LORD SKERRINGTON concurred.

The Court answered the question of law in the negative, sustained the appeal, and remitted to the Sheriff to enter on the register of voters the names of the appellant and of the persons designed in the schedule annexed to the case.

Counsel for the Appellant—A. M. Anderson, K.C. — Wark. Agent — Alexander Ramsay, S.S.C.

Counsel for the Respondent—C. N. Johnston, K.C.—Russell. Agent—D. Maclean, Solicitor.

COURT OF SESSION.

Thursday, December 8.

SECOND DIVISION.

(EXCHEQUER CAUSE).

CROOKSTON BROTHERS *v.* INLAND REVENUE.

Revenue—Income Tax—Person Not Resident in United Kingdom—Trade Exercised in United Kingdom—Income Tax Act 1853 (16 *and* 17 *Vict. cap.* 34), *sec.* 2, *Schedule D.*

The Income Tax Act 1853, section 2, Schedule D, imposes income tax, *inter alia* — "For or in respect of the annual profits or gains arising or accruing to any person whatever, whether a subject of Her Majesty or not, although not resident within the United Kingdom, from . . . any profession, trade, employment, or vocation exercised within the United Kingdom. . . ."

A French company owned mines in Algeria from which it exported phosphates to the United Kingdom. The contracts for the sale of the phosphates were entered into in the United Kingdom by agents of the company who were resident there. The agents had authority to sell the phosphates at any price above a minimum fixed by the company. Contracts made by the agents within the scope of their authority were binding on the company without confirmation. The agents were remunerated by a commission on the selling price of the goods. The delivery of the phosphates took place outwith the United Kingdom. The contracts provided that the price of the goods should be payable in cash in London. In practice the payment was made by means of crossed cheques. The ordinary course of business was that cheques were drawn in favour of the company, but they were occasionally drawn in favour of the agents. The agents did not cash any cheques, but sent them on to the company, endorsing them when necessary. The company had no stock of goods, no bank account, and no branch office in the United Kingdom, and its name did not appear on any premises or in any directory as carrying on business there.

Held (*diss.* Lord Dundas) that the company did not exercise a trade in the United Kingdom.

Revenue—Income Tax—Person Not Resident in United Kingdom—Agent having Receipt of Profits or Gains Belonging to Person Resident Abroad—Income Tax Act 1842 (5 *and* 6 *Vict. cap.* 35), *sec.* 41.

The Income Tax Act 1842, section 41 (as amended by the Income Tax Act 1853, section 5), enacts — "Any person not resident in [the United Kingdom], whether a subject of Her Majesty or not, shall be chargeable in the name of . . . any factor, agent, or receiver, having the receipt of any profits or gains arising as herein mentioned, and belonging to such person, in the like manner and to the like amount as would be charged if such person were resident in [the United Kingdom] and in the actual receipt thereof. . . ."

A French company exported its goods from Algeria to the United Kingdom. Under the contracts of sale the price of the goods was payable in cash in London. In practice the payment was made by means of crossed cheques. In the ordinary course of business the cheques were drawn in favour of the company, but they were occasionally drawn in favour of the company's agents, who were resident in the United Kingdom. The agents did not cash any of the cheques or pay them into a bank in the United Kingdom, but sent them all on to the company in France, endorsing them when necessary. The agents were remunerated by a commission which was remitted to them by the company.

Held that the agents were not agents having the receipt of profits or gains belonging to the company.

The material sections of the Income-Tax Acts are quoted *in the rubrics.*

Crookston Brothers, merchants, Glasgow, were assessed under Schedule D of the Income-Tax Acts as agents for the Compagnie des Phosphates du Dyr (hereinafter referred to as "the company") in respect of profits derived by the company from carrying on the trade of vendors of phosphates within the United Kingdom. Crookston Brothers appealed to the Commissioners for the General Purposes of the Income-Tax Acts.

The following *facts* were admitted as proved—"(1) The company is a French company, having its head office in Paris, where all its board meetings and other company meetings are held, its books kept, and banking and general business transacted. The company owns phosphate mines at Dyr, in French territory in Algeria, and works those mines and sells the phosphate, which is shipped at the port of Bona, Algeria, by the company. . . . The appellants, who carry on business

as merchants and have their place of business in Glasgow, are the sole principal agents for the sale of the company's phosphates in the United Kingdom and elsewhere. . . . The terms of the appellants' appointment as agents of the company are set forth in the contract . . . between the company and the appellants, dated 22nd June 1899, and were in force in the years to which the appeals relate. . . . (2) The appellants have authority to sell the company's phosphates at or over minimum prices fixed by the company. The appellants make the sales without reference to the company. It is left to the appellants' discretion to whom to sell. The appellants are not liable for bad debts and hold no stock of phosphates. The company have sub-agents in various parts of the United Kingdom, who are appointed by the appellants, subject to the company's approval. (3) The contract used in selling the phosphates is contained in two documents. The purchaser's document is addressed by the purchasers to the company from the purchaser's place of business, and sets out that the purchasers 'have this day bought from you thro' Crookston Bros., Glasgow, about . . . tons (10 per cent. more or less in seller's option) of dried Algerian and/or Tunisian phosphate at the price of . . . per unit of tribasic phosphate of lime (calculated upon the total phosphoric acid present when dried at 212 degs. Fahrenheit) and per ton of 2240 lbs. (moisture to be deducted from weight), cost, freight, and insurance (f.p.a.) to . . . or as near thereto as vessel can get, always afloat.' The sellers' document sets out that the company have sold the like quantity of phosphates to the purchasers. This document is addressed to the purchasers from Glasgow, and is signed 'The Compagnie des Phosphates du Dyr, *per* Crookston Bros.' The contract contains provisions in regard to the quality of the phosphate, its shipment, its delivery from the ship and weighing, its sampling and analysis conjointly by representatives of the company and of the purchasers after the phosphates have arrived in the United Kingdom and in regard to the payment of the price. The provision in regard to the payment of the price is in the following terms—'Payment by cash in London for three-fourths of amount of provisional invoice, less freight on presentation of and in exchange for B/L and policies of insurance (F.P.A. and free of war risks), balance also in cash on receipt of final invoice, less 2½ per cent. discount on gross amount.' The price includes cost, freight, and insurance. The company pays loading expenses and port charges at Bona. The buyer pays landing expenses and port charges at port of discharge. . . . (4) The phosphates are shipped by the company at the port of Bona, Algeria, in vessels chartered for the company. . . . (5) The bill of lading used bears the name of the company as shippers, and that the phosphates shall be delivered 'unto order or their assigns, he or they paying freight for the same as per charter-party dated . . . all the terms and exceptions contained in which charter are herewith incorporated.' The bills of lading arrive in Glasgow in four days in course of post, while the goods would not be landed in this country till ten or twelve days after sailing. Immediately on the arrival in Glasgow of the bills of lading they are endorsed by the appellants to the purchasers and handed over to the purchasers in exchange for three-fourths of the price in the invoice. (6) The phosphates are insured on the instructions of the appellants, and the premiums of insurance are paid by the appellants on behalf of the company. The policy of insurance is taken in favour of 'Crookston Brothers as well in their own name as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain in part or in all.' (7) The invoices for the phosphates are rendered by the appellants to the purchasers along with the endorsed bills of lading and policies of insurance in anticipation of the receipt of three-fourths of the price in the invoice. This is done immediately on the arrival in Glasgow of the bills of lading. The price charged in the invoice includes cost, freight, and insurance, but the freight is deducted from the price in the invoice and paid by the purchasers direct to the shipowners. The bills of lading are sometimes sent from the company's office in Paris and sometimes from the appellants' office in Glasgow. The policies of insurance are sent to the purchasers along with the bills of lading. (8) Apart from the stipulations contained in the purchasers and sellers' documents, no particular instructions are given to purchasers as to how cheques should be made payable or crossed. The requirement that payments are to be made by cash in London involves however the use of crossed cheques. Cheques are made payable by purchasers in some cases to the company and in other cases to the appellants. The appellants invariably send to the company in Paris the cheques as received, endorsed where necessary, and do not in any case pay them into a bank in the United Kingdom. There has never been a case in which payment has been made by a customer in cash. There has never been a case in which a cheque has been realised before handing over the shipping documents, as it has never been considered necessary to do so. (9) There is no special form of reecipt, and receipts are granted by a discharge on the invoice or by letter, or by the purchaser's own form of receipt, but the receipt is always signed 'Compagnie des Phosphates du Dyr, *per* Crookston Bros.' (10) All correspondence with purchasers is conducted by the appellants. The appellants are paid a commission to cover the various services rendered by them, and on the total amount of their income or profits arising from this commission they have already been assessed and paid income tax for the years in question. The appellants receive payment of their commission by remittance from the company in Paris."

The contract of sale between the com-

pany and the purchasers of phosphates provided, *inter alia*—"Should any vessel be lost with part or whole of this contract on board, the contract to be void for such portion, and all shipping documents and policies of insurance to be returned to sellers in exchange for repayment of advance, if any, made against the same."

The Commissioners found "(1) That the company exercise a trade in the United Kingdom, and that the profits of the sales made by the company in the United Kingdom are subject to income tax. (2) That the appellants are agents of the company within the meaning of section 41 of the Income Tax Act 1842, and so liable in payment of income tax on any assessment which may be made in respect of the profits of the company on sales in the United Kingdom. . . . ." and accordingly they made an assessment on the appellants.

The appellants obtained a Case for the opinion of the Court, in which the foregoing facts were set forth.

The following *questions of law* were stated:—"1. Whether on the facts stated the company exercises a trade within the United Kingdom which renders the appellants as their agents liable to be assessed under Schedule D of the Income Tax Acts in respect of the profits of such trade? 2. Whether the appellants are factors, agents, or receivers having the receipt of the profits or gains of the company within the meaning of section 41 of the Income Tax Act 1842?"

Argued for the appellants—The question whether a trade was exercised within the United Kingdom was a question of fact depending on the whole circumstances of the case—*Erichsen* v. *Last*, 1881, 8 Q.B.D. 414, *per* Jessel, M.R. The view formerly taken by the Courts was that when the trade was in any way connected with the United Kingdom the person carrying it on was liable for income tax, but it was now recognised that a distinction must be drawn between trading with the United Kingdom and trading within the United Kingdom—*Grainger & Son* v. *Gough*, [1896] A.C. 325, *per* Lord Herschell. On the facts of the present case it was clear that the trade was not carried on within the United Kingdom. The company had no stock, no branch office, and no bank account in this country. There was no office with their name above the door. The price was not paid in this country, and the delivery of the goods took place before they arrived in this country, either at shipment or at latest when the bills of lading were endorsed—*Delaurier* v. *Wyllie*, November 30, 1889, 17 R. 167, 27 S.L.R. 148; *Turner* v. *Rickman*, 1898, 4 T.C. 25. Even if the contracts of sale were made in the United Kingdom, that fact was not conclusive when it was not coupled with payment of the price or delivery of the goods in this country, and neither of these facts was present here. But in fact the contracts were not made in this country, because they were not concluded until the purchaser's document arrived in Paris. None of the cases founded on by the Crown were really in point. In all of them there was some element favourable to the Crown which was absent in the present case. In *Tischler & Co.* v. *Apthorpe*, 1885, 2 T.C. 89, the foreigner had a branch office in the United Kingdom. In *Pommery & Gréno* v. *Apthorpe*, 1886, 2 T.C. 182, the foreign company had a stock of wine and a bank account in this country, and there were premises with their name above the door. In *Werle & Co.* v. *Colquhoun*, 1888, 20 Q.B.D. 753, payment was made in this country, and the foreigner had his name in the London Directory. The circumstances of *Erichsen* v. *Last* (*cit.*), *Watson* v. *Sandie & Hull*, [1898] 1 Q.B. 326, and *Wingate & Co.* v. *Inland Revenue*, June 16, 1897, 24 R. 939, 34 S.L.R. 699, were quite unlike those of the present case. In *Grainger & Son* v. *Gough*, [1896] A.C. 325, the decision was in favour of freedom from taxation, and the present case was indistinguishable. (2) The appellants were not agents having the receipt of profits belonging to the company. They had no express authority to receive payment, and as they were acting on behalf of a disclosed principal they had no implied authority at common law—Bowstead on Agency, p. 96; *Linck* v. *Jamieson*, 1886, 2 T.L.R. 206. The ordinary course of business was that the price of goods sold by the appellants was paid not to them but to the company. It was immaterial that by mistake customers occasionally made out cheques in favour of the appellants. The appellants never retained the money, but endorsed the cheques and sent them on to their principals. If they did retain the money they would be in breach of their contract.

Argued for the respondent—(1) The company exercised a trade or business in this country. The contracts of sale were made here; the goods were delivered here; and the price was payable in London; samples were to be taken in this country, and the analysis of the samples was to take place here. On these facts it was clear that the appellants' principals were exercising a trade in the United Kingdom—*Erichsen* v. *Last*, *cit.*; *Pommery & Gréno* v. *Apthorpe*, *cit.*; *Werle & Co.* v. *Colquhoun*, *cit.* But it was enough for the respondent that the contracts of sale were made in this country. Where the making of contracts was of the essence of the business, and a foreigner either personally or through agents made contracts in this country with British customers, which were in substance British contracts, he was exercising a trade in the United Kingdom, and was liable to be assessed for income tax—*Grainger & Son* v. *Gough*, *cit.*; *Erichsen* v. *Last*, *cit.*, *per* Brett, L.J. In the present case the contracts were of the essence of the trade, because without them there could be no profits, and they were plainly British contracts, because they were to be performed in this country—*Missouri Steamship Co.*, 1889, 42 Ch. D. 321. (2) The appellants were agents having the receipt of profits and gains. An agent for sale had implied authority to receive the price of goods sold—Story on Agency, p. 123. Under the contract the

price was payable in London, and, *de facto*, cheques were sometimes made out in favour of the appellants. On these facts it was impossible to say that the appellants were not in receipt of profits and gains belonging to the company. Counsel also referred to the following cases—*Gresham Life Assurance Society* v. *Bishop*, [1902] A.C. 287; *Leggat Brothers* v. *Gray*, 1908 S.C. 67, 45 S.L.R. 67; *Scottish Widows' Fund* v. *Inland Revenue*, 1909 S.C. 137, 46 S.L.R. 993.

At advising—

LORD ARDWALL—The first two questions raised in this case upon the construction of the Income Tax Acts are whether on the facts stated the company known as the Compagnie des Phosphates du Dyr, hereinafter referred to as "the company," during the years ending 5th April 1903 and 5th April 1904 "exercised a trade within the United Kingdom" within the meaning of Schedule D of the Income Tax Act of 1853, and second, whether, if so, the appellants Crookston Brothers, merchants, Glasgow, acted during that period as their agents in such sense as to make them answerable under section 41 of the Income Tax Act of 1842.

The first of these questions is a question of fact, and, as was remarked by Jessell, M.R., in the case of *Erichsen* v. *Last*, 8 Q.B.D. 414, "there are a multitude of things which together make up the carrying on of a trade, and I know of no one distinguishing incident, for it is a combined fact made up of a variety of things." Keeping this in view, I shall now proceed to inquire whether the circumstances of this case do or do not show that the company carried on a trade in the United Kingdom within the meaning of the Income Tax Acts, and the following facts seem to me to be of importance:—

The company carries on its business in Paris, and has its head office there, where its books are kept and its banking and general business transacted. It owns mines at Dyr in Algeria, from which a mineral known as tribasic phosphate of lime is procured. This mineral is sold in the condition in which it is procured in the mines, no manufacturing or other process being applied to it except that of drying it. Under all the contracts of sale it is delivered into vessels at the port of Bona in Algeria under bills of lading c.i.f., and it appears to me, having regard to the decision in the case of *Delaurier* v. *Wyllie*, 17 R. 167, it must be held that the goods are delivered to the purchaser either at Bona on shipment or on the endorsation of the bills of lading. Unfortunately no specimen bills of lading are produced, but the conditions of shipment sufficiently appear from the purchase and sale contracts and a specimen charter-party. (2) The profits of the trade were necessarily all included in the price in return for which the goods were sold, and it is provided that that price should be payable in cash in London. The method of payment apparently was that cheques or drafts on London were sent to the appellants, Crookston Brothers, payable to the company, and were sent over to Paris, where they were handed over for collection to the company's bankers there and the amount carried to the company's credit in their bank account in Paris. It is stated that occasionally, but contrary to the regular practice between the company and the appellants, customers sometimes sent cheques or drafts to the appellants payable to their order, but when that was done the appellants at once endorsed them and sent them to Paris as received, and in no case were they ever paid by the appellants into a bank in the United Kingdom. Accordingly it appears that the goods which were traded in were produced abroad, delivered abroad or upon the high seas, and the money representing their price received abroad by the company. So far, then, the trade in the substance in question is carried on abroad and not in the United Kingdom. (3) It is said, however, that the contracts of sale were all concluded in this country, and this seems to be the case, although, as appears from article 3 of the case, the contracts of sale were contained in two documents, and one of these, the purchasers' document, is addressed by the purchasers to the company in Paris from the purchasers' place of business. The fact that these contracts were concluded through agents in this country is not in my opinion conclusive of the question. (4) The appellants acted in this country as commission agents for the company in terms of agreement, and under a limited authority sold the goods in question on behalf of a disclosed principal and arranged for the shipment of these goods, being paid by a commission of 2 per cent. and the reimbursement of certain specified outlays. This commission and cash for outlays was paid direct by remittances from the company in Paris, and necessarily so, because, as I have already stated, the appellants never fingered the price of the goods at all. So far, then, as appears from the above statement of facts, the only ground on which the company can be made liable for income tax under the Act in question is because their goods were sold through a commission agent in this country in return for a commission.

I am of opinion that the sound legal view of this state of matters is that the company did not exercise a trade within the United Kingdom with regard to these goods, but that the appellants did carry on a trade as commission agents for which they were paid a commission in the usual way, on which commission they have been charged and have paid income tax. Were it to be affirmed that in this case the company were liable as exercising a trade within the United Kingdom, it appears to me that on similar grounds every foreign manufacturer, mine owner, or merchant who consigns goods to a commission agent in this country might be held liable in income tax as carrying on a trade here. I do not think this is the true meaning of the Act, and I think the present case may be differentiated from all the decisions

referred to in the case in which foreigners were held to be trading within the United Kingdom and which were cited at the debate. In every one of these there was some element or other which is not present in the present case, and with reference to these decisions it may be pointed out that the company kept no stock of their goods in this country; that they had no branch office in this country; their name did not appear on any office or in any directory as carrying on business in this country; no payment of money was received by them in this country, for I cannot regard it as a payment in this country that they received in Paris payment by what is called by business men "London paper"; they kept no bank account in this country, and delivery of the goods did not take place here. They had no representative in the proper sense of that term in this country, such as Erichsen was in the case of *Erichsen* v. *Last*, 8 Q.B.D. 415, with branch offices and a staff of employees. I cannot hold that the word "representative" covers independent commission agents such as the appellants in this case. It would cover a manager or a servant of the company, but not independent agents who do commission business for their own profit and under a limited authority.

On these grounds I am of opinion that the company did not during the years in question exercise a trade within the United Kingdom in the sense of Schedule D of the Income Tax Act.

With regard to the second question, I am of opinion that the words "having the receipt of any profit or gains" apply to the actual receipt of money, and do not apply to a case such as there is here, where the agreement of parties was that the appellants had no power to make the price of goods payable to themselves, and that in point of fact very few cheques were made payable to them, and that the fact that contrary to the regular course of business customers occasionally made cheques payable to the appellants really does not alter the question, as the appellants invariably sent to the company in Paris the cheques as received, and did not in any case cash them themselves and put the money into their own bank account, which indeed would be a breach of the contract of agency between them and the company. I think it is clear that the contemplation of the statute was that receivers, factors, or agents should only be liable to pay income tax for their principals where they have in their own hands the means of recouping themselves by having the receipt in money of profits and gains belonging to their principals.

I am therefore of opinion that, even assuming the first question to be answered in the affirmative, the appellants are not liable to make payment of the income tax which is claimed from them. Holding this opinion on the first two questions, it is unnecessary for me to deal with the third question in the case.

LORD DUNDAS—Two principal matters were argued in this case: (1) Whether or not the foreign company exercises a trade within the United Kingdom within the meaning of the second clause of Schedule D to section 2 of the Income Tax Act 1853 (16 and 17 Vict. cap. 34); and (2) whether its agents in this country (the appellants) are factors, agents, or receivers having receipt of the profits or gains of the company, within the meaning of section 41 of the Income Tax Act 1842 (5 and 6 Vict. cap. 35).

I am clearly of opinion, as I understand all your Lordships are, that the second of these questions must be answered in the negative; and if that view is correct it affords a sufficient ground for deciding this case against the Crown. But the first question was the subject of a full argument at our Bar; and it raises a point of some interest and importance upon which I have the misfortune to differ in certain respects from your Lordships. I propose, therefore, to follow the order in which the case was presented to us, and to state my opinion upon the first question before dealing with the second; although (as already indicated) our unanimous opinion in regard to the latter question renders the subject of the first a matter of merely academic interest so far as the present case is concerned.

In my opinion the foreign company does exercise a trade within the United Kingdom within the meaning of Schedule D. It is true that its position is in a good many respects favourably distinguishable upon the facts from that of foreign companies which have in previous cases been held to have so exercised a trade. It has no office or clerical staff here. Its name is not exhibited on any door, window, or the like, nor does it appear in a directory; no stock of its goods is kept in this country; and it has no bank account here. As regards delivery also, which has always been considered an important element, I think the Crown's contention (that delivery took place in the United Kingdom) is erroneous. This point is not, to my mind, free from difficulty; but I have come to the conclusion that, upon a sound construction of the admitted facts and documents, the deliveries were made either at Bona, the port of shipment, or (at latest) when the bills of lading were endorsed, and therefore, in either view, outwith the United Kingdom.

So far the facts of the case seem to me to be adverse to the Crown. But there remain two more questions of fact to be considered. We had a keen argument whether or not the payments to the company were made in this country. I think they were so made. I do not lay particular stress upon "the requirement that payments are to be made by cash in London;" but I think the facts stated in the case, and particularly the fact that all the receipts are signed "Compagnie des Phosphates du Dyr, *per* Crookston Brothers," and are delivered here, point conclusively to the payments (as in a question between the foreign company and its British customers) being made in Glasgow. So far, then, as this question of the payments is concerned

I am in favour of the Crown upon the facts stated; but (for reasons to be immediately given) I consider that the Crown does not require to found upon this point. For I now come to the last and, as I think, the most important question of fact — viz., whether or not the contracts of sale by the company were made within the United Kingdom. In my opinion they were so made. It is admitted that "the appellants have authority to sell the company's phosphates at or over minimum prices fixed by the company. The appellants make the sales without reference to the company. It is left to the appellants' discretion to whom to sell." Crookston Brothers, therefore, are not mere canvassers for orders, to be approved or rejected by their principals, but have full authority to make contracts of sale so long as the price they contract for is not below the prescribed minimum. The case states that "the contract used in selling the phosphates is contained in two documents"—called "the purchaser's document" and "the seller's document" respectively. These documents form the written evidence of the sale in each case; but even assuming (what is not to my mind quite clear) that the contract had not been previously completed, I cannot hold that its completion is postponed until the "purchaser's document" is received by the company in Paris. I think the contract is completed (at latest) when this document is posted (in the United Kingdom) by the purchaser.

Viewing the matter in the light of authority, I consider that the following propositions may be deduced from the numerous cases which have been decided, mostly in England. In the first place, if contracts are concluded by or on behalf of a foreigner, and the goods delivered, and payment made, all within the United Kingdom, it seems clear that the foreigner will be held to exercise a trade in this country. Next, I think the result will be the same if the contracts are concluded and the deliveries made in this country, though the payments are received abroad. This was, for example, the basis of the judgment in *Watson* v. *Sandie & Hull* (1898, 1 Q.B. 326. 3 T.C. 611) as I read the case. I think the American principals there received the payments abroad, and not in this country, for it seems clear enough that if the agents Sandie & Hull had failed after a customer had paid them for goods received, but before they had handed the price to their principals, the loss must have fallen upon the latter, and not upon the purchaser, and conversely, if the customer had failed after receiving the goods but before he paid for them, Sandie & Hull (and not the foreign principals) must have borne the loss. In *Turner* v. *Rickman* (1898, 4 T.C. 25), Wills, J., while holding that the contracts were concluded and the deliveries made in the United Kingdom, was of opinion that, even if the contracts had been made in New York, the delivery of the goods here would by itself have constituted an exercise of trade in this country. Lastly, I consider that it follows by necessary implication from the opinions delivered by the noble and learned Lords in the important case of *Grainger & Son* v. *Gough* [1896], A.C. 325, 3 T.C. 462 — the actual decision was in favour of freedom from taxation—that if the contracts are concluded in this country, that fact alone will be sufficient to constitute an exercise of trade here. If this last view is correct, it is conclusive of the point now under discussion in favour of the Crown.

The case of *Grainger & Son* was, no doubt, decided in favour of the appellants' freedom from taxation, upon the double ground that no contracts were made in the United Kingdom—the agents could only canvass for offers, and submit them to their foreign principals for acceptance or rejection—and that there was no delivery here, for it was made at Rheims. The Lords pointed out that in these features the case differed from all previous cases. But Lord Watson stated (p. 339, foot), apparently with approval, that in "*Werle & Co.* v. *Colquhoun* (1888, 20 Q.B.D. 753, 2 T.C. 402) the decision of the Court of Appeal was based upon the express ground that the foreign wine merchant exercised his trade in England by making contracts there for the sale of his champagne through his English agent;" and proceeding to comment on *Erichsen* v. *Last* (1881, 8 Q.B.D. 414) as "a decision of the same class," his Lordship said — "I agree with the opinion expressed in that case by Cotton, L.J., that wherever a foreigner, either by himself or through a representative in this country, 'habitually does, and contracts to do, a thing capable of producing profit, and for the purpose of producing profit, he carries on a trade or business,' and that the profits or gains arising from these transactions in the United Kingdom are liable to income tax." The opinion thus approved by Lord Watson seems to be exactly in point upon the question I am dealing with. Then Lord Herschell (in *Grainger's* case) said (p. 335) —"In all previous cases contracts have been habitually made in this country. Indeed, this seems to have been regarded as the principal test whether trade was being carried on in this country. Thus in *Erichsen* v. *Last* the present Master of the Rolls said—'The only thing which we have to decide is whether, upon the facts of this case, this company carry on a profit-earning trade in this country. I should say that whenever profitable contracts are habitually made in England by or for foreigners, with persons in England because they are in England, to do something for or supply something to those persons, such foreigners are exercising a profitable trade in England even though everything to be done by them in order to fulfil the contracts is done abroad.'" These words of Lord Esher (then Brett, L.J.), are very wide, and if correct directly cover the present case. I pause for a moment to observe that at a later part of the same opinion he pointed his previous words by saying (p. 418, ft.) — "The contracts are made and habitually made with the com-

pany in England, and therefore it seems to me that the company carry on in England the trade or business of making such contracts." I gather that Lord Herschell agreed with and approved of Lord Esher's expressions, which he quoted (he certainly did not dissent from them), and I humbly think these go much further than to regard the making of contracts as "the principal test" of trading; they treat it as a conclusive test. In confirmation of this view, I observe that Lord Davey points out (in *Grainger's* case, at p. 246) that the previous cases "all differ in the vital respect that sales of goods were in these cases made in England." I refer to, but refrain from quoting, the opinions of the learned Judges in *Werle & Company* and in *Erichsen* v. *Last*, already eited; but it is worth while to notice that in *Werle's* case the argument which was rejected by the Court was explicitly to the effect (20 Q.B.D. at p. 757, top) that "it is clear that the property passes and delivery is given at Rheims, and all that the appellants do in England is to make a contract. That is not enough to charge them." Lastly, in the case of *Turner* (1898, 4 T.C. 25), already referred to, Bruce, J., said "the appellant must satisfy us according to the decision in *Grainger* v. *Gough* that all contracts for the sale and all deliveries of merchandise to customers were made in a foreign country." If this is a correct interpretation of the result of *Grainger's* case, it is conclusive in favour of the Crown upon the branch of the case now under discussion. It seems to me, at all events, that, at least since the decision in *Grainger & Sons*, it must be held that, apart from the presence or absence of other elements in any given case, it is enough to constitute an exercise of trade *within* the United Kingdom (not merely a trading *with* the United Kingdom), if the foreigner, by himself or his agent, carries on a course of selling his goods to customers within the kingdom; and I think that element is, as already stated, clearly present here. Nor do I see anything awkward or anomalous in this result, for a course of dealing by way of sales is of the very essence of the exercise of a trade. There is nothing to the contrary, so far as I see, in the decision in *Sully* v. *Attorney-General* (1860, 29 L.J. Exch. 464), where it was held that a course of purchasing in this country by a foreign company goods for re-sale abroad did not constitute an exercise of trade here by the company.

For these reasons, my opinion upon the first matter argued in this case is in favour of the Crown. From what I have said it sufficiently appears that, even if my view upon the facts had been different from what it is as to the question of the payments being made to the company within the United Kingdom, I should still have held that the company was exercising a trade in this country by the mere fact of making their sale contracts here. It is, I think, true that in most of the reported cases not only contracts were concluded but also payments were made in the United Kingdom. But I am unable to hold that the fact of such payments was necessary to constitute the exercise of trade; and I think that the Judges, especially the noble and learned Lords who delivered such elaborate opinions in *Grainger & Son* v. *Gough*, would have made it clear (if they had so thought) that a course of contracts would not by itself constitute an exercise of trade unless the payments were also made in this country. But, as I have endeavoured to demonstrate, their opinions appear to have proceeded upon the contrary footing, which seems to be not unreasonable, viz., that a course of sales contracted in the United Kingdom with a view to profit imports an exercise of trade there, although the payments may be made abroad and not in this country.

It is, however, of little moment as regards this particular case, whether the opinion I have expressed upon the first branch of the argument is right or (as is more probable, seeing that I stand alone in it) is wrong; for I am clearly of opinion, with all your Lordships, that the second question put to us must be answered adversely to the Crown. Looking to the admitted facts, I am at a loss to see how the appellants can justly be described as agents "having the receipt of any profits or gains . . . belonging to" the company. There is no need to labour the point; but I may quote a passage from Lord Davey's opinion in *Grainger & Son* (at p. 346, ft.) where his Lordship said—"The words 'having the receipt of any profits or gains,' &c., should grammatically be read with the words 'factor, agent, or receiver,' and not with 'receiver' only; and that 'having the receipt of any profits or gains' does not mean 'any part of the profits or gains,' but 'the taxable profits or gains of any business, &c." Lord Davey added—"I feel great doubt whether on the facts of the present case Messrs Grainger & Son were such agents; but it is not necessary to decide that." I think Lord Davey's doubt would have been even greater upon the facts of the case now before us; for they are much weaker, from the Crown's point of view, than those in *Grainger's* case. It appears from the report (p. 326) that the agents there sometimes received cash in London on account of their principal, which they used, so far as necessary, for payment of their commission, applying the balance to payment of other charges for him; and (p. 328) that besides cash some cheques on behalf of the principal were paid to and cashed by the agents. Now in the present case the facts are that "cheques are made payable by purchasers in some cases to the company and in others to the appellants. The appellants invariably send to the company in Paris the cheques as received, endorsed where necessary, and do not in any case pay them into a bank in the United Kingdom. There has never been a case in which payment has been made by a customer in cash." On these facts I do not think the appellants ever received, or were entitled to receive in any proper sense, moneys belonging to the company. Nor do I see

how they could properly, looking to their invariable course of dealing, cash any cheque which might come into their hands for the company, though made payable to themselves, or hold its proceeds as a fund from which to retain such sum as might be sufficient to repay themselves the amount of assessments on the company to income tax in respect of its trade in this country. I find no difficulty or embarrassment in reaching this conclusion consistently with the view which I have already expressed to the effect that, as in a question between the company and its British customers, the payments were made within the United Kingdom, viz., in Glasgow. After the cheques or drafts reach the hands of the company's authorised agents there, who sign and deliver receipts for them in name of their principals, it would, I apprehend, be impossible for the company to deny, in a question with the purchasers, that payment has been made to it—made, as I hold, in Glasgow. But it does not follow, and is not, in my opinion, the case, that the agents in merely transmitting the cheques, &c., to Paris, were persons "having the receipt of any profits or gains . . . belonging to" the company.

The result of the whole matter, even assuming my views in regard to the first question to be correct, will probably be unsatisfactory to the Crown from a practical point of view. But I apprehend that "if the Crown can find such an agent as is described in section 41, they can assess him; but supposing they cannot, they must take such means as they are able to get at the person who should be assessed"—(*per* Lord Esher, M.R., in *Werle & Co.*, 20 Q.B.D. at p. 790.)

In my opinion we ought to answer the second question in the case in the negative; find that the second finding contained in the determination of the Commissioners is wrong; and that it is unnecessary to deal with the other questions in the case and findings by the Commissioners.

LORD SALVESEN — The question in this case is whether a French company which has its office in Paris, and whose business consists in working phosphate mines in Algeria and selling the produce, "exercises a trade within the United Kingdom" within the meaning of the Income Tax Acts. The words quoted have no technical meaning, and have been said by more than one learned Judge to be synonymous with "carry on business." There is therefore no question of construction of the Act, but the point is simply this, whether the facts agreed on as to the company's sale of its products here constitutes a carrying on of business within the United Kingdom so as to make it liable to be assessed for the profits of such business so far as so carried on.

The material facts are as follows: The appellants are the sole principal agents for the sale of the company's phosphates in the United Kingdom and elsewhere. They are not said to have no other business, and it may be inferred that they deal as commission agents in other commodities. Under their agreement with the French company, dated 22nd June 1899, which was in force for the years to which the appeal relates, they are appointed the general selling and shipping agents of the company, and their remuneration is fixed at a commission of 2 per cent. on the price of the phosphates which they sell. This commission includes office expenses generally, but not expenses such as sampling, superintending, weighing, and commission to sub-agents, which are payable by the company. The appellants' authority is to sell the company's phosphates at or over minimum prices fixed by the company, and they make the sales without reference to the company. While it is left to the appellants' discretion to whom to sell, they are not liable for bad debts and hold no stock of phosphates. The company has sub-agents in various parts of the United Kingdom who are appointed by the appellants, subject to the company's approval.

When a sale is made by the appellants they send a sale note to the purchasers signed by them in name of the company, "per Crookston Brothers." The purchaser on receiving this document, if he finds that it correctly sets forth the transaction entered into, signs and forwards to the company in France a bought note containing the same provisions as the sale note. The phosphates are shipped by the company from the port of Bona, Algeria, in vessels chartered for the company on the instructions of the appellants, and bills of lading are granted by the masters in favour of the company as shippers, deliverable unto order or their assigns. These bills of lading reach Glasgow at least a week before the arrival of the goods, and are at once endorsed by the appellants to the purchasers and handed over to them in exchange for three-fourths of the price in the invoice. The invoices for the phosphates, which are forwarded by the appellants to the purchasers along with the endorsed bills of lading and policies of insurance, state the price of the goods sold, including cost, freight, and insurance, but the freight is deducted from the amount brought out in the invoice and paid by the purchasers direct to the shipowners. In terms of the bought and sold notes payment is to be made by cash in London, which involves the use of crossed cheques which are made payable by the purchasers in some cases to the company and in others to the appellants. In the latter case the appellants simply endorse the cheques and forward them to the company in Paris. No money belonging to the company has in any case been collected or retained by the appellants, and they received payment of their commission by remittance from the company in Paris. On the profits arising from this commission the appellants have already been assessed and paid income tax.

These being the agreed-on facts, it would appear that the appellants simply act as any other agent would who was employed to sell goods belonging to a foreign house

in this country. The only specialties are that the appellants are the sole principal agents both for sale and shipment, and that minimum prices at or above which they may sell are fixed beforehand, so that a sale made by the appellants within the limits of their authority is binding on the company and requires no confirmation. The object of the purchase note is presumably in the interest of the purchaser, who after the receipt by the French company of such purchase note without challenge is safe to assume that its terms were in fact within the appellants' authority as agents.

Had the question which arises here been submitted to any business man I think he would have had no hesitation in saying that the French company does not carry on any business or exercise any trade in this country.' As Lord Herschell pointed out in the case of *Grainger & Son*—"There is a broad distinction between trading with a country and carrying on trade within a country. Many merchants and manufacturers export their goods to all parts of the world, yet I do not suppose anyone would dream of saying that they exercise or carry on their trade in every country where their goods find purchasers." That dictum appears to me to be precisely applicable to the present case, for I cannot see how it can make any difference that the foreign merchant obtains his orders through the medium of an agent resident here, or, as in *Grainger's* case, by means of circulars which he addresses to possible customers in this country, or by advertisements inserted in British newspapers. A difficulty, however, is undoubtedly occasioned by certain judicial dicta, some of which may be construed as meaning that if contracts for the sale of merchandise are habitually made in this country, either by the foreign merchant himself or by a commission agent on his behalf, and delivery takes place in this country, then the foreign merchant is exercising a trade on the profits of which he is liable to assessment here. In none of the decided cases, however, do I find that only these two elements were present. In the earliest case — that of *Erichsen* on which the Commissioners appear to place most reliance—the facts were entirely different. There the company had three marine cables connecting the United Kingdom with Denmark. These were worked by the company's servants, and it had also a London office where it took messages. The appellant was the sole representative of the company in the United Kingdom, and through him they habitually received money in this country from English subjects for the messages which they transmitted. They were therefore clearly trading here, and indeed just as much were they carrying on business in this country as they were in Denmark where their chief office was, and where were situated the other ends of the three marine cables in question.

The next case was that of *Tischler & Co.*, which was the first of a series of cases dealing with wine-growers and wine merchants. The facts were as follows:—The senior partner of the foreign wine merchants was in the habit of spending four months yearly in England at different times, for the purpose of seeing customers and taking orders from retail merchants; they had general agents in England who collected the accounts, received cheques and moneys, and transacted all necessary business not in person transacted by Mr Tischler. They had, moreover, a room in their agents' office, for which they paid rent. On these facts they were held to be exercising a trade in this country.

In *Pommery & Gréno* the facts were somewhat similar, aad the judgment was also adverse to the foreign company. There, too, the business was conducted through an agent, but he was an agent who carried on no other business than that of the foreign company as their representative, and their names along with his were exhibited on his premises. This agent had a stock of the foreign merchant's wine from which he supplied customers unless the orders were of large amount, when they were supplied by them direct. All the sums due by customers for wine so sold were collected by the agent on behalf of the foreign merchants, who kept a banking account in London. All these facts were founded on by Denman, J. In his opinion he said—"It appears to me that if the company here choose to keep such an establishment as that which is stated here, working through an agent in England, who obtains orders in England, and who causes goods to come from a foreign country to English customers, and through whose hands the moneys pass, and through whom all such arrangements as those stated in this case are made, that is carrying on a trade in England."

This case was followed by another in 1888 — *Werle & Co.* v. *Colquhoun.* In that case also foreign merchants were held to exercise a trade in England through an agent who was their sole representative, and the facts are not materially different from those in *Pommery & Gréno.* As in that case, the foreign merchant's name was exhibited on the staircase of the office of their agent, and their agent held a large stock of wines on their behalf, from which customers were supplied. The purchasers paid the invoiced prices either in money or by bill in favour of the agent, although formal receipts were sent by the foreign merchants direct. The grounds of judgment were most concisely stated by Lopes (L.-J.), who said—"The contracts are made in this country; the wines are supplied here to English customers, and are paid for by English customers to a person who is authorised by the appellants to receive payment, and to receive it in England;" and again—"It appears to me the profits are earned in England in respect of goods ordered in England, sent to England, and paid for in England by English customers. I think, therefore, the profits in question arise from a trade exercised in England, and are therefore assessable." In all these cases

there are *obiter dicta* which, if literally construed, would seem to indicate that the essential point in determining whether a trade is exercised in this country is whether the contracts for the sale of the goods are made here. In none of the cases, however, was this the only element on which the decision proceeded. In all of them the deliveries were held to be made in England, and payment of the purchase price of the goods was regularly received there. Where these three elements occur, then it would seem to be settled that a trade is exercised in England, even although it is carried on entirely by an agent who is remunerated wholly by commission.

In the subsequent case of *Grainger & Son*, already referred to, the Court of Appeal [1895], 1 Q.B. 71, following certain of the dicta in the earlier cases, held that a trade was exercised in this country by foreign wine merchants through an agent whom they appointed to canvass and seek for orders in this country. The House of Lords, however, reversed that judgment, holding that as all the contracts for the sale and delivery of the merchandise to customers were made in a foreign country, the foreign merchant did not exercise a trade in the United Kingdom within the meaning of the Income Tax Acts. In that case the agent had authority to bind the foreign firm by the contracts which he made on their behalf, subject to a right of rejection of any particular orders which the foreign merchants might be unwilling to execute on account of the financial position of the purchaser. The deliveries were also made in Rheims, although the destination was England. On the other hand, money was collected by the agent in England, but this, by itself, was held not to be enough. Lord Watson said—"When a trade is carried on in a foreign country, and British subjects not only purchase but take delivery there, I don't think that the employment of an English agent to collect and remit the debts due to him by these customers can be regarded as an exercise of his trade in this country by a foreign merchant."

The other two cases which were relied on by the Crown were those of *Watson* v. *Sandie & Hull* and *Thomas Turner, Limited* v. *Rickman*. In the former a foreign firm was held to exercise a trade in England by making consignments of goods to an English firm for sale on commission, the English firm selling the goods in their own name, receiving the proceeds of sale, and assuming all responsibility of payment by the purchasers. In the latter the foreign company had an agent in England who, on receipt of the offers for the company's goods communicated the offers and accepted them on receiving the company's authority. The goods were then consigned to Liverpool in the name of the agent, who distributed them to the customers. It was held that the contracts and the deliveries were both made here, and it also appears, although this is not so much relied upon in the judgments, that payment of the price of the goods was made to the agent. There is therefore no case in which a foreign firm has been held to exercise a trade in this country where it did not receive direct or through its agent payment in this country of the price of the goods in which it traded.

The importance of this fact appears from the case of *Sully*, 2 T.C., p. 149. In this case Cockburn, C.-J., in delivering the opinion of the Court, said—"Wherever a merchant is established, in the course of his operations his dealings must extend over various places; he buys in one place and sells in another. But he has one principal office in which he may be said to trade, namely, where his profits come home to him. That is where he exercises his trade. It would be very inconvenient if this were otherwise. If a man were liable to income tax in every country in which his agents were established, it would lead to great injustice. . . ." "The subjects of a foreign state not resident here cannot be made amenable to our laws; how, then, are their profits to be made amenable to the fiscal law? Simply by a provision that whosoever carries on the business and receives the profits here shall be assessed." This case was referred to with approval by Lord Watson in *Grainger & Son* as having been decided by six very eminent Judges. In my opinion it is conclusive of the present case.

The conclusions I reach on the facts with regard to the three matters which (in a case of this kind, where the foreign firm has no branch establishment in this country) have been regarded as important are as follows—

1. Were the contracts habitually made in this country? In my opinion this question falls to be answered in the affirmative. There is nothiug in the case to suggest that any sale made by the appellants on behalf of the company to an English purchaser was not to be regarded as complete until the purchase note had been forwarded by the purchaser to the company and received by the latter. In law I do not doubt that where a British agent makes a contract of sale with a British subject within the country, that sale becomes instantly binding on the company, provided the agent has authority so to contract and has acted within the limits of his authority. I cannot help observing, however, that it appears to me that undue importance has been attached by some of the English Judges to the place where, in a legal sense, the contract is made, when considering its bearing on the question whether a foreign firm has exercised a trade in this country. I say so for this reason, because the foreign firm could always, if it chose, reserve to itself the right of suspending any sale provisionally made by the agent until its formal approval had been obtained. On the authority of the case of *Grainger & Son*, if it did so, and if no completed sale were made until the foreign firm signified its approval, the contract would be held as having been made abroad; and yet there would be no substantial difference between such a contract and one where the agent

had previously received authority to complete the contract.

I am fully aware that my opinion runs counter to some dicta of the English Judges, and especially to the dictum of Lord Justice Brett in the case of *Erichsen*, which was quoted without disapproval in the subsequent case of *Grainger & Son*, and from which it might be inferred that the fact that a foreign company makes its contracts in England for the sale of goods there, even when it does so through an agent, is of itself sufficient to constitute an exercise of trade by a foreign company so as to render it amenable to assessment under our fiscal law. Such a view would be very far reaching in its results, for it is certain that a very large proportion if not the bulk of the foreign goods imported into this country are sold through agents resident here, and its immediate effect if it could be enforced would be destructive of agency business altogether. The definition of what constitutes an exercise of trade to which I refer instead of simplifying the solution of the problem appears to me unnecessarily to complicate it. How is it to be determined whether contracts of sale made by an agent are profitable or not when this can only be ascertained by reference to the books of the foreign company which are not accessible to the agent? Then, again, in what cases can it be said that contracts are "habitually" made in England, or what warrant is there in the Act for holding that if a trade is exercised in England from which profits accrue it makes any difference whether that trade consists in the making of one contract or of many? Is it to be said, for instance, that if an agent here sells fifty different lots of wine to British customers the foreign firm shall be held to habitually contract here, and that they do not do so if he sells a single cargo of a like or greater quantity? Again, where a foreign merchant employs agents in many different parts of the country for the sale of his goods, which of these agents is to be held as exercising a trade on his behalf, or are they all to be held as so exercising it? If the latter, how can such an agent be assessed on the assumed profits of a foreign firm by the sale of its goods in England when only a fraction of these transactions passes through his hands. An *obiter dictum* which involves so many difficulties, none of which it was necessary to consider in the case in which it was delivered, humbly appears to me not to be one which affords any useful guidance in applying the simple words of the Acts to any given set of circumstances of an entirely different nature from those which were the subject of consideration in the case in which it was delivered, and leaves out of view the essential distinction pointed out by Lord Herschell between trading with a country and trading within a country.

2. Was the place of delivery in this country? On the facts as presented to us it is plain that the bills of lading for the goods were always delivered to the English purchasers while the vessels conveying them were still at sea. The legal property in the goods accordingly passed to the purchaser when he received the bills of lading, and but for the special stipulation with regard to insurance contained in the contract of sale he would have been entitled to the benefits of the policy, the premium for which was included in the price. Apart from this question of insurance, the risk of the goods after the bills of lading had been delivered to the purchaser would be with him, so that delivery in the legal sense took place before the goods arrived in this country. In this respect the case differs from most if not all the cases already referred to. Again, however, I take leave to remark that for the purpose of considering whether a trade is exercised by a foreign firm in this country, the actual place where delivery is made, whether on the high seas or at the domicile of the foreign firm, does not seem to me to be a vital matter, seeing that the delivery is made to fulfil a sale to a British customer, and that the goods whether at the risk of the seller or the purchaser before they arrive in this country are destined for consumption and are in fact consumed here. If, however, a trade cannot be exercised by a foreign firm in the sale of goods to British merchants unless the contracts and deliveries are both made within this country, then these conditions have not been satisfied in the case before us.

3. Was the price of the goods, which necessarily includes any profit which was made by their sale, paid in this country? Now it is stated in article 8 of the statement of admitted facts that the stipulation containcd in the purchasers' and sellers' documents that payment should be made by cash in London involved the use of crossed cheques. It is further stated that these cheques were in some cases made payable by the purchasers to the company and in other cases to the appellants, but that the appellants invariably sent to the company in Paris the cheques as received endorsed by them, and that they did not in any case pay them into a bank in the United Kingdom. No money was therefore actually collected in this country and no profit received. The circumstance that cheques were occasionally made payable to the appellants appears to me to be immaterial, for as the contract of sale was made in the name of the company cheques ought to have been made out by the purchasers in its name and not in the name of the agents. In this matter the company dealt with its English customers in exactly the same way as if it had made sales direct to them. It would of course in such a case have to employ a banker or other agent in this country to exchange the documents of title for the proportion of the price which was payable on delivery of these. But the bankers' and agents' duty would be at once to remit the amount so received to the foreign company, whose endorsation was required before the cheque could be paid by the purchasers' banker. In my opinion therefore it cannot be held that the foreign company received payment of the price of

the goods sold to British customers within this country, and on that ground I do not think they can be held to have exercised a trade here.

If the foreign company did not exercise a trade within the United Kingdom, it is of course illegal to assess the appellants as their agents on the profits made by the company by the sale of their goods in England. But even if this were decided otherwise, the question remains whether the appellants are agents to whom section 41 and section 44 of the Income Tax Act apply. A large majority of the noble Lords who decided the case of *Grainger & Son* expressed the opinion that the words "in receipt of profits" qualify the word "agent" as well as the word "receiver." The agent therefore cannot be assessed unless he is or ought to be in receipt of moneys belonging to his foreign principal. The facts I have already adverted to show that the appellants have never been in receipt of such profits. It is true that in the case of cheques which were made payable to them by British purchasers they could have uplifted the money and held it in their own hands, but I think it is clear that they would have been in breach of their duty as agents had they done so. The words "in receipt of profits" must, I apprehend, be construed as meaning lawfully in receipt of profits, and I apprehend that an agent is not lawfully in receipt of money due to his principal under a contract of sale made in the principal's name because the purchaser chooses or is induced by the agent to make the cheques payable to him. The intention of the statute is not to make the agent personally liable for the income tax due by the foreign firm, but only to make him so liable where he has the opportunity of recouping himself out of moneys belonging to the foreign firm. In the present case I think it would be a great injustice to make the appellants so liable, because I see no prospect of their being able to recover from their foreign principals the amount of the assessment by retaining any moneys due to the latter. Purchasers would, no doubt, hereafter in every case be notified by the company that the document of title would not be delivered except against cheques drawn in favour of the Company. And the appellants would thus never have an opportunity of recouping themselves in respect of the assessments which have now been levied upon them in respect of the years 1904-5; they are, moreover, in the position of never having had in their hands during the whole period of their agency any sums due to the Company in respect of the sale of the Company's goods; and unless the Company choose to waive the point they can never get any of its moneys into their hands within this country. On this separate ground also I am of opinion, agreeing as I do with all your Lordships, that the appellants are entitled to succeed. It follows that, so far as I am concerned, the first two questions stated for the opinion of the Court should be answered in the negative; and the third question need not therefore be considered, as the assessment will fall to be discharged.

LORD JUSTICE-CLERK — As regards the first question in the case, the real matter of inquiry is whether a foreign company selling goods to purchasers in this country, in the circumstances disclosed in the minute of agreed on facts, must be held to be carrying on business within this country, so as to bring their profits made by such business assessable to income tax here. Now, the facts of the case seem to me to make it plain that the French company to whom the Messrs Crookston act as agents do not carry on business in this country, unless it be indirectly through these agents, who are not their servants or employees, but persons in independent business as commission agents for whoever may seek their services in that capacity, and are willing to pay them a commission on the business done. The French company have no office, no employees, no goods, no bank account, and they in no way hold themselves out by advertisement or by directory entries, or name plate, or premises, or otherwise, as doing business themselves in this country, There is no trace of any active transaction of business by them. Whatever business is done is done not by them but through others acting merely as agents on commission. Any transaction entered into by the agents upon their mandate, which is to sell at or above a minimum price fixed by the French company, is so entered into by sale note sent to the purchasers by the agents in name of the company "*per* "Crookston Brothers." The purchaser then completes the transaction by transmitting a bought note to the company in Paris, who despatch the goods and forward a bill of lading to Messrs Crookston, who endorse it and exchange it for three-fourths of the price. Thus the goods are not delivered in the United Kingdom, for all your Lordships hold that delivery takes place either at the port of Bona, the port of despatch, or when the bill of lading is endorsed over to the buyer, which takes place before the goods reach this country.

The question whether the payment for the goods is made in this country is the question of difficulty, seeing that there is a difference of opinion on the Bench in regard to it. There is no doubt that the receipts for the price of the goods run as received "*per* Crookston Brothers," the commission agents, and delivered to the purchasers here. But I am unable to see that that is conclusive upon the question whether the money was paid in the country in which the receipt was given. Messrs Crookston carried through the transactions for the foreign company under their mandate, and presumably had authority from them to grant the receipts, the principals having, as was the fact, received the money through London by exchange. I do not think that the fact that in some cases purchasers drew cheques in favour of Crookston Brothers affects the question, for in these cases the cheques are at once endorsed on to the com-

pany, the Crookstons having no right to take possession of the price, or to handle it as their own in any way. The only right they have is to their commission, and this is paid to them from Paris by the company.

Can it be said that this course of dealing constitutes a "carrying on of business" by the French company within this country? It is of course trade carried on between Frenchmen and British subjects. The company here are French export traders. Do they not fall rather under the case of *Grainger & Son?* Had it not been that some expressions have been used in certain decided cases, it would not have appeared to me that the question could have been answered otherwise than in one way. I do not think that any weight in this direction can be given to the case of *Erichsen.* There the foreign company, which owned telegraph cables, received regular payments at an office of their own in London for work to be done in sending telegraph messages by their cables, these cables being attached to instruments in their premises in this country for transmitting messages.

Nor do I think that the question can be tested by cases—*Fischer's* case—when the foreigner came himself to this country from time to time to tout for business, and whose agents collected the moneys for sales, and did all the business he himself did when in the country, leaving practically his moneys in their hands, with a duty to account to him. And still less do I think one can be guided by the case of *Pommery & Greno,* who by a sole agent carried on their business in this country, with their name on his premises, and entrusted him with a stock of their wines in this country from which they through him supplied customers. In their case all money due to them in this country was paid to him, and they kept a bank account in London into which his duty was to pay in the sums received. Such a case appears to me to be clearly a case of "carrying on a trade" within the country, but it does not appear to me to be at all on all fours with the present case. The case of *Werle* very much resembles the case of *Pommery & Greno.* Both cases differed from the present in that the person representing the company as sole agent was authorised to receive and did receive payment in England. The case of *Grainger* seems to point to this, that when it appears in any case to be laid down that the matter is to be determined by considering whether the contract is made in England, it is not necessarily to be taken as conclusive, without such other elements as occur in the cases respectively. The place of delivery, and the mode in which payment is carried out are both important elements in the matter. In *Grainger's* case delivery was not made in England but abroad, and it was held that the employment of an agent to collect debt was not necessarily to be regarded as exercise of trade in the country, the agent having to remit the moneys to his principals abroad.

There are other cases relied on by the Crown, but they appear to me to be essentially different from the present, as in them the goods were beyond doubt sent to this country and not to the purchaser, and delivery given of them in this country after their arrival, and through the foreign merchant's representative, as the goods of the foreign merchant up to the moment of delivery—a state of things not found in this case.

The firm for whom the Messrs Crookston acted as commission agents had its place of business in France, to which the proceeds of the business came direct. No goods of theirs were kept in this country. No business premises were occupied by them in this country. No personal action took place on their part in this country. To me it appears that they fall within the distinction expressed by Lord Herschell when he spoke of the difference between doing business "with a country" and doing business "within a country." Here the French company can only be reached through Messrs Crookston, on the footing, as expressed by Chief-Justice Cockburn in the case of *Sully,* that the person who "carries on the business here and receives the profit shall be assessed." These last words test the question. Can it be said here that Messrs Crookston "receive the profit?" I do not think it can. They have no right to receive the profit and deal with it. Their interest and their only interest is to receive a commission according to the value of the sales for which the French company have received the price, and this they receive from Paris. Reverting to a matter already referred to, I will only add that I do not think that if the view I express is the right one on the character of the relations of the Crookstons to the French firm, it can be overcome by the circumstance that the receipts reaching the purchasers are signed for the company "*per* Crookston Brothers." It does not appear to me that that is different from any receipt granted in name of his principal by another who thus acknowledges for him that the money has passed, but who has no right whatever over it, and is a mere hand to give it over to the person in right of it.

On the first question I therefore come to the same conclusion as the majority of your Lordships.

Upon the second question, on which there is unanimity, I entirely agree with the opinions which your Lordships have expressed, and abstain from saying anything more, which could only be a repetition of what is so clearly set forth in your Lordships' opinions.

The Court reversed the decision of the Commissioners, and answered the first and second questions of law in the negative.

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