NO. 1204—HIGH COURT OF JUSTICE (KING'S BENCH DIVISION)—
4TH, 5TH AND 14TH JUNE, 1940

COURT OF APPEAL—20TH, 22ND AND 25TH NOVEMBER, 1940

HOUSE OF LORDS—16TH, 17TH, 19TH AND 23RD FEBRUARY AND
27TH APRIL, 1942

McMILLAN v. GUEST (H.M. INSPECTOR OF TAXES)(1)

Income Tax, Schedule E—Office of profit within the United Kingdom—Director of British company residing abroad.

The Appellant was a director of a private limited company incorporated under the Companies Acts in this country in which it was resident and controlled. In 1919 he was appointed general manager of an associated company in America, where he thenceforward resided. He remained a director of the British company, receiving copies of minutes, balance sheets, managing directors' and auditors' reports, and assisted in the management of the British company's Canadian branch. But he took no part in England in the management of the British company and exercised no functions as a director in England.

Held, *that, as a director of the British company, the Appellant held a public office within the United Kingdom within the meaning of Schedule E, and was accordingly assessable to Income Tax in respect of his director's remuneration from that company.*

CASE

Stated under the Income Tax Act, 1918, Section 149, by the Commissioners for the General Purposes of the Income Tax for the Division of St. Margaret and St. John in the County of Middlesex for the opinion of the King's Bench Division of the High Court of Justice.

1. At a meeting of the Commissioners for the General Purposes of the Income Tax for the Division of St. Margaret and St. John in the County of Middlesex held at 15 Victoria Street in the City of Westminster on 22nd February, 1939, James Gellatly McMillan (hereinafter called "the Appellant") appealed against the following assessments made upon him under Schedule E of the Income Tax Act, 1918, in the sums of:—

£13,457 for the year 1937-38
£13,831 for the year 1938-39

in respect of his office as a director of a company called A. Wander, Ltd.

2. The following are the agreed facts:—

(1) In 1910 the Appellant joined A. Wander, Ltd. (hereinafter called "the old company") which was the predecessor of the present company of the same name. The business of the old company was the manufacture and sale of food preparations. In 1914 the Appellant was made a managing director of the old company and in 1918 or 1919 Sir Harry Hague was made a joint managing

(1) Reported (C.A.) [1941] 1 K.B. 258; (H.L.) [1942] A.C. 561.

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director of the old company with the Appellant. A copy of the memorandum and articles of association of the old company are attached hereto, marked " A ", and form part of this Case(1).

(2) Some time prior to 1919 a company (hereinafter called " the Chicago " company ") had been incorporated in Chicago for the sale in America of food preparations similar to those sold by the old company and in the year 1919 the Appellant was asked by his co-directors of the old company to go to Chicago to supervise and reorganise the business of the Chicago company and to become its general manager. After the terms of his remuneration as such general manager had been satisfactorily settled and agreed, the Appellant left for Chicago in 1919. Since 1919 he has continued to receive remuneration from the Chicago company for his services as general manager. In 1922 he ceased to be a joint managing director of the old company but he remained a director thereof.

(3) Since 1919 the Appellant has been resident and ordinarily resident in America. In 1938 he became a naturalised American citizen.

(4) In 1923 the old company was reconstructed. It sold the whole of its assets and undertaking to a new company (hereinafter called " the " new company ") of the same name which was incorporated on 8th January, 1923. Pursuant to the reconstruction the old company went into liquidation. A copy of the memorandum and articles of association of the new company is attached hereto, marked " B ", and forms part of this Case(1). The new company holds a minority interest in the shares of the Chicago company. The new company is resident and controlled in the United Kingdom.

(5) The Appellant was appointed a director of the new company by its articles of association (see article 83). He has no contract of service with the new company.

(6) Article 90 of the new company's articles of association provides that the remuneration of the directors, other than the managing directors, shall be a sum equal to fifteen per cent. of the net profits of the company in every year (after making a deduction from such net profits of a sum equal to two-and-a-half per cent. on the paid up capital of the company) and such remuneration is to be divided among the directors in such proportions as they may agree, and in default of agreement, equally.

(7) Whilst the said article 90 has not been altered, the directors of the new company agreed in 1927 that the fifteen per cent. above referred to should be reduced to ten per cent. as from 1st January, 1926, and only ten per cent. has since that date been paid to them. (A copy of this agreement dated 12th July, 1927, is attached hereto, marked " C ", and forms part of this Case(1).)

(8) Under the foregoing arrangements, the Appellant, as a director of the new company, received " tax free " remuneration during the years 1936-37 and 1937-38 in the respective sums of £10,127 and £10,467. The assessments for 1937-38 and 1938-39 under appeal have been made in the respective sums of £13,457 and £13,831, the basis of such assessments being the amounts received by the

(1) Not included in the present print.

Appellant (plus the Income Tax payable by the company on his behalf) in the year preceding the year of assessment, thus:—

Remuneration as director		1937-38 *assessment*
1936 remuneration received March, 1937	...	£10,127
Add		
Income Tax on directors' fees 1936-37	...	£3,330
Amount of assessment		£13,457
Remuneration as director		1938-39 *assessment*
1937 remuneration received April, 1938	...	£10,467
Add		
Income Tax on directors' fees 1937-38	...	£3,364
Amount of assessment		£13,831

(9) The services which the Appellant renders to the new company are set out in the statement annexed hereto and marked "D"(1). Copies of all minutes, annual balance sheets and managing directors' and auditors' reports of the new company are sent regularly to the Appellant in America. Unless the receipt of such information can be so regarded, the Appellant takes no part in England in the management of the new company, and exercises no function in England as a director of the new company. He has attended no board meetings of the new company in England, except one in 1931, when he happened to be in this country on holiday. He also attended one board meeting of the new company, which was held in Chicago in 1925. The new company does not require the Appellant to attend board meetings and notices of board meetings are not sent to him.

3. Counsel on behalf of the Appellant contended that in the foregoing circumstances the Appellant did not hold or exercise an office of profit within the United Kingdom within the meaning of Schedule E to the Income Tax Act, 1918.

4. It was contended on behalf of the Crown:—

(1) That a directorship of an English company is an office of such a nature that there are duties attached to it by Statute from which no person can escape by means of a private arrangement with the company and referred to Sections 37, 112 and 122 of the Companies Act, 1929.

(2) That if a director lives abroad and everything to be done by him with regard to the company's management can be done abroad, that does not relieve him of his duties in respect of the company under the Companies Act. For that reason the office of such a director is an office of profit which is held within the United Kingdom.

(3) That the Appellant holds a directorship in an English company which is an office of profit within the United Kingdom.

5. The following cases were referred to:—

Pickles v. *Foster*, 6 T.C., pages 131 and 132.
Proctor v. *Ryall*, 14 T.C., pages 204, 206 and 213.
Barson v. *Airey*, 10 T.C., pages 609, 636, 641 and 644.

(1) Not included in the present print.

6. We, the Commissioners who heard the appeal, decided that as the Appellant retains the right and duty to exercise the power of a director he is therefore liable to assessment under Schedule E.

Dissatisfaction with our determination as being erroneous in point of law was thereupon expressed on behalf of the Appellant who subsequently required us to state and sign a Case for the opinion of the High Court, which Case we hereby state and sign accordingly.

Dated 17th July, 1939.

A. H. PREECE,
A. HARRIS,
HAROLD W. COUZENS,
Commissioners of Taxes for the Division of St. Margaret and St. John in the County of Middlesex.

J. A. WARRINGTON ROGERS,
Clerk to the Commissioners for the Division of St. Margaret and St. John in the County of Middlesex.

The case came before Lawrence, J., in the King's Bench Division on 4th and 5th June, 1940, when judgment was reserved. On 14th June, 1940, judgment was given against the Crown, with costs.

Mr. J. Millard Tucker, K.C., and Mr. Terence Donovan appeared as Counsel for the Appellant, and the Attorney-General (Sir Donald Somervell, K.C.) and Mr. Reginald P. Hills for the Crown.

JUDGMENT

Lawrence, J.—The Appellant is a director of an English public company but does not exercise any of his functions as a director within the United Kingdom. In these circumstances, the Commissioners have held that he is liable under Schedule E on his remuneration as a director.

For the Appellant it is contended: (1) that the question turns upon the construction of Schedule E; (2) that the cases of *Pickles* v. *Foster,* [1913] 1 K.B. 174; 6 T.C. 131, and *Proctor* v. *Ryall,* 14 T.C. 204, decide that under Schedule E only those officers of public companies are chargeable who exercise their offices within the United Kingdom; (3) that the case of *Barson* v. *Airey,* 10 T.C. 609, is consistent with the above cited cases, having been decided on the ground that the exercise of the chairman's office in China was not separable from the other exercise of his office as chairman within the United Kingdom; (4) that the case of *Bennet* v. *Marshall,* 22 T.C. 73, being a decision on Schedule D, is not relevant to the question under discussion, and (5) that a director's duties under the Companies Acts do not necessitate his presence in the United Kingdom or any activity here which can properly be called the exercise of his office.

For the Crown it was contended that the case of *Bennet* v. *Marshall* is really inconsistent with *Pickles* v. *Foster* and *Proctor* v. *Ryall,* and that the result of accepting a directorship of an English public company coupled with the duties imposed upon a director by the Companies Acts, is that the director does have or exercise his office within the United Kingdom since the fundamental matter to be considered is the source of his income and not the place of the exercise of his office, and the source of his income is his contract with the English company.

I am of opinion that I ought to follow *Pickles* v. *Foster* and *Proctor* v. *Ryall,* which were decided upon Schedule E and were not considered by the Court of Appeal in *Bennet's* case, which was upon Schedule D. Moreover, I respectfully agree with the reasoning of Rowlatt, J., in *Proctor* v. *Ryall* and,

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in particular, that Rule 18 (2) applicable to Schedule E " indicates by its " language . . . . that the place of exercise governs."(1) It would have been unnecessary to provide that a person chargeable shall be deemed to exercise his office at the head office of the department under which it is held if the locality of its exercise was irrelevant.

In the present case, the agreed facts are that the Appellant in fact exercised no part of his office within the United Kingdom, and the Commissioners have not found otherwise but based their judgment upon the ground that he was liable because he retained the right and duty to exercise his powers as a director in the United Kingdom, a ground which, in my opinion, is inconsistent with the cases cited and with the true construction of Schedule E.

The appeal will, therefore, be allowed with costs.

Mr. Tucker.—My Lord, on the footing of your Lordship's judgment, we are entitled to have repayment of the tax already paid. Will your Lordship fix the rate of interest?

Lawrence, J.—Yes, 3 per cent.

Mr. Tucker.—If your Lordship pleases.

The Crown having appealed against the decision in the King's Bench Division, the case came before the Court of Appeal (Sir Wilfred Greene, M.R., and Clauson and Goddard, L.JJ.) on 20th, 22nd and 25th November, 1940, and on the last-named date judgment was given unanimously in favour of the Crown, with costs, reversing the decision of the Court below.

The Attorney-General (Sir Donald Somervell, K.C.) and Mr. Reginald P. Hills appeared as Counsel for the Crown, and Mr. J. Millard Tucker, K.C., and Mr. Terence Donovan for Mr. J. G. McMillan.

JUDGMENT

Sir Wilfrid Greene, M.R.—We need not trouble you, Mr. Hills.

This is an appeal from a judgment of Lawrence, J., who reversed the decision of the General Commissioners for the Division of St. Margaret and St. John in the County of Middlesex.

The Respondent has for many years been a director of a company called A. Wander, Ltd., and was a director of the predecessor of that company, which was reconstructed in the year 1923. The Company is a company incorporated under the Companies Acts. Its directorship and the whole of its government is in this country. The Respondent appealed to the General Commissioners against assessments made upon him under Schedule E of the Income Tax Act, 1918, for the years 1937-38 and 1938-39 in respect of his office as a director of the Company.

It appears that for many years the Respondent has, in fact, resided in the United States of America, where he performed tasks on behalf of the old company and also for the new company since its formation. During the years of assessment he was in the United States performing those tasks, which consisted of generally furthering the interests of the Company in the Continent of North America and the interests of a subsidiary company in which it was interested in the United States, of which he was, I think, the managing director. During the period in question covered by these assessments, he did

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(1) 14 T.C., at p. 214.

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not, in fact, take any part in the direction of the Company in England. He resided the whole time in North America, where he performed the tasks to which I have referred. He attended no board meetings in England and, speaking quite generally, he took no part at all in the direction of the Company in England.

The remuneration of the directors of the Company is provided for by the articles, but the original arrangements with regard to remuneration, contained in article 90, have been modified by an agreement between the Company and its directors (including the present Respondent), dated 12th July, 1927. The articles had provided that the remuneration of the directors other than the managing directors should be an amount equal to 15 per cent. of the net profits in every year ascertained in the manner indicated. By this agreement the divisible remuneration for the directors was reduced to 10 per cent. of the profits.

It is to be observed that the remuneration payable to the Respondent under the articles, as modified by this agreement, is paid to him as a director without any reference to particular tasks which he may be performing in the Continent of North America. The tasks which he is there performing are tasks which he does not perform under any obligation so to do. He could refuse to perform them; he could return to this country tomorrow; he could during the period of assessment have taken the part which he was entitled to take in the direction of this Company in England; he had the right to attend the board meetings in England if he had been so disposed, and the work that he was doing in the Continent of North America was something entirely outside his duties as a director; he was under no contract to perform those tasks and he received no remuneration for doing so.

It was suggested in argument that he could be regarded as having had delegated to him, under article 108, the powers of the board. That article in common form provides that: "The Directors may delegate any of their "powers to committees consisting of such member or members of their body "as they think fit." No such delegation was, in fact, made, so far as appears from the Stated Case, beyond which, of course, we are not entitled to go with regard to matters of fact.

The position, therefore, to sum it up, during the relevant period, was this: the Respondent was a director of an English company which had its seat of government in England. During the period in question he had all the rights of a director. He was subject also to all the liabilities of a director. His duties as director (by which I mean the duties which fall upon him by the general law and the particular articles of this Company) were, so to speak, in abeyance for the reason that his fellow directors had dispensed with his services in England, because, no doubt, they thought that he would do better work by remaining in the United States. Nevertheless, all his rights and all his duties as director, if they had been, in fact, exercised, would have been exercised in this country and nowhere else, a circumstance which, to my mind, is not affected by the fact that during this period he has been doing other work for the Company voluntarily at the request of his fellow directors and without payment. If the position of this gentleman with regard to the Company which I have stated is borne in mind, I cannot myself find any real difficulty in construing the language of Schedule E as applied to those facts. It was held by the General Commissioners that the Respondent during the years in question was liable to assessment under Schedule E. That decision, of course, implies that, in their view, the Respondent had or exercised a public office or employment of profit within the United Kingdom. That decision was reversed by Lawrence, J., and this appeal results.

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Schedule E provides that tax under the Schedule " shall be charged in " respect of every public office or employment of profit ". I need not read the other words, because they are not applicable to the present case. The necessity of the office having a public character appears in the Schedule itself and, of course, governs the remaining relevant provisions. Then, under Rule 1, tax under the Schedule is to be charged " on every person having or exercising " an office or employment of profit mentioned in this Schedule "; and the list of public offices and employments of profit is to be found in Rule 6. It is there for the first time that the reference to locality appears. Rule 6 provides that: " The tax shall be paid in respect of all public offices and employments " of profit within the United Kingdom or by the officers hereinafter respectively " described, namely . . . . "—then the relevant head is letter (*h*): " offices " or employments of profit under any company or society, whether corporate " or not corporate ".

I pause there to deal with one argument that was put forward by Mr. Tucker on behalf of the Respondent, namely, that the holder of the office of director in a company incorporated under the Companies Acts does not hold a public office under a company within the meaning of that paragraph. He asked what the element of publicity was and how it should be defined in order to come within the language of the paragraph. It is, in my opinion, too late in the day to hold that the holder of the office of director in a company incorporated under the Companies Acts is not the holder of a public office within the meaning of the Rule. No doubt, when the original Income Tax Acts were passed, the phrase " any company or society, whether corporate " or not corporate " embraced a very limited number of companies or societies, because at that time the great expansion of joint stock enterprise had not begun. Nevertheless, such companies as did exist, I venture to think, were unquestionably regarded as companies the holding of office in which was the holding of a public office. As time has gone on, the nature of companies incorporated under the Companies Acts, of course, has changed, and now under the same Acts are incorporated companies of great importance, whose operations are a matter of public interest, as well as the most trivial companies which concern nobody but those directly interested in them: but I am myself quite unable to think of any division of companies incorporated under the Companies Acts which would confine the phraseology of this Rule in the way that Mr. Tucker would have it confined. What the necessary element of publicity must amount to in order to come within the language of the Rule is a matter which we are not called upon to define. It is really one of those cases, I cannot help thinking, which must answer itself, and I am prepared to hold and to hold without hesitation that the director of a company incorporated under the Companies Acts is the holder of a public office. So much for that argument.

The next argument that is put forward on behalf of the Respondent is that the test of locality which should be applied for the purpose of finding out whether an office is or is not within the United Kingdom lies in the question: Where are the functions of the office performed? It is said that in the present case all the functions of the office are performed by the Respondent outside the United Kingdom. It is important to bear in mind, in relation to that argument, the real nature of the office of a director. The word " office " is not infrequently used as a synonym for " employment ", but the office of director is something quite different from the employment of an agent or even the employment of a Crown servant. Under a contract of mere employment, the tasks to be performed by the employee are, of course, to be performed in the place which the contract indicates, and, if a

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person is employed as agent abroad of an English company, his task is to perform the duties of that agency abroad, and I can well see why in a case of that kind it would not be possible to say that an agent held an office within the United Kingdom; he would fall to be assessed, if he is assessable at all, under Schedule D and not under Schedule E—that is, before the Act was amended. But, in the case of a director, the position appears to me to be entirely different. What I am saying deals—and deals only—with this particular Company, and I have no intention of expressing any opinion as to what might happen in the case of a director of an English company whose seat of government was in a foreign country. In such a case, there may be an argument for saying that different considerations apply; I say nothing about it, because it is not relevant to the consideration of the present problem, and I express no opinion one way or other; but, in the case of a company situated and governed as this Company is, it is to be remembered (and this appears to me to be the crucial matter) that every right which a director has and every duty which the law, general or special, imposes on the director is to be exercised in this country and nowhere else. As a test of that, in the matter of the director's rights, it must be remembered that a director is entitled to ask the assistance of the Courts of this country to enable him to exercise those rights. If he is excluded by his fellow directors from the board-room, he is entitled to obtain the assistance of the Courts here to secure entrance for him. That brings out one of the differences between the case of a director of a company and the case of a person who is merely employed by a company. Such a person has no such specific rights which will be specifically safeguarded by the Courts. If he is excluded from the job for which he is employed, his remedy is a remedy in damages. A director, on the other hand, has a definite specific right which is entitled to protection.

In the case of an ordinary director who does, in point of fact, perform the duties of a director in this country, it, of course, cannot be questioned that Schedule E applies to him. The problem is on the facts of this case to ascertain what is the true test of the locality of the office. We have here, on the one hand, functions performed in the United States and in Canada which are outside the normal duties of a director; we have the normal duties of a director exercisable, if he were minded to exercise them, in England and nowhere else; we have the normal rights of a director enforceable, if he were minded to enforce them, in England and nowhere else. It appears to me that the office is tied to this country by reason of those circumstances, and the fact that during any given period an individual director is not performing those duties or exercising those rights does not sever that tie. If the case be taken of a director who takes no part whatsoever in the company's affairs and does no work for it, who neither performs the duties nor exercises the rights of a director but chooses, let me assume, to live abroad; let me also assume that the articles of his company, like the articles of the present Company, do not put him under compulsory retirement if he fails to attend board meetings; it could not be suggested, it appears to me, that such a director would not be properly described as the holder of a public office within the United Kingdom or as a person having a public office in the United Kingdom. If he has not an office in the United Kingdom, where has he? It seems to me that in such a case the applicability of Schedule E is beyond question.

The present case is a variant of that. It is precisely on all fours with the facts I have suggested in the assumed case, with the added circumstance that the director in question is voluntarily and without remuneration doing work for the Company in the United States. Does that super-added fact

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really alter the position? In my opinion, it does not. It seems to me that the basic fact remains that the office *qua* office and considered as a complex of rights and duties is a thing which is tied to and bound up with the locality of the Company itself. These added voluntary functions are something outside the basic duties and rights of the office, and the fact that they have been added to those basic rights and duties which still remain does not operate to disassociate the office of this director from the Company in England. Those appear to me to be the real conclusive arguments which displace the claim of the Respondent in this case.

A number of authorities were referred to. I do not find any real assistance from them, but there are one or two of them to which I must refer. Mr. Hills referred to two cases decided under Schedule D, *Pickles* v. *Foulsham,* 9 T.C. 261, and *Bennet* v. *Marshall,* 22 T.C. 73. Those were cases under Schedule D and were decided in reference to the language of that Schedule, which is different from the language of Schedule E. I do not find that those cases really assist me in the decision of the present question. But there were cases referred to by Mr. Tucker and Mr. Donovan with regard to which I must say a word. The earliest of those was the case of *Barson* v. *Airey,* 10 T.C. 609. That was a case where the chairman of the board of a British company earned certain additional remuneration in respect of services performed by him for the company when on visits to China. The only argument in that case was that the additional remuneration which he received in respect of those services could be disassociated from his office of director. The General Commissioners found as a fact that that additional remuneration was paid to him as chairman of the company for services rendered by him as a director. The only question when the matter came before the Court was whether there was evidence to support that finding. It does not appear to me that there is anything in that case which bears on the present question. The taxpayer there was chairman of directors, and he performed the normal duties of a director in this country during the period of assessment in question, save for the fact that during part of the period he was away in China. He was, therefore, unquestionably having or exercising the office of director in this country and, once the decision was reached and once it was accepted, as it was accepted in that case, that the extra remuneration earned by what he did in China was payable to him in his capacity as director, the whole of his emoluments as director were caught by Schedule E. In other words, you cannot split up an office under Schedule E and refer part of the remuneration paid for it to what is done in England and part to what is done abroad; provided it is an office within the United Kingdom then any additional remuneration for work done abroad is caught by the Schedule. It appears to me that there is nothing in that case which assists in the decision of the present case.

The next case to which I shall refer (it is not in order of sequence, because I reserve for the last the case which most directly affects the present decision) is the case of *Corry* v. *Robinson,* 18 T.C. 411. That was the case of an established Civil Servant who held the position of deputy cashier in His Majesty's naval base at Singapore, and the question arose as to his salary and certain allowances. The taxpayer there, of course, was a person whose entire functions and duties had to be exercised in Singapore. He was not in the least in a position similar to that of a director of a company, but he was merely an employee of the Crown employed in Singapore for the purpose and the purpose only of performing duties in Singapore. It is true that his position is referred to as an office, but in truth and in fact it was merely an ordinary employment under the Crown. In other words, the only element of locality in

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the case except the actual situation of the employer, the Crown, was in Singapore, and it is difficult to see in such a case, if it had not been for certain special language in the Rules, why the office, if it were regarded as an office, should not be held to be located outside the United Kingdom. But in that particular case that conclusion could not be reached because of the special language of Rule 18 to Schedule E. That Rule makes special provision for employees of the Crown or holders of offices under the Crown. Sub-rule (1) provides: " The tax shall be assessed and charged by the respective com- " missioners for all the offices in each department, in the place where the said " commissioners execute their offices, although certain of the offices in the " same department may be executed elsewhere." Then Sub-rule (2), which is the important one, is: " A person chargeable in respect of an office or " employment of profit shall be deemed to exercise it at the head office of the " department under which it is held, and shall be assessed and charged at " that head office, although the duties of the office or employment are per- " formed, or any profits thereof are payable elsewhere, whether within the " United Kingdom or not." The taxpayer in *Corry* v. *Robinson*[1] came exactly within that Sub-rule. He was the holder of an office or, as I should have preferred to put it, he was employed under a Government Department, and the Rule provides that such persons are to be deemed to exercise the office or employment at the head office of the department. Accordingly, it was held that he was assessable under Schedule E in respect of the entirety of his remuneration.

In passing, I should say that in the present appeal an argument was based on that Sub-rule, because it was said that the reference to the exercise of the duties of the persons there referred to as being possibly outside the United Kingdom indicated that throughout the Schedule the true test of the locality of the office is the place where its functions are performed. The argument, in my opinion, fails to apply to the present case for the reasons which I have already given, that the functions and duties fall to be performed in this country and nothing would alter that circumstance, and the fact that certain extra things were done abroad cannot possibly alter it.

The next and last case to which I must refer is the case of *Proctor* v. *Ryall*, 14 T.C. 204. That was a decision of Rowlatt, J., in the case of a foreign director of a British company. That director was responsible for the whole of the British company's continental business, but his only remuneration was a fixed salary paid by the company plus commission on the company's profits from trading on the Continent. He lived in Paris with his family, but he came to London once a month to attend the company's meetings, and he was assessed under Schedule E. It was held by the Special Commissioners and by Rowlatt, J., that the office was an office within the United Kingdom, and I should have thought that there was no real difficulty in coming to that decision on any view, because he was actually attending board meetings. But Rowlatt, J., made some observations which I approach, as I always do approach the observations of that learned Judge on Income Tax matters, with very great respect, and those observations are to be found on page 214. The learned Judge says: " The question then arises: What is the locality of an " office, which is an abstraction? " Then he goes on to say: " In the Act " of 1918 the words are ' having or exercising '. It seems to me that " the place of an office is where the officer ' has ' or ' exercises ' it. Rule " 18 (2) to Schedule E, although, as I shall explain, I do not think it directly " affects this case, indicates by its language (which goes back to Section 181 " of the Act of 1803) that the place of exercise governs. And Mr. Justice

(1) 18 T.C. 411.

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" Horridge obviously thought that was the test when he decided *Pickles* v. " *Foster,* 6 T.C. 131. But where does the officer exercise his office? In " the case of a sinecure I should imagine he would exercise it at the seat of " the body under which he holds it. In ordinary cases I will assume that " prima facie the place of his duties would be the main consideration, but, " no doubt, the legal nature of the post would require a close examination " to see whether it could be said to have a local existence anywhere else. " When the Section dealing with the assessment of offices in towns corporate " and counties, which I shall have to refer to in a moment, is looked at, " it will be seen that offices in companies are to be assessed where the company " is, which also, I think, supports the view I have endeavoured to express." Then he says: " I do not think it is safe to say that an office must necessarily " be situated at the home of the company in which it is held." Then the learned Judge refers to *Pickles* v. *Foster* and *Pickles* v. *Foulsham*(1), and he deals with the facts of the case before him. He says(2): " I am bound to " say I think I must hold that his office is situate within the United Kingdom. " He is a director of this Company and he comes here, and he sits, not as an " assessor or as a person called in; he sits, no doubt, as a director under the " Articles, and I think he was bound to sit. As I have already explained, " I can only come to the conclusion that, although it is an exceptional case, " and very technical—and, I think, very hard—it cannot be said that his " office is not an office in the United Kingdom." The learned Judge there is considering the place where the functions were performed, and he lays particular stress on the fact that the director there did, in fact, perform functions in England by attending board meetings. But if the learned Judge intended to express the general proposition that a director of a company, whose rights and duties, so far as this country is concerned, remain, so to speak, dormant while he does something special abroad, is to be taken as holding an office outside the United Kingdom on the ground that the only functions he performs are those special functions abroad, with great respect I cannot take that view. My reasons for declining to take that view sufficiently appear from what I have said in the earlier part of this judgment.

In the result, the appeal, in my view, should succeed.

Clauson, L.J.—I agree. I am satisfied, for the reasons that have been given by the Master of the Rolls, that my brother Lawrence was wrong in reversing the judgment of the Commissioners and that the Commissioners came to a right conclusion. I never differ from any judgment on Income Tax matters of my brother Lawrence without hesitation, but I am sure that courtesy to my learned brother does not require that I should swell the volume of the reports by repeating with mere variations of language the views which have been expressed by the Master of the Rolls, in the whole of which I concur.

Goddard, L.J.—I agree.

Mr. Hills.—My Lords, the appeal is allowed with costs?

Sir Wilfrid Greene, M.R.—Yes.

Mr. Tucker.—My Lord, might I make an application to your Lordships for leave to appeal in this case?

Sir Wilfrid Greene, M.R.—Mr. Hills, we think that this is a case where leave might properly be given.

Mr. Hills.—If your Lordship pleases.

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(1) 9 T.C. 261. (2) 14 T.C., at p. 215.

An appeal having been entered against the decision in the Court of Appeal, the case came before the House of Lords (Lords Atkin, Wright, Roche and Porter) on 16th, 17th, 19th and 23rd February, 1942, when judgment was reserved. On 27th April, 1942, judgment was given unanimously in favour of the Crown, with costs, confirming the decision of the Court below.

Mr. J. Millard Tucker, K.C., and Mr. Terence Donovan appeared as Counsel for the Appellant, and the Attorney-General (Sir Donald Somervell, K.C.) and Mr. Reginald P. Hills for the Crown.

JUDGMENT

Lord Atkin.—My Lords, this is an appeal from an Order of the Court of Appeal reversing a decision of Lawrence, J., who allowed an appeal by the Appellant, Mr. McMillan, from a determination of Commissioners for the General Purposes of the Income Tax upholding an assessment on the Appellant for Income Tax under Schedule E. The sole question is whether the Appellant, who in the years of assessment was a director of a limited company, A. Wander, Ltd., had held a public office of profit within the United Kingdom. The facts are not in dispute, and are set out in paragraph 2 of the Case stated by the General Commissioners, which I will not here repeat. Schedule E of the Income Tax Act, 1918, provides that " Tax under " Schedule E shall be charged in respect of every public office or employment " of profit ". By Rule 6: " The tax shall be paid in respect of all public " offices and employments of profit within the United Kingdom . . . . " (*h*) offices or employments of profit under any company or society, whether " corporate or not corporate ".

It is necessary to consider whether the Appellant (1) held an office, (2) held a public office, (3) held a public office within the United Kingdom.

(1) On the first point there was no dispute. There is no statutory definition of " office ". Without adopting the sentence as a complete definition, one may treat the following expression of Rowlatt, J., in *Great Western Railway Co.* v. *Bater*(1), [1920] 3 K.B., at page 274, adopted by Lord Atkinson in that case(2), [1922] 2 A.C., at page 15, as a generally sufficient statement of the meaning of the word: " an office or employment which was a sub- " sisting, permanent, substantive position, which had an existence independent " of the person who filled it, which went on and was filled in succession by " successive holders ". There can be no doubt that the director of a company holds such an office as is described.

(2) It was contended by the Appellant that while he held an office yet it was not a public office within the meaning of the Income Tax Act, 1918. It can hardly be said to be obvious that the position of director of a trading company which may carry on business with a very small capital on a very small scale is necessarily a public office. But it is impossible to give effect to the words of Rule 6 (*h*)—" any company " so as to distinguish between those whose offices are public and those whose offices are not. In particular in reference to companies incorporated under the Companies Acts it has to be remembered that the Legislature has thought fit to impose duties upon their officers which attach to them as such, and which are not imposed upon private partnerships, as for instance Sections 27 (2), 37, 112, 122, 217 of the Companies Act, 1929. I can find no reason for distinguishing in this respect between offices held in a private company within the meaning of the Companies Acts (which this is) and a public company. Some of the above Sections, though not all, apply to both. The office of director of this company was for the above reasons a " public office ".

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(1) 8 T.C. 231, at p. 235. (2) *Ibid.*, at p. 246.

(Lord Atkin.)

(3) Was, then, the office held by the Appellant a public office " within " the United Kingdom "? As to this I am completely satisfied by the reasoning of the Master of the Rolls in his judgment delivered in the Court of Appeal. I will only add that we are here dealing with an " office ", not with an " employment ", the locality of which may be governed by different considerations. The office of director of an English company, the head seat and directing power of which is admitted to be in the United Kingdom, seems to me of necessity to be located where the company is. It is in fact part of the organic structure of the corporation. In such a case I do not think that it is true, as suggested by Rowlatt, J., in *Proctor* v. *Ryall,* 14 T.C. 204, at page 214, that " the place of exercise governs." The Appellant, though resident in the United States, while there held office in the United Kingdom; and though he may have taken his share of the directing power only in attending to the activities of the English company in the United States and in Canada, he did so by virtue of his English office. From this point of view I think that too much emphasis may be laid upon the source from which the office was remunerated; but the fact that it was English reinforces the view that the locality of the office was in fact English. Like the Master of the Rolls, I derive little assistance from previous cases. I consider it to be clear that the director of an English company which is resident in the United Kingdom, wherever he resides and whether or not he takes any part in directing the affairs of the company, holds an office in the United Kingdom.

For these reasons I am of opinion that the appeal fails and should be dismissed with costs.

My noble and learned friend **Lord Roche** wishes me to state that he concurs in the Order proposed.

Lord Wright.—My Lords, the Appellant was not resident in this country during the years of charge. Accordingly the emoluments derived from his directorship in A. Wander, Ltd. are not taxable unless they fall within the words of Schedule E, nor are they affected by the provisions of Section 18 of the Finance Act, 1922, because they could not have been charged under Schedule D. The Crown has therefore to establish that they are profits of a public office or employment within the United Kingdom, which last condition is specified in Rule 6.

As Rule 6 (*h*) expressly includes offices or employments of profit under a corporate company, and as A. Wander, Ltd. is a company registered in England under the Companies Acts, the requirements of Schedule E would seem so far to be satisfied. The Company, further, is one which, as the Case finds, is resident and controlled in the United Kingdom. I limit my observations to such a company, without considering what is the position of a company registered in the United Kingdom but controlled and managed abroad. The next matter to be examined is whether the directorship held by the Appellant is an office or employment within the meaning of Schedule E. The word " office " is of indefinite content; its various meanings cover four columns of the New English Dictionary, but I take as the most relevant for purposes of this case the following: " A position or place to which certain " duties are attached, especially one of a more or less public character." This, I think, roughly corresponds with such approaches to a definition as have been attempted in the authorities, in particular *Great Western Railway Co.* v. *Bater*(1), [1922] 2 A.C. 1, where the legal construction of these words, which had been in Schedule E since 1803 (43 Geo. III, c. 122, Section 175), was discussed. It was there held that the position of a clerk in a railway

(1) 8 T.C. 231.

(Lord Wright.)

company was not an office or employment of profit of a public nature within Schedule E. Lord Wrenbury, at page 35(1), was content so to hold without attempting to define what type of office or employment would satisfy the language of the Schedule. Lord Sumner, at page 25(2), said that to hold otherwise would be an abuse of language. To hold that the director of a company such as A. Wander, Ltd. (though it is what is called a private company) does not have an office within the meaning of the Schedule would equally, in my opinion, be an abuse of language. Everyone, I think, would say that as director he held an office in the Company. The word " employ- " ment ", in my opinion, has to be construed with and takes its colour from the word " office ".

If I may adopt the words of the Master of the Rolls, it is too late to say that the director of a company like this does not hold an office within Schedule E. I do not attempt what their Lordships did not attempt in *Bater's* case, that is, an exact definition of these words. They are deliberately, I imagine, left vague. Though their true construction is a matter of law, they are to be applied in the facts of the particular case according to the ordinary use of language and the dictates of common sense, with due regard to the requirement that there must be some degree of permanence and publicity in the office. In *Bater's* case Lord Wrenbury seemed to disapprove of the opinion of Bankes, J., in *Berry* v. *Farrow*, [1914] 1 K.B. 632, that a director held an office within the Schedule(3), but I cannot think that his disapproval was justified or has been supported. In *Watson* v. *Rowles*(4), 95 L.J.K.B. 959, a director of a private limited company was held to be taxable under Schedule E. The public character of the company is sufficiently established by its being incorporated under the statutory machinery of the Companies Acts and by its being subject to the provisions of these Acts. It is, however, clear that not all officers, and still less all employees, of a limited company or of any corporate body are holders of an office or employment under Schedule E. This is illustrated by *Bater's* case and much earlier by *Attorney-General* v. *Lancashire and Yorkshire Railway Co.*, 2 H. & C. 792. I do not think that the agency considered in *Pickles* v. *Foster* (5), [1913] 1 K.B. 174, was correctly treated as an office or employment within Schedule E.

There still remains the question whether the Appellant's office or employment, though it is public, is one within the United Kingdom as required by Rule 6 of Schedule E. The Commissioners held that it was because the Appellant retained the right and duty to exercise the power of a director. That decision was reversed by Lawrence, J., on the ground that the place of exercise governed; for that principle he relied on *Pickles* v. *Foster* and on the dictum of Rowlatt, J., in *Proctor* v. *Ryall*, 14 T.C. 204. That dictum, however, was not necessary to the decision of the case and is qualified in its scope; for instance, Rowlatt, J., refers to the case of a sinecure; which is not exercised anywhere at all (6). I do not think that Rowlatt, J., was right if or so far as he held that the place of exercise governed.

The office of a director is something notional; its locality is one degree, if that is possible, even more notional. In my opinion, the place where it is exercised, if it is exercised anywhere at all, is not necessarily the test. As obvious illustrations, I may refer to heads (*d*), (*e*), (*f*), under which come officers in the Armed Forces of the Crown. To them Rule 18 (2) of the Schedule clearly applies, at least as machinery for the assessment which is to be at the head office of the department. But in any case the words of Rule 1 are not simply " exercising " but " having or exercising " the office or

(1) 8 T.C. at p. 257. (2) *Ibid.*, at p. 252. (3) *Ibid.*, at p. 257. (4) 11 T.C. 171.
(5) 6 T.C. 131. (6) 14 T.C., at p. 214.

(Lord Wright.)

employment. Exercising no doubt does involve activity in the office or employment, but a man may have an office and draw the emoluments without doing any work at all. For instance, a director may in certain cases be properly allowed to retain his emoluments when for good reasons he may be relieved from any active duties at all. I have already mentioned the case of a sinecure. The peculiarity of this case is that the Appellant has all the time been rendering in the United States and in Canada services of great value to the company, while at the same time he has been released from and has not performed the normal duties of a director, such as attending at board meetings. But he has still remained a director, and as such cannot be in a different position from what he would have been in if he had not rendered those services abroad. I agree with the Master of the Rolls that it is in the office of director that the crucial test is to be found, because " every right which a " director has and every duty which the law, general or special, imposes on " the director is to be exercised in this country and nowhere else."(1) That is the test accepted in substance by the Commissioners. It is, I think, the true test in a case like this. The Appellant had or held all through the years of charge the office of director in the United Kingdom. That, in my opinion, is sufficient to satisfy the Schedule.

The cases cited do not afford any strict parallel. In *Corry* v. *Robinson,* 18 T.C. 411, the taxpayer, who was deputy cashier at the naval base at Singapore, was not only outside the United Kingdom during the period of charge, but exercised all the duties of the employment there, as its nature required. The Master of the Rolls, I think correctly, treats the liability of the taxpayer there as depending on Rule 18 (2), which relates to employment under the Government. *Pickles* v. *Foster,* 6 T.C. 131, could be sufficiently decided against the Crown on the ground that the agency in West Africa was not an office or employment within Schedule E. The ruling that the office or employment to come within Schedule E must be exercised in the United Kingdom was not necessary to the decision and cannot, I think, be supported.

I think that the appeal should be dismissed.

Lord Porter.—My Lords, I agree that this appeal should be dismissed. The Appellant has been charged to tax under Schedule E in respect of a public office or employment of profit.

Under the Rules applicable to this Schedule: " 1. Tax under this Schedule " shall be annually charged on every person having or exercising an office " or employment of profit mentioned in this Schedule . . . in respect of all " . . . fees . . . 6. The tax shall be paid in respect of all public offices and " employments of profit within the United Kingdom or by the officers herein- " after respectively described, namely:—(*h*) offices or employments of profit " under any company or society, whether corporate or not corporate ".

The Appellant is a director of A. Wander, Ltd., a private company which is resident and controlled in the United Kingdom; he was appointed a director by the articles of association and has no contract of service with the Company. By article 90 the remuneration of the directors is a sum equal to ten (originally fifteen) per cent. of the net profits of the Company in every year, and is divisible among the directors in such proportion as they may agree, and, in default of agreement, equally. Since 1919 the Appellant has been resident in the United States of America and in 1938 he became a naturalized American citizen. Mr. McMillan went to America to take over the management of a company in Chicago allied to the predecessors of A. Wander, Ltd., for whom he opened a Canadian office, and concerned himself in the administrative and selling organisation there. In 1930, largely as a result of his advice, a

(1) *See* page 197 *ante*.

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Canadian factory was built. Mr. McMillan superintended its building and has since that time continued to advise its manager on matters relating to the conduct of the business. The Appellant, as managing director of the Chicago company, consults with the managing director of the English company, or any other director of the latter company when they are in Chicago, regarding anything to the advantage of the English, Chicago or Canadian businesses, and has assisted in Canada in engaging the Canadian staff. Copies of all minutes, annual balance sheets and managing directors' and auditors' reports of A. Wander, Ltd., are sent regularly to the Appellant in America, but he has attended no board meetings in England except one in 1931, and only one in Chicago in 1925. He is not required to attend board meetings of the English company, indeed, notices of such meetings are not sent to him.

In these circumstances he was assessed by the Commissioners in respect of his income as director of the English company under Schedule E of the Income Tax Act, 1918, for the years 1937-38 and 1938-39, but being dissatisfied with the decision in point of law, required a Case to be stated.

The case, from which the facts I have set out are taken, was heard first by Lawrence, J., who overruled the Commissioners, and afterwards by the Court of Appeal, who restored their assessments. Your Lordships have to determine if they were right in so doing.

The points taken on behalf of the Appellant were two in number: (1) that the office was not within the United Kingdom, and (2) that it was not public.

For the first point reliance was placed upon the decisions in *Pickles* v. *Foster,* [1913] 1 K.B. 174; 6 T.C. 131, and *Proctor* v. *Ryall,* 14 T.C. 204. The result of those cases was said to be that an office was not within the United Kingdom unless it was exercised there, and the Appellant went on to argue that on the facts found he did not exercise his office in this country.

The Crown did not dispute—and indeed I think it is plain under the Rules applicable to Schedule E—that tax is charged only on persons having or exercising an office mentioned in the Schedule, and the only offices mentioned in the Schedule are those within the United Kingdom.

If therefore the office is not within the United Kingdom it is not the subject of tax under this Schedule. But though they made this admission, the Respondent did not accept the view that the office must be exercised within the United Kingdom. Whether a person, who holds the office of director in a company resident and managed and therefore controlled in this country, who receives his fees from a pool provided in this country for himself and his co-directors—a pool divided up in the proportions which they agree—and who receives copies of minutes, annual balance sheets and managing directors' and auditors' reports, exercises or does not exercise his office in this country is a question which I do not think it necessary to decide.

In the two cases quoted the problem was expressed with sufficient accuracy by asking: Was the employment exercised here or not? no question of "having "an office" arose. But it does arise in the present case, and whatever views one may entertain as to the accuracy of the language used in the cases referred to above when applied to those individual cases, it is not, I think, intended to apply to all cases under Schedule E.

For the present purpose it is enough to say that a person in the position of the Appellant holds an office in this Kingdom despite the fact that he has not in fact attended any meetings in this country since 1931. He is a director of a company resident and managed in this country, entitled to attend any board meetings which may be held here, giving advice as to matters concerning its management, and supplied at least with its formal literature. In

(Lord Porter.)

such a case it is, I think, immaterial that most, if not all, of Mr. McMillan's activities are carried out in America; he still holds an office in the United Kingdom.

If the Appellant is, as I think he is, wrong on this point, he still has a second string to his bow. Even, he says, if he has or exercises an office in the United Kingdom, it yet is not a public one.

That it is an office is, I think, plain. It has permanency apart from the temporary holder and is held in one of the specified corporations. One has only to refer to Sections such as 145 and 151 of the Companies Act, 1929, to find the phrase office of director expressly mentioned. Indeed, this is not in dispute. What is controverted is the allegation that a directorship, at any rate in a so-called private company, is a public office. The argument is put upon the ground that at worst—i.e., at worst for the Appellant—directors, in the case of companies not by Statute requiring any directors, if appointed at all (as they may be, but are not compelled to be in the case of a private company), are not holders of a public office.

There is no magic in the phrase " private company ". It is true that it need not have directors or issue a prospectus; that it is not permitted to have more than 50 shareholders and may have no more than two; but it still must be registered and keep an official register of its members. It is a corporate body constituted by Act of Parliament (now the Companies Act of 1929), and that Act imposes duties upon the office itself and its holder for the time being.

These obligations are imposed in the public interest in order that some public control over its organisation and activities may be obtained. No doubt less control is exercised in the case of a private than in the case of a public company; but the former is not private in the sense that it has no public formalities to carry out, and the word " private " is only used as a convenient label to distinguish it from the so-called public company. I think the office is a public one, and I agree with the motion proposed from the Woolsack.

Questions put:

That the Order appealed from be reversed.

The Not Contents have it.

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

The Contents have it.

[Solicitors:—Goulden, Mesquita & Co.; Solicitor of Inland Revenue.]

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