secure Ryan's dismissal, a good deal of time would necessarily elapse before the process could be completed.

In Shephard's case I think that the probability of his seeking and obtaining further service under the Commonwealth (after incapacity as a telegraphist) is so remote that I should ignore it.

There will be judgment for Ryan for £1,078 and costs.

There will be judgment for Shephard for £1,067 and costs.

The moneys paid into court will be paid out to the plaintiffs and deducted from the amount of damages awarded.

Solicitors for the plaintiffs, *Cleland & Teesdale Smith.*

Solicitor for the defendant, *W. H. Sharwood,* Crown Solicitor for the Commonwealth, by *Fisher, Powers, Jeffries & Brebner.*

C. C. B.

[HIGH COURT OF AUSTRALIA.]

ROBERTSON . . . . . APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION RESPONDENT.

Income tax (Cth.)—Assessment—Exempt income—Whether "income derived from sources outside Australia" and "chargeable with income tax in any country outside Australia"—Taxability of income in Great Britain—Questions affecting—Interference with decision of commissioner or board of review—Income Tax Assessment Act 1922-1931 (*No.* 37 *of* 1922—*No.* 23 *of* 1931), *sec.* 14 (1) (*q*) (i.) (1).

The court can only interfere with the determination or decision of the Commissioner of Taxation or the board of review upon a question whether income included in an assessment to income tax is "income derived from sources outside Australia" and "chargeable with income tax in any country outside Australia" within the meaning of sec. 14 (1) (*q*) (i.) (1) of the *Income Tax Assessment Act* 1922-1931, and is accordingly exempt income under that section, when it is affirmatively established that the exercise of the judgment or discretion reposed in the commissioner or the board of review has miscarried.

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The taxpayer, who was a director of a company incorporated in Victoria, spent more than six months in each of the relevant years in Great Britain, partly on pleasure and partly on the business of the company. He obtained funds in England by means of an overdraft at the London branch of his Australian bank. His salary and other moneys were paid into his account at the Melbourne office of the bank. With these funds securities were purchased, which the bank held. After his return to Australia these were sold and the proceeds used to extinguish the London overdraft. The taxpayer objected to the inclusion in his assessments to income tax for the years ending 30th June 1930 and 1931 of certain portions of his income on the ground that they were exempt income under sec. 14 (1) (*q*) (i.) (1) of the *Income Tax Assessment Act* 1922-1931. He had not in fact been charged with income tax in Great Britain. The commissioner and the board of review disallowed the objection.

Held that, as the board had not failed to consider the three crucial questions affecting liability to taxation in Great Britain, namely, residence, remittance of income and exercising in Great Britain the employment of a director, the appeal failed.

Effect of Schedules D and E of the *Income Tax Act* 1918 (8 & 9 Geo. V. c. 40) as amended by the *Finance Act* 1922 (12 & 13 Geo. V. c. 17), sec. 18 (1), considered.

APPEAL from the Board of Review.

The taxpayer, Charles Victor Robertson, objected to his assessment in respect of income derived from personal exertion during the years ending 30th June 1930 and 1931 on the ground that portion of the income assessed was "income derived from sources outside Australia" and was "chargeable with income tax in" a "country outside Australia" within the meaning of sec. 14 (1) (*q*) (i) (1) of the *Income Tax Assessment Act* 1922-1931 and was accordingly exempt income. The taxpayer was a joint managing director of a company incorporated in Victoria and was called the governing director and based his claim on the fact that he was resident in Great Britain from March 1929 to January 1931 on business for his company. He claimed that he was resident in Great Britain for a period exceeding six months, which made the income liable to assessment under the British Income Tax and Finance Acts, thus making the salary referred to chargeable with income tax in a country outside Australia within the meaning of sec. 14 (1) (*q*) of the *Income Tax Assessment Act* 1922-1931. The commissioner disallowed the objections on the ground that it had not been proved to his satisfaction that the income was to any extent chargeable with income tax in any country outside Australia. The taxpayer

appealed to the board of review, which dismissed the appeal and confirmed the commissioner's decision.

From this decision the taxpayer appealed to the High Court, the questions of law involved being :—

(1) Was the income, the subject matter of the assessment, derived from sources outside Australia ?

(2) Was such income chargeable with income tax in any country outside Australia ?

(3) Was such income exempt from income tax by virtue of sec. 14 (1) (*q*) of the *Income Tax Assessment Act* 1922-1931 ?

Fullagar K.C. and *Knight*, for the appellant.

O'Bryan, for the respondent.

Cur. adv. vult.

July 26.

DIXON J. delivered the following written judgment :—

Par. *q* (i) (1) of sec. 14 (1) of the *Income Tax Assessment Act* 1922-1931 exempts from income tax income derived from sources outside Australia to the extent to which that income is proved to the satisfaction of the Commissioner of Taxation to be chargeable with income tax outside Australia.

The taxpayer appeals from a decision of the board of review refusing a claim on his part for exemption in respect of income from personal exertion derived during the years ending 30th June 1930 and 1931.

The taxpayer is a joint managing director of a company incorporated in Victoria and is called the governing director. The company act as consulting accountants, teach by correspondence and otherwise, and, as I gather, publish literature for use in business training and practice. Early in 1929 he visited Europe and was absent from Australia for two years.

The taxpayer's salary as governing director is substantial and he seeks exemption for the whole sum which, upon an apportionment, is referable to so much of the period of his absence as is included within the two years of income ending 30th June 1931. On his visit to Europe he combined business with pleasure and inquired into a number of questions in the interests of his company and conducted some business negotiations on its behalf. He had

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armed himself with a power of attorney. During each of the twelve months ending 5th April 1930 and 5th April 1931, years of assessment for British income tax, he spent in the aggregate more than six months in England.

He contends that during his absence the source of his salary was outside Australia and that, in respect of the amount for which he claims exemption, he was chargeable with income tax under the laws of the United Kingdom. In fact he has made no return to the British assessors of income tax and has not been assessed to such tax. The amount of the salary payable to the taxpayer depended upon a resolution of the board of directors passed some years before under an article of association and he held office under an appointment made pursuant to another article. It does not appear to me to be altogether clear that the source of his remuneration, during his absence, was outside Australia, but for some reason it was admitted on behalf of the commissioner that in respect of the income in question this condition of the Commonwealth exemption was satisfied. At the same time it was denied that any part of his salary arose from the exercise in the United Kingdom of his employment of managing or governing director. If it did so arise, the taxpayer to that extent would be chargeable with British income tax.

The commissioner maintained that upon no ground was any part of the income taxable in Great Britain. So far as he was concerned, it was not proved to his satisfaction that any of the income was there chargeable. The decision of the board of review was against the taxpayer and from that, the commissioner said, it followed that it was not proved to the board's satisfaction. The provision conferring the exemption makes it depend on his or the Board's satisfaction. The court cannot, it was said, examine the correctness of the conclusion. Further, before an Australian court, English law is a matter of fact and so, it was contended, the decision of the board could involve no question of law and there is no appeal to the court from a decision of the board of review unless it does involve a question of law.

For a proper understanding of the manner in which these contentions apply, I think it is necessary to know what are the considerations upon which, under the British *Income Tax Acts*, the taxpayer's

liability depends. Unfortunately the not very simple system of British income tax is more than usually complicated in its application to such facts as the present. This arises in part from the uncertainty that must result when residence in a country is made a criterion of legal liability and in part from the fact that the income is derived from an employment and that the employment is that of a director. It is well to begin with the method of taxation of the remuneration of directors under the British *Income Tax Acts*.

The established practice appears to have been to treat the office of director of an incorporated trading company as an employment of profit within schedule E. The remuneration of a director was therefore charged under that schedule (See *Berry* v. *Farrow* (1); *Barson* v. *Airey* (2); *Watson* v. *Rowles* (3); *Proctor* v. *Ryall* (4)). The schedule applied only to employments exercised within the United Kingdom, and, if the duties were performed elsewhere, it was necessary to bring the income derived from the employment within schedule D before it could be taxed (*Pickles* v. *Foster* (5)). The territorial limitation upon the application of schedule E has occasioned some difficulties in relation to the office of director. In *Proctor* v. *Ryall* (4) *Rowlatt* J. took the question to be where the office was situate. He, therefore, held a director chargeable under schedule E because the company was incorporated in and managed from England where the board met, although the taxpayer himself resided abroad and, except for attending directors' meetings, performed abroad all his duties, which were those of a "foreign director" managing the foreign business of the company. In *Barson* v. *Airey* (6) the chairman of directors of an English company went to China on the business of the company and for his services there received additional remuneration. This raised a question whether the whole remuneration could be assessed under schedule E, a question answered in the affirmative on the ground that the remuneration all arose from the office of director, which was "within" the United Kingdom.

(1) (1914) 1 K.B. 632, at p. 637.
(2) (1925) 10 Tax Cas. 609, at pp. 635, 636; 42 T.L.R. 145.
(3) (1926) 11 Tax Cas. 171, at p. 176; 95 L.J.K.B 959.
(4) (1928) 14 Tax Cas. 204.
(5) (1913) 1 K.B. 174; 6 Tax Cas. 131.
(6) (1925) 10 Tax Cas. 609; 42 T.L.R. 145.

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The practice of bringing income derived from the office of director under schedule E was perhaps shaken by a decision upon that schedule the reasoning of which appears to have run counter to long established methods of assessment. If the law had not been altered it would have produced effects upon settled practice highly inconvenient to the revenue. The decision was given by the House of Lords in 1922. Their Lordships decided that the schedule was confined to offices or employments that in some undefined way could be considered as public and that, notwithstanding the express inclusion of railway companies in the schedule, a fourth class railway clerk could not be assessed under it because his office or employment was not "public" (*Great Western Railway Co.* v. *Bater* (1)). *Rowlatt* J., who decided the case in the first instance, said that, in spite of the use of the word "public" in the definition, as it had been applied it had practically disappeared (2). In the Court of Appeal, Lord *Sterndale* M.R. said that he could not agree with that, but what was true was that the word "public" had been interpreted in a very much more liberal sense than at first would, perhaps, seem to be its meaning. *Scrutton* L.J. regarded the chargeability of the clerk's salary under schedule E as depending on the question whether he held an office or employment of profit under a company. This he considered to be a question of fact and on that ground he refused to disturb the commissioners' decision that the schedule applied. But he explained the practical consequences and remarked upon the difficulties. After saying that he thought the court's decision was not very satisfactory even to themselves, he went on:—"That results from the fact that the *Income Tax Acts* are being worked under a system of considerable antiquity, which in many respects has not been amended by Parliament. All employees whose income reaches a certain amount, which has varied from time to time, are taxable either under schedule E or under schedule D. Whether they come under one schedule or the other has certain consequences, which I do not profess to enumerate exhaustively, but some of them are: If they come under schedule E, they are taxed on the income of the year of assessment and if they come under schedule D, they are taxed on the average of the preceding three years' income, if there

(1) (1922) 2 A.C. 1; 8 Tax Cas. 231.
(2) (1920) 3 K.B., at p. 273; 8 Tax Cas., at pp. 234, 235.

is such an average ; and that if they come under schedule D, they are assessed directly, and must fight out their battles with the income tax authorities by themselves ; but if they come under schedule E they are assessed through their employer who has to pay to the income tax authorities, and then deduct the tax from the employee. Naturally under those circumstances it may make a difference to a man whether he is taxed under schedule D or under schedule E. Now schedule E itself taxes public offices or employments of profit. I do not know whether, looking at it by the light of nature, you would ever say that a fourth class clerk in the running department of the Great Western held a public office or employment of profit" (1).

In the House of Lords this decision was reversed. The ground of the reversal was that an office or employment to come within schedule E must have some attribute justifying the application of the description "public" or "of a public nature." But the judgments contain many expressions of opinion tending against the liberal manner in which this very vague requirement had been applied. In particular, Lord *Wrenbury* said that he disagreed with the view expressed in *Berry* v. *Farrow* (2) that the company director had there been rightly assessed under schedule E. He described him as "managing director of an insignificant limited company to which he had assigned a patent but which, in fact, had done no business" (3). But probably his Lordship adopted this dyslogistic description rather to illustrate the lengths to which the application of schedule E might lead than because he thought that, if the company had pursued a more active and profitable course and had attained importance or notoriety, its directors might properly have been assessed under the schedule. The practical result of the decision of the House of Lords would have been to place under schedule D many employments which under existing practice were dealt with under schedule E, the assessments being made upon the employer and the tax collected at the source. As might be expected, to avert such a consequence, a legislative change was made at once. It was done in the same year. The *Finance Act*

(1) (1921) 2 K.B., at p. 139; 8 Tax Cas., at p. 239.
(2) (1914) 1 K.B. 632.
(3) (1922) 2 A.C., at p. 34 ; 8 Tax Cas., at p. 257.

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1922 includes the following provision: sec. 18 (1): "Such profits or gains arising or accruing to any person from an office, employment or pension as are, under the *Income Tax Act* 1918, chargeable to income tax under schedule D (other than the profits or gains chargeable under case V. of schedule D, or under rule 7 of the miscellaneous rules applicable to schedule D), shall cease to be chargeable under that schedule and shall be chargeable to tax under schedule E, and the rules applicable to that schedule shall apply accordingly subject to the provisions of this Act."

Whether because of the uncertainty of the lengths to which the decision of the House of Lords might be pressed or for reasons of policy, this provision appears to be expressed very widely. There were "employments" which had never been considered to fall under schedule E. Those holding or pursuing them had always been assessed under schedule D. It is for this reason that for the proper understanding of the appellant's case I have thought it desirable to set out above the history of the question. For, under schedule D, a person residing in the United Kingdom is chargeable on the annual profits or gains from any trade, profession, employment or vocation, whether the same be respectively carried on in the United Kingdom or elsewhere. Thus, if the appellant were a person residing in the United Kingdom, it might, if there were no more, appear to follow that he was chargeable upon the remuneration he received as a director whether or not what he did in the United Kingdom amounted to "carrying on" there the employment of director. He would be chargeable under schedule E because of the transfer into that schedule of employments assessable under schedule D, although, because the office was situate out of the United Kingdom, schedule E would not otherwise apply. Further, schedule D is expressed to bring into charge the annual profits and gains arising or accruing to any person although not resident in the United Kingdom from any trade, profession, employment or vocation exercised within the United Kingdom. Apparently if what the appellant did in England amounted to an exercise of his employment of director, then, even although he was never a resident, his remuneration, at least in so far as it arose or accrued from that exercise of such employment would, by transfer from schedule D, be brought into

charge under schedule E. In other words, if there were no more in the legislation, liability might appear to arise from mere residence on the part of the appellant or from the exercise of his director's office or employment within the United Kingdom. But schedule D contains other provisions which make it impossible to deal with liability arising from residence in so simple or direct a manner. The schedule includes in the charge the profits and gains of residents arising or accruing from property whether situate in the United Kingdom or elsewhere. Tax under the schedule is charged under six specified cases, the first five of which describe the nature of the income comprised therein and the sixth of which catches the residue not contained in the others. Case I. relates to trade. Case II. consists of "tax in respect of any profession, employment or vocation." Case V. is "tax in respect of income arising from possessions out of the United Kingdom." The cases are further qualified by rules, some of which are applicable to one or more specified cases only and others generally. Case II., for instance, is "to extend to every employment by retainer," a description which may not be inconsistent with the attributes of a directorate. For in *Bater's Case* (1) Lord *Sumner*, after saying that he had doubts whether every employment not by retainer is within E, makes a statement showing how he understood the expression. He says that, if it was so, then he thought that the employment of the railway clerk was "by retainer though annual, for he is not engaged to do a definite thing, to get it done in his own time and in his own way, but to do things of a definite class, as and when he is required, being paid whether his efforts are always required or not."

The second of the rules applicable to case V. provides that the tax in respect of income arising from possessions out of the United Kingdom shall be computed on the full amount of the actual sums annually received in the United Kingdom from remittances there payable, or from property imported, or from money or value arising from property not imported, or from money or value so received on credit or on account in respect of any such remittances, property, money or value brought or to be brought into the United Kingdom.

It is clearly settled that this rule limits the application of case V. to income actually received in some form or another in the United

(1) (1922) 2 A.C., at p. 29; 8 Tax Cas., at p. 254.

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Kingdom. If the language of the rule admitted of doubt on this point it would be removed by the circumstance that income arising from stocks, shares or rent is excepted and the taxpayer is made chargeable on the whole whether it has been brought to the United Kingdom or not, unless he satisfies the commissioners either that he has no domicil in the United Kingdom, or, if he is a British subject, that he is not ordinarily resident there. If he so satisfies them, the exception does not apply and he is taxed on so much of such income only as is remitted. It is apparent that a resident of the United Kingdom having a source of income abroad may find it much to his advantage to bring the source within case V., to have it classed as a "possession," and so pay tax not on the full amount which accrues from the source but upon so much only as is brought to the United Kingdom. For instance, in the present case, if the appellant was resident in England, and his employment as a director, considered as a source of income, was a "possession out of the United Kingdom," it is said that it would escape taxation in Great Britain because strictly none of the actual income was remitted to him.

The advantage of assessment on actual remittances from foreign sources of income was conceded to a much larger class of taxpayers than those residents who fell within the first category enumerated in schedule D, namely, those deriving profits or gains from any kind of property. The word "possessions" in case V. was treated as far more extensive than "property." In the leading case of *Colquhoun* v. *Brooks* (1), Lord *Macnaghten* said that it was not a technical word. "It seems to me," he continued, "that it is the widest and most comprehensive word that could be used. Why, for instance, should not 'possessions in Ireland' mean everything, every source of income that the person chargeable has in Ireland, whatsoever it may be." Lord *Herschell* said:—"I cannot see why it may not fitly be interpreted as relating to all that is possessed in Her Majesty's dominions out of the United Kingdom or in foreign countries and which is a source of income. And if so I do not think any violence would be done to the language if it were held to include the interest which a person in this country possesses in a business carried on elsewhere" (2).

(1) (1889) 14 App. Cas. 493, at p. 516.

(2) (1889) 14 App. Cas., at p. 508.

For reasons upon which it is unnecessary to enter, reasons arising from the provisions dealing with the ascertainment of the amount of taxable income and with the machinery of assessment the strength of which cannot be felt without a study of the judgments, the House of Lords decided that the income of a resident derived from a business carried on abroad could not be assessed under case II., but fell under case V. Accordingly, a partner residing in London in a firm conducting a hardware business in Melbourne was held to be chargeable, not with his full share of profits, but only with so much as was actually remitted to him in London.

In the report, published last year, of the Committee on Income Tax Codification, a work from which much enlightenment may be obtained upon the British law of income tax, *Colquhoun* v. *Brooks* (1) is chosen as one of two examples given of "the large body of authoritative expositions" contained in the law reports "not only of individual words, phrases and sections, but also of the scheme of the income tax system." It is described as governing the liability of British residents in respect of businesses carried on abroad. But the sentence that follows implies a limitation upon the authority of such a decision as a source of law. "Expositions such as these have in turn given rise to further discussion in later cases, and the difficulty of applying previous judgments to different facts has resulted in the necessity of interpreting those previous judgments themselves." Recently *Colquhoun* v. *Brooks* (1) has undergone this process; the House of Lords has limited its application in a way which perhaps may be considered revolutionary by those deriving from abroad what in Australia we should call income from personal exertion. In *G. W. Eaton-Turner* v. *T. McKenna* (2), the taxpayer resided in England, that is, he possessed a residence there, but he derived income from an employment which he carried on exclusively outside the United Kingdom. His contract of service contained a condition that payment should be made as he directed and his direction was that payment should be made in England. No doubt because of the difficulty of describing as a foreign possession an employment the remuneration for which was payable in Great Britain, the assessment upon the taxpayer was made under so much of schedule

(1) (1889) 14 App. Cas. 493 (2) (1937) A.C. 162; 20 Tax Cas. 566.

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D as was transferred to schedule E and not under case V. The taxpayer, who presumably did not deny the correctness of the opinion that his income did not fall within case V., contended that under *Colquhoun* v. *Brooks* (1) he was outside the other cases of schedule D. To this view the courts declined to give effect.

In an appeal arising out of a second attempt to impose liability upon the litigant who succeeded in *Pickles* v. *Foster* (2), the House of Lords had decided that, although an employment might under *Colquhoun* v. *Brooks* (1) be a foreign possession within case V., yet, when the chief remuneration under a contract of employment was payable within the United Kingdom, the source of profit could not be said to be out of the Kingdom so as to be a foreign possession.

These decisions leave anything but a clear dividing line between those employments abroad exposing a resident to taxation upon the whole remuneration and those in respect of which the taxable fund is limited to actual receipts in the United Kingdom.

The report of the committee, to which I have already referred, contains a section devoted to employments in the United Kingdom and employments abroad. From it I shall quote in full a passage which upon this point appears to me to show the state of the law applicable to the appellant. The passage is as follows :—" The division of income into United Kingdom income and foreign income necessitates the determination of the circumstances in which income derived from employments is to be treated as derived from a United Kingdom or from a foreign source ; there is no guidance to be found in the existing Acts. Before 1922, if the office or employment held or exercised was a public office or employment, tax was charged under schedule E. In other cases tax was charged under schedule D, the general charging provision being that tax should be charged ' in respect of the annual profits or gains arising or accruing . . . to any person residing in the United Kingdom from any . . . employment . . . whether the same be . . . carried on in the United Kingdom or elsewhere ' (see rule 1 (*a*) (ii.)). But this general charge is consistent with a charge being made either under case II., which provides that ' the tax shall extend to every employment by retainer in any

(1) (1889) 14 App. Cas. 493.

(2) (1913) 1 K.B. 174 ; 6 Tax Cas. 131.

character whatever,' or under case V., which charges foreign possessions. In 1922, by sec. 18 of the *Finance Act* of that year, profits or gains arising from employments chargeable under schedule D, 'other than the profits or gains chargeable under case V. of schedule D,' were transferred from schedule D to schedule E. The exception effected by the words quoted is a clear indication that Parliament contemplated the possibility, at any rate, of profits and gains from some employments being chargeable under case V., but as to the circumstances in which they are to be so chargeable the Acts are silent. The case law on the subject is meagre. It is practically limited to the case of a single individual—Mr. Pickles. Mr. Pickles had entered, in England, into an agreement with an English company to take charge, in Africa, of the company's business there, and to devote the whole of his time to the business of the company. His salary and commission commenced as from the date of his sailing for Africa and terminated on the day upon which he gave up charge of the African business. Mr. Pickles had, at all material times, a home in England in which his wife and family lived and in which he was in the habit of residing when in England. Two attempts were made to charge Mr. Pickles—one for the years 1906-07 and 1907-08, the other for the year 1919-20. The only alteration in the circumstances which had occurred between the earlier years and the later year was that, in the earlier years, one half of Mr. Pickles' salary was paid to his wife in England, and the other half to Mr. Pickles either in Africa or England, whereas in the later year the whole remuneration was paid by the company into a banking account in England, on which his wife had the power of drawing. In the first case (*Pickles* v. *Foster* (1)), it was sought to charge Mr. Pickles as the holder of a public office under schedule E of the Act of 1842 (for that Act was at the time still in force), but he was held not to be liable, on the ground that a public office the duties of which were performed abroad was not within secs. 146, 147 of the Act of 1842, unless the office was one which, though actually exercised abroad, was constructively exercised in the United Kingdom. In the second case (*Pickles* v. *Foulsham* (2)) it was sought to charge Mr. Pickles in respect of a foreign possession under case V. of schedule D

(1) (1913) 1 K.B. 174 ; 6 Tax Cas. 131. (2) (1925) A.C. 458 ; 9 Tax Cas. 261.

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of the Act of 1918 (for that Act had in the meantime superseded the Act of 1842). Again it was held that Mr. Pickles was not liable. The grounds for the decision in the House of Lords vary, some of their Lordships being of opinion that this particular form of employment did not constitute a foreign possession, and others that, though it did constitute a foreign possession, there was no element of remittance (upon which alone tax is charged) in view of the fact that the remuneration was entirely paid in this country. But Lord *Cave* in the course of his speech said 'I do not doubt that (to take two simple instances) a doctor residing in England and practising in France only, or a mining engineer having a residence here and wholly employed by a Spanish mining company in Spain, might be held to have a foreign possession and to be assessable under case V.' The only other relevant case is that of *McKenna* v. *Eaton-Turner* (1) which came before the King's Bench Division in December 1934, and in which the decision has since been affirmed by the Court of Appeal. In that case Mr. Eaton-Turner, who was resident in the United Kingdom, had entered into an agreement with a British company to act for it as mines manager in West Africa. No part of his work or duties, according to the findings of the commissioners, fell to be performed or was performed in the United Kingdom; by arrangement the main part of his remuneration was paid into a banking account in the United Kingdom. It was held that Mr. Eaton-Turner's employment fell within the charge to tax under schedule D, par. 1 (*a*) (ii.), and case II., and that by virtue of sec. 18 of the *Finance Act* 1922 it was brought within schedule E, under which schedule he had been correctly assessed. As no clear guidance on the point at issue was to be gathered from the case law, we made inquiries as to what was the practice with regard to employments other than public appointments. We were informed that the practice of the Board, based on their interpretation of rule 1 (*a*) (ii.) and (iii.) of schedule D, and the decision in *Pickles* v. *Foulsham* (2), is as follows:—A. Residents. (i.) Where the duties are wholly or partly performed in the United Kingdom the full emoluments are charged under schedule E; (ii.) Where the duties are wholly performed abroad—(*a*) the full emoluments, if the emoluments are normally received,

(1) (1936) 1 K.B. 1.

(2) (1925) A.C. 458; 9 Tax Cas. 261.

wholly or in part, in the United Kingdom, are charged under schedule E; (*b*) the emoluments, if wholly received abroad, are, so far as they are remitted to the United Kingdom, charged under case V. of schedule D. An exceptional receipt of emoluments in the United Kingdom, e.g., when the employee is on leave here, is not treated as involving liability under schedule E. (It is to be noted that the decision in *Pickles* v. *Foulsham* (1) drew no clear distinction between employment under a United Kingdom employer and employment under a foreign employer; in practice the rule above stated under (ii.) (*a*) is applied only to service under a United Kingdom employer, a person in the service of a foreign employer who, though resident in this country, performs his duties wholly abroad being charged under case V., and not under schedule E, wherever his emoluments are received). B. Non-residents. (i.) Where the duties are wholly or partly performed in the United Kingdom, the emoluments, to the extent to which the duties are performed in the United Kingdom, are charged under schedule E. (ii.) Where the duties are wholly performed abroad, there is no liability."

To this extract it is, perhaps, desirable to add a reference to the interesting commentary made by the committee upon *Cooper* v. *Cadwalader* (2) and the effect thereon of *McKenna* v. *Eaton-Turner* (3), which appears at p. 43 of the report.

So far I have dealt with the effect on liability to the revenue produced by actual residence and by the application of the category "income arising from possessions out of the United Kingdom." To this category I have attributed a limiting operation. Given actual residence, it limits liability upon income falling under it to sums actually received in the United Kingdom. But liability under case V. may be incurred although the taxpayer's sojourn in England does not come up to the standard of full residence. In this respect case V. may enlarge liability. That it may do so is a consequence of the second of the miscellaneous rules applicable to schedule D. The rule is as follows: "2. A person shall not be charged to tax under this schedule as a person residing in the United Kingdom, in respect of profits or gains received in respect of possessions or securities

(1) (1925) A.C. 458; 9 Tax Cas. 261.
(2) (1904) 5 Tax Cas. 101; 12 Sc. L.T.R. 449.
(3) (1936) 1 K.B. 1; (1937) A.C. 162; 20 Tax Cas. 566.

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out of the United Kingdom, who is in the United Kingdom for some temporary purpose only, and not with any view or intent of establishing his residence therein, and who has not actually resided in the United Kingdom at one time or several times for a period equal in the whole to six months in any year of assessment, but if any such person resides in the United Kingdom for the aforesaid period he shall be so chargeable for that year."

In this provision the expression resides " at one time or several times for a period equal in the whole to six months in any year " is taken, I think, to require no more than actual presence for the necessary time. Although the word " reside " is used, it seems evident that a distinction is drawn between establishing a residence and living or staying in Great Britain for six months as a visitor.

In *Levene* v. *Inland Revenue Commissioners* (1) Viscount *Cave* L.C. said: " Similarly a person who has his home abroad and visits the United Kingdom from time to time for temporary purposes without setting up an establishment in this country is not considered to be resident here—although if he is the owner of foreign possessions or securities falling within case IV. or V. of schedule D, then if he has actually been in the United Kingdom for a period equal in the whole to six months in any year of assessment he may be charged with tax under rule 2 of the miscellaneous rules applicable to schedule D."

The provision applies only to income from possessions or securities. But it produces the consequence that to be in the United Kingdom for an aggregate of six months in a year of assessment exposes the visitor to tax upon remittances of income from such sources elsewhere. In its application to the appellant what I have set out may be summed up as follows :—

(1) As he was in England for more than six months, he would be chargeable if both the following conditions were fulfilled: (*a*) If any of his remuneration were remitted to the United Kingdom during the relevant time, and (*b*) if his employment as a managing director constitutes a possession outside the United Kingdom.

(2) If his employment as a managing director does not constitute such a possession abroad, and he actually filled the description of

(1) (1928) A.C. 217, at p. 223.

"person residing in the United Kingdom," he would be liable upon the whole income, irrespective of remittances.

(3) If he exercised within the United Kingdom his employment of a director, he would be liable on the remuneration arising therefrom.

The question whether the appellant became a resident of Great Britain is said to be one of fact. In two cases in the House of Lords reported consecutively the conception has been elaborately discussed (*Levene* v. *Inland Revenue Commissioners* (1); *Inland Revenue Commissioners* v. *Lysaght* (2)). The committee's report, already quoted, after saying that no one subject which arises in the application of the *Income Tax Acts* has been more prolific of dispute than residence, gives the following summary of the result (vol. 1, pp. 35, 36):—"Nor are the decisions of the courts very helpful, for it must now be taken to be settled law that the question of residence is a question of fact, on which the decision of the commissioners before whom the matter comes on appeal is final unless the courts decide that there was no evidence on which the commissioners could properly have come to the conclusion at which they arrived. Two principles, however, seem to be established by the decision:— (1) That a person may be resident in two or more countries. (2) That though the possession of an establishment available in this country may be good ground for finding the fact of residence here, the absence of such an establishment, even though coupled with the possession of an establishment abroad, is not incompatible with residence here (*Lysaght* v. *Commissioners of Inland Revenue* (3)). The courts have also dealt with the question how far circumstances existing before or after the year of charge can be taken into consideration. *Rowlatt* J. in *Lysaght* v. *Commissioners of Inland Revenue* says: 'I do not think that the position of this gentleman during the years 1922, 1923 and 1924, which are here in question, must be coloured by a reference to his previous life' (4), but Viscount *Sumner* says in *Levene* v. *Commissioners of Inland Revenue*: 'I agree that the taxpayer's chargeability in each year of charge

(1) (1928) A.C. 217.
(2) (1928) A.C. 234.
(3) (1927) 2 K.B. 55, per *Rowlatt* J. at p. 60; (1928) A.C., per Viscount *Sumner*, at pp. 244, 245; 13 Tax Cas. 511, at pp. 516 and 528.
(4) (1927) 2 K.B., at p. 60.

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constitutes a separate issue, even though several years are included in one appeal, but I do not think any error of law is committed if the facts applicable to the whole of the time are found in one continuous story' (1). On the whole, the commissioners seem now inclined to look at the course of the appellant's movements over a series of years. For the assistance of visitors to the United Kingdom in ascertaining their position in relation to the question of residence, the Board of Inland Revenue have prepared a statement which is as follows:— 'A visitor who maintains no place of abode in the United Kingdom and whose visits are not habitual but occasional only is not regarded as resident in the United Kingdom unless he has been in the United Kingdom for a period or periods equal in the whole to six months in the income tax year (beginning 6th April). If, however, he maintains a place of abode in the United Kingdom, available for his use, he is regarded as resident for any year in which he pays a visit, of whatever length, to the United Kingdom. Moreover, even though he does not maintain a place of abode in the United Kingdom available for his use, and does not stay for six months in any one year, he is regarded as becoming resident if he visits the United Kingdom year after year (so that his visits become in effect part of his habit of life) and the annual visits are for a substantial period or periods of time. The question of residence in any particular case can only be determined by reference to the facts of the case. But it can be said that the Board of Inland Revenue would normally regard an average annual period or periods amounting to three months as "substantial" and the visits as having become "habitual" after four years. And, where the visitor's arrangements indicated from the start that regular visits for substantial periods were to be made, he would be regarded as resident in and from the first year.' "

If I were the tribunal of fact whose duty it was to determine the question of residence in the present case, I should find that the taxpayer had not become a "person residing in the United Kingdom," although by reason of his spending in England an aggregate of six months in each of the two years of his absence from Australia he became chargeable in respect of profits or gains received in respect

(1) (1928) A.C., at pp. 226, 227.

of possessions out of the United Kingdom, if any such profits or gains were remitted to him. He clearly went to England as a visitor. His settled home was in Australia and he was away from it only for the purpose of obtaining the advantages of travelling abroad. The advantages included the gathering of information for use in his company's business and meeting people personally with whom the company desired to enter into negotiation, as well as pleasure, relaxation and the enjoyment of the interests which other countries present. There was no purpose the fulfilment of which would require his presence in England for an unknown or indefinite duration of time. He did not take a flat or house there. Returning to the same hotel and leaving heavy luggage there shows little except that such a course appeared convenient at the moment. The use of a London office of an Australian bank as a postal address appears to me to have no significance. The two facts most in favour of residence are, first, the length of the period abroad and his repeated return throughout to England, and, second, his putting his children to school there. These two facts are, no doubt, associated in purpose. Probably he did not desire to leave his children for two years and for that reason and because two years at school abroad might seem an advantage he took them with him. It was natural to choose England for their schooling and it does not appear that their presence there caused him to shorten the time he might otherwise have spent elsewhere. His case is unlike those in which the taxpayer, having always had his home in Great Britain, goes abroad for some purpose not necessarily permanent and returns to Great Britain at intervals. The retention of slight connections with the country has then appeared enough to found an inference of continued residence. *Lysaght's Case* (1) is a strong illustration. But, although my own inclination would be definitely against finding that the taxpayer became a person residing in the United Kingdom, it is quite plain that if commissioners for the purposes of the *Income Tax Acts* had made a finding that he did so reside, on appeal in England it could not have been disturbed. Further, the passage I have quoted from the Report of the Committee on Income Tax Codification perhaps suggests that the commissioners would regard the period of six

(1) (1928) A.C. 234.

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months as having an artificial importance beyond that assigned to it by the Act which limits it to income from possessions and securities abroad.

Under the Commonwealth *Income Tax Assessment Act* 1922-1931, sec. 14 (1) (*q*), as it is the Board of Review, who, when there is a reference from the commissioner, must be satisfied that the income was chargeable in the United Kingdom, it seems to follow that the question of residence was for them and is not for me finally to decide.

Because the taxpayer was in England for an aggregate of six months in each year, it becomes necessary to consider his liability under case V. In the present state of authority it is difficult indeed to say whether his employment of a managing director should be regarded as a " possession " out of the United Kingdom. I feel no doubt that before the decision in *Eaton-Turner's Case* (1) remittances of salary would have been charged with tax upon that basis. From what was said in *Foulsham* v. *Pickles* (2) it appears that such a source of income would be considered a " possession," and, if entirely " out of the United Kingdom," would expose the resident to tax only under case V. on remittances. In *Cooper* v. *Cadwalader* (3), the taxpayer, who had a residence of two months annually in Scotland, practised law in New York. He was taxed under cases IV. and V. as on the income from securities and " possessions." The committee, in their comment upon this case (p. 43), say :—" It was not in that case suggested, and we understand that in practice it has never since been suggested, that a taxpayer in Mr. Cadwalader's position is chargeable on the full profits of a profession carried on entirely abroad. It may be that it is considered that in such a case the doctrine of *Colquhoun* v. *Brooks* (4) would apply, but having regard to the judgments in *McKenna* v. *Eaton-Turner* (5) it is by no means clear that that doctrine is applicable to the case of a profession carried on by an individual."

On the whole, I think that the office of managing director of an Australian company, considered as a source of income, would be classed as a possession within case V.

(1) (1937) A.C. 162 ; 20 Tax Cas. 566.
(2) (1925) A.C., at pp. 462, 463, by Viscount *Cave* L.C. ; at p. 466 by Lord *Dunedin*, and at p. 468 by Lord *Buckmaster*.
(3) (1904) 5 Tax Cas. 101 ; 12 Sc. L.T.R. 449.
(4) (1889) 14 App. Cas. 493.
(5) (1936) 1 K.B. 1 ; (1937) A.C. 162 ; 20 Tax Cas. 566.

After this judgment had been written a report came to hand of the decision of *Lawrence* J. in *Bennet* v. *Marshall* (1). In that case the taxpayer, a person residing in the United Kingdom, was vice-president of an American corporation and the question was how he was to be assessed in respect of the profits of that employment. His corporation was a parent company having subsidiary companies in many parts of the world through which it operated. The taxpayer's duties were to supervise these foreign undertakings, including that in England. He spent only about eight weeks a year in America and over six months in the United Kingdom. *Lawrence* J. decided that the source of the income was not the work done by the taxpayer in the United Kingdom or in any other part of the world, but the contract with the American company, under which his income was payable outside the United Kingdom. Accordingly he was assessable not under schedule E but under case V. of schedule D upon the money remitted. This decision appears to me to cover the present case. It confirms the opinion I have expressed that the plaintiff's source of income is a possession out of the United Kingdom falling under case V.

The view I have adopted would raise the question whether the taxpayer's business activities in England brought any part of the source of income within the United Kingdom. The admission on the part of the Federal Commissioner of Taxation that the income for which exemption is claimed was derived from sources outside Australia, if right, almost carries the consequence that the source was within the United Kingdom at least in part and for some of the time. But the admission was not intended to produce such a result and the issue itself was contested by his counsel as well as the kindred issue whether the employment of a director was exercised within the United Kingdom. For myself, I do not think that what the taxpayer did in the interests of his company in Great Britain amounts to an exercise of his employment in Great Britain, nor is it inconsistent with his office of managing director remaining a possession entirely out of the United Kingdom. The steps he took consisted in inquiry and discussion or negotiation. Without minimizing their usefulness and extent, I do not think they give his sojourn abroad the stamp of a business enterprise or

(1) (1937) 3 All E. R. 208.

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mission undertaken in the course of the duties of his office. It was, no doubt, desired to take advantage of his intended stay in England to make the investigations and to discuss the projects in question. But, in doing this, he was not, in my opinion, executing his office of managing or governing director in England.

If these conclusions be correct it would follow that his liability to British income tax is limited to remittances made of his director's remuneration. The cases of *Kneen* v. *Martin* (1) and *Hall* v. *Marians* (2) show that no liability is incurred from the remission of money to the United Kingdom unless it is identifiable with or traceable to the income of the possession. In particular " it is unsound to contend that, if money is borrowed by a person who is entitled to income from foreign possessions, whether the money is borrowed on the security either of the capital or the income of the possessions abroad or on other property, or without security at all, such a person must be taken, within the meaning of rule 2, to have received sums in the United Kingdom. . . . To borrow money is not to receive income, and, prima facie, I think the only effect of so borrowing money here is to become liable to pay the sum to the creditor in this country. It is quite immaterial, as I think, that the motive which may lie behind either the borrowing or the lending is to afford some benefit to the taxpayer here or that it is due to the fact that there is security abroad in any of the forms I have mentioned. I say with regard to such a transaction that no income has been received, from possessions out of the United Kingdom, in this country " (per *Maugham* L.J., *Hall* v. *Marians* (3)).

The taxpayer in the present case obtained funds in England by means of an overdraft at the London branch of his Australian bank. His salary and other moneys were paid into his personal account in Melbourne. With the funds accumulating to his credit in that account securities were purchased which the bank held. After his return to Australia these were sold and the proceeds used to extinguish the London overdraft. This transaction does not appear to me to involve a payment or receipt of funds in the United Kingdom taxable under case V. The result is that, if I were the tribunal to

(1) (1935) 1 K.B. 499 ; 19 Tax Cas. 33.

(2) (1933) 18 Tax Cas. 148 ; (1935) 19 Tax Cas. 582.

(3) (1935) 19 Tax Cas., at pp. 603, 604.

decide the matters of fact upon which the taxpayer's liability to British income tax depends, I should make findings inconsistent with his present contention. But, as the duty is reposed, not in the court, but in the board of review, the taxpayer is entitled to the exercise of their judgment upon the facts. Upon such questions as whether a stay in a country amounts to residence, activities amount to the exercise of an employment, a fund in one place "represents" income in another, questions vaguely defined and depending on matters of degree, the exercise of the board's judgment, as distinguished from the court's, may be of much importance to the taxpayer. It is true that the decision of the board of review was against the taxpayer. But he is at liberty to attack that decision upon the ground that the board misconceived the true issues which should be determined. If he could establish affirmatively that it had done so, it would be necessary to send the case back to the board for their reconsideration. The commissioner's contention that the taxpayer has no remedy, even if the board had completely misapprehended the British income tax law, is based at least in part on the view that sec. 14 (1) (*q*) (i.) meant to leave everything to the conclusive judgment of the commissioner subject to a reference to the board. But, apart from this extreme view, it is, I think, clear according to the view taken in this court of analogous provisions that the court can only interfere when it is affirmatively established that the exercise of the judgment or discretion reposed in the commissioner or board of review has miscarried. On this question, the written decision of the board has caused me some misgiving and I have had some doubt whether enough does not appear to entitle the taxpayer to a rehearing. But, after examining the record of proceedings as well as the decision of the board, I have come to the conclusion that upon the three crucial questions of residence, remittance of income and exercising in Great Britain the employment of a director, it is not shown that the board failed to consider and determine them.

For these reasons I dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant, *Wilson Heriot.*

Solicitor for the respondent, *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.

H. D. W.