's output to the Company to be sold in London on commission. The Company instructs Mr. Kowin and Mr. Lovell of the amount to which it is prepared to make advances against produce. Then Mr. Kowin and Mr. Lovell enter into negotiations with the dairy companies and interview the directors, and offer verbally to make advances within the limit so fixed. The common practice then is that the secretary of the dairy company writes to Mr. Kowin stating that the dairy company accepts the proposals made by Messrs. Kowin and Lovell on behalf of the Defendant Company, and in some cases no reply is sent by Mr. Kowin, in some cases Mr. Kowin merely acknowledges, and in some cases Mr. Kowin acknowledges and confirms. The understanding arrived at is that all the produce shall be shipped to the Defendant Company in London, but in some cases there is no binding obligation to that effect. The Defendant Company advances through a bank in the Colony per lb. f.o.b. ocean steamer against shipping documents, the amount of advance being that previously arranged by Mr. Kowin and Mr. Harold Lovell with the directors, and then sells on commission in London, returning to the factories during the season any surplus made after deducting expenses and commission.

The enactment which has to be interpreted, and applied to these facts, is section 51 of the Land and Income Assessment Act, No. 49 of 1900, which imposes a tax upon income derived from business, and derived from New Zealand, and the question that arises is whether the profits admittedly gained by the Appellants fall within this enactment; in other words, whether the business from which the profits have been derived is a business carried on in New Zealand, in such a sense as to bring the profits within the scope of the New Zealand taxing Act.

The question is not free from difficulty, as is evidenced by the difference of opinion which has occurred in the Supreme Court.

The governing authority on this subject is the case of *Grainger* v. *Gough*, 1896 A.C. 325, before the House of Lords, in which the earlier decisions were considered and appreciated. The language of the English Income Tax Acts and that of the New Zealand Act are not identical, but there is sufficient similarity in substance to make the English decisions authoritative as to the principles to be applied to the interpretation of the Colonial Act.

One rule is easily deducible from the decided cases. The trade or business in question in such cases ordinarily consists in making certain classes of contracts and in carrying those contracts into operation with a view to profit; and the rule seems to be that where such contracts, forming, as they do, the essence of the business or trade, are habitually made, there a trade or business is carried on within the meaning of the Income Tax Acts, so as to render the profits liable to income tax.

Thus, in the numerous cases relating to the business of foreign wine-producers who ship their wines to England, the profits of such business have been held taxable in England when the contracts of sale of the wines were habitually made in England. So in *Erichsen* v. *Last* (8 Q.B.D., 414) the business in question consisted of collecting telegraphic messages in England and sending them abroad in consideration of payments made in England. It was held that the profits were taxable in England where the contracts which yielded those profits were entered into.

But the decisions do not seem to furnish authority for going further back, for the purpose

of taxation, than the business from which profits are directly derived, and the contracts which form the essence of that business. In *Grainger* v. *Gough* (1896 A.C. 325, at p. 340) Lord Watson said—

> "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 without 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 his Lordship cited the case of *Sulley* v. *The Attorney-General* (5 H. and N., 711) in which an American firm habitually purchased goods in England and shipped them to America for resale at a profit, and it was held that the profits were not taxable in England. So in *Grainger* v. *Gough* itself, the case differed from the earlier wine-trade cases in that the actual contracts of sale were not made in England, the transactions there being limited to canvassing for and securing orders, and therefore there was no taxation in England.

In the present case their Lordships are of opinion that the business which yields the profit is the business of selling goods on commission in London. The commission is the consideration for effecting such sales. The moneys received by the Appellants, out of which they deduct their commission, and from which, therefore, their profits come, are paid to them under the contracts of sale effected in London. The earlier arrangements entered into in New Zealand appear to their Lordships to be transactions the object and effect of which is to bring goods from New Zealand within the net of the business which is to yield a profit. To make those transactions a ground for taxing, in New Zealand, the profits actually realised in London would in their Lordships' opinion be to extend the area of taxation further than the authorities warrant.

In the result their Lordships agree with the view of the case taken by Sir Robert Stout, C.J. They will humbly advise His Majesty that the Appeal should be allowed; that the question which the Supreme Court answered in the affirmative should be answered in the negative, and the judgment of that Court discharged except as regards costs. The Respondent will pay the costs of this Appeal.