REPORTS OF CASES IN HOUSE OF LORDS AND PRIVY COUNCIL, WHICH, THOUGH NOT ORIGINATING IN SCOTLAND, DEAL WITH QUESTIONS OF INTEREST IN SCOTS LAW.

HOUSE OF LORDS.

Friday, July 9, 1915.

(Before Earl Loreburn, Lords Parker, Sumner, and Parmoor.)

MITCHELL *v.* EGYPTIAN HOTELS LIMITED.

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

Revenue—Income Tax—Assessment of Profits on Foreign Investments — Company Resident and Registered in London Trading Abroad—Liability for Income Tax on Profits Made Abroad and not Remitted Home—Income Tax Act 1842 (5 *and* 6 *Vict. cap.* 35), *sec.* 100, *Sched. D, Cases* 1 *and* 5.

A company registered in London for the purpose of carrying on an hotel business in Egypt resolved that the company's business should be carried on in Egypt by a local board independent of the home board (except that the latter fixed their remuneration). Only such part of the profits as was required for distribution as dividends in London and payment of home expenses was remitted home. The company was assessed to income tax under case 1 of Sched. D of section 100 of the Income Tax Act 1842 in respect of the whole of their profits, which were derived exclusively from the Egyptian business. The Court of Appeal, reversing Horridge, J., held that the control exercised by the board of directors in London was merely the control of the manner in which the profits arising from the carrying on of the business should be dealt with and did not amount to carrying on business, which was as and from the 27th August 1908 wholly carried on by the local board, and therefore the company was assessable to income tax on such profits only as were actually remitted to London.

The House, upon consideration, was equally divided in opinion, with the result that according to the practice of the house the appeal stood dismissed.

Decision of the Court of Appeal (reported 1914, 3 K.B. 118) *affirmed.*

Appeal by the Surveyor of Taxes from a decision of the Court of Appeal, reported 111 L.T.R. 189, 1914, 3 K.B. 118, reversing a decision of Horridge, J., reported 108 L.T.R. 558, upon a Case stated by Commissioners under 43 and 44 Vict. cap. 19, sec. 20.

The Commissioners for the General Purposes of Income Tax for the City of London were of opinion on the facts that the assessment was properly made under case 1. This decision was upheld by Horridge, J., but was reversed by the Court of Appeal (Lord Cozens-Hardy, M.R., Buckley, L.J., and Channell, J.).

The company derived its profits solely from two hotels in Cairo. On the 27th August 1908 the articles of association were altered by special resolutions of the company, and under the articles as altered the management of these hotels was carried on exclusively by an Egyptian board. Since August 1908 the directors in England had met only once for the purpose of recommending a dividend and authorising the secretary to obtain a loan from the company's English bankers to enable a dividend to be paid, and the dividend was declared at a general meeting of the company.

Their Lordships' considered judgment was delivered as follows:—

EARL LOREBURN—I have felt great difficulty in this case, and if any point of law had been involved I should myself have desired a re-argument. But the law has been already laid down in two cases decided by this House, and the only question is whether or not this case comes within the principle. My own view is, on the whole, in accordance with that of Lord Parmoor, whose judgment I have had the advantage of reading in print, and I have nothing to add. It is a question of fact, and I think it is very near the line.

LORD PARKER—The effect of the decision of this House in *Colquhoun* v. *Brooks* (14 A.C. 493) may be stated as follows:—Where a person resident in the United Kingdom is interested in a trade or business wholly carried on abroad, such trade or business for the purposes of the Income Tax Acts falls under the head of "Possessions in any part of Her Majesty's Dominions out of Great Britain or Foreign Possessions," within the meaning of case 5 of Schedule D, and accordingly no part of the profits or gains of such trade or business is assessable to tax under Schedule D unless and until it be transmitted to and received in the United

Kingdom. Where, however, the trade or business is carried on wholly or in part within the United Kingdom, the profits and gains thereof are assessable to tax under case 1 of the schedule. It is to be observed that in *Colquhoun* v. *Brooks* the person alleged to be chargeable under case 1, though resident in England, was a partner in a trade or business carried on in Australia. He is called a sleeping partner, but this term is obviously used, not in the sense of a partner who by the terms of the partnership contract had no power to interfere with or take part in the trade or business in Australia, but in the sense of a partner who from one reason or another had not interfered or taken part in such trade or business. In fact, though asleep for all the purposes of the trade or business during the whole period for which the profits and gains of the trade or business were said to be assessable under case 1, he might at any moment have shaken off his slumbers and joined with his Australian partners in the active management of the partnership affairs. The important point therefore was not whether he had power to interfere with the trade or business, but whether he had so in fact interfered during the period for which the Crown alleged that he was assessable under case 1.

In considering whether the principle of *Colquhoun* v. *Brooks* applies to any particular circumstances, it is also necessary to bear in mind your Lordships' decision in the case of *San Paulo (Brazilian) Railway Company, Limited* v. *Carter* (1896 A.C. 31), to the effect that a trade or business cannot be said to be wholly carried on abroad if it be under the control and management of persons resident in the United Kingdom, although such persons act wholly through agents and managers resident abroad. Where the brain which controls the operations from which the profits and gains arise is in this country the trade or business is, at any rate partly, carried on in this country.

I will now invite your Lordships' attention to the facts in this case. Since the 28th August 1908 the affairs of the company have been regulated by the articles as altered by the special resolutions confirmed on the 27th August 1908. According to these articles all the company's affairs and business whatsoever in Egypt and the Soudan are under the control of a local board, to the exclusion of the board of directors of the company, and of all general meetings of the company not held in Egypt. The local board holds its meetings in Egypt and not elsewhere. It is found by the special case that the business carried on by the company during the year of assessment was the carrying on of two hotels in Egypt, these hotels being under the direct management of servants of the company under the orders of the local board, and the profits of the company being derived wholly from such hotels. All the members of the local board reside in Egypt. Since the 27th August 1908 the board of directors of the company have met once only. At this meeting a day was fixed for the annual meeting of shareholders, it was decided to recommend a dividend of 5 per cent., a draft of the directors' report and the accounts for the year ending 30th April 1909 was submitted and approved, and the secretary was authorised to obtain a loan from the company's bankers to enable the dividend to be paid. The annual meeting of the shareholders was held on the 29th June 1909, when the directors' report and the accounts for the year ending 30th April 1909 were adopted and the dividend recommended by the directors declared.

Under these circumstances it appears to me indisputable that no single act has been done in or directed from this country by way of participation in or furtherance of the trade or business of the company from which the profits or gains said to be chargeable to income tax since the 28th August 1908 have arisen. It was argued that a company can only have one business, and that such business necessarily includes the passing of annual accounts, the declaration of a dividend if circumstances admit, and the financial arrangements necessary to enable such dividend to be paid. I cannot accept this argument. The trade or business we have to consider is a trade or business from which profits or gains can arise, and not the business of disposing of and dividing such profits and gains when they have arisen, and I can see no reason why a corporation any less than an individual should not be engaged in more than one trade or business at the same time.

The Attorney-General further insisted on the various powers which, even under the altered articles, are still retained by the board of directors of the company. He pointed out that the board of directors of the company have power to determine the remuneration of the members of the local board, to decide when the Egyptian profit and loss account is to be made out, what is to be done with the available cash in Egypt, how cash is to be provided for the Egyptian business if none be available, and generally to determine all questions of finance. It may well be possible that the board of directors of the company still retain powers by virtue of which they could, if occasion arises, so interfere with the company's business in Egypt that such business would cease to be carried on wholly outside this country, but, as I have already pointed out, it is not what they have power to do, but what they have actually done, which is of importance for determining the question which now arises for decision. In the absence of any act done or directed by any person resident here in participation or furtherance of the business operations in Egypt from which the profits and gains in question arose, I think your Lordships are bound to come to the conclusion that this trade or business was carried on wholly outside the United Kingdom, and therefore is within case 5 rather than case 1. If this be so, the decision of the Court of Appeal must be confirmed and the appeal dismissed with costs.

LORD SUMNER—Where a resident in the United Kingdom is proprietor of a profit-earning business wholly situate and carried

on abroad he is chargeable to income tax under case 5 of Sched. D if he takes no part in earning them, and if he takes any part is chargeable under case 1. This is true whether the proprietor is a natural or an incorporated person—whether he takes part in earning the profits in his own person or only by agents or servants. The question is whether the profits are wholly or partly earned from a business wholly or partly carried on in the United Kingdom. If he takes a part at home in earning the profits its importance relatively to that taken by his agents abroad does not matter, nor does the liability to be charged under case 1 depend on active interference. Control exercised here over business operations abroad, though they are far greater in volume or magnitude, will suffice for case 1—*San Paulo (Brazilian) Railway Company* v. *Carter*, 1896 A.C. 31. So too will mere oversight regularly exercised, even though actual intervention never becomes necessary, everything abroad going smoothly without it—*Ogilvie* v. *Kitton*, 5 Tax Cas. 338. Some actual participation in carrying on the trade is necessary though it may not go beyond passive oversight and tacit control. It is not enough that the proprietor merely has the legal right to intervene, otherwise *Colquhoun* v. *Brooks*, 14 A.C. 493, would have been otherwise decided, for there the respondent was entitled to intervene at any time, though in fact he never did so, but took his share of the profits just as they happened to be earned by those in control abroad.

In the present case I think that the Commissioners have intended to state all the facts which they found to be proved and material. Their express findings are exhaustive, and they do not intend to involve any unexpressed findings in the general terms of their conclusion in par. 14 in favour of the Inland Revenue.

It is important to note that the dispute turns upon the narrow question whether the profits attributable to a definite period, namely, that commencing the 27th August 1908, fall under case 1 or case 5. It is found that "during the year of assessment the company's profits were derived from the said hotels," namely, hotels in Egypt, "and no other source." On the 27th August 1908 certain alterations in the articles, *bona fide* and properly made, came into operation, the object of which was to secure that the said profit-earning business should thenceforward be wholly carried on abroad and not at all in the United Kingdom, where the company is admittedly resident. The question is whether this object was attained.

After the date above-mentioned the board of directors met only once during the year of assessment. At this meeting they authorised the assistant secretary to borrow £10,750 from a bank in this country. The case finds that "the local board in Egypt reported the results of the trading to the board of directors for the purpose of being incorporated in the company's accounts and balance-sheets, and acted upon for the declaration of dividends," and therefore, as I read it, impliedly finds, and certainly nowhere finds the contrary, that such results were adopted by the board of directors. This must have included adopting the remuneration payable to the local board, which the accounts showing these results must if properly kept have debited to the Egyptian trading. Under the amended article it was for the board of directors to fix the remuneration of the local board in Egypt, but on the facts found in the case in my opinion they did not exercise their powers. Rightly or wrongly they allowed the remuneration to be fixed in Egypt. Again the money was borrowed not for any purpose connected with earning the profits in question, but apparently for the purpose of raising funds with which to pay a five per cent. dividend on the ordinary shares, which could not be paid otherwise without depleting the working capital in Egypt. It is clear that this borrowed sum was not intended to feed the Egyptian business with further capital, still less had it played any part in earning the profits in question. Again the board's power of deciding when a balance of profit or loss should be struck, so as to lead to the declaration of a dividend, does not seem to have been exercised. Accounts were made up in Egypt to the end of the usual financial year in time to be ready for the annual general meeting of the company, independently of any special exercise of its powers by the board of directors.

I am of opinion that what the board of directors actually did fell short of taking any part in or exercising any control over the carrying on of the business in Egypt, and that where the directors forebore to exercise their powers the bare possession of those powers was not equivalent to taking part in or controlling the trading. Upon the facts found, as I understand them, I think that the profits in question arise from foreign possessions and that the decision of the Court of Appeal was right.

Reference was made to the *Liverpool and London and Globe Insurance Company* v. *Bennett*, 1913 A.C. 610, 51 S.L.R. 575, but there the matter in debate was the effect of making investments abroad under the direction of the company in this country, which it was part of the company's business to make in order to advance the total volume of its profits. I do not think that case germane to the present appeal. The differences there pointed out between the trade of a natural person and his other private activities on the one hand, and the totality of the activities of a trading company in carrying on its trade in all branches on the other, are not material to the present question. The mere declaration and payment of a dividend here out of profits earned in a business otherwise wholly carried on abroad does not prevent the business in which the profits have already been earned from having been wholly carried on abroad. To say that part of a company's business is to pay dividends if it has earned them seems to me to be a play upon words.

LORD PARMOOR—The point for the decision in this appeal is whether the respondents, whose registered office is situate in England, are liable to pay income tax under

case 1 of Schedule D, upon the whole of their profits, or under case 5, upon a sum not less than the full amount of actual sums remitted to Great Britain. The Commissioners for the General Purposes of Income Tax for the City of London held that on the facts the assessment was duly and properly made under case 1. This decision was upheld by Horridge, J., but reversed in the Court of Appeal.

In my opinion the principles to be applied in the decision of this appeal have been settled in this House in the two cases of *Colquhoun* v. *Brooks* (14 A.C. 493), and of *San Paulo (Brazilian) Railway Company* v. *Carter* (1896 A.C. 31). In the latter case Lord Watson states succinctly the ambit of the decision in *Colquhoun* v. *Brooks*—"In my opinion the decision in *Colquhoun* v. *Brooks* directly affirms the rule that every interest in the profits of trade belonging to a person who is within the meaning of the Act resident in the United Kingdom, must be charged under the first case of Sched. D, if the trade is carried on either wholly or in part within Great Britain or Ireland, and is chargeable under the fifth case if the trade is exclusively carried on in any of His Majesty's dominions outside the United Kingdom."

The question therefore to be determined in this appeal is whether the trade of which the profits are sought to be charged is carried on either wholly or partly within the United Kingdom, or exclusively carried on outside the United Kingdom. This is a question of fact to be determined by the Commissioners, if there is evidence before them from which their finding might in reason be drawn, or unless they have gone wrong on a point of law. I think that there was such evidence before them in the present case, and that their decision does not contravene any legal principle.

At an extraordinary meeting of the company held in London on 10th August 1908 certain special resolutions were passed and subsequently confirmed at a confirmatory meeting held in London on the 27th August 1908. These special resolutions are set out in the case stated by the Commissioners. Their general effect is that the Egyptian business of the respondents should be carried on and managed by a local board, to the exclusion of the board of directors of the company, and that such local board should be wholly independent of any other directors and board of the company and of general meetings of the company (not being general meetings held in Egypt), and in no way under the control thereof.

The Egyptian business of the company includes all the company's affairs and business whatsoever in Egypt and the Soudan, including the business of carrying on the company's hotels in Egypt and the Soudan, and everything connected therewith, including the incurring of debts and liabilities, buying, selling, and supplying goods, the hiring, using, and supplying labour, paying of debts, and the doing of all things necessary or in any way incidental to such business. The profits of the company on which the income tax is sought to be charged are derived wholly from the Egyptian business. In the year of assessment the dividend was declared in June.

Mr Peat, a director of the respondents, gave evidence that the special resolutions which became operative on the 27th August 1908 had been strictly observed and acted upon, and that the local management of the hotels was carried on exclusively by the local board in Egypt, who reported the financial trading results to the board of directors of the company in England for the purpose of being incorporated in the company's accounts and balance sheets and acted upon for the declaration of dividends. The Egyptian accounts were made up and audited in Egypt and subsequently forwarded to the respondents' office in London and submitted to the general meetings of the respondents in London. The balance sheets and the profit and loss accounts of the company were made out in London, and all the accounts of the respondents, except so far as rendered unnecessary by the local audit in Egypt, were audited in England. As an instance of the extent to which the control of finance was exercised in England the assistant secretary was authorised at a meeting of the respondents held in England on the 29th June 1909 to obtain a loan of £10,750 from the Anglo-Egyptian Bank, and to transfer £2692, 6s. 4d. to debenture interest account, and £10,925 to dividend No. 5 account in Cairo and London, to meet the financial requirements as at the 30th June 1909. Before and after the 27th August 1908 all the meetings of the directors of the respondents have been held from time to time in England and not elsewhere.

In addition to parole evidence the Commissioners had in evidence before them the memorandum and articles of association of the respondents. The respondents are an English company having its registered office in England, and, subject to the special provisions affecting the Egyptian business, the general management of the affairs of the company is in the ordinary way entrusted to the directors. The control of the share capital of the company was left with the directors, including the question of its increase or reduction. It was within the power of the directors to say when the profit and loss of the Egyptian business should be made out and in what manner the available assets should be allocated. The directors decided how much the Egyptian managers should be paid, and if the Egyptian business should be carried on at a loss in any particular year, the responsibility rested with them of making any necessary financial arrangements. On this evidence the Commissioners found that before and after the 27th August 1908 the directors of the respondents were empowered to, and did, deal with the general affairs of the company, including all general financial arrangements of the company.

In my opinion there was evidence before the Commissioners on which within reason they could come to the above finding. It was open to the Commissioners to find that a business is not exclusively carried on outside the United Kingdom when all the

general financial arrangements are dealt with and controlled at meetings held from time to time at the offices of the company in England. The Commissioners further found that the head and seat and controlling power of the company remained in England with the board of directors of the company. How far in any particular case the power over finance gives controlling power is a question for the Commissioners, but I find it difficult to appreciate how any trade or business can be exclusively carried on outside the United Kingdom by a company which has its offices in England and whose directors are empowered to and do deal with all the general financial arrangements of the company. I agree with Horridge, J., that it is not possible to serve the business of the respondents in such a way as to hold that there is a cleaving line between general questions of finance and the local management in Egypt.

It was said in argument that although the directors in England had general controlling powers in matters of finance there was no evidence that they exercised this power in relation to the Egyptian business. For the reasons already stated I think that there was evidence on which the Commissioners could find that the directors of the respondents had not only the power to deal with all general financial arrangements of the company, but also exercised this power. It becomes therefore unnecessary to decide how far the reservation of a power of control which has not been exercised is in itself sufficient to negative a claim to be treated under case 5, but I do not desire to be understood as throwing any doubt on the decision in *Ogilvie* v. *Kitton* (5 Tax Cas. 338).

In my view the appeal should be allowed.

Order of Court of Appeal affirmed and appeal dismissed.

Counsel for the Appellant—Sir J. Simon, A.-G.—Sir S. Buckmaster, S.-G.—W. Finlay, K.C. Agents—H. Bertram Cox, Solicitor of Inland Revenue.

Counsel for the Respondents—Sir R. Finlay, K.C.—A. M. Bremner. Agents—Board & Company, Solicitors.

HOUSE OF LORDS.

Tuesday, May 11, 1915.

(Before Earl Loreburn, Lords Parker, Sumner, Parmoor, and Wrenbury.)

PARKER *v.* OWNERS OF SHIP "BLACK ROCK."

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—"*Accident Arising Out of and in the Course of the Employment.*"

A seaman, with leave, went on shore to buy provisions, his contract of service being "Crew to supply their own provisions." On the seaman's return he fell into the water and was drowned, somewhere in the length of the pier at the end of which his ship had been moored, but from which she had been moved to another berth.

Held that the accident did not arise "out of and in the course of his employment."

Appeal by the widow of a fireman from an order of the majority of the Court of Appeal (LORD COZENS-HARDY, M.R., and EVE, J., EVANS, P., *diss.*) affirming an award of His Hon., Judge A. P. THOMAS sitting as arbitrator under the Workmen's Compensation Act 1906, at the County Court, Liverpool.

The appellant, who was the widow of Christopher Parker, a fireman on board the respondents' coasting steamer "Black Rock," claimed compensation in respect of her husband's death.

On the 7th January 1913 Parker signed an agreement for a round coasting voyage in the "Black Rock." The contract of service was contained in a printed document issued by the Board of Trade, but before Parker signed it the scale of provisions required by section 25 of the Merchant Shipping Act 1906 to be served out to the crew during the voyage (where the crew do not furnish their own provisions) was struck out and in lieu thereof were inserted in writing the words—"Crew to provide their own provisions."

On the 14th January 1913 the "Black Rock" was moored alongside the North Pier at Newlyn. Parker went ashore in the afternoon with another man for the purpose of buying provisions for himself for the ensuing voyage. His going ashore for this purpose was with the knowledge and tacit consent of his employers. There was an entry in the ship's log-book that Parker and his companion had gone ashore to buy provisions, and the evidence was that they had purchased articles to the value of 7s. after having drinks together. The night of the 14th January 1913 was dark and rainy, and a gale was blowing. The wind and rain would have been almost directly in the face of anyone walking down to the pierhead, which was badly lighted.

During the time that Parker was ashore the vessel had been moved from the north to the south pier, but this fact could not have been known to him. After parting with his companion nothing more was known about Parker's movements until the next day, when his body was found on the shore at a place where it was likely to have been washed up had the man fallen off the pierhead into the water.

The widow in these circumstances claimed compensation on the ground that at the time of the accident the deceased was fulfilling the duty he owed his employers to go ashore for the purchase of provisions, and therefore was on ship's business when the accident happened to him.

The County Court Judge inferred from such facts as could be proved that Parker