No. 538.—HIGH COURT OF JUSTICE (KING'S BENCH DIVISION).—
3RD MARCH, 1924.

COURT OF APPEAL.—27TH AND 28TH MAY, 1924.

HOUSE OF LORDS.—7TH, 8TH, 11TH AND 19TH MAY, AND
6TH NOVEMBER, 1925.

WHITNEY *v.* THE COMMISSIONERS OF INLAND REVENUE.[1]

Super-tax—Liability of non-resident alien in receipt of income from the United Kingdom—Service abroad of notice to make return of income—Finance (1909–10) *Act*, 1910 (10 *Edw.* VII, *c.* 8), *Sections* 66 *and* 72—*Income Tax Act*, 1918 (8 & 9 *Geo.* V, *c.* 40), *Sections* 5 *and* 7.

The Appellant, a citizen of and domiciled and resident in the United States, did not reside in or visit the United Kingdom at any time between March, 1914, *and the* 5*th April*, 1921, *but in each year he received dividends from a British company which was assessed to Income Tax under Case* I *of Schedule D in respect of its profits.*

The Special Commissioners served upon the Appellant by registered post at his New York address notices to make returns of his income for Super-tax purposes for the years 1917–18 *to* 1920–21 *inclusive, and in the absence of returns made assessments*

(1) Reported K.B.D. and C.A., [1924] 2 K.B. 602, and H.L., [1926] A.C. 37.

to Super-tax upon him for those years in sums estimated according to the best of their judgment under the provisions of Section 72 (5) *of the Finance* (1909–10) *Act*, 1910, *and Section* 7 (5) *of the Income Tax Act*, 1918, *notices of the assessments being sent to him by registered post at his New York address.*

On appeal before the Special Commissioners the Appellant contended—

(i) *that the Special Commissioners had no jurisdiction to serve outside the United Kingdom a notice requiring a return of income for Super-tax purposes;*

(ii) *that, in these circumstances, he had not failed to make a return, and that the Special Commissioners had, therefore, no jurisdiction to make the estimated assessments in question;*

(iii) *that a non-resident could be lawfully assessed only (if at all) in the name of a trustee or agent, and not in his own name;*

and (iv) *that a non-resident, or in any case a non-resident alien, was not liable to be assessed to or charged with Super-tax at all.*

The Special Commissioners decided that the Appellant was liable to be assessed in his own name on the amount of his income charged to Income Tax in the preceding year, and that the notices requiring him to make returns for the purposes of Super-tax having been properly served the assessments were validly made in the absence of returns.

Held (*Lord Phillimore dissenting*), *that a person not resident in the United Kingdom, whether British or alien, whose income liable to British Income Tax for the preceding year exceeds the Super-tax limit, is liable to Super-tax in respect of such income and* (*Viscount Cave*, L.C., *also dissenting*) *that he is assessable thereto in his own name; and* (*Viscount Cave*, L.C., *and Lord Phillimore dissenting*) *that the Special Commissioners have jurisdiction to serve abroad a notice to make a return of income for Super-tax purposes, that in the absence of such return they have power to make an assessment estimated according to the best of their judgment, and that the assessments in question had accordingly been properly made on the Appellant.*

Commissioners of Inland Revenue *v.* Huni[1] *approved.*

CASE

Stated under the Finance (1909–10) Act, 1910, Section 72 (6), and the Taxes Management Act, 1880, Section 59, and under the Income Tax Act, 1918, Sections 7 (6) and 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

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[1] 8 T.C. 466.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on the 18th July, 1923, for the purpose of hearing appeals, Mr. Harry Payne Whitney, hereinafter called "the Appellant," appealed against the following assessments to Super-tax made upon him under the provisions of the Income Tax Acts :—

For the year ending the 5th April, 1918, in the sum of £90,000.

For the year ending the 5th April, 1919, in the sum of £90,000.

For the year ending the 5th April, 1920, in the sum of £90,000.

For the year ending the 5th April, 1921, in the sum of £90,000.

2. The Appellant is a citizen of and is domiciled and resident in the United States of America. Between the month of March, 1914, and the 5th April, 1921, the Appellant has not at any time resided in or visited the United Kingdom.

3. At all material times the Appellant and his wife were the holders of large blocks of shares in a Company registered and carrying on business in the United Kingdom, which was duly assessed to Income Tax under Case I of Schedule D in respect of the profits and gains of its trade. In each of the years ending the 5th April, 1917, the 5th April, 1918, the 5th April, 1919, the 5th April, 1920, and the 5th April, 1921, the Company declared and paid dividends out of those profits and gains and the Appellant and his wife were in receipt of such dividends in each of those years. Thus for each of the years preceding the respective years for which the assessments under appeal were made, and for those respective years, the Appellant and his wife were in receipt of income from a source in the United Kingdom.

4. On the 10th March, 1920, notices in the form prescribed by Regulations made by the Commissioners of Inland Revenue, of which a copy is annexed hereto and forms part of this Case(1), were sent by registered post to the Appellant in New York requiring him to make a return of his income for the purposes of Super-tax for each of the years ending respectively the 5th April, 1918, the 5th April, 1919, and the 5th April, 1920. On the 21st October, 1920, a similar notice was sent by registered post requiring the Appellant to make a return of his income for Super-tax purposes for the year ending the 5th April, 1921, and at the same time a renewed application was made for the returns for the three preceding years.

5. The Appellant did not, however, comply with the said notices or any of them and did not make any return of his income for the purposes of Super-tax. In the absence of any return the

(1) Omitted from the present print.

Special Commissioners dealing with the matter made assessments upon the Appellant according to the best of their judgment for each of the years ending the 5th April, 1918, the 5th April, 1919, the 5th April, 1920, and the 5th April, 1921, in respect of income accruing to him and his wife from sources in the United Kingdom and these are the assessments which form the subject of the appeal.

Notices of these assessments were in due course sent by registered post to the Appellant in New York, and notices of appeal against these assessments were duly given.

It is admitted on behalf of the Appellant that all notices in this case were addressed to his proper address in New York.

6. It was contended on behalf of the Appellant :—

(1) That the Special Commissioners had no power or jurisdiction to serve out of the United Kingdom upon a non-resident a notice requiring a return of income for the purposes of Super-tax.

(2) That the Special Commissioners had no power or jurisdiction to serve out of the United Kingdom upon a non-resident alien a notice requiring a return of income for the purposes of Super-tax.

(3) That a non-resident can be lawfully assessed to tax (including Super-tax) only (if at all) in the name of a trustee, guardian, tutor, curator, committee, factor or agent and not in his own name.

(4) That the Appellant did not, on the facts before the Commissioners, fail to make a return, and the Commissioners had in the circumstances no jurisdiction to make upon the Appellant the assessments appealed against or any of them.

(5) That a non-resident is not liable to be assessed to or charged with Super-tax at all.

(6) That a non-resident alien is not liable to be assessed to or charged with Super-tax at all, and

(7) That the assessments were invalid and should be discharged.

7. It was contended on behalf of the Crown that the assessments had been correctly made and should be confirmed.

8. We were of opinion that the Appellant was liable to be assessed to Super-tax in his own name on the amount of his income charged to Income Tax in the preceding year, and that the notices requiring him to make returns for the purposes of Super-tax having been properly served the assessments were validly made in the absence of returns. There being no dispute as to the amounts we accordingly confirmed the assessments.

9. The Appellant immediately upon the determination of the appeal declared to us his dissatisfaction therewith as being erroneous in point of law and in due course required us to state a Case for the opinion of the High Court pursuant to the Finance (1909–10) Act, 1910, Section 72 (6), and the Taxes Management Act, 1880, Section 59, and to the Income Tax Act, 1918, Sections 7 (6) and 149, which Case we have stated and do sign accordingly.

J. JACOB, R. COKE } *Commissioners for the Special Purposes of the Income Tax Acts.*

York House,
23, Kingsway, London, W.C.2.
7th November, 1923.

The case came before Rowlatt, *J.*, in the King's Bench Division on the 3rd March, 1924, when Sir John Simon, K.C., M.P., Mr. A. M. Bremner, and Mr. F. McMullan appeared as Counsel for the Appellant, and the Attorney-General (Sir Patrick Hastings, K.C., M.P.), the Solicitor-General (Sir Henry Slesser, K.C.) and Mr. R. P. Hills for the Crown.

Counsel for the Appellant did not seek to argue the case in that Court in view of the decisions of the Court of Appeal in *Marion Brooke* v. *The Commissioners of Inland Revenue*(1) and of the King's Bench Division in *The Commissioners of Inland Revenue* v. *Huni*(2), and judgment was accordingly given in favour of the Crown with costs.

An appeal having been lodged against this decision, the case came before the Court of Appeal (Pollock, *M.R.*, and Warrington and Sargant, *L.JJ.*) on the 27th and 28th May, 1924, when the same Counsel appeared as in the King's Bench Division.

Judgment was delivered on the latter day unanimously in favour of the Crown, with costs, confirming the decision of the Court below.

JUDGMENT.

Pollock, M.R.—This appeal must be dismissed.

The case raises what, at first sight, looks like a puzzling point, and no doubt it is possible to overlay it with picturesque details which may make it extremely attractive, and appear possible to impose some sort of hardship upon persons who are non-resident here, but, stripped of details, it comes back to a very simple point.

We are told by the Case that: " At all material times the " Appellant and his wife were the holders of large blocks of shares " in a Company registered and carrying on business in the " United Kingdom, which was duly assessed to Income Tax " under Case I of Schedule D in respect of the profits and gains

(1) 7 T.C. 261. (2) 8 T.C. 466.

(Pollock, M.R.)

"of its trade. In each of the years ending the 5th April, 1917, "the 5th April, 1918, the 5th April, 1919, the 5th April, 1920, "and the 5th April, 1921, the Company declared and "paid dividends out of those profits and gains, and the Appellant "and his wife were in receipt of such dividends in each of those "years. Thus for each of the years preceding the respective "years for which the assessments under appeal were made, and "for those respective years, the Appellant and his wife were in "receipt of income from a source in the United Kingdom."

Now, that being the position, one takes the Income Tax Act (and it matters not whether one looks at the old Statute of 1842, or, rather, the Statute of 1853, or as it is at the present day), and one looks to see whether, under those circumstances, there is any liability to Income Tax, and one finds under Schedule D in the effective Act of 1853 that there is a charge, that is to say, Income Tax is granted :—" to Her Majesty . . . for and in respect of "the annual profits or gains accruing to any person whatever, "whether a subject of her Majesty or not, although not resident "within the United Kingdom, from any property whatever in "the United Kingdom." As found by the Commissioners, the property subject to the tax consists of the profits and gains of the business carried on by a company registered, and carrying on its business, in the United Kingdom. Dividends were paid and declared out of those profits and gains in the United Kingdom, and the Appellant and his wife were, therefore, in receipt of property in the United Kingdom. Under those circumstances I call attention to the old Schedule D of the Statute of 1853 which imposed, prima facie, a liability to Income Tax in respect of those annual profits or gains. If I take the modern form of Statute, it is to be found in the Schedule to the Act of 1918, and there the Schedule says: "Tax under "this Schedule shall be charged in respect of the annual profits "or gains arising or accruing . . . to any person, whether a "British subject or not, although not resident in the United "Kingdom, from any property whatever in the United King-"dom." Indeed, it is not contested that there is this liability on the part of the Appellant, and his wife, persons who are, I think, American by birth, and are resident in New York. The point as to whether they are aliens or not is not taken by Sir John Simon, but it is said they are not resident over here, and, although they are not resident over here, again it is admitted that their property over here comes within the terms of Schedule D, whether in the one Act or the other that I have quoted, so that they would be liable to Income Tax. That has been decided in the case of *Brooke* v. *Commissioners of Inland Revenue*(1). That decision is binding upon this Court. It was binding upon Mr. Justice Rowlatt, before whom the appeal from the Commissioners came, and it is admittedly binding upon this Court. That matter

(1) 7 T.C. 261.

(Pollock, M.R.)

cannot be raised, at any rate, in this Court. Sir John Simon wishes to safeguard himself in the matter of the point which was decided in *Brooke* v. *Commissioners of Inland Revenue*, so that if an opportunity should occur it should not be said that he had given up the point which was raised, and decided, in *Brooke* v. *Commissioners of Inland Revenue*. He is, of course, entitled to reserve to himself full liberty in respect of that decision, and nothing that we say, or that he has argued in this Court, will impede his raising the point in the appropriate case in the Court higher than the present. But Sir John Simon says this : Assuming that there is this liability to Income Tax, what is imposed here is Super-tax, and it is said you can exact Super-tax, and that you can, by appropriate means, namely, by sending by registered post a notice to Mr. Whitney in New York, take steps to apprise him of a liability which, if he does not respond to the notice, can be enforced against him by appropriate steps; and, indeed, this appeal relates to the question whether or not there is any machinery to enforce the liability to Super-tax, which was established by the decision in *Brooke* v. *Commissioners of Inland Revenue*. It is pointed out that in that particular case the service was made upon the person charged when she was in England, and notice of the charge was served upon her in England. In the present case the distinction is taken that service was by post addressed to an address in New York, and that, therefore, the conditions which were held sufficient in the case of *Brooke* v. *Commissioners of Inland Revenue* do not appear in the present case.

Now, the way in which it is said that it is impossible to use this system of giving notice to the person charged is this. It is said if you will look at the Section imposing Super-tax you will find that Super-tax is to be deemed to be an additional duty of Income Tax, and therefore you are entitled to say that its character, its nature, and method in which it is to be regarded and treated is the same as that of Income Tax. I agree that Section 66 of the Finance (1909–10) Act, 1910, does say that what is called Super-tax is to be imposed, and that it is an additional duty of Income Tax, but I wish to dissociate myself entirely from the view that Super-tax is, in all its features, simply the equivalent of a further duty of Income Tax, and that it is not independent of, or in any way separate from, or distinguishable from, Income Tax. I think what was said by Lord Sterndale in the case of *Davis* v. *Inland Revenue Commissioners*, reported in [1923] 1 King's Bench, at the bottom of page 373[1], is of great importance on this point : " I think we have to approach this " matter with this fact in mind : that Super-tax is an additional " Income Tax. In that sense it is not a separate tax. It has " been so held in several cases ; indeed it appears perfectly clearly " from the Statute which imposes Super-tax. But if it be sought

[1] 8 T.C. 341, at p. 355.

(Pollock, M.R.)

"to deduce from that this proposition, that, therefore, all pro-"visions with regard to Income Tax or Super-tax are to be con-"sidered as common to them both, there is no foundation for "such a deduction." I desire to associate myself with that view. However, the present argument is put in this way. It is said, at any rate, Super-tax is sufficiently akin to Income Tax to justify you looking at what was the system intended for the collection of Income Tax, and when you have got Regulations which have been made, as they have been made, for the purposes of enabling the Commissioners to send notices by post, in the construction of those Regulations you must have regard to the purpose, and the limits of the purposes, for which they were to be used, and you cannot treat them as at large, and independent of the qualifications and limitations which ought to be imposed in their construction, in view of the Sections of the Income Tax Acts which circumscribed the powers of collectors of Income Tax in the days when they were first enacted, and our attention was called to Section 41 of the Income Tax Act of 1842. It is said that if you will take that Section you will find that, in the case of a non-resident, provision is made whereby persons can be made liable in the name of a factor, an agent, or a receiver, and that is the appropriate method of rendering a non-resident liable. If you will then follow out from Section 41 the scheme of the Act as illustrated by, or, indeed, enacted in Sections 46, 47, 48, 51, and 53, you will see that the intention is that there shall be an appropriate area within which notices can be given. There are notices to be given to persons who are within that appropriate area. You will find a number of other details, all pointing to something like the delimitation of the powers and the area within which the powers are to be exercised imposed by these Sections, and thus, when you come to consider what the Regulations are, you must treat those Regulations, and construe them, as being appropriate to those limited powers, and not further, or otherwise.

I think the answer to that is this: Section 41 of the Act of 1842, and the subsequent chain of Sections, are not to be treated as imposing limitations upon the wide terms of Schedule D, to which I have already referred. If authority is needed for that, I think it is to be found in *Tischler* v. *Apthorpe*(1), where Mr. Justice Mathew, and Mr. Justice A. L. Smith, point out that Section 41 is not intended to be a limiting Section, it is an enabling Section, giving powers to the Commissioners, if they are unable to get at the principal, to secure the liability of the principal through the agent: "Where the case arises contem-"plated by Section 41," says Mr. Justice Mathew(2), "of a "resident abroad who cannot be reached by the Commissioners, "then the Commissioners are entitled to fall back upon the "valuable and useful provision contained in the Section," and

(1) 2 T.C. 89. (2) *Ibid.* at p. 93.

(Pollock, M.R.)

Mr. Justice A. L. Smith says this [1]: "I am clearly of opinion "that Section 41 was not passed in derogation of the rights of "the Revenue, but was passed to aid them." Later, when that decision came before Lord Esher, Master of the Rolls, he said this, that he agreed with the judgment in *Tischler* v. *Apthorpe:* "I do not think that the right to assess is limited by Section 41, which is only machinery." I am quoting from *Werle* v. *Colquhoun*[2], which is reported in 20 Q.B., at page 753.

Now, pausing there for a moment, it seems quite clear that any interpretation put upon Section 41 which would in any way embarrass or circumscribe the rights of the Revenue would be a wrong interpretation; wider words really could not be used than those used by Mr. Justice A. L. Smith, that Section 41 was not passed in derogation of the rights of the Revenue, and the rights of the Revenue are the very wide powers which are contained in Schedule D to which I have referred.

That view of Section 41, expressed and upheld in the Court of Appeal as it was in 1888, was considered by Mr. Justice Atkin, as he then was, in *Brooke* v. *Inland Revenue Commissioners* [3]. He says, at page 70 of [1917] 1 K.B.[4]: "These cases"—that is *Tischler* v. *Apthorpe*, and *Werle* v. *Colquhoun*—"appear to "show conclusively that in the case of a non-resident the Com-"missioners are not restricted to the means provided by Section 41"; in other words, it seems quite clear that you have to look at the Schedule, which is Schedule D, and the Section imposing it, which confers the wide powers, and the wide liability, as still existing, and not in any way cut down by subsequent Sections which may be utilised in particular cases, but which are only to be utilised in the cases where they are of service to the Revenue.

If an illustration, again, is wanted of the wide powers of the Revenue still left untouched by subsequent Sections it is to be found in the case of *Ex parte Huxley* [5], reported in [1916] 1 K.B., at page 788. In that case an infant, who had no trustee or guardian having the direction, or management, or control of his property within Section 41 of the Income Tax Act, 1842, was held assessable to Income Tax in respect of his personal earnings. The Master of the Rolls, Lord Cozens-Hardy, says that, although the jockey in question was an infant, and although he had no guardian who could be charged, he was yet chargeable because the Act of 1842 makes all persons receiving profits chargeable to Income Tax under Schedule D, and the infant was a person receiving profits, and there was no Section which cut down his liability. It seems, therefore, to me that the argument presented upon Section 41, and the subsequent chain of Sections, breaks down in the case not only of Income Tax, but of Super-tax.

[1] 2 T.C. at p. 94.
[2] 2 T.C. 402, at p. 412.
[3] 7 T.C. 261.
[4] 7 T.C. at p. 268.
[5] Rex *v.* Newmarket Commissioners (*ex parte* Huxley), 7 T.C. 49.

(Pollock, M.R.)

But when I come to the question of Super-tax I think the matter becomes even more plain, because Super-tax is originally imposed by Section 66 of the Finance (1909-10) Act, 1910, and the powers for the purpose of collecting it are contained in Section 72 of that Act: "Super-tax shall be assessed and charged "by the Commissioners for the special purposes of the Acts "relating to income tax." I think everyone who has been concerned in Income Tax cases knows that there are both General Commissioners and Special Commissioners, and the assessment and charging of Super-tax is entrusted to the Special Commissioners whose jurisdiction is not limited to particular areas, but embraces the whole of the country, and certainly the whole of the area in which those profits accrued to, and became payable to, the Appellant and his wife in the United Kingdom, and Section 72 provides, under Sub-section (8): "The Commis-"sioners may make regulations for the purpose of carrying this "section into effect." No wider powers as to regulations, it seems to me, could be used. They have made Regulations; they have made Regulations which it is not said are *ultra vires*, but it is said that the construction of the Regulations must be such as to limit them. It seems to me that the powers of the Commissioners are intended to be wide—wide as in the cases which I have quoted. The powers of collecting Income Tax are wide, and intended to effect and carry out the imposition of Income Tax upon all property which is in this country, and whether it belongs to a resident, or a non-resident. In the present case, under the Regulations, the Commissioners have secured that a notice should be sent to Mr. Whitney. He agrees that he received the notice. The only question, therefore, that can be raised is: Was there any power to send him that notice?

It is said that these words: "The Commissioners may make "regulations for the purpose of carrying this section into effect" must, in some way, be cut down in respect of the Regulations, and that it is improper to have made use of the post which is indicated by the Regulations for the purpose of reaching a non-resident. It is always important to bear in mind that although the owner of the property is, no doubt, concerned, as the person who will have ultimately to pay on that, or some other property, still, the charge that is made by Schedule D is imposed upon the annual profits or gains, or in respect of the annual profits or gains, accruing to any person from any property whatever in the United Kingdom. It is the fact that there is property here that induces the liability to the Income Tax.

It appears to me that this very point which has been taken has, in effect, been decided by Mr. Justice Rowlatt in *The Inland Revenue Commissioners* v. *Hunt*(1), which is reported in [1923] 2 K.B., at page 563. He says this(2): "The question

(1) 8 T.C. 466. (2) 8 T.C. at p. 473.

(Pollock, M.R.)

" is whether in this case the machinery has failed the Revenue. " There is a provision which is applicable to Super-tax which " enables the Revenue authorities to assess a person who is " abroad in the name of his agent. I do not think that provision " throws much light upon this question, because it has been held " several times that that provision is in augmentation of the " powers of the Revenue, and not in limitation of them. If " the person chargeable can be served, the necessary steps can " be taken against him personally, without troubling about an " agent, even though he has an agent, and if he has no agent " that it is the only way it can be done." Mr. Justice Rowlatt, whose experience in these cases is very wide indeed, had, no doubt, in his mind, the case of *Tischler* v. *Apthorpe*(1), and the subsequent case of *Werle* v. *Colquhoun*(2), and he stated the proposition which he did from his experience, and felt it was so well founded upon authority that he did not actually require to cite the authorities. But he did come to the conclusion in that case that the machinery had not failed the Revenue. I have come to the same conclusion. I think it is impossible to circumscribe, in the matter of Super-tax, or of Income Tax, but I am dealing only with Super-tax, the powers and sphere of the Regulations that have been made, and, inasmuch as there is a duty on the Commissioners to try and collect the Revenue which arises from property in this country, they had, therefore, power to issue this notice by post; that has been done, response to it has not been made, the duty which falls upon the owner of property in this country has not been fulfilled, and therefore the Commissioners were in a position to proceed to make an assessment themselves.

For these reasons I think the assessment was rightly made, I think that the decision of the Commissioners was right, and that therefore the appeal ought to be dismissed and dismissed with costs.

Warrington, L.J.—I am of the same opinion. The question raised on this appeal is whether certain assessments to Super-tax made by the Special Commissioners under Section 7, Sub-section (5), of the Income Tax Act, 1918, are valid assessments. It is said they are not because the condition precedent to their having power to make the assessment themselves is the failure of the person concerned to make a return required by the Section. There is no question here that the person concerned did not make the return, but it is said that notice requiring him to make it was not properly served upon him. That is the only question we have to determine.

Now the taxpayer in this case is an American subject. He is resident in America, and has no residence here. He and his wife have large possessions in this country from which he

(1) 2 T.C. 89. (2) 2 T.C. 402.

(Warrington, L.J.)

and she derive a very considerable income indeed. It is admitted that it must, in this Court, be held, on the authority of *Brooke's* case[1], in [1918] 1 K.B., at page 257, that he is liable to Super-tax in respect of the income of the property I have just mentioned. It is settled that, notwithstanding the provisions contained in Section 41 of the Act of 1842, and the corresponding provision in the Act of 1918, the Commissioners are entitled to charge the man himself as a taxpayer, and are not driven to the necessity of serving notices upon, and making the assessment in the name of, an agent in this country. Mr. Whitney, therefore, is, in every respect, properly treated as the person liable to pay tax.

Then the next question which arises is: Have the Commissioners taken the proper proceedings for the purpose of enforcing that liability? That question turns entirely upon the provisions of Section 72 of the Act which created Super-tax, that is, the Finance (1909–10) Act, 1910, and the corresponding Section of the Act of 1918, that is to say, Section 7. It is quite unnecessary to read more than one of those two, because they exactly correspond. Section 7—there are very few parts which are material for the present purposes—provides this: "Super-tax "shall be assessed and charged by the special commissioners." Then the second Sub-section is: "Every person upon whom "notice is served, in manner prescribed by regulations under "this section, by the special commissioners, requiring him to "make a return of his total income from all sources . . . "shall make such a return in the form and within the time "required by the notice," and if he fails to make a return under this Section, or if the Special Commissioners are not satisfied with the return they may make an assessment to Super-tax according to the best of their judgment. Then Sub-section (8) is: "The Commissioners of Inland Revenue may make "regulations for the purpose of carrying this section into effect." As I have already shown, it is settled that Mr. Whitney is a person from whom the Commissioners may require a return, they do require a return, and under the Regulations which were duly made under the Sub-section they have to serve notice upon him. Those same Regulations provide that any notice required to be served on any person under these Regulations may be either delivered to such person, or left at his last known place of abode, or sent by post by pre-paid registered letter addressed to such person at his last known place of abode, and such service shall be deemed sufficient service for the purpose of these Regulations.

Now, it is pointed out that the notice which is the document in question, asserts no jurisdiction over the man; all that it does is to tell him he is required to do a certain act, and that if he

(1) Marion Brooke *v.* The Commissioners of Inland Revenue, 7 T.C. 261.

(Warrington, L.J.)

fails to do that act somebody else will take a certain step. That is all that it does. With a notice of that sort, one looks to see whether any restriction is imposed by the legislative authority which gives power to serve the notice as to the place where it shall be served. The only restriction alternative to personal delivery to the man himself is that it is to be left at his last known, or usual place of abode, or sent there by post by registered letter pre-paid. There is no local restriction except that if it were left otherwise than in his own personal possession it must be left at his last known place of abode, or sent there by post by registered letter. What they have done is they sent the letter by post. That seems to me to be sufficient service, and being sufficient service, it is not disputed that the assessment which was made by the Commissioners in default of his complying with that notice was an effectual assessment.

It seems to me, therefore, that the appeal must be dismissed, and the assessment must stand.

Sargant, L.J.—I am of the same opinion. After an argument which has travelled over a good deal of ground, the only question that this Court has to decide in this case is whether a proper notice was given to the Appellant. It is admitted that he was liable, and chargeable, under Schedule D of the 1853 Act, to Super-tax, that is to say, by the analogy by which Super-tax was imposed on persons in respect of property which was liable to Income Tax. The question is whether, he being abroad, the Commissioners were competent to serve a notice upon him which would originate the consequences which fall on anyone who does not make a return.

Now the only Section in question is Section 7 of the Act of 1918, which is the only Section I will refer to, because although the two years of the assessment refer to an earlier date, and are governed by the Act of 1910, the language of that Act is precisely the same as the language of the 1918 Act for these purposes. Section 7 speaks of every person upon whom notice is served, and Sub-section (5) speaks of anyone who fails to make a return, and then certain consequences follow. It is, therefore, I think, essential that there should be some service on the individual. The argument of the Appellant is substantially this, that a service on the individual in this case must be a service within the jurisdiction, that there is nothing which gives the Commissioners any power whatever to effect a service of such a notice out of the jurisdiction. I think whether it was sent by post or not is immaterial. It is said that they had no power to send a messenger with an individual notice, or in any other way to give a notice which operated outside the territorial jurisdiction. It seems to that that is applying wrongly the sort

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of analogy which is derived from the service of writs, documents which seek to enforce a personal liability against an individual by means of the jurisdiction of the Courts. It seems to me that the notice in such a case as this is much more like the notices which have to be given with regard to individual contracts, such as notices to terminate a lease, or to exercise an option, or, at any rate, to be of the class of notices which are referred to in Order XI, Rule 8 (*a*), of the Rules of the Supreme Court, which, after providing for service of certain Originating Summonses, and other processes, adds this: "Nothing herein "contained shall in any way prejudice or affect any practice "or power of the Court under which, when lands, funds, choses "in action, rights or property within the jurisdiction are sought "to be dealt with or affected, the Court may, without affecting "to exercise jurisdiction over any person out of the jurisdiction "cause such person to be informed of the nature or existence "of the proceedings with a view to such person having an "opportunity of claiming, opposing, or otherwise intervening." It seems to me that in the case of such a notice as that which is provided for in Section 7 of the Income Tax Act of 1918 there is no prima facie implication that the area within which that notice may be served is the area of territorial jurisdiction such as prescribed, or is necessary, in the case of a writ. I think it is for the Appellant, rather than for the Crown, to show some limitation of this general power of service which, prima facie, is operative wherever the person to be served can be found in such a case as this. If that is so, the result follows and it is not questioned that the service was effected, in fact, according to the Regulations, and there having been service, it appears to me that all the consequences follow which are sought to be enforced in the case, namely, that the Commissioners had power themselves to make an estimate, and make an assessment in accordance with that estimate.

I will only add this, that great reliance has been placed upon what was said by Mr. Justice Mathew, as he then was, and Mr. Justice A. L. Smith, as he then was, particularly on what the former said, in *Tischler* v. *Apthorpe*[1] in this passage at the conclusion of the judgment. He is referring to the old Act: "If the principal can be got at, there is no "need to have recourse to Section 41, or to have recourse to "Section 44. Where the case arises, contemplated by Section "41, of a resident abroad who cannot be reached by the Com- "missioners . . ." Those two passages or phrases, "can be "got at," and "cannot be reached by the Commissioners," were dealt with by the Appellant as if they meant cannot be legally got at because they are outside the jurisdiction. I do not think that was what the learned Judge referred to. I think that what he was speaking of was the physical difficulty of finding them.

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[1] 2 T.C. 89, at p. 93.

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and getting at them. If that is so, there is no inference adverse to the Crown to be drawn from the passage in question, or from the corresponding passage in the judgment of Mr. Justice A. L. Smith.

Mr. Reginald Hills.—The appeal will be dismissed with costs?

The Master of the Rolls.—Yes.

Mr. Reginald Hills.—If your Lordships please.

Notice of appeal having been given against the decision in the Court of Appeal, the case came before the House of Lords on the 7th, 8th; 11th and 19th May, 1925, when judgment was reserved.

Sir John Simon, K.C., M.P., Mr. A. M. Latter, K.C., Mr. A. M. Bremner, and Mr. F. McMullan appeared as Counsel for the Appellant, and the Attorney-General (Sir Douglas Hogg, K.C., M.P.) and Mr. R. P. Hills for the Crown.

On the 6th November, 1925, judgment was delivered in favour of the Crown with costs (Viscount Cave, *L.C.*, and Lord Phillimore dissenting), confirming the decision of the Court below.

JUDGMENT.

Viscount Cave, L.C.—My Lords, this appeal raises the question whether the Appellant, a citizen of the United States residing in New York, has been properly assessed to Super-tax.

The Appellant and his wife were the holders of shares in a company registered and carrying on business in the United Kingdom, which in each of the tax years ending on the 5th April in the years 1917, 1918, 1919, 1920 and 1921, respectively, paid a dividend on its shares; and in respect of each of those years the company was duly assessed to Income Tax and made a proportionate deduction from its dividends, the Appellant and his wife thus bearing Income Tax by way of deduction.

On the 10th March, 1920, the Special Commissioners of Income Tax, purporting to act under Section 72 (2) of the Finance (1909–10) Act, 1910, and Section 7 (2) of the Income Tax Act, 1918, caused notices to be sent by registered post to the Appellant in New York requiring him to make a return of his total income from all sources for each of the years ending on the 5th April, 1918, the 5th April, 1919, and the 5th April, 1920; and on the 21st October, 1920, the Commissioners caused a notice to be sent to him in like manner requiring him to make a like return for the year ending on the 5th April, 1921, and the three preceding years. The Appellant had no representative in the United

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Kingdom upon whom these notices could have been served. The Appellant made no return, and thereupon the Special Commissioners, in pursuance of Section 72 (5) of the Act of 1910 and Section 7 (5) of the Act of 1918, made an assessment upon him to Super-tax in the sum of £90,000 for each of the four years referred to in the notices in respect of the income arising to him and his wife from sources in the United Kingdom during the preceding year, and caused notice of the assessments to be sent by registered post to him in New York. The Appellant appealed against these assessments to the Special Commissioners, who confirmed them, subject to a Case stated for the opinion of the High Court, and their decision has been affirmed by Mr. Justice Rowlatt, and the Court of Appeal. The Appellant has now appealed to this House.

Of the four assessments under appeal, the first two were made under the Finance Acts of 1910 and 1915, and their validity depends upon the construction of those Acts, while the remaining two were made under the Income Tax Act, 1918, and must be dealt with according to the meaning which may be put upon that Act. But as the Act of 1918 reproduced and consolidated all the subsisting provisions of the earlier Acts, it will be sufficient for the present purpose if I refer to the sections of the Act of 1918 without indicating in each case the corresponding sections of the earlier statutes.

My Lords, Section 4 of the Act of 1918 provides that Super-tax shall be charged in respect of the income of any "individual," the total of which from all sources exceeds a specified amount; and it was argued on behalf of the Appellant that the word "individual" (which is doubtless substituted in this Section for the word "person" used elsewhere in the Act in order to exclude a corporation) must have some limitation, and that it should be read as confined to individuals who are within the territorial jurisdiction of the British Parliament and so as excluding persons resident abroad. I do not think that the operation of the Section can be so limited. Super-tax is described in the Section as an "additional duty of income tax"; and Income Tax is expressly charged under Schedule D, paragraph (1) (*a*) (iii), on the profits and gains accruing to a person not resident in the United Kingdom from any property in the United Kingdom or from any trade or employment carried on there. Further, Section 7 (2) of the Act provides for returns to be made for Super-tax purposes by the representatives or agents of non-residents, and this provision would not have been made if non-residents had been intended to be free from the tax. I think, therefore, that the word "individual" used in Section 4 is wide enough to include a non-resident who has an income in respect of which he is chargeable with ordinary Income Tax either directly or by way of deduction.

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It was suggested that, if a non-resident is chargeable with Super-tax, he must be so chargeable in respect of his total income from all sources, including income received abroad and not remitted to this country, and that Parliament cannot have intended such a result. To this it was answered on behalf of the Crown that no such result follows, and that the charge is limited in the case of a non-resident to his "Income Tax income," that is to say, to income in respect of which he is chargeable with ordinary Income Tax, either directly or by way of deduction. If this is so, it is certainly strange that so important a limitation was not expressed in the Act; and the answer presents some further difficulties. Section 5 (1) of the Act provides that "for the purposes of super-tax, the total income of any individual "from all sources shall be taken to be the total income of that "individual from all sources for the previous year, estimated "in the same manner as the total income from all sources is "estimated for the purposes of exemption or abatement under "this Act," subject to certain deductions allowed by Sub-section (3) of the same Section; and the Finance Act, 1920, Schedule 3, provides that, for the words "estimated for the purposes of "exemption or abatement under this Act," there shall be substituted the words "required to be estimated in a return made "in connection with any claim for a deduction from assessable "income." Now, when reference is made to the sections of the Act which deal with exemption and abatement, it appears that the total income to be estimated under those sections includes some income which is not chargeable with ordinary Income Tax. Thus, under the proviso to Section 26, certain persons there described, including persons resident abroad for the sake of health, can only obtain exemption or abatement on the terms of calculating their total income from all sources in respect of which tax may not be chargeable, as well as income in respect of which tax is chargeable. This appears to me to create a serious difficulty in the way of the Crown. I agree that it is impossible to impute to the Legislature an intention to tax an alien resident in his own country on his total income, British and foreign, for the sole reason that he has invested a substantial sum in this country; and, accordingly, that such a person, if chargeable with Super-tax at all, is chargeable on his "Income Tax income" and no more. But the fact that the charge is not so limited by the Statute points to the conclusion that an alien non-resident is not intended to be subject to the charge.

But the important and difficult question remains, whether the Act of 1918 provides machinery for assessing to Super-tax an alien resident abroad and having no representative in this country. It has been held in a series of cases, such as *Tischler* v. *Apthorpe*, (1885) 2 T.C. 89, 52 L.T. (n.s.) 814, and *Werle* v. *Colquhoun*[1], (1888) 20 Q.B.D. 753, that the power given by

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[1] 2 T.C. 402.

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Section 41 of the Income Tax Act, 1842 (now represented by Rule 5 of the General Rules in the First Schedule to the Act of 1918), to charge a person resident abroad in the name of a person acting on his behalf in the United Kingdom is an additional power given to the Revenue authorities and does not prevent them from assessing a non-resident person if he is found here; and in *Brooke v. Inland Revenue Commissioners*(1), [1917] 1 K.B. 61, [1918] 1 K.B. 257, this principle was applied to Super-tax. As Mr. Justice Mathew put it in *Tischler* v. *Apthorpe*(2), "if the "principal can be got at, there is no need to have recourse to "Section 41 or to have recourse to Section 44; where the case "arises, contemplated by Section 41, of a resident abroad who "cannot be reached by the Commissioners, then the Commis-"sioners are entitled to fall back upon the valuable and useful "provisions contained in those two Sections." But this leaves untouched the question whether, if the person sought to be charged is an alien having no representative in this country and incapable of being "reached by the Commissioners" here, he can be personally served with a notice of assessment or with a notice preliminary to assessment while he is abroad; and this is the question which has to be answered in the present case. It was answered in the affirmative by Mr. Justice Rowlatt, in *Inland Revenue Commissioners* v. *Huni*(3), [1923] 2 K.B. 563, and by Mr. Justice Rowlatt and the Court of Appeal in the present case, and has now to be finally determined by this House.

My Lords, the question so raised must in the main be tested by an examination of the provisions of Section 7 of the Income Tax Act, 1918, which alone provides the machinery for an assessment to Super-tax; and having carefully considered the terms of that Section I have come to the conclusion that it is not applicable to cases such as this. Section 7, Sub-section (1), enacts that "super-tax shall be assessed and charged by the "special commissioners," thus excluding the system of local assessments which is applicable to ordinary Income Tax; but that Sub-section must (I think) be read with the succeeding parts of the Section which prescribe the manner in which the assessment and charge are to be made. Sub-section (2) is in the following terms: "Every person upon whom notice is served, in manner "prescribed by regulations under this section, by the special "commissioners, requiring him to make a return of his total "income from all sources, or. in the case of a notice served upon "any person who is chargeable with or liable to be assessed to "income tax, as representing an incapacitated, non-resident or "deceased person, of the total income from all sources of the "incapacitated, non-resident or deceased person, shall, whether "he is or is not chargeable with super-tax, make such a return "in the form and within the time required by the notice." This enactment, which does not (as was suggested) give a privilege

(1) 7 T.C. 261. (2) 2 T.C. at p. 93. (3) 8 T.C. 466.

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but imposes a duty, is plainly binding upon any person (whether British or not) who is within the jurisdiction; and it may be—though on this I express no opinion—that it binds a British subject resident abroad. But it is difficult to believe that the Legislature of this country can have intended to impose such a duty upon a subject of a foreign country resident and being in that country, whether he is or is not chargeable to Super-tax here. The difficulty is increased when it is noted that by Sub-section (3) of the same Section it is made the duty of every person chargeable with Super-tax to give notice to the Special Commissioners that he is so chargeable—an enactment which is surely inapplicable to an alien resident and being out of the jurisdiction, who cannot be assumed to have any knowledge of our law; and that by Sub-section (4) any person who without reasonable excuse fails to make any return or to give any notice required by the Section is made liable to an immediate and a continuing penalty. By what right such a penalty could even in express terms be imposed upon an alien resident and being abroad, it is not easy to understand; and it appears to me that Sub-sections (2) to (4) cannot have been intended to apply to such a person. Now the power given by Sub-section (5) to the Special Commissioners to make an assessment to Super-tax "according to the best of their "judgment" is contingent on "failure" to comply with the obligation to make the return under Sub-section (2); and I see no escape from the conclusion that, where no such obligation exists, there can be no such "failure" to comply with it and accordingly that in such a case an assessment under Sub-section (5) cannot be made. The case is similar in some respects to the case of *Neilson*, [1890] 18 R. 338, and to *Dyson* v. *Attorney-General*, [1912] 1 Ch. 158.

In the course of the argument some discussion took place as to the effect of a Regulation made by the Special Commissioners under Section 72 (8) of the Finance (1909–10) Act, 1910, and continued in force by Section 238 of the Income Tax Act, 1918. This Regulation prescribes that any notice required to be served on any person under the Regulations may be sent by post by registered letter addressed to such person at his usual or last known place of abode, and that such service shall be deemed sufficient service for the purpose of the Regulations. It does not appear to me that this Regulation has a close bearing upon the point arising for decision in this case. When a notice is sent by post the postal authorities are only the agents of the sender to deliver the notice. The position is the same as if the sender—in this case the Special Commissioners—had sent a messenger abroad to serve the notice there upon the Appellant in person; and if (as I hold) personal service of the notice in this case could not have been effectively made upon the Appellant in New York, it follows that the service by post was equally ineffective. The

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Regulation cannot alter the construction of the Act or enlarge the Commissioners' jurisdiction (see Lord Davy in *Barraclough* v. *Brown*, [1897] A.C. 615, at p. 624).

Reference was also made to cases in which a document, not being a writ or other legal process, has been held to be capable of being served out of the jurisdiction; but these cases do not appear to me to be very material. The question, as it presents itself to me, is not whether the notices could be served out of the jurisdiction, but whether they could be so served upon an alien resident out of the jurisdiction; and this must depend upon the construction of the statute and not upon any rule as to service.

My Lords, the judgments of Mr. Justice Rowlatt in *Huni's* case[1] and of the Court of Appeal in the present case appear to proceed upon the view that it is immaterial whether service of a notice under Section 7 (2) upon an alien resident abroad does or does not create a legal obligation binding the person served, or whether Sub-sections (3) and (4) of the same Section are or are not enforceable against him, and that in the case of such a person it is sufficient that he has been invited to make a return and has been told that if he does not do so the Commissioners will assess him according to the best of their judgment. The Commissioners can then, it is said, act under the general authority to assess and charge Super-tax conferred upon them by Sub-section (1) of the Section, and may assess him as best they may. Mr. Justice Rowlatt in *Huni's* case dealt with this point as follows[2]: "Now it seems to me that the machinery created by this Section "has several aspects. It may lead to the commission of an offence. "What effect that has abroad it is not for me to say now. It "creates a duty. What the result of that is as such I do not know, "and I am not called upon to say. But I think it also operates "as a notice and no more. If a separate section had been framed "in somewhat less imperative language, it could have been made "quite clear. I think, however, there is involved in this "machinery the mere giving of a notice as a preliminary to the "Commissioners proceeding to do something which they are "entitled to do with regard to the respondent in respect of his "present or past property in this country, and that I ought not "to limit the words of the statute so as to make this notice as "a mere notice null and void." With the greatest respect for the opinion of the learned judge, I do not think that Sub-sections (2) to (4) can be so brushed aside. The Section must be read as a whole. Sub-section (1) is quite general in its terms and gives no authority to the Commissioners to make an assessment in any particular way. The manner in which they are to exercise their powers of assessment and charging is laid down in the Sub-sections which follow, and it is only if the person alleged to be chargeable with tax "fails" to comply with a notice under Sub-section (2) that the Commissioners are authorised to make an assessment upon him to the best of their judgment (which, in one case, has

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(1) 8 T.C. 466. (2) 8 T.C. at p. 474.

(Viscount Cave, L.C.)

been referred to as a "random" assessment) under the fifth Sub-section. The suggestion which was made during the argument that an assessment so made could be revised on proceedings being taken to enforce it, appears to be negatived by Section 176 and other sections of the Act. Further, it is expressly stated in the Respondents' case upon this appeal that the Commissioners in making the assessments purported to act in pursuance of Section 72 (5) of the Finance (1909–10) Act, 1910, or the corresponding provisions in the Income Tax Act, 1918; and I fail to see how in face of this statement the Respondents can now be permitted to lay aside Sub-section (5) and to claim that they acted under the general power in Sub-section (1). The course prescribed by the Section is that notice shall be first given to the person to be charged to make a return, and it is only if he fails to comply with this obligation that he can be asssesed at the Commissioners' discretion. If the machinery provided for assessment is not applicable to the case, then there is no power to tax.

My Lords, the conclusions at which I have arrived on the sections of the Act dealing with Super-tax are confirmed by a reference to the sections dealing with ordinary Income Tax. Super-tax is an additional duty of Income Tax (Section 4), and by virtue of Section 7 (6) all provisions of the Act relating to persons who are to be chargeable with Income Tax and to Income Tax assessments are, so far as they are applicable, to apply to the charge and assessment of Super-tax. Now it was not suggested in the argument before your Lordships that a notice relating to Income Tax could be served upon an alien resident abroad, and this although, under Section 220 (5) of the Act and the Regulations made by the Commissioners under Section 36 of the Finance (No. 2) Act of 1915, Income Tax notices may be served by post. Further, Section 101 of the Act of 1918 (which in this respect reproduces Section 53 of the Act of 1842) refers to a person not resident in the United Kingdom as a person who by reason of such non-residence "cannot be personally charged" under the Act, and similar expressions are to be found in Section 103 and in Rules 3 and 5 of the General Rules applicable to all the Schedules. Although the express statement of the impossibility of a personal charge on a non-resident is not to be found in Section 7 (2), yet the terms of that Sub-section referring to the notice to be sent and served on a representative of a non-resident assume that the impossibility exists. It appears to me that the whole statute is framed on the basis that direct assessment, whether to Income Tax or to Super-tax, can only be made upon persons who are or reside in this country or on representatives in this country of persons who reside abroad; and that if it is desired to have effective machinery for charging with Super-tax an alien resident and being abroad who has no representative here, that machinery must be provided by an amendment of the statute.

(Viscount Cave, L.C.)

If your Lordships should agree with the view which I have put forward, it will follow that the decision in *Inland Revenue Commissioners* v. *Huni*(1) must be deemed to be overruled.

I am of opinion that this appeal should be allowed and the assessments set aside, with costs here and below.

Lord Dunedin.—My Lords, the noble and learned Lord on the Woolsack has come to a conclusion as to two points on which I am in entire concurrence with him. First, he considers that any individual who receives profits from property in the United Kingdom is liable to Super-tax, and second, he holds that the income of the individual from all sources mentioned in Section 4 of the Act is income which is taxable within the United Kingdom. I shall therefore do no more at this stage than indicate with the utmost brevity the considerations which led me to the same conclusion.

As regard the first, there are the express words of Schedule D, which, dealing with ordinary Income Tax, says that " tax under " this Schedule shall be charged in respect of (*a*) the annual profits " or gains arising or accruing . . . (iii) to any person, whether " a British subject or not, although not resident in the United " Kingdom, from any property whatever in the United Kingdom "; and then there are the words of Section 4 which describe the Super-tax thereby imposed as an additional duty of Income Tax, which words are explained in a very luminous judgment of the late Lord, then Mr. Justice, Parker in the case of *Bowles* v. *The Attorney-General*(2), [1912] 1 Ch. 123. The point was decided in terms by the Court of Appeal in *Brooke* v. *The Inland Revenue Commissioners*(3), [1918] 1 K.B. 257.

As to the second, there is the consideration that according to Section 5, Sub-section (1), for the purposes of Super-tax the total income of any individual from all sources is to be estimated in the same manner as the total income is estimated for the purposes of exemption and abatement. Now, when you come to the Section dealing with exemption you find, Section 9, that the total income, which to entitle relief is not to be above the figures specified in the succeeding sections, is income estimated in accordance with the provisions of this Act, and income of a non-resident in the United Kingdom accruing out of the United Kingdom and not brought within the United Kingdom does not fall to be estimated according to the provisions of this Act.

Further, I am not troubled with Section 26, which has given my noble and learned friend some hesitation. For the clause there is not a substantive provision, but is only a proviso to a clause excepting from the privilege of exemption and relief those who are non-resident. It has nothing to do with the general scheme of the statement of income. Further, I would add that Section 5 (2) seems to me to point strongly the same way. Section 5 (2)

(1) 8 T.C. 466. (2) 5 T.C. 685. (3) 7 T.C. 261.

(Lord Dunedin.)

provides that when an assessment to (ordinary) Income Tax has become final, that is also final as regards the income from all sources for the purposes of Super-tax, thus showing that income which is not liable to Income Tax, i.e., income of a non-resident accruing abroad and kept abroad, is not to be taken into account in the matter of Super-tax.

I must, however, remark that this Sub-section cannot be further pressed for the purposes of this case, for if the Scotch case, which was not quoted to us, of *Duncan v. The Inland Revenue*(1), 1923 S.C. 388, was rightly decided—and I take it it was—it has no application to income such as that in the present case, where deduction for ordinary tax is made at the source.

My Lords, I shall now permit myself a general observation. Once that it is fixed that there is liability, it is antecedently highly improbable that the statute should not go on to make that liability effective. A statute is designed to be workable, and the interpretation thereof by a Court should be to secure that object, unless crucial omission or clear direction makes that end unattainable. Now, there are three stages in the imposition of a tax: there is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment. That, *ex hypothesi*, has already been fixed. But assessment particularises the exact sum which a person liable has to pay. Lastly, come the methods of recovery, if the person taxed does not voluntarily pay.

Now I have already dealt with the first stage. I come to the second, and that, so far as Super-tax is concerned, is dealt with in Section 7. Sub-section (1) says that Super-tax shall be assessed and charged by the Special Commissioners. That does away with all of what I may call the territorial arrangements which apply to ordinary Income Tax. Next follow a set of sub-sections which provide for means which may help the Special Commissioners in their task. It is here that I part company with the noble and learned Lord Chancellor. Holding that Sub-sections (2), (3) and (4) setting forth the request for and the making of the return of income from all sources are inapplicable to an alien non-resident in the United Kingdom, he concludes that where no return has been made there can be no failure in the sense of Sub-section (5), and that accordingly no assessment can be made. My Lords, I cannot help feeling with the utmost respect that that is tantamount to making liability dependent on failure to make a return, and yet *ex hypothesi* a liability is already established. But my real reason for differing from my noble and learned friend is that I look on these Sub-sections as mere aids to the Special Commissioners in their task, and not as conditions of their power. That power is, to my mind, conferred by Sub-section (1). As in the cases of *Tischler*, 2 T.C. 89, and *Werle*(2), 20 Q.B.D. 753, it

(1) 8 T.C. 433. (2) 2 T.C. 402.

(Lord Dunedin.)

was held that the power given to charge a resident abroad in the name of a person acting on his behalf in the United Kingdom did not prevent a direct assessment on that person if he was in effect found in the United Kingdom, so by analogy I think that the failure of some of the provisions of the succeeding Sub-sections to fit a particular case, does not prevent the Special Commissioners proceeding under the powers of Sub-section (1). It is, I think, apparent that the Special Commissioners are bound if they can to adopt the methods provided by the succeeding Sub-sections, and so I think indeed they have done. They have sent a notice requiring particulars in the only way available to them, viz., by post, and it is admitted that that notice was received. The next step lay with the Appellant, and he made no return, and I agree that the penalty section is inapplicable. For the Appellant is not subject to the jurisdiction of the English Court, nor has the British Parliament power to enjoin him personally to do anything.

Then comes Sub-section (5). I think that he failed to make a return, for I read "failure" in the sense of "de facto did not "make," not in the sense of "contrary to law did not make." Accordingly, I think the Special Commissioners were authorised to make an assessment according to the best of their judgment. But quite apart from that I think that under Sub-section (1) they were entitled to assess. I lay stress on that for this reason. It might have been that the notice never reached him. I think that the Commissioners would still have been entitled to assess, but the difference would have been that, if and when the Appellant came to know of the assessment made, he would have been absolutely entitled to be heard as to the amount, and if necessary to get it altered under the powers conferred on the Commissioners by Sub-section (7); whereas, when there has been failure by a person who is bound to furnish the notice under Sub-section (3), I imagine that there is no absolute right on the part of the person assessed to have the assessment altered, although I doubt not, as the object of the Act is to tax people justly and not unjustly, that the Commissioners would even then be ready to consider the question of the amendment of an assessment quite unjust as to amount.

My Lords, I think that I have expressed in somewhat different words what was said by Mr. Justice Rowlatt in *Huni's* case(1), [1923] 2 K.B. 563. I think that the case was well decided, and I therefore move that this appeal should be dismissed with costs.

Lord Wrenbury.—My Lords, some of the years here in question are before and some after the Income Tax Act, 1918. There is no need to discriminate between them, for the language of the enactments relevant in the matter here in dispute is the same, whether the year in question be before or after 1918.

(1) Commissioners of Inland Revenue *v.* Huni, 8 T.C. 466.

(Lord Wrenbury.)

Schedule D provides as follows: "Tax under this Schedule "shall be charged in respect of: (*a*) The annual profits or gains "arising or accruing . . . (iii) to any person, whether "a British subject or not, although not resident in the United "Kingdom, from any property whatever in the United Kingdom, "or from any trade, profession, employment or vocation exercised "within the United Kingdom." It is therefore beyond possibility of dispute that a non-resident alien is chargeable with tax under this British statute under some circumstances. The only possible question is whether the non-resident alien is chargeable with tax under the circumstances of the present case.

The policy of the Act is to tax the person resident in the United Kingdom upon all his income whencesoever derived, and to tax the person not resident in the United Kingdom upon all income derived from property in the United Kingdom. The former is taxed because (whether he be a British subject or not) he enjoys the benefit of our laws for the protection of his person and his property. The latter is taxed because in respect of his property in the United Kingdom he enjoys the benefit of our laws for the protection of that property. Lord Herschell in *Colquhoun* v. *Brooks*(1), 14 A.C. 504, expressed this by saying that "the Income "Tax Acts themselves 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."

My Lords, in my opinion the key to the solution of the question which arises in the present case is to be found in the words which I have quoted from Schedule D. There is no question but that the non-resident alien is taxable for something. He certainly, for instance, is taxable to Income Tax in respect of income upon which tax can be deducted at the source. If he is to be non-taxable under some circumstances in respect of income arising from property in this country, I think that words addressed to his particular case must be looked for in the statute expressing him to be free from that liability.

In the present case the property is, the person is not, within the United Kingdom. The person is a non-resident alien—an American subject residing in the United States. He is not here, but he draws a large income from property here. The question is whether he is taxable for Super-tax in respect of that property.

There are in the Income Tax Act, 1918, two charging sections, viz., Section 1 relating to Income Tax; and Section 4 to Super-tax. Section 1 charges Income Tax in respect of all property, profits or gains described in (amongst others) Schedule D. The charge is "in respect of" the property. The charge is upon the person in respect of the property. Section 4 charges an "additional duty "of income tax (in this Act referred to as super-tax)." The

(1) 2 T.C. 490, at p. 499.

(Lord Wrenbury.)

charge is "in respect of the income of any individual the total of "which from all sources exceeds" a certain sum. As to the meaning of the word "individual," I agree with that which has been said by the Lord Chancellor. It includes the person sought to be charged in this case.

As regards the word "income" I agree again with the conclusion at which the Lord Chancellor has arrived. It means such income as is within the Act taxable under the Act. Section 5 (1) assists in taking this view. The Act has nothing to do with the foreign income of one who is not a British subject and who is not resident here. The territorial limit of the Act to which Lord Herschell referred in *Colquhoun* v. *Brooks* does not extend to the foreign income of the person who is foreign both by nationality and by residence. The Act nowhere purports to tax income which is neither derived from property in the United Kingdom nor income received by a person resident in the United Kingdom. The word income wherever found in the statute is to be understood as excluding income neither so derived nor so received. But it includes all other income by virtue of the express words of Schedule D. If the person is resident in the United Kingdom his income from property whether in the United Kingdom or not is charged. If he is not resident in the United Kingdom his income from property in the United Kingdom is charged whether he is a British subject or not. So far, it is, I think, plain that the non-resident alien is to the extent above stated charged with the tax. This is true of Income Tax and is equally true of the additional duty of Income Tax, called Super-tax.

My Lords, in my opinion, under the express words of Schedule D the non-resident American is chargeable in respect of income arising from property in the United Kingdom.

There is a second question in the case, viz.: whether the Appellant has been duly brought within the machinery for assessment provided by the Act. This turns upon Section 7. There was sent to the Appellant by post addressed to him in the United States a notice under Section 7 (2) requiring him to make a return. It is contended that there was no right to post him such a notice so addressed. The case, it is contended, is similar to the case of service of a writ out of the jurisdiction. I do not agree. It is similar rather to the service of a notice of dishonour of a bill or of a notice to quit or of a notice requiring payment of calls upon shares as a preliminary to forfeiture in default of payment. It is not a step in a judicial proceeding, but a step which will create *inter partes* a state of things in which judicial proceedings can subsequently be taken in default of compliance. I think the notice was duly served. In my opinion, *Inland Revenue Commissioners* v. *Huni*[1], [1923] 2 K.B. 563, was rightly decided.

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(1) 8 T.C. 466.

(Lord Wrenbury.)

But even if this is not so, it remains that Section 7 (1) in providing that Super-tax shall be assessed and charged by the Special Commissioners has given them an authority and has imposed upon them a duty which remains in them, even if the machinery of the subsequent Sub-sections fails to meet the case.

Section 7, Sub-section (1), is self-contained and imperative. Section 4 has imposed a charge. Section 7 (1) has imposed upon the Special Commissioners the duty of assessing the amount. Sub-sections (2) to (5) do no more than supply machinery for giving effect to Sub-section (1). But there are no words to the effect that if that machinery is inapplicable to the particular case, the duty in Sub-section (1) shall fail to exist and shall not be performed. Under Section 7, Sub-section (3), it is the duty of every person chargeable with Super-tax to give notice that he is chargeable. If, therefore, I am right in thinking that the non-resident alien is chargeable in respect of property in the United Kingdom, it was his duty to give that notice, and whether he performed that duty or not, and whether the notice addressed to him out of the United Kingdom was duly served or not, it remains that Section 7, Sub-section (1), stands as a statutory duty which the Special Commissioners must discharge to the best of their ability, leaving the party assessed to his remedy if he is in a position to prove that the assessment made upon him is excessive. The power of the Commissioners to assess in default of a return is not an exclusive power to assess. Their power and duty to assess arises not only in the case in which the taxpayer makes default, but because Sub-section (1) gives them power to assess and imposes upon them the duty to do it. If (but for this point) the liability exists I am unable to agree in the view that the liability is non-existent if it be found that the machinery provided by the Act does not fit the case.

I rest my judgment upon this second question, however, on the first ground, viz.: that the notice could be posted to the alien abroad.

Upon both questions I think that the Crown succeeds, and that this appeal ought to be dismissed.

Lord Phillimore (read by Lord Carson) :—

My Lords, by Section 4 of 8 & 9 George V, c. 40, an additional duty of Income Tax (in the Act referred to as Super-tax) is charged in respect of the income of any individual, the total of which from all sources exceeds £2,500.

And by Section 5 the total income for this purpose is to be estimated in the same manner as the total income from all sources is estimated for the purposes of exemption or abatement under the same Act, with certain provisos not material to the present case.

(Lord Phillimore.)

Mr. Whitney's income so estimated is certainly above £2,500 a year, and he is certainly an individual.

But is he an individual who is intended to be subjected to this taxation ? He is a foreigner and non-resident. He has not been at any material time even temporarily in this country.

Parliament has not by this Act arrogated a right to tax all the world of well-to-do men. That is conceded. What, then, is the limit ?

It is suggested that Super-tax follows Income Tax, that Mr. Whitney is taxable to Income Tax in respect of part of his property, that is, in respect of his investments in Great Britain, and so should be subject to Super-tax in respect of the income from that property exceeding £2,500.

My Lords, I can see no such limit. I find that individuals are to be taxed. I can see that it cannot be all the individuals in the world. There must be some qualification. I could understand that the limit might be all income-taxable individuals ; but I see no justification for so violent a gloss as would confine the word individual to all income-taxable individuals and then apply it only in respect of their income-taxable property and, not as the statute provides, in respect of their income from all sources.

I turn now to the mode in which the income of a super-taxable individual is to be ascertained. I get this by reference, as directed by the statute, to claims for exemption or abatement. These are provided for by Sections 9 to 31.

I find in Section 27 that a person claiming exemption or abatement must state all the particular sources from which his income arises. I imagine Mr. Whitney making this return. Where would he find warrant for omitting from his return his income derived from investments in America ? And if he is to return this income, what provision is there for his not being assessed upon it ? But Counsel for the Crown agree that he is not to be so assessed.

Exemption and abatement cases are, as a rule, only for persons resident in the United Kingdom. But there are certain exceptions in favour of persons residing abroad under Section 26, and it is clear that in those cases income from all sources, "including "any income in respect of which tax may not be chargeable as "well as income in respect of which tax is chargeable," is to be included.

What is a non-resident to do who is told to return for Super-tax purposes his total income estimated as it would be for purposes of exemption or abatement ? How is he to make a true return and one according to the form and yet avoid being assessed upon non-assessable income ? What is to happen if his income from British sources is under the Super-tax limit, but his total income from all sources above it ?

(Lord Phillimore.)

A point was made by the Attorney-General on the words of Section 5 (3) (*b*), where it is contemplated that an individual subject to this tax may be in the service of the Crown abroad, which he said showed that the tax was intended to be charged on non-residents.

It seems to me a slender basis on which to build the argument. To begin with, the service may be for no long period, and may be quite consistent with the subject having a residence in this country.

Further, it is possible that the statute intends to treat public servants drawing their money from the revenues of the State only temporarily non-resident (and many of them will be diplomats whose foreign residence is extra-territorial) as for this purpose in a position equivalent to residents.

The second point made by Counsel for the Appellant turned upon questions of procedure. I do not think that the two points can be separated. If I felt sure that Parliament had intended to tax individuals in the position of the Appellant, I should struggle to adapt the procedure ; though I might in the end find that such an adaptation made too violent a demand upon the language of the statute.

But if I find that the procedure is inapplicable, this will be a strong reason for supposing that Parliament did not intend to tax this class with this tax.

Now, in the first place, your Lordships have to consider Sub-sections (3) and (4) of Section 7. If people in the position of the Appellant are chargeable with Super-tax, they must give notice to the Special Commissioners, and their failure renders them liable to a penalty.

If a non-resident, and especially a non-resident alien, should be minded to come to this country for the purpose of visiting the Exhibition at Wembley, would it not be monstrous if he were suddenly prosecuted for this penalty ? It seems to me no answer to suggest that in the circumstances the penalty imposed would be a nominal one. He would have been treated as a lawbreaker.

Then, again, no assessment can be made except after failure to make a return or upon the making of an unsatisfactory return. It has been suggested that Sub-section (1) of the same Section gives power to the Commissioners in special cases to arrive at an assessment in any way they think proper ; but in my opinion that is not so. Sub-section (1) only makes them the officers to determine. The conditions of this determination are to be found in Sub-section (5). It is only when there is a failure or an unsatisfactory return that they are enabled to make an assessment according to the best of their judgment. Failing the condition precedent, they have no jurisdiction.

(Lord Phillimore.)

Then let me consider the form of return which the individual is required to make. "Return" is a word of art familiar in our law, as, for example, the return to a writ. This form would require him, as I have already observed, to make a return of his total income from all sources for the previous year, or, in the language of the declaration which he signs, "the whole of my "income from every source whatsoever," which further is to be "estimated according to the provisions of the Income Tax Acts."

I am not sure whether there is any duty on non-resident British subjects, and one should perhaps add not merely non-resident here but domiciled abroad, to know the provisions of our Income Tax Acts. But I am sure that it is not the duty of a non-resident and undomiciled alien to know them.

I pass over minor objections to the form, but I think it convenient to refer to what was said by Lord Cozens-Hardy (Master of the Rolls) in *Dyson* v. *Attorney-General*, [1912] 1 Ch. at page 160, concerning the at one time famous "Form 4." "The return," he says, "is one and indivisible. No penalty could "be exacted for omitting to make an unauthorised return."

I would further fortify myself by two authorities.

In *Ex parte Blain*, (1879) 12 Chancery Division at page 326, Lord Justice James speaks of "the broad general universal "proposition that English legislation, unless the contrary is "expressly enacted or so plainly implied as to make it the duty "of an English Court to give effect to an English statute, is "applicable only to English subjects or to foreigners who by "coming into this country, whether for a long or a short time, "have made themselves during that time subject to English "jurisdiction."

In *Colquhoun* v. *Heddon*(1), (1890) 25 Q.B.D. at page 134, Lord Esher (Master of the Rolls) says: "It seems to me that "unless Parliament expressly declares otherwise, in which case "even if it should go beyond its rights as regards the comity of "nations the Courts of this country must obey the enactment, "the proper construction to be put on general words used in an "English Act of Parliament is that Parliament was dealing only "with such persons or things as are within the general words "and also within its proper jurisdiction. . . . "

It has been said that no point was made of Mr. Whitney being an alien. But it is a point that, if the statute should be construed as the Crown desires, it must include aliens.

Putting all these matters together, I think that as the law at present stands the Appellant is not liable to Super-tax, and I see no great harm in coming to that conclusion. If it is desired, it would be easy for Parliament to express the liability in plain language and direct the necessary modification in the procedure.

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(1) 2 T.C. 621. at p. 625.

(Lord Phillimore.)

Meanwhile, there would be no harm, in my humble judgment, in giving to those responsible for the finances of the country the opportunity of considering the familiar saying about the bird with the golden eggs.

My Lords, my sentence would be for allowing this appeal.

Lord Carson.—My Lords, I am of opinion that this appeal fails. As I am in complete agreement with the reasoning and conclusions arrived at by my noble and learned friends Lords Dunedin and Wrenbury, I do not think it necessary to add anything.

Questions put:—

That the Order appealed from be reversed.

The Not Contents have it.

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

The Contents have it.