HIGH COURT OF JUSTICE—1ST AND 2ND MAY, 1952

COURT OF APPEAL—23RD AND 24TH JULY, 1952

HOUSE OF LORDS—24TH, 25TH, 26TH FEBRUARY AND 20TH APRIL, 1953

(1) Bray (H.M. Inspector of Taxes) *v.* Colenbrander

(2) Harvey (H.M. Inspector of Taxes) *v.* Breyfogle[1]

Income Tax — Residents in the United Kingdom employed by foreign companies under contracts made abroad — Duties performed entirely or mainly in United Kingdom — Remuneration payable abroad — Whether employment assessable under Schedule E or Case V *of Schedule D.*

(1) During the years 1945-46 *to* 1949-50 *inclusive, C, a Dutch national, was, for Income Tax purposes, resident in the United Kingdom, where he held the appointment of London correspondent of a Dutch newspaper. There was no written contract regarding his appointment, which had been made in Holland. C's duties were performed mainly in the United Kingdom but his remuneration was payable in Holland, part being remitted to London.*

(2) During the year 1947-48, *B, an American citizen, was, for Income Tax purposes, resident in the United Kingdom, where he held the appointment of manager of the London branch of an American bank. This appointment was not contained in a formal agreement but had been made orally in New York, and his salary was paid into his bank account there as it had been before he came to the United Kingdom. B's duty in London was to advise his bank on economic matters in Europe, but he also transacted general overseas business for the bank. He visited the United States at intervals in the course of his duties but he maintained no home there; and as occasion demanded he visited other countries in Europe, although no such visit was made during the year* 1947-48 *which, in that respect, was not a typical year.*

On appeal before the Special Commissioners against assessments to Income Tax under Schedule E for the years 1945-46 *to* 1949-50, *and for the year* 1947-48 *respectively, it was contended for C and B that they were chargeable under Case* V *of Schedule D on so much of their salaries as was remitted to this country, in accordance with the decision in* Bennet *v.* Marshall, 22 T.C. 73. *It was contended for the Crown, in C's case, that he held a public office or employment of profit within the United Kingdom and was assessable under Schedule E or, alternatively, that he was so assessable as a person residing in the United Kingdom; and, in B's case, that because his duties were carried out mainly in London the case was to be distinguished from* Bennet *v.* Marshall. *The Commissioners allowed the appeal in each case.*

Held, *that the Commissioners' decisions were correct.*

[1] Reported 215 L.T.Jo. 225; [1953] 1 All E.R. 1090.

(1) *Bray* v. *Colenbrander*

CASE

Stated under the Income Tax Act, 1918, Section 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the High Court of Justice.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 12th September, 1950, W. S. A. Colenbrander (hereinafter called "the Respondent") appealed against assesments of £412 for the year 1945-46, £1,703 for the year 1946-47, £1,703 for the year 1947-48, £1,703 for the year 1948-49 and £1,703 for the year 1949-50 raised upon him under Schedule E, Income Tax Act, 1918, in respect of his office or employment as London correspondent to the Dutch newspaper *Het Parool.*

2. At the hearing of this appeal evidence was given before us by the Respondent, and the facts found by us on that evidence are set out in the following paragraphs numbered 3 to 8 inclusive.

The sole point for our decision was, and for the opinion of the High Court is, whether the Respondent is assessable under Schedule E, Income Tax Act, 1918, in respect of the said years 1945-46 to 1949-50 inclusive, in view of the fact that during the material years his employers were resident abroad, and his salary was also payable abroad.

3. The Respondent is a Dutch national and was appointed by the editor of *Het Parool* as journalist to that newspaper on 1st June, 1945. There was no written contract of employment or service agreement, and arrangements as to his remuneration, conditions of service and the nature of his duties were at all times made by the editor, on behalf of *Het Parool,* which was owned by a Dutch corporation.

4. After joining the staff of the newspaper the Respondent worked in its foreign department in the Amsterdam offices until 23rd December, 1945, when he came to the United Kingdom to take up an appointment as London correspondent to the newspaper, as from 1st December, 1945. There had been no previous London correspondent to *Het Parool,* which was, during the war, an "underground newspaper" associated with the liberation of Holland from the German invaders, and was thus in the year 1945 virtually a new newspaper.

5. In order to carry out the work expected from him the Respondent had to live near Westminster. He had the use of a desk between the hours of 8 and 10 p.m. each day in the London offices of the *Manchester Guardian,* to enable him to inspect foreign cables of that newspaper as they came in, and before they were printed. This was not, however, in any sense an address of *Het Parool* although the arrangements were made between the two newspapers. The remainder of the Respondent's duties, which consisted mainly of covering politics and diplomacy for his newspaper, were carried on from his flat in Dover Street, London. This flat was taken by the Respondent in his own name shortly after he came to the United Kingdom, but as the rent was too high for his means *Het Parool* assisted him by paying a portion of the rent.

6. The Respondent had not, prior to 1945, been engaged in journalism, but had been a school teacher before the war. Consequently his employment by *Het Parool* was at first of a temporary character; he was engaged on a month-to-month basis and was on probation. Subsequently, when he

had gained experience and given satisfaction to the editor of *Het Parool*, his employment attained a more permanent character, but he continued to be paid on a monthly basis. Moreover, there was for a considerable time a possibility of his being called up for military service in Indonesia. A series of dates of "call up" notices during the years 1946 to 1949 was put in evidence (Exhibit A)(1). On several occasions the editor of *Het Parool* was able to get the call up withdrawn but, particularly in the years 1947 and 1949, there seemed a strong probability that his efforts might not be successful. On one occasion when the Respondent visited the editor in Amsterdam for consultations, he was told that *Het Parool* must look for a successor to him as London correspondent, but that as long as he was not called up he should carry on with his duties.

7. Since his appointment as London correspondent from 1st December, 1945, as aforesaid, the Respondent has remained in the United Kingdom as from 23rd December, 1945 (the date of his arrival to take up his duties) except for holidays and periodical visits to Amsterdam to confer with the editor of *Het Parool*. The Respondent was therefore resident in the United Kingdom for each of the years 1945-46 to 1949-50 inclusive, and the duties of his office or employment were mainly, and indeed almost exclusively performed in the United Kingdom.

8. The Respondent's gross remuneration amounted to a sum of approximately £125 per month, payable in Holland. His wife and child continued during the material period to reside in Holland, and by arrangement with his employers a fixed sum of 500 guilders was paid in Holland direct to his wife for the maintenance of his home there. The balance, amounting to a sum of £78 5*s*. 8*d*. per month, was remitted to this country at his request. The Respondent's employers had an account at Blijdenstein & Co., bankers, in Threadneedle Street, on which account the Respondent was entitled to draw, and each month a sum was remitted from his employers to include (1) the said balance of his monthly remuneration not paid to his wife in Holland; (2) the employers' contribution towards the rent of his flat; (3) an amount to cover the expenses incurred by the Respondent on behalf of *Het Parool* in London.

9. It was contended on behalf of the Appellant;

(1) that the Respondent held a public office or employment of profit within the United Kingdom, and had exercised all the duties thereof in the United Kingdom, and that he was therefore properly assessed under Schedule E, Rules 1 and 6, Income Tax Act, 1918, for the said years 1945–46 to 1949–50 inclusive, in respect of the salary and emoluments of such office or employment;

(2) in the alternative, that the Respondent was assessable as a person residing in the United Kingdom in respect of the annual profits or gains accruing from an employment carried on therein under Case II, Schedule D, which by the provisions of Section 18, Finance Act, 1922, were thereafter chargeable under Schedule E;

(3) in either event the assessments for the said years 1945–46 to 1949–50 under Schedule E, Income Tax Act, 1918, were correctly made and should be confirmed.

10. It was contended on behalf of the Respondent;

(1) that on the evidence in this case the source of the Respondent's employment was outside the United Kingdom, because the contract of service was entered into in Holland and the remuneration was wholly payable in that country;

(1) Not included in the present print.

(2) that the fact, which was not denied, that the duties of the Respondent's employment were mainly performed in the United Kingdom was irrelevant, and that, on the authority of *Pickles* v. *Foulsham*, 9 T.C. 261, and *Bennet* v. *Marshall*, 22 T.C. 73, the Respondent did not exercise a public office or employment within the United Kingdom ;

(3) that the Respondent was assessable for the said years under Rule 1 (*b*) and Rule 2, Case V, Schedule D, Income Tax Act, 1918, on the full amount of the actual sums annually received in the United Kingdom subject to a deduction for any disbursements or expenses laid out or expended for the purposes of the employment, and that the profits or gains accruing from the Respondent's employment were therefore specifically excepted under the provisions of Section 18 (1), Finance Act, 1922, from the transfer to Schedule E of the profits and gains arising from employments other than those chargeable under Case V of Schedule D ;

(4) that the assessments under Schedule E for the said years 1945–46 to 1949–50 inclusive were bad and should be discharged.

11. We, the Commissioners who heard this appeal, allowed the appeal of the present Respondent and discharged the assessments for the said years 1945–46 to 1949–50 inclusive.

In coming to this decision we found that the Respondent's employers were resident abroad and that his salary was payable abroad, that the locality of the Respondent's source of income, i.e. the said office or employment, was in Holland. We therefore held, on the authority of *Bennet* v. *Marshall*, 22 T.C. 73, that the Respondent was not liable to assessment under Schedule E, Income Tax Act, 1918, in respect of the salary and emoluments of an office or employment exercised outside the United Kingdom, notwithstanding that the duties of the said office or employment were mainly performed in the United Kingdom.

In regard to the alternative contention put forward on behalf of the Crown, we held that the Respondent was in receipt of income arising from an office or employment within the meaning of Rule 1 (*b*), Case V, Schedule D, Income Tax Act, 1918, which under the provisions of Section 18 (1), Finance Act, 1922, was specifically excepted from the transfer of offices or employments falling under Case II, Schedule D to Schedule E. In our opinion, once we had found, on the authority of *Bennet* v. *Marshall*, that the Respondent's office or employment was not exercised within the United Kingdom, it necessarily followed that the profits or gains arising from such office or employment were not assessable under Case II of Schedule D (now transferred to Schedule E), but only, if at all, under Case V, Schedule D, as the profits or gains of a foreign possession.

12. The Appellant immediately after 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 Income Tax Act, 1918, Section 149, which Case we have stated and do sign accordingly.

A. W. BALDWIN
NORMAN F. ROWE } Commissioners for the Special Purposes of the Income Tax Acts.

Turnstile House,
94–99, High Holborn,
London, W.C.1.
27th February, 1951.

(2) *Harvey* v. *Breyfogle*

CASE

Stated under the Income Tax Act, 1918, Section 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the High Court of Justice.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 4th June, 1951, Mr. R. J. Breyfogle (hereinafter called "the Respondent") appealed against an assessment made upon him under Schedule E to the Income Tax Act, 1918, for the year 1947–48 in the sum of £5,009.

The Respondent has the title of manager of the London branch of the National City Bank of New York (hereinafter called "N.C.B." or "the bank"). The question raised by the case is whether, on the facts, the Respondent is, as the Crown contends, assessable under Schedule E in respect of all sums paid to him by N.C.B. as remuneration for the said office, or whether, as is contended on his behalf, he is assessable not under Schedule E but under Case V of Schedule D on the basis of remittances out of such sums actually received in the United Kingdom.

On the facts and evidence hereinafter appearing it was agreed by both parties to the appeal that we were bound by the authority of *Bennet* v. *Marshall*, 22 T.C. 73, to decide in favour of the Respondent, but the Crown reserved the right to argue, where competent, that the said Case was wrongly decided.

2. N.C.B is incorporated in New York, where its head office is situated and is the leading bank in America for the transaction of overseas business, being concerned more than any other American bank with activities in England, Europe and the Far East. It is also the principal American bank for the handling of overseas operations of British banks and financial houses, and holds a substantial part of the dollar deposits of all British banks in America. It has two branches in England. It is essential for N.C.B. to keep in close touch with economic and monetary policy all over the world, and this necessitates an intimate knowledge of what is being done and said in London.

3. The Respondent is an American citizen and domiciled in the United States of America. He has held various posts in N.C.B. since he joined it in 1929. After a period of service at the head office in New York, he went to Spain in October, 1930, and from then onwards until the end of 1944 he served N.C.B. at various places abroad, nearly all of them in Spain or in Spanish-speaking communities, including Madrid, Barcelona and Cuba. He had connections with Latin America and the Caribbean all through his career. At the end of 1944 he was brought back to New York and served there for a few months. Early in 1945 he was appointed to come to England with the title of manager of the London branch, and has continued to hold that appointment down to the present time.

4. The said appointment in 1945, which was made on the invitation of the vice-president in charge of overseas commitments of the bank to come to this country, was confirmed by the president of the bank in New York. The appointment was concluded orally, there being no formal service agreement. It is common ground that it was made at the head office of N.C.B. in New York.

5. It was understood and agreed that the Respondent's emoluments while serving in this country should continue as in the past to be paid into his banking account in New York. As one of the staff of the bank in America he had been and continued to be a member of its American contributory staff pension scheme, his own contributions being deducted from his salary. The bank has a separate and distinct staff pension scheme for employees in England, of which the Respondent is not a member.

6. The appointment to this country carried with it a wide ranging commission. The Respondent acts largely as deputy for a vice-president of N.C.B.—Mr. Hayden—who is stationed in London. One part of his main functions is to keep the Head Office in New York apprised of economic and monetary policy and developments in London, Europe and other parts of the world, for which London provides a unique centre, besides being the centre of the sterling area. Thus, for example, from 1945 to 1947 the British Colonial Office was engaged very actively in the task of rehabilitation in the Far East, where N.C.B. had very large commitments and a corresponding interest in the arrangements then being made. The other part of the Respondent's main functions is to carry through transactions of N.C.B. abroad in the light of his knowledge of the general policy and ways of operation of the head office.

7. The Respondent's specific duties—subject to his developing and departing from them, in so far as it may be necessary, in the general interest of N.C.B.—may be broadly listed as follows ;

(1) to maintain personal relationships with the chairmen and senior officers of the British banks in furtherance of N.C.B.'s interests ;

(2) to maintain close contact with financial writers, economists and Government officials here ;

(3) to negotiate and hold discussions with London bankers and banks on mutual problems overseas, keeping in constant touch with banks which maintain accounts with N.C.B. in New York ;

(4) to keep in close touch with oil and sugar interests ;

(5) to attend, as representative of the head office in New York, meetings abroad of the International Chamber of Commerce (which normally meets in Paris) and other international bodies ;

(6) to concern himself generally with commercial interests in Latin America, in particular guiding his head office as to facilities sought in that area by British companies, and conducting affairs connected with this country on behalf of visitors from Latin America sent to him by his head office ;

(7) to keep a close connection with Lloyds, N.C.B. with its affiliate, the City Bank Farmers Trust Company, being the clearing house for all Lloyds dollar income, handling all the premium income of Lloyds in America and all Lloyds dollar commitments throughout the world ;

(8) to arrange international credits and other matters on behalf of visitors to London from many countries—this last duty being of much importance and occupying a great deal of time.

8. As regards oil and sugar interests, referred to in (4) of the foregoing paragraph, while the vice-president, Mr. Hayden, is more concerned with oil, the Respondent is particularly concerned with sugar on account of his experience in Spanish-speaking countries where it is produced. N.C.B. has very substantial overseas commitments in the sugar interests in the Caribbean, which are related very closely to British sugar interests. The Respondent on behalf of N.C.B. holds himself available to advise delegates to meetings

of the International Sugar Council which are always held in London, there having been one such meeting in 1945, one again in 1946, four in 1947, three in 1948, six in 1949 and two in 1950.

9. The Respondent makes very frequent and voluminous reports to New York, in pursuance of the first of his main functions, as described in paragraph 6 above. A few specimen letters written within the year of assessment 1947–48 to which this appeal relates were produced to us by way of illustration ; they are not annexed hereto, but may be referred to, if necessary as part of this Case.

10. The Respondent gave evidence before us, which we accepted, as follows. He was domiciled in the United States, but since his appointment to this country had been resident here, living in a flat at first but in 1946, some time after his family had joined him, purchasing a house. In 1947–48 both his children were at school here, although at the present time his daughter is at college in America. He did not maintain a home in the United States. He aimed at visiting the States something like once every year and a half, for some six to eight weeks, these visits and their duration depending on how much time could be usefully employed there and how pressing other commitments might be on the Continent or elsewhere. He paid one such visit in 1947, for about six weeks from near the end of October, nearly all of which was spent in New York, with short stays in Boston and—partly for personal affairs—in Canada. The purpose of the visits was to keep up to date with the way senior officers of N.C.B. were thinking and see how they would react to possible occurrences. He sometimes went abroad on the Continent, but no occasion necessitated this in 1947–48, which was not in that respect a typical year. He had recently been to Spain, a country in which he had served 11 years and which always kept him posted with developments, usually sending people here to see him. He was more often in this country than the vice-president, Mr. Hayden. He deferred to the vice-president not as his superior officer but as his senior in years and experience. Each usually showed the other his reports to New York. While there were certain countries with which one of them was more closely connected than the other, and each had certain specialities, their duties absolutely corresponded.

The witness explained that his title of manager was merely for convenience as a name. He was not a manager of the London Branch in the same sense as a manager, for example of a branch of N.C.B. in a New York suburb. He did not " manage " anything in the sense that the word is understood in a bank here. There was ordinary banking business at the London branch, dealt with by men who were not responsible to him, although he exercised supervision of them from time to time on a matter of general policy, and occasionally signed correspondence.

The witness agreed that it was completely essential that his work of keeping N.C.B. in New York informed of world opinion and policy should be performed from London. There was no other city which could give the required background.

He took part in the International Sugar Council merely as a representative of N.C.B., not as a delegate or with other official status. The Council was attended by Government delegates of the prime sugar-exporting countries, such as Cuba, San Domingo, the Philippines and Peru. He was well acquainted with the sugar situation, and when people came from these countries it was his duty to facilitate their activities here and bring them together as much as possible. The purpose of N.C.B. was simply to keep itself as well connected as it could with the sugar industry.

The witness stated that it was the purpose of N.C.B. in appointing him to this country to have someone here not merely to collect and transmit information to New York, but also, as an officer thoroughly conversant with head office ways of world operation, to be available in London for transactions on behalf of persons to whom it was convenient to call there and not to go to New York. People came repeatedly from the Continent, and it usually fell to him to see those who came from Belgium, Holland, Italy, Spain and also the Scandinavian countries. For instance, a Dane would come wanting to arrange a credit matter to be fixed up in India. Then he would send a message to New York, " This is proposed. If you agree, will you advise Bombay, and if so let me know and I will tell him? " Thus in many ways he handled overseas business for N.C.B., which had nothing to do with the books or operations of the two English branches. He actually spent a good deal more time in dealing with these matters, and seeing the people concerned, than in collecting and reporting economic, etc., information.

In N.C.B.'s book of officially authorised signatories, the witness's signature appeared as an authorised signature for foreign branches under the heading " European Division, London, England ".

11. It was contended on behalf of the Respondent that on the facts of the case he was clearly assessable, not under Schedule E of the Income Tax Acts, but under Case V of Schedule D on the basis of remittances out of his remuneration actually received in the United Kingdom. Reliance was placed on *Bennet* v. *Marshall,* 22 T.C. 73.

12. The Crown, while admitting that we were bound by the authority of the said case, recorded its contention, for argument where competent ;

(1) that *Bennet* v. *Marshall* had been wrongly decided ;

(2) that the facts of the present case were materially distinguishable from those in *Bennet* v. *Marshall* in that the activities of the present Respondent in the exercise of his employment were necessarily mainly carried on in the United Kingdom ; and

(3) that in either case the assessment under appeal was correctly made on the Respondent in respect of his remuneration under the provisions of Schedule E.

13. We, the Commissioners who heard the appeal, were ourselves satisfied that, on all the facts of the case and particularly the facts that the contract of employment was made in New York and that the payments for the employment were also made in New York, we were bound by the decision of the Courts in *Bennet* v. *Marshall.* We accordingly discharged the assessment to Income Tax Schedule E made upon the Respondent for the year 1947–48.

14. The Appellant immediately after 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 Income Tax Act, 1918, Section 149, which Case we have stated and do sign accordingly.

G. R. HAMILTON
F. N. D. PRESTON } Commissioners for the Special Purposes of the Income Tax Acts.

Turnstile House,
94–99, High Holborn,
London, W.C.1.
21st November, 1951.

The first case came before Danckwerts, J., in the High Court on 1st and 2nd May, 1952, and the second case on 1st May, 1952, when in each case judgment was given against the Crown with costs.

Mr. J. Millard Tucker, Q.C., and Sir Reginald Hill, appeared as Counsel for the Crown, and Mr. F. Heyworth Talbot, Q.C., and Mr. Desmond Miller for Mr. Colenbrander and Mr. Roy Borneman, Q.C., and Mr. S. M. Young for Mr. Breyfogle.

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(1) *Bray* v. *Colenbrander*

Danckwerts, J.—This is an appeal by the Crown against the decision of the Special Commissioners who rejected certain assessments made upon Mr. Colenbrander. It will be convenient, first of all, to refer to the facts as stated in the Case.

In paragraph 2 of the Case the Commissioners say:

> "The sole point for our decision was, and for the opinion of the High Court is, whether the Respondent is assessable under Schedule E, Income Tax Act, 1918, in respect of the said years 1945-46 to 1949-50 inclusive, in view of the fact that during the material years his employers were resident abroad, and his salary was also payable abroad."

I do not think that is really meant to be a conclusive statement of fact because, if it were, it would appear that the matter was really concluded by that statement having regard to the decision of the Court of Appeal in *Bennet* v. *Marshall,* 22 T.C. 73, to which I shall have to refer presently so far as this Court is concerned. The Case continues:

> "3. The Respondent is a Dutch national and was appointed by the editor of *Het Parool* as journalist to that newspaper on 1st June, 1945. There was no written contract of employment or service agreement, and arrangements as to his remuneration, conditions of service and the nature of his duties were at all times made by the editor, on behalf of *Het Parool,* which was owned by a Dutch corporation.
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> 4. After joining the staff of the newspaper the Respondent worked in its foreign department in the Amsterdam offices until 23rd December, 1945, when he came to the United Kingdom to take up an appointment as London correspondent to the newspaper, as from 1st December, 1945. There had been no previous London correspondent to *Het Parool,* which was, during the war, an 'underground newspaper' associated with the liberation of Holland from the German invaders, and was thus in the year 1945 virtually a new newspaper.
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> 5. In order to carry out the work expected from him the Respondent had to live near Westminster. He had the use of a desk between the hours of 8 and 10 p.m. each day in the London offices of the *Manchester Guardian,* to enable him to inspect foreign cables of that newspaper as they came in, and before they were printed. This was not, however, in any sense an address of *Het Parool* although the arrangements were made between the two newspapers. The remainder of the Respondent's duties, which consisted mainly of covering politics and diplomacy for his newspaper, were carried on from his flat in Dover Street, London. This flat was taken by the Respondent in his own name shortly after he came to the United Kingdom, but as the rent was too high for his means, *Het Parool* assisted him by paying a portion of the rent.
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> 6. The Respondent had not, prior to 1945, been engaged in journalism, but had been a school teacher before the war. Consequently his employment by *Het Parool* was at first of a temporary character; he was engaged on a month-to-month basis and was on probation. Subsequently, when he had gained experience and given satisfaction to the editor of *Het Parool,* his employment attained a more permanent character, but he continued to be paid on a monthly basis. Moreover, there was for a considerable time a possibility of his being called up for military service in Indonesia. A series of dates of 'call up' notices during the years 1946 to 1949 was put in evidence (Exhibit A). On several occasions the editor of *Het Parool* was able to get the call up withdrawn but, particularly in the years 1947 and 1949, there seemed a strong

probability that his efforts might not be successful. On one occasion when the Respondent visited the editor in Amsterdam for consultations, he was told that *Het Parool* must look for a successor to him as London correspondent, but that as long as he was not called up he should carry on with his duties.

7. Since his appointment as London correspondent from 1st December, 1945, as aforesaid, the Respondent has remained in the United Kingdom as from 23rd December, 1945 (the date of his arrival to take up his duties) except for holidays and periodical visits to Amsterdam to confer with the editor of *Het Parool*. The Respondent was therefore resident in the United Kingdom for each of the years 1945-46 to 1949-50 inclusive, and the duties of his office or employment were mainly, and indeed almost exclusively, performed in the United Kingdom."

Now we come to what is probably the most important paragraph in the Case.

"8. The Respondent's gross remuneration amounted to a sum of approximately £125 per month, payable in Holland. His wife and child continued during the material period to reside in Holland, and by arrangement with his employers a fixed sum of 500 guilders was paid in Holland direct to his wife for the maintenance of his home there. The balance, amounting to a sum of £78 5*s.* 8*d.* per month, was remitted to this country at his request. The Respondent's employers had an account at Blijdenstein & Co., bankers, in Threadneedle Street, on which account the Respondent was entitled to draw, and each month a sum was remitted from his employers to include (1) the said balance of his monthly remuneration not paid to his wife in Holland; (2) the employers' contribution towards the rent of his flat; (3) an amount to cover the expenses incurred by the Respondent on behalf of *Het Parool* in London."

Then, after stating the contentions on behalf of the parties, the Commissioners say that they

"allowed the appeal of the present Respondent and discharged the assessments"

for the years in question. Then they add:

"in coming to this decision we found that the Respondent's employers were resident abroad and that his salary was payable abroad, that the locality of the Respondent's source of income, i.e. the said office or employment, was in Holland. We therefore held, on the authority of *Bennet* v. *Marshall*, 22 T.C. 73, that the Respondent was not liable to assessment under Schedule E, Income Tax Act, 1918, in respect of the salary and emoluments of an office or employment exercised outside the United Kingdom, notwithstanding that the duties of the said office or employment were mainly performed in the United Kingdom."

Then they state the alternative contention, but I will not deal with that at the moment.

I propose, first, to deal with the contention which was put forward, really as an alternative, by Mr. Tucker on behalf of the Crown. That was that Mr. Colenbrander's situation came within the direct terms of Schedule E, in that it fell within the provisions of that Schedule exactly. Schedule E states:

"Tax under Schedule E shall be charged in respect of every public office or employment of profit,"

and so on. Then Rule 1 says:

"Tax under this Schedule shall be annually charged on every person having or exercising an office or employment of profit mentioned in this Schedule,"

and so on. Then Rule 6 provides:

"The tax shall be paid in respect of all the public offices and employments of profit within the United Kingdom or by the officers hereinafter respectively described".

Then there are a number of offices set out under letters of which (*h*) is:

"offices or employments of profit under any company or society, whether corporate or not corporate".

(Danckwerts, J.)

It is contended on behalf of the Crown that this was a " public office " or " employment of profit " within the United Kingdom—and there is no doubt that it falls within a description of this kind—that is, carried on within the United Kingdom and nowhere else. It has been established, I think, that all these different provisions in Schedule E are governed by the word " public ". Therefore, the question is whether the particular kind of employment which the Respondent had in the present case falls within the description of " a public office " or " an employment of profit ".

I have been referred to some cases in which the Courts have wrestled with the difficulties which are produced by this odd phrase and the peculiarity generally of these provisions: in particular *Great Western Railway Co.* v. *Bater*, in 1922, 8 T.C. 231, and *McMillan* v. *Guest*, in 1942, 24 T.C. 190.

Rowlatt, J., in the earlier case, suggested that some attempts at definition had referred to an employment which amounted to a subsisting permanent public position which had existence separate from the person who filled it. That was approved, I think, in substance by Lord Atkin in *McMillan* v. *Guest*. It is not a very satisfactory definition. Indeed it seems to me that the phrases used in the Act defy definition and I do not propose to attempt anything of the sort. But, giving the best consideration I can to the matter, after having carefully considered the observations in the two cases to which I have referred, I cannot come to the conclusion that the position which Mr. Colenbrander held of London correspondent of this newspaper, which seems far from permanent, as I understand the facts as found, comes within the description of " public office " or " employment of profit " within the meaning of Rule 6 of Schedule E of the Income Tax Act, 1918. Therefore it seems to me that is fatal to the contention of the Crown that he is properly taxable under Schedule E.

Having disposed of that, the point which remains is whether under Schedule D he comes within Case II of Schedule D, or whether he comes within Case V, that is to say, he is only taxable in respect of income " arising from possessions out of the United Kingdom " in so far as there are remittances to this country, and not upon the whole of his income.

The position in regard to this point is rather difficult because I think the result of the decision of the Court of Appeal in *Bennet* v. *Marshall*(1) is that, if it be correct that the Respondent's remuneration from the Dutch Corporation was payable to him in Holland and by contract nowhere else, that decision covers the point, and it is a case of a foreign possession within Case V of Schedule D.

The difficulty is really caused by the fact that, after the provision of 500 guilders to be paid each month to his wife, the balance of £78 5*s.* 8*d.* was remitted to this country by his employers and paid into a firm of bankers in Threadneedle Street, and the Respondent could draw the sums which he required from that account. There is no actual finding, so far as I can see, that he ever drew anything at all, but I think it is a fair inference that he must have drawn what he required for the purpose of his living expenses over here and the payment of his rent.

There are two possible inferences or explanations which may be drawn from the facts as found in paragraph 8 of the Case stated by the Commissioners which I have already read. One is, as contended on behalf of the Crown, that there was a subsidiary contract, that is to say, really

(1) 22 T.C. 73.

a variation of the original contract to substitute a position involving payment of part of the salary of the Respondent in this country instead of in Holland. I think it is right to say that if that be the true inference, as contended by Mr. Millard Tucker, it would be fatal to the claim that Case V applied because the salary would not be wholly payable outside this country but would be payable partly in this country, and it would be difficult to contend that the source of the income in question was wholly outside the United Kingdom.

But there is an alternative explanation which seems to me quite possible and that is that there was no legal variation of the oral contract of service between the Respondent and his employers at all; but that, simply for his own convenience, the Respondent made a request to his employers to pay part of his salary to his wife and to remit the rest on his behalf to this country. It may be that the employers could have refused to assent to his request and he could not have enforced it. It may be also that, if they assented to his request for the time being and then afterwards decided to change their minds, he could not have objected to them saying: "We are no longer prepared to remit money to you in England for various reasons, and we will pay it into your account wherever you wish, but in Holland only".

It is not easy to decide which is the right conclusion to draw from the facts stated by the Commissioners, but I think I am entitled to pay some attention to the conclusion which they reached upon the evidence which they heard which they state in paragraph 11 of the Case:

> "In coming to this decision we found that the Respondent's employers were resident abroad and that his salary was payable abroad, that the locality of the Respondent's source of income, *i.e.*, the said office or employment, was in Holland."

I think it is clear that the Special Commissioners were competent to deal with the matter and they were applying their minds to the question which was vital, whether there was some binding agreement which entitled the Respondent to demand payment in England of his part of his salary, and they seem to me to have negatived that conclusion in fact. Accordingly I come to the conclusion that the only legally effective provision which was binding on the employers was to pay the salary of the Respondent in Holland. Therefore it seems to me that, in accordance with the decision of the Court of Appeal in *Bennet* v. *Marshall*[1], the source of the Respondent's income was situate outside the United Kingdom and therefore came within Case V of Schedule D as being a foreign possession so that he could only be taxable in this country upon the sums which were remitted to this country.

The result of that is that the appeal is dismissed.

Mr. Millard Tucker.—The appeal will be dismissed with costs. There is the same arrangement in this case, namely, that wherever we get and whatever the result, Mr. Colenbrander is indemnified in respect of costs.

Danckwerts, J.—Very well.

(2) *Harvey* v. *Breyfogle*

Danckwerts, J.—I am bound to follow the case of *Bennet* v. *Marshall*, 22 T.C. 73, and I give judgment accordingly confirming the Commissioners. That is right, is not it?

Mr. Millard Tucker.—That is so, my Lord.

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(1) 22 T.C. 73.

(Danckwerts, J.)

Mr. Borneman.—With costs?

Danckwerts, J.—Need I make any direction as to costs?

Mr. Borneman.—I ask for judgment with costs.

Mr. Tucker.—Would your Lordship make a formal Order for costs, and then we shall have the right to have them taxed if necessary.

Danckwerts, J.—I will. They will be taxed, I suppose, as between solicitor and client.

Mr. Tucker.—That will be called to the attention of the Taxing Master. The Taxing Master will not deal with costs unless there is an Order for costs.

Danckwerts, J.—Then I dismiss the appeal with costs.

Mr. Tucker.—That will be sufficient.

Mr. Borneman.—Perhaps your Lordship will allow me to say this. I know my friend spoke quite unwittingly, but when he was opening this case he used the expression, "ways and means by which Mr. Breyfogle could get hold of this money in this country by having a banking account in the Isle of Man and that sort of thing." There has never been any suggestion that Mr. Breyfogle has been operating that kind of thing.

Mr. Tucker.—No.

Mr. Borneman.—Anybody not knowing the facts might have drawn that conclusion. I only want to say there is no foundation for any such suggestion.

Danckwerts, J.—There is no sort of device in this case. It was a natural business arrangement.

Mr. Borneman.—It was, my Lord.

Danckwerts, J.—This happens to fall within it.

Mr. Borneman.—It may have been felt that somebody listening in Court might have thought the suggestion behind this case was that Mr. Breyfogle——

Danckwerts, J.—I think Mr. Tucker was speculating in his mind about what people might do if they were sufficiently ingenious.

Mr. Borneman.—He was.

Mr. Tucker.—Perhaps I had better say I withdraw everything.

The Crown having appealed against the above decision the cases came before the Court of Appeal (Somervell, Denning and Romer, L.JJ.) on 23rd and 24th July, 1952 when judgment was given unanimously against the Crown, with costs in each case.

Mr. J. Millard Tucker, Q.C., and Sir Reginald Hills appeared as Counsel for the Crown, Mr. F. Heyworth Talbot, Q.C., and Mr. Desmond Miller for Mr. Colenbrander, and Mr. Roy Borneman, Q.C., and Mr. S. M. Young for Mr. Breyfogle.

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(1) *Bray* v. *Colenbrander*

Somervell, L.J.—This is an appeal by the Crown from a decision of Danckwerts, J. It concerns assessments for the years 1945 to 1950. I may summarise briefly the facts as set out in the Case. The Respondent taxpayer was a Dutch national who entered the employment of a Dutch corporation who were the proprietors of a Dutch newspaper called the *Het Parool*. He entered their employment on 1st June, 1945, and in December, 1945, he came to the United Kingdom as London correspondent of the paper. He

remained here except for holidays and occasional visits to the editor or manager of the newspaper in Holland. There are further details set out in the papers as to the circumstances of his work here which I do not think I need summarise.

The taxpayer's contention which was upheld by the learned Judge was that his employment is a foreign possession within Case V and that he was taxable only on the sums remitted. The Crown contended before the Commissioners that the Respondent held a public office under Schedule E. The learned Judge found against that contention and it was not pursued before us. The contention of the Crown before us is that the taxpayer is assessable under Case II of Schedule D, which deals with

> "tax in respect of any profession, employment, or vocation not contained in any other Schedule."

The employments under that Case were by Section 18 of the Act of 1922 made chargeable under Schedule E, but it is to be noted that in the Sub-section which effects that change, profits or gains (which, of course, means in respect of offices, employments, or pensions, with which the section deals) chargeable under Case V of Schedule D, are excepted from the provisions of the Sub-section. I will now read Case V. Rule 1 provides:

> "The tax in respect of income arising from possessions out of the United Kingdom other than income which—(*a*) is immediately derived by a person from the carrying on by him of any trade, profession or vocation either solely or in partnership; or (*b*) arises from any office, employment or premium, shall be computed . . .',

in a certain way. Rule 2 with which we are concerned, provides:

> "The tax in respect of income arising from possessions out of the United Kingdom, other than income to which Rule 1 applies, shall be computed on the full amount of the actual sums annually received in the United Kingdom from remittances payable in the United Kingdom . . .",

and so on. The taxpayer's contention here is that he comes under that Rule and he seeks to be assessed only on remittances. Subject to leave to appeal to the House of Lords, the Crown desire, as Mr. Tucker told us, to submit in the House of Lords that a decision of this Court in *Bennet* v. *Marshall*, 22 T.C. 73, is wrong, but as it stands that decision binds this Court. In the present case Mr. Tucker submits that on one point he can distinguish the present case from that case and on that ground, therefore, the appeal ought to be allowed.

Bennet v. *Marshall* dealt with the application of Case V to an employment. The taxpayer, during the relevant years, had a residence here, in fact it was his only residence during those years. He was vice-president of a United States company and his duties were to supervise the sale of the company's products throughout the world. The headquarters of the company were in Ohio but payment of his salary was made to a bank where he had an account in Canada. Much of his work, or rather, as MacKinnon, L.J., indicated, and the facts in the case indicated, most of it was done in the United Kingdom though he visited other countries for substantial periods. The headquarters of the part of the business with which he was dealing were at the seat of the company in the United States which, of course, controlled his activities. All members of the Court agreed that Case V covered trades, professions, employments, and vocations. That conclusion was based in the main on the reasoning of the House of Lords in *Colquhoun* v. *Brooks*, 2 T.C. 490, which dealt with a trade wholly carried on outside the United Kingdom and held that income from that trade was within Case V, in other words, the interest in it was a foreign possession.

(Somervell, L.J.)

The argument for the Crown in *Bennet* v. *Marshall* was that to be within Case V, just as a trade must be wholly carried on outside the United Kingdom, so an employment must be wholly carried on outside the United Kingdom, and admittedly Mr. Marshall carried on his employment to a large extent in this country. The question posed by all members of the Court was: What is the source of the income? In deciding how that question should be answered in respect of employment the Court distinguished employment from trade or profession. I will read a passage from the judgment of Sir Wilfrid Greene, M.R., starting at the bottom of page 85(1):

> ". . . I think it is just to observe that there is an inherent difference between a trade and a profession on the one hand and an employment on the other when one is considering the essential question which is to be looked at, namely, what is the source of the income. Trades and professions are, so to speak, based on activity, either by the persons carrying on the trades or by the persons carrying on the professions. A trade or profession is not attached to some specific contract, and, accordingly, in such a case it is impossible to put a finger on a particular contract as the source of the income. The profits of the profession and the profits of the trade come from the general state of activity of the trader or the professional man, and having regard to the fact that trades and professions are not to be divided up, if a doctor carries on his profession in England and abroad, you cannot treat that as being two professions; he is carrying on the one profession; similarly, a trader who carries on a trade in England and also abroad is carrying on one trade, assuming that it is the same trade and not a distinct trade. The fact that part of his trade is carried on abroad does not make it a distinct trade any more than the fact that a profession is carried on partly abroad makes it a distinct profession, with the result that, when once it is found that the trader or the professional man is carrying on a trade or profession in this country, it is impossible to predicate of that trader or professional man that the source of his income is a source out of the United Kingdom. But in the case of employment different considerations arise. Employment arises from a contract of employment and, therefore, there is what there is not in the other cases, some definite contract to which to look when inquiring into the source of the income which it is sought to charge. I should have thought, therefore, that in the case of employment the contract is the first thing that must be looked at to find out the answer to the question raised in any particular case of employment: is it or is it not income derived from a source out of the United Kingdom? As I have said, I am quite unable to find in *Colquhoun* v. *Brooks*(2) any rule laid down or anything in the reasoning which compels us to say, as the Crown here would have us say, that in no case where part of the activities of the employment take place in this country can the income be said to be derived from a source out of the United Kingdom."

The Master of the Rolls then proceeded to regard that distinction as established by the reasoning in the decision of the House of Lords in *Pickles* v. *Foulsham*, 9 T.C. 261, and [1925] A.C. 458. Romer, L.J., came to the same conclusion but it is clear from his judgment that he regarded himself as bound by the decision in *Pickles* v. *Foulsham* and at any rate was uncertain whether, apart from that decision, he would have come to the same conclusion.

It is unnecessary to consider the detailed examination which was made in that case of *Pickles* v. *Foulsham* because, of course, it is a decision which binds us, but I think it is desirable to refer very briefly to the facts in *Pickles* v. *Foulsham* for reasons which will emerge. That was a case where the taxpayer was employed by a British company and his duties were wholly performed outside the United Kingdom in West Africa. The Crown was seeking to say that he was assessable under Case V on the basis that the test to be applied in considering whether the possession was foreign was: Where was the work done by the employee done? The bulk of his remuneration was payable by the British company in the

(1) 22 T.C. (2) 2 T.C. 490.

United Kingdom. He had been held to be resident here. The Commissioners decided that he was assessable under Case V but the House of Lords rejected that view and held that his salary was not a foreign possession. As I say, without going into details, of course that plainly laid down that salary from an employment is not a foreign possession because all the work is done outside the United Kingdom. You must have regard to other factors and in that case the factors were that the employer was within the jurisdiction and the bulk of the salary, at any rate, was paid within the jurisdiction.

It is, of course, necessary to consider what *Bennet* v. *Marshall* decided. In regard to the relevancy or irrelevancy of the place where the work is done Sir Wilfrid Greene, M.R., said this[1]:

> ". . . in considering the source of income in the case of an employment, regard is not to be had to the place where the tasks of the employee are performed."

Romer, L.J., basing himself, as I have said, on the reasoning in the House of Lords in *Pickles* v. *Foulsham*[2] regarded that case as definitely deciding that in the case of an employment the locality of the source of income is not the place where the activities of the employee are exercised and MacKinnon, L.J., I think, proceeded on the same basis. It seems to me plain, having regard to those two sentences, and to other passages in the judgment, that the decision would have been the same if Mr. Marshall's activities as employee had been wholly in the United Kingdom instead of, as they were, mainly. I will assume that in the present case, although the Respondent visited the head office from time to time it would be fair to regard his work as wholly done here, but no difference can, I think, be based on that. There was some reference to the actual words used in the judgment as to the test. Sir Wilfrid Greene, M.R., at the end of his judgment, said:

> ". . . the test for ascertaining the source of income is to look for the place where the income really comes to the employee, and that place is Canada."[1]

In considering that sentence it has to be borne in mind that earlier in his judgment, there being some obscurity as to whether the original contract provided for payment in Ohio, Sir Wilfrid Greene, M.R., made it plain that he was proceeding on the basis that the contract must be regarded for present purposes as a contract for payment in Canada. It was suggested that Sir Wilfrid Greene, M.R., might be intending to lay down that the place of payment under the contract was the only relevant circumstance. I do not so read what he said nor, of course, would it be necessary for the decision. I think one must read those words in their context as being applicable in a case such as that with which Sir Wilfrid Greene, M.R., was dealing, namely, where the payer, the employer, was abroad as well as the place of payment. I cannot think he was suggesting that in a case where the employer was a British company it would necessarily follow that the possession was a foreign one because under the contract the salary was payable at some place abroad. Romer, L.J., in some words following those which I have already read, after having negatived the place where the activities of the employee are exercised as the test, said[3]:

> ". . . but the place either where the contract for payment is deemed to have a locality or where the payments for the employment are made, which may mean the same thing."

If there is any difference or ambiguity as to the precise meaning of the words used by either Sir Wilfrid Greene, M.R., or Romer, L.J., we must

(1) 22 T.C. at p. 92. (2) 9 T.C. 261. (3) 22 T.C. at p. 94.

(Somervell, L.J.)

proceed on the basis, of course, of what the case decided, and I find no difficulty myself in understanding and applying those words in the light of the facts as they were admitted to be by all parties concerned, namely, that the payer was abroad and that the salary was paid abroad.

Turning to the present case, I will deal in a little more detail with the findings as to the relevant facts. The contract of employment was made abroad. In *Pickles* v. *Foulsham*(1), Lord Dunedin in his speech did not regard the place where the contract was made, I think, as relevant, or at any rate as in any sense conclusive on the basis, as I understand it, that the answer to the question posed is to be found by considering not where the contract was made but what it provided. However, whether relevant or not, in the present case the contract was made abroad. The employer was undoubtedly abroad and the finding, which is the important finding (on part of which Mr. Tucker seeks to distinguish this case) with regard to his remuneration is in paragraph 8:

> "The Respondent's gross remuneration amounted to a sum of approximately £125 per month, payable in Holland. His wife and child continued during the material period to reside in Holland, and by arrangement with his employers a fixed sum of 500 guilders was paid in Holland direct to his wife for the maintenance of his home there. The balance,"

[payable in Holland]

> "amounting to a sum of £78 5*s.* 8*d.* per month, was remitted to this country at his request. The Respondent's employers had an account at Blijdenstein & Co., bankers, in Threadneedle Street, on which account the Respondent was entitled to draw, and each month a sum was remitted from his employers to include (1) the said balance of his monthly remuneration not paid to his wife in Holland; (2) the employers' contribution towards the rent of his flat; (3) an amount to cover the expenses incurred by the Respondent on behalf of *Het Parool* in London."

It seems to me plain that this amounts to a finding that under the contract the salary was payable in Holland and when one comes to the second sentence where the balance is dealt with one must, I think, write in these words—"the balance payable in Holland was remitted to this country at his request". Mr. Tucker conceded that if this balance had been paid into the Respondent's own bank in Holland and then by arrangement made by him with his bank it had been remitted to this country, the case would have been indistinguishable from *Bennet* v. *Marshall*(2). The short question is whether, what I may call the machinery of getting the money over here, as set out in the paragraph which I have read, makes a difference.

Mr. Tucker invited us, in the first instance, to treat the finding as a finding that the contract had been altered so that the balance became payable under the contract in the United Kingdom, but I cannot so read it. It seems to me the Commissioners are saying that the balance remaining payable in Holland was remitted at the request of the taxpayer and not in fulfilment of an altered term of the contract. I think, therefore, the finding means that the balance under the contract remained payable in Holland. Pausing there on *Bennet* v. *Marshall* this was therefore income arising from a foreign possession. I think the fact that the method of bringing the balance over here was arranged by the employer at the request of the Respondent does not affect the source of the income which remained, therefore, a foreign possession within Case V.

Mr. Tucker sought to take a further point having regard to the contribution which was made towards the rent of his flat, but it seems to all of us, having regard to the finding of the Commissioners in paragraph 11, that

(1) 9 T.C. 261. (2) 22 T.C. 73.

the case was argued before them on the basis of the Respondent's salary and that it would not be right, therefore, to allow a special point based on the circumstances as to rent which might have been more fully investigated, to be put before this Court. For these reasons I would dismiss the appeal.

Denning, L.J.—I agree and have nothing to add.

Romer, L.J.—I also agree.

Somervell, L.J.—The appeal will be dismissed. We will not make an Order as to costs, or would you like to have it?

Mr. J. Millard Tucker.—We prefer an Order as to costs but it will not affect the arrangement which has been made.

(2) *Harvey* v. *Breyfogle*

Somervell, L.J.—Having dealt with the effect of the decision in *Bennet* v. *Marshall*[1] in the judgment we have just delivered, it is unnecessary in this appeal to say more than that, having read the case, it is in our view covered by *Bennet* v. *Marshall,* and Mr. Tucker would not argue the contrary. Therefore, this appeal will be dismissed with costs.

Denning, L.J.—I agree.

Romer, L.J.—I agree.

Mr. Tucker.—I am instructed to make an application to your Lordships for leave to appeal to the House of Lords. I need not elaborate the matter I am sure, having regard to what I said when I opened the appeal.

Somervell, L.J.—We all think this is a proper case for leave to appeal. You will take them both.

Mr. Tucker.—Yes.

Mr. Heyworth Talbot.—And on the same terms.

Mr. Tucker.—Nothing will alter the agreement which has been made by the Commissioners of Inland Revenue which was that both Appellants should be fully indemnified as to costs no matter to what court the matter went.

Romer, L.J.—Apparently the leave will be more fruitful than the leave which was given in *Marshall's* case.

Mr. Tucker.—Yes, my Lord.

The Crown having appealed against the above decision the cases came before the House of Lords (Lords Normand, Oaksey, Morton of Henryton, Reid and Cohen) on 24th, 25th and 26th February, 1953, when judgment was reserved. On 20th April, 1952, judgment was given unanimously against the Crown, with costs in each case.

The Attorney-General (Sir Lionel Heald, Q.C.), Mr. J. Millard Tucker, Q.C., and Sir Reginald Hills appeared as Counsel for the Crown, and Mr. F. Heyworth Talbot, Q.C., and Mr. Desmond Miller for Mr. Colenbrander and Mr. Roy Borneman, Q.C., and Mr. S. M. Young for Mr. Breyfogle.

Lord Normand.—My Lords, in each of these appeals the Respondent entered into a contract of employment with an employer resident abroad. The contract was in each case entered into in the country of the employer's

(1) 22 T.C. 73.

(Lord Normand.)

residence and it provided for payment of the employee's remuneration in that country. Parenthetically it should be said that there is no suggestion that the place of payment was nominal or pretended, or that the real or genuine place of payment was not the place specified in the contract. Nothing, therefore, of what follows in this opinion in any way touches a case where the designated place of payment is challenged as nominal or pretended and unreal. Substantially the whole duties of the employee under the contract in each case were performed in the United Kingdom and any duties performed elsewhere were, for the purposes of these appeals, negligible. The Respondents were resident in the United Kingdom at all material times.

By the assessments under review the Crown assessed each of the Respondents under Schedule E in respect of all sums paid to them as the remuneration of their employment, and the Crown has consistently maintained that the Respondents were assessable as persons residing in the United Kingdom in respect of the whole annual profits and gains accruing from an employment carried on in the United Kingdom under Case II of Schedule D which, by the provisions of Section 18 of the Finance Act, 1922, became chargeable under Schedule E. The Respondents have with equal consistency maintained that they are assessable under Case V of Schedule D and that the measure of assessability is the amount of the actual sums annually received by them in the United Kingdom (Rule 2 of the Rules applicable to Case V). They claim the benefit of the express exception in Section 18 (1) of the Finance Act, 1922, whereby profits and gains chargeable under Case V of Schedule D remain chargeable under that Schedule.

It is now quite settled that the word " possession " in Case V covers employment (*Colquhoun* v. *Brooks,* (1889) 14 A.C. 493,(1) *Foulsham* v. *Pickles,* [1925] A.C. 458,(2) *Bennet* v. *Marshall,* [1938] 1 K.B. 591,(3) per Sir Wilfrid Greene, M.R., at pages 600-1). But to fall within Case V the " possession ", the employment, must be outside the United Kingdom, which means entirely outside the United Kingdom. The Respondents' case is that an employment is entirely outside the United Kingdom if the place of payment under the contract of employment is outside the United Kingdom, and that the place or places at which the duties of the employment are performed by the employee are irrelevant to the question whether the " possession " is outside the United Kingdom. They further say, and it is admitted, that *Bennet* v. *Marshall* so decided. *Bennet* v. *Marshall* was decided by the Court of Appeal, and the Special Commissioners, Danckwerts, J., and the Court of Appeal, have all followed it as an authority binding on them in the present cases.

The present appeals are therefore brought for the purpose of bringing under review the ruling of the Court of Appeal (Sir Wilfrid Greene, M.R., Romer and MacKinnon, L.JJ.), in *Bennet* v. *Marshall,* that the employee was assessable only under Case V because the place of payment of his remuneration was outside the United Kingdom, and that the fact that some of his duties were performed in the United Kingdom was irrelevant to the question whether the " possession " was wholly outside the United Kingdom. The Court of Appeal's decision was unanimous and it affirmed the judgment of Lawrence, J., as he then was, in the Court below. In both Courts it was held that the case was concluded by the decision and reasoning of this House in *Foulsham* v. *Pickles.* That was disputed by the Crown,

(1) 2 T.C. 490. (2) 9 T.C. 261. (3) 22 T.C. 73.

and it is the real point of controversy in this case. The facts in *Foulsham* v. *Pickles*[1] were the converse of those in the present cases and in *Bennet* v. *Marshall*[2], for in it the taxpayer was employed abroad by an English company under a contract of employment, which provided for payment of his remuneration in England. This House held that his employment was not wholly out of the United Kingdom. The question debated in *Bennet* v. *Marshall* was whether the *ratio decidendi* of this House in *Foulsham* was (*a*) that the place or places where the employee performed his duties were irrelevant to the question whether his employment was wholly outside the United Kingdom, and that the only relevant matter was the place of payment of his remuneration, or (*b*) that the place of payment was *a* relevant consideration, without excluding as irrelevant the place or places at which the duties were performed.

That question was carefuly considered by Lawrence, J., and by the members of the Court of Appeal in *Bennet* v. *Marshall,* Sir Wilfrid Greene, M.R., devoted a large part of his judgment to a close examination of the speeches of each of the noble Lords who took part in *Foulsham.* All these learned judges came to the conclusion which I take from the words of Romer, L.J. His words are all the more worthy of attention since he confessed that, apart from authority, he would have come to a different view. After stating that *Colquhoun* v. *Brooks*[3] had decided that

> "whenever there is a source of income of which it can properly be said that it is wholly situated abroad, that source of income falls to be taxed under Case V of Schedule D,"

he concluded thus:

> "The House of Lords . . . in *Foulsham v. Pickles* have definitely decided that, in the case of an employment, the locality of the source of income is not the place where the activities of the employee are exercised but the place either where the contract for payment is deemed to have a locality or where the payments for the employment are made, which may mean the same thing."[4]

I have studied the judgments of Lawrence, J., and of the Court of Appeal in *Bennet* v. *Marshall* so far as they bear on the question of the *ratio decidendi* of *Foulsham* v. *Pickles,* and I am unable to find any ground for rejecting them or indeed any ground for criticism. It is my humble opinion that Sir Wilfrid Greene, M.R., who dealt most fully with the point, expounded the House of Lords' judgments with extraordinary precision and insight. It would be a mere waste of time to go over again the ground that he has so completely and satisfactorily covered in that part of his judgment. There is no doubt left in my mind that this case is governed by the *ratio* of *Foulsham* v. *Pickles.*

The appeals must therefore, I think, be dismissed, with costs. But before leaving the cases I wish to refer to a matter which at one time caused me some uneasiness, and which I mentioned at an early stage of the hearing as a matter which might require consideration.

If, instead of being fully satisfied that *Bennet* v. *Marshall* had correctly interpreted the reasoning in *Foulsham* v. *Pickles,* we had come to think, on a nice balance of considerations on one side and the other, that the Crown's argument in the appeals should on the whole be preferred, what would our duty have been? Ought we to have given judgment in favour of the Crown? Or ought we to have had regard to the hardships and injustices which might result? The point is this. In 1938 *Bennet* v. *Marshall* was decided; leave was obtained to appeal to this House but

(1) 9 T.C. 261. (2) 22 T.C. 73. (3) 2 T.C. 490. (4) 22 T.C. at p. 94.

(Lord Normand.)

nothing followed on that. In the successive Finance Acts between 1938 and 1950, when the assessments in the present cases were, I think, made, the Inland Revenue could have laid before Parliament a clause to make it clear for the future that the place where the employee performed his duties was a relevant circumstance in considering the locality of the employment. Nothing was done. But now this appeal is taken and if it had succeeded it would have rendered a number of taxpayers liable to additional assessments going back six years. In the interval between 1938 and 1950 many people must, I should think, have entered into contracts of employment with a tract of future time in the faith that the place of payment of their salary was conclusive in settling whether they would have to pay British Income Tax on the actual amount of their remuneration remitted to the United Kingdom, or upon the whole amount of their remuneration. That would have been for them of great importance when they were negotiating the contract.

This matter was mentioned at the hearing but it was not debated. I would have asked that it should be debated if the conditions in which it might have been important had not evaporated by the conclusion of the argument. I am still in doubt about what our duty would have been if these conditions had still been present. I have formed no opinion about it, save on this one point, that in modern times it would be unrealistic to attach more importance to a disposition of property made on the faith of a judicial decision than to a contract with a tract of future time entered into on the faith of a judicial decision. I wish it to be clearly understood that, in raising this question as I did, I had no thought of blaming or casting any reflection on anyone.

Lord Morton of Henryton.—My Lords, my noble and learned friend, **Lord Oaksey,** has asked me to say that he agrees with the opinion which has just been delivered.

My Lords, I agree that this appeal must be dismissed, for the reasons given by my noble and learned friend on the Woolsack, and I only desire to add two observations.

I would echo the tribute which has been paid to the judgment of Sir Wilfrid Greene, M.R., in *Bennet* v. *Marshall,* [1938] 1 K.B. 591, but I think that one slip appears in that judgment, which was extempore, at page 611. The learned Master of the Rolls there said:

> "If I am right in my view as to the effect of *Foulsham* v. *Pickles* it has the result in this case that the test for ascertaining the source of income is to look for the place where the income really comes to the employee, and that place is Canada. That is where the source is, and it is outside the United Kingdom."(2)

It was immaterial, for the purposes of that case, whether the source of income was the United States of America or Canada, but I should have thought it was the United States, where the Respondent's employers resided and whence his pay was remitted to Canada. I make this observation because I am apprehensive that some subtle argument may be based hereafter on this portion of the judgment.

I have formed no view upon the matter discussed by Lord Normand at the end of his speech, as it proved unnecessary to hear any argument thereon.

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(1) 22 T.C. 73. (2) *Ibid.*, at p. 92.

Lord Reid.—My Lords, I concur.

Lord Cohen.—My Lords, I also agree that this appeal should be dismissed for the reasons given by my noble and learned friend on the Woolsack, and would only add that, like my noble and learned friend, Lord Morton of Henryton, I have formed no opinion on the matter discussed by Lord Normand at the end of his speech, as it proved unnecessary to hear any argument thereon.

Questions Put :

Bray (*H.M. Inspector of Taxes*) v. *Colenbrander.*

That the Order appealed from be reversed.

The Not Contents have it.

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

The Contents have it.

Harvey (*H.M. Inspector of Taxes*) v. *Breyfogle.*

That the Order appealed from be reversed.

The Not Contents have it.

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

The Contents have it.

[Solicitors—Solicitors of Inland Revenue ; Simmons & Simmons, and Linklaters & Paines.]

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