GRAINGER & SON V GOUGH (SURVEYOR OF TAXES)

462 G r a in g e r a n d S o n v . [V o l. I l l No. 187.—In t h e H o u s e o f L o r d s , 12t h , 13t h , an d 16t h M arch , a n d 1s t M ay 1896. G r a in g e r a n d S on v . G o u g h (Surveyor of Taxes). Income Tax.—Schedule D.—Foreign wine merchant executing orders ob tained here.—Agent.—Liability to pay for principal.—A French wine merchant appoints an English firm as his sole representatives in England fdr the sale of champagne. The English agents obtain orders, which they transmit to their principal. The French wine merchant exercises his discretion as to executing the orders. The wine ordered is forwarded from Rheims direct to the pur chasers at the expense and risk of the latter. Payments are for the most part made direct to the French wine merchant, though sometimes they are made through the agents. All ■receipts are sent by the French wine merchant to the customers direct. The English agents are paid by commission. Held, (Lord Morris dissenting), that the French wine merchant does not exercise a trade within the United Kingdom, and is consequently not liable to Income Tax on his profits and gains. Decision of Court of Appeal(2) reversed.

[Note.—The Court expressed a unanimous opinion that the words " having the receipt of any profits err gains " in section 41 of 5 & 6 Viet. c.. do not apply only to the word " receiver.”] This was an appeal by Grainger and Son against the decision of the Court of Appeal, reported ante, p.. Asquith, Q.C. (Pyke, Q.C., and R.M. Bray with him), for Grainger and Son.—M. Roederer does not exercise a trade within thi§ country (Sulley v. Attorney General)(’). He may carry on a trade with this country without carrying it on within it. No contract for the sale of his wine is made in England by Grainger and Son. They solicit and receive orders from customers here, but it is their duty and their practice in every case to forward each order, as they receive it, to M. Roederer, who has the right of accepting or

(‘) Reported [1896] A.C.,. («) Ante, p.. (*) 2 T.C., 149.P a r t LII] G o u g h (S u r v e y o r o f T a x e s) 463 rejecting it as he thinks fit. They have no power to bind him to a contract of sale by anything they do here. The contract is only completed when it is accepted in France. In Werle v. Colquhoun(x) the Court found as a fact that the contracts for the sale of the wine were made in this country. But even if M. Roederer is exercising a trade within this country, there is no machinery in the Acts for assessing his profits. Grainger and Son, to be assessable, must be in receipt of the profits or gains of the business, for the words “ having the receipt of any profits or gains ” in section 41 of the Income Tax Act of 1842 apply to an agent as well as a receiver. But Grainger and Son do not receive the profit, and do not know whether profit is made. It cannot be contended that an agent who has merely received payment of his disbursements, and his commission, has got profits of his principal in his hands. The Legislature only regards a person residing abroad as exercising a trade in this country when {ie has an agent here who receives for him the profits or gains of that trade. The only class of agent contemplated is an agent who does in fact conduct the business of his principal here, and who, as tHfe consequence of his conduct of the business, is in receipt of the profits and gains, and therefore capable of discharging the duties which are cast on the agent by the Act. Pyke, Q.C.—The meaning of section 41 can be gathered from previous legislation, 39 Geo. III. c.. s. 38, and 43 Geo. III. c.. s. 89, both show that the agent intended is a person in the actual receipt of the profits and gains of his principal. Sir R. B. Finlay, S.G. (Danckwerts with him) for the Surveyor.—The fact that extensive and habitual sales take place here is an argument that M. Roederer is exercising a trade within this country, as also are the facts that he advertises in the Post Office Directory and has registered his trade mark. The place where the contract is concluded as a binding contract is not necessarily the place where the business is carried on. The substantial part of the business is the getting of the orders, and that is done here. The soliciting of orders in a district has been held to be carrying on business there. **Turner v.** Evans, 2 Ellis and Blackburn,.

See also Brampton v. Beddoes, 13 Common Bench, New Series, p.. The point as to the making of a binding contract only arises in one case in a thousand, where the solvency of the person who has given the order is doubtful. The customer knows nothing of any special arrangement between M. Roederer and his agent as to the acceptance of orders. As soon as there is a representative here whose function it is to get orders, business is carried on here. M. Roederer is here by his agent. See **Tischler v. Apthorpei}), Pommery and Greno v. Apthorpe(3) and Werle v.** Colquhoun(4). Grainger and Son, being the agents through whom

(l) 2 T.C.,. (*) 2 T.C.,

. (*) 2 T.C... (*) 2 T.C., 402.46-1 G r a in g e r a n d S on v . [V o l. I l l the trade is exercised, are agents within section 41, the words " having the " receipt of any profits or gains " applying only to " receivers." In any case Grainger and Son do receive a portion of the profits and gains, for they receive part of the gross receipts. Danckwerts.—The contract is not completed until Grainger and Son forward the invoice to the customer, or it may be said that directly a person sends an order in reply to Grainger and Son's circular there is a complete contract. Grainger and Son practically accept the orders, and direct M. Roederer to ship. They have power to accept orders subject to Roederer's right to reject any on the ground of the insolvency of the proposed customer. Roederer is at all events carrying on here " a concern in the nature of trade." Asquith, Q.C. in reply. Cur. adv. vult. J udgm ent Lord Herschell.—My Lords, the Appellants are wine merchants carrying on business in the city of London. They act as agents in this country for certain purposes, which will require careful consideration, for M. Louis Roe derer, a wine merchant, whose chief place of business is at Rheims, in the Republic of France. Two questions arise for determination—first, whether M. Roederer exercises any trade, employment, or vocation wkhin the United Kingdom; and next, whether, if so, he is liable to be assessed to the Income Tax in the name of the Appellants as being his agents within the meaning of section 41 of the 5 & 6 Viet. c.

. The first step to be taken is to ascertain with accuracy what are the facts in the present case. I say this because one of the learned Judges in the Court of Appeal expressly relied on the fact that contracts were habitually made in this country by M. Roederer, and another member of the Court seems to have regarded the finding in the case that " the Appellants are agents in " Great Britain for the sale of L. Roederer's wine," as involving a finding, that sales by Roederer took place in this country. Standing by itself, the finding would probably have this meaning, but it does not stand alone. The whole of the facts found must be considered in conjunction with one another, as well those in the amended as in the original case. The nature of the Appellants agency is plain enough. They canvass for orders for Roederer's wine, and receive a commission on all orders from Great Britain, if executed. The functions of the sub-agents whom they appoint are the same. When orders are received they " are transmitted by the Appellants to Louis

 " Roederer at Rheims, and he exercises his discretion as to executing the " said orders." This is the statement in the original case. In the amend ment it is stated that " orders are sought by them as agents on behalf of " Louis Roederer as their principal, that such orders are given by customers " to Messrs. Grainger and Son, and received by them, but the Appellants " allege that the said Louis Roederer, in his arrangements with them as his " agents, has reserved a right to reject any particular order." The Com missioners add that, in their opinion, this right is, in fact, intended to protect Roederer in cases where there is doubt as to the pecuniary position of the customer giving the order, and that no special notice is given to the customer of the right so reserved. The Commissioners appended to the amended case certain documents produced by the Appellants as specimens indicative of the manner and style of bpsiness transacted by them on behalf of M. Louis Roederer. One of them is an order addressed to the Appellants. It commences " Please ship, per " G. & J. Porter," and then specifies certain quantities and

descriptions of Roederer's wine. The Appellants, in reply to this, write, " In compliance " with your obliging order of yesterday, we shall have much pleasure in " requesting M. L. Roederer to ship for your account, through Messrs. G. & J. " Porter, of Calais," the wine specified. Taking the findings together, I think it clear that no contracts to sell wine were ever made by the Appellants on behalf of Roederer. All that they did was to transmit to him the orders received, and until he had agreed to comply, or complied, with them, there was no contract. He was under no obligation to the persons giving the orders to the Appellants to execute any one of them. I think the statement in the original c.ase was, having regard to the documents, a perfectly correct one, and that it is not accurate to speak of Roederer's having reserved to himself a right to reject any particular order. An order given to a merchant for the supply of goods does not of itself create any obligation. Until something is done by the person receiving the order, which amounts to an acceptance, there is no contract. It is clear that the Appellants, in receiving an' order, did not accept.or purport to accept it on Roederer's behalf so as to constitute a contract, and that they had no authority so to do. The learned Solicitor General, in his argument for the Crown, did not contend that any contracts were made in this country by M. Roeder either personally or through his agents; indeed he admitted the contrary. Mr. Danck- werts did argue that there were such contracts. His argument was an ingenuous one. He called attention to certain price lists which were distributed by the Appellants amongst persons likely to give orders, and contended that as soon as an order was given tQ them by a person receiving one of those lists, a contract to supply the specified quantity at the price named in the list

(Lord Herschell.) was complete, subject only to a right on the part of Roederer to disavow it. I think it impossible to accede to this contention. In my opinion this would not be understood by anyone in the trade to be the effect of giving an ordeF for goods specified in such a price list. The transmission of such a price list does not amount to an offer to supply an unlimited quantity

of the wine described at the price named, so that as soon as an order is given, there is a binding contract to supply that quantity. If it were so, the merchant might find himself involved in any number of contractual obligations to supply wine of a particular description which he would be quite unable to cany out, his stock of wine of that description being necessarily limited. I entertain, I confess, a very clear opinion that the Solicitor General was quite right in arguing the case on the assumption that no sales were made in this country. Taken in connexion with the facts stated, I think the finding that the Appellants " are agents in Great Britain for the sale " of Roederer's . wine means no more than this, that they are engaged by him to canvass for custom, to seek to obtain from persons in this country orders for his wine. The wine is sold to the customers as it lies in Rheims cellar, or " pris en cave." The customer pays the cost of packing and carriage from the cellars and takes all risk. The delivery to the purchaser therefore takes place in France. The wine is invoiced to the purchaser in Roederer's name as vendor, the invoice being sent to the Appellants, and by them transmitted to the purchaser. The amounts due in respect of the wines sold are sometimes collected by the Appellants on behalf of Roederer, and sometimes remitted direct to him. When the payments are made to the Appellants in cash or in cheques on London banks cashed by them, the moneys so received are credited to Roederer against the amount of the commission due to them, and charges incurred by them on his behalf. Taking it to be the fact, as in my opinion it undoubtedly is, that contracts for the sale of wine are not made by Roederer in this country, and that the delivery by him to purchasers always takes place in France, it appears to me that the case differs widely from any that have hitherto been decided. 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(l), 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 countiy. 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

(») 8 Q.B.D., 414.

P a r t LII] G o u g h (S u r v e y o r o f T a x e s) 467 (Lord Herschell.) “J n England, even though everything to be done by them in order to fulfil “ the contracts is done abroad.” All that the Appellants have done in this country on behalf of M. Roederer has been to canvass for orders, to transmit to him those orders when obtained, and in some cases to receive payment on his behalf. Beyond this he has done nothing in this country, either personally or by agents. Does he then exercise his trade within the United Kingdom? It has been sometimes said that it is a question of fact whether a person so exercises his trade. In a sense this is true, but in order to determine the question in any particular case, it is essential to form an idea of the elements which constitute the exercise of a trade within the meaning of the Act of Parliament. In the first place, I think there is a broad distinction between trading with a country, and carrying on a 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 in which their goods find customers. When it is said, then, that in the present case England is the basis of the business, that the wine was to be consumed here, and that the business done would remain undone but for the existence of the customers in England, I cannot accept this as proof that M. Roederer carries on his trade in this country. It would equally prove that every merchant carries on business in every country to which his goods are exported. Moreover, the proposition would be just as true if English customers gave their orders personally at Rheims. Something more must be necessary in order to constitute the exercise of a trade within this country. How does a wine merchant exercise his trade? I take it, by making or buying wine and selling it again with a view to profit. I t all that a merchant does

in any particular country is to solicit orders, I do not think he can reasonably be said to exercise or carry on his trade in that country. What is done there is only ancillary to the exercise of his trade in the country where he buys or makes, stores, and sells his goods. Indeed, I do not think it was contended that the solicitation of custom in this country by a foreign merchant would in all cases amount to an exercise by him of his trade “ within ” this country. The learned Counsel shrank from maintaining that if, for example, he sought custom only by sending circulars to persons residing here or advertised in British newspapers he could on that account be said, within the meaning of the statute, to be exercising his trade in this country. They relied on the circumstance that he had appointed agents in this country who regularly solicited and received orders and transmitted them to M. Roederer, If in each case the other circumstances are the same, the contract of sale being made abroad and the delivery taking place there, I find myself quite unable to see how the mode in which orders are solicited and obtained, whether by an agent or by circu lars or advertisements, can make the difference, and cause the trade in the one

(Lord Herschell.) case to be exercised, and in the other not to be exercised, within this country. If the mere employment by a foreign merchant of an agent to solicit and to transmit orders does not amount to an exercise of his trade in this country, I do not think that it becomes an exercise of his trade here if, in addition, the agent in some cases receives the price of the goods sold for transmission to his principal. Still less does it appear to me material that in the London Post Office Directory there was inserted, by the authority and with the knowledge of Grainger and Son (but not, I may observe, so far as is stated, by the authority or with the knowledge of Roederer), “ Roederer, Louis, Rheims, " Champagne Merchant (Grainger and Son, Agents), 21, Mincing Lane.” For these reasons I have come to the conclusion that the taxing section does not apply in the present case. This view renders it unnecessary to decide the question whether the Appellants are agents within the meaning of section 41 of 5 & 6 Viet. But I must

say that, as at present advised, I cannot adopt the view that the words, “ having the receipt of any profits or gains,” control the word " receiver ” only, and not the words " factor ” and “ agent.” The word “ agent ” obviously cannot extend to every agent for whatever purpose he may be employed, as, for example, to an advertising agent. This was felt by Mr. Justice Cave, who said that it meant an agent “ for the purpose “ of exercising the trade in question, if it was a trade.” But if the word “ agent ” must be in some way controlled, why introduce words for the purpose, instead of treating it as controlled by the words which follow, and which may not only be made to control it without doing any violence to the language used, but seem to me to be naturally applicable to it, especially on a consideration of all the terms of the section? At the same time, I am not disposed to put so narrow a construction on the section as was contended for by the Appellants. In the case of a trade exercised in this country, I think any agent who received for the foreigner exercising such trade moneys which included trade profit, would be within the provisions of . It was said, that if M. Roederer was not liable to Income Tax in this case, it would give foreigners an unfair advantage over British traders. This does not appear to me be the case. I do not think such' considerations can legitimately influence our decision; but if they are to be introduced, I think it would be much more prejudicial to British traders if we were to lay down that though the scale and delivery of their goodS takes place in this country only, they carry on business in every other country, from which they obtain orders for their goods through solicitation by an agent, or, indeed, in any other way; for I do not think it can logically or reasonably make any difference in principle what the method of soliciting custom may be. I think the appeal should be allowed, with costs, both here and in the Courts below.

P ar t L II] Go ug h (Su r v e y o r o f T a x e s) 469 Lord Watson.—My Lords, this appeal raises two questions upon the construction of the Income Tax Acts. Did Louis Roederer, who is a champagne merchant residing and carrying on business in France, during the years 1884, 1885, and 1886, exercise his trade in this country within the meaning of Schedule D. of the Act

of 1853? If so, did the Appellants, Grainger and Son, act during that period as his agents, in such sense as to make them answerable under section 41 of the Act of 1842, for doing everything necessary in order to the assessment and payment of duty upon the profits or gains arising from the exercise of his trade within the United Kingdom? The facts upon which the answers to be given to these questions depend have been stated by the Commissioners of Taxes for the City of London in a Special Case which was amended by them upon a remit from the Queen's Bench Division. Louis Roederer supplies large quantities of champagne from his cellars at Rheims to consumers in the United Kingdom. He has no place of business in this country, and keeps no stock of wine here, either by himself or by an agent. During the three years for which Income Tax is claimed, his name was inserted in the London Post Office Directory, under the head " Trades," in these terms, " Roederer, Louis, Rheims, Champagne Merchant (Grainger " and Son, Agents), 21 Mincing Lane, E .C .," that being the address of the Appellants, who carried on business as wine merchants upon their own account, and also acted during the period in question as his agents. Beyond receiving payments in cash or bills on his account as will presently be noticed, the Appellants' agency was limited to soliciting orders for champagne, either by themselves or through sub-agents who were appointed by them. These orders when received were not accepted by the Appellants, who had no authority to that effect, but were transmitted by them to Louis Roederer, at Rheims, who invariably reserved the right to reject any order forwarded to him. The necessary result of that course of dealing was, that until Roederer had accepted the order, there was no contract which could bind him or afford a right of action against him to the person who gave it. When an order was accepted the wines were packed in Rheims, at the expense of the customer, to whom they were then forwarded direct, at his cost and risk. An invoice was made out at Rheims, charging the price of the wine according to current lists, furnished to the customer by the Appellants, together with expenses of packing, &c., which was sent to the Appellants, for transmission to

the customer. Each invoice contained a slip requesting those customers who preferred paying by bill or cheque on Paris to have these drafts made out to their own order, and then to endorse them to Louis Roederer so as to enable him to identify each remittance with the customer who sent it. The Appellants were remunerated for these services by a commission upon the orders which they procured. In some cases customers of L. Roederer

(Lord Watson.) made payment to them in cash; but the money thus received by them rarely exceeded the sum due to them as commission, and then only to a small anjount. The Appellants also, received English and foreign drafts and cheques in favour of Louis Roederer, for. which they gave acknowledgments to the customer. These drafts and cheques were forwarded by them to Louis Roederer, whc* then sent a receipt direct to the customer. These facts appear to me to raise a question in regard to the nature of the trading connexion between Louis Roederer and his customers in the United Kingdom, which is not covered by any previous decision. In Tischler v . Apthorpei1) and in Pommery and Greno v. Apthorpe(2), the foreign wine merchant traded in this country through an English agent, who sold his wine in England, and received the price, making delivery to the buyer, either from the stock which had been sent to him by his principal, or by directing a consignment to be sent from Rheims. In Werle & Co. v. Colquhoun(s) 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. Erichsen v. Last (8 Q.B.D., 414), although it did not relate to the wine trade, was a decision of the same class. The telegraph company whose profits were assessed to Income Tax, had its principal seat of business in Copenhagen, but it had offices and agents in various parts of the United Kingdom, where its agents made contracts for the transmission of messages through its wires, and received- payment for sending them. I agree with the opinion expressed in that case (8 Q.B.D., 420) by the present Master of the Rolls,

that whenever 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. There is, in my opinion, a very broad distinction between the case of a foreigner making contracts in England with his English customers for the sale of his wines, either personally or through a representative, and the case of his making similar contracts with these customers in his own country. In the present instance the orders forwarded to Louis Roederer were, in law, nothing more than offers to purchase, until the contract between him and each offerer was completed by his acceptance at Rheims; and he fulfilled his part of the contract by making delivery of the wine sold to the purchaser, and at his risk, in Rheims. The trade of Louis Roederer consists in the sales of his champagne, and it is from these sales that his profits or gains are derived.. Accordingly, the first and main question to be considered in this appeal is

(1) 2 T.C.,

. (*). 2 T.C.,. (3) 2 T.C., 402.

P a r t LII] G o u g h (S u r v e y o r o f T a x e s) 471 (Lord Watson.) whether that which was actually done within the United Kingdom in relation to and for the promotion of his business by Louis Roederer, or by the Appel lants on his behalf, amounts to an exercise of his trade within the meaning of Schedule D. There may, in my opinion, be transactions by or on behalf of a foreign merchant in this country so intimately connected with his business abroad that without them it could not be successfully carried on, which are neverthe less insufficient to constitute an exercise of his trade here within the meaning of Schedule D. In illustration of that view, I may refer to Sulley V. Attomey- Generali}), which was decided in the Exchequer Chamber by no less than six very eminent Judges. An American firm carried on a business in

New York, which consisted in the re-sale there of goods purchased on their account in England. One of the partners, who resided in Nottingham, bought the goods required by his firm, and paid for them with money remitted to him from New York. It was held in these circumstances that the firm did not exercise its trade in the United Kingdom in such sense as to bring its profits within the scope of the Income Tax Acts. One reason assigned for the decision was that the firm's transactions here did not involve any profits or gains, which were wholly dependent, upon the re-sales effected by the firm on the other side of the Atlantic. The learned Judges recognised the principle that purchasing stock in this country with the view of trading in it elsewhere does not of itself constitute an exercise of the trade in the United Kingdom, when that department of the business from which profits or gains are directly realised is carried on in another country. If any substantial distinction could be drawn between canvassing through agents in this country for orders which are sent to Rheims for acceptance or rejection and^the systematic purchase gf goods in the English market for the purpose of trading with them in America, I am disposed to think that the distinction would not be unfavourable to the contention of the present Appel lants. There is no substantial difference between obtaining orders for wines, according to the method pursued by Louis Roederer, and attracting customers to Rheims by advertising and sending circulars to the trade in England. Such things are done by British merchants in foreign countries, and are 'also done by foreign merchants in Britain, in the interest and for the promotion of their home business. If their business consists, as that of Louis Roederer does, in the sale of wines or other merchandise neither the British nor the foreign merchant can, in my opinion, be said to exercise his trade beyond the limits of his own country so long as all contracts for the sale of their goods and all deliveries to the purchaser are made within these limits.

(>) 2 T .C , 149.

(Lord Watson.) The fact that some payments were made in cash to the Appellants and that they also received and forwarded drafts endorsed to Louis Roederer by buyers of his champagne, although it might have been of importance if he had exercised his trade in this country, does not appear to me to have a material bearing upon the question already discussed: When a trade is carried on in a foreign country, and British customers not only purchase but take delivery there, I do not think that the employment of an English agent to collect and remit the debts due to him by these purchasers can be regarded as an exercise of his trade in this country by the foreign merchant. I am, therefore, of opinion that your Lordships ought to reverse the judg ments of the Appeal Court and of the Queen's Bench Division, and to find and declare that Louis Roederer did not in the years 1884, 1885 and 1886 exercise his trade in the United Kingdom. In that view it becomes unnecessary to consider the question whether the Appellants as his agents are responsible in terms of section 41 of the Act of 1842. But having heard a full argument upon the point, I desire to say that I am not prepared to hold with the learned Judges in the Courts below that the words " having the receipt of any profits or gains," as they occur iri that clause, refer only to a " receiver." The con text of the Act appears to me to indicate that they ought to be read as applicable to each and all of the persons enumerated. Lord Macnaghten.—My Lords, I have had an opportunity of considering the judgments which have already been delivered by my noble and learned friends, and I have nothing to add except that I concur in the motion proposed, and for the reasons which have been stated. Lord Morris—My Lords, I am of opinion that the judgment of the Court of Appeal affirming the judgment of the Queen's Bench Division, should be affirmed. It is unnecessary for me to repeat all the facts of the case. The first and main question is, did Louis Roederer exercise a trade in England? There can be no definition of the words " exercising a trade." It is only another mode of expressing " cariying on a business," but it certainly carries with it the meaning that the business or trade must be habitually or systematically exercised, and that it cannot apply to

isolated transactions. There is no special legal meaning to the words “ exercising a trade,” and it must be considered with regard to what could be its ordinary or popular meaning, and that must in each case depend on the facts of that particular case, and we are not to canvass what might be a logical outcome from any decision when it is the facts of the particular case that are solely decided on. I have heard no suggesion of any plainer or more intelligible meaning for the words “ exercise his trade ” than the words themselves convey. Now, the leading facts of the case are, Roederer is an extensive wine maker at Rheims, in France. He ships, and for years has shipped, large quantities

(Lord Morris.) of champagne to England. The Appellants are his agents in England. The offers or proposals for the purchase of Roederer’s wines are sought for and received by the Appellants from customers, as such agents. As between Roederer and the Appellants he reserves the right to reject any particular order, a right stated in the case as intended to protect Roederer in cases of doubt of the solvency of the customer. No special notice is given to the customer of such right being reserved. The invoices of the wine when shipped are sent by Roederer to the Appellants, who forward them to the customers. Direct payments by draft or order are made to Roederer more frequently than they are made to the Appellants, and the receipts are sent by Roederer direct to the customers. Exhibits 1, 2, and 5 show the mode of dealing. Exhibit 5 gives the initiation of the transaction; it is addressed by the Appellants to the proposed customer, and states they are instructed by their principal, Roederer, to inform him, &c.; it then goes on to say “ Mr. L. Roederer will " be prepared to ship champagne,” and solicits orders for the wines now offered by Mr. Roederer at the prices referred to in an accompanying list. Roederer’s stamp is affixed at the foot. Exhibit No. 1 shows an order addressed to the Appellants and requesting shipment, while Exhibit No. 2 gives the reply of the Appellants thus, “ In compliance with your obliging order of “ yesterday, we shall have much pleasure in requesting

Mr. L. Roederer to “ ship for your account,” &c. These exhibits thus evidence an offer by the Appellants, as the agent of Roederer, of wines at fixed prices, an order from the customer for a certain quantity, and an acceptance by the Appellants. There is thus a completed contract between the customer and Roederer through his agents, the Appellants, controlled, perhaps, by the limit of authority given by Roederer to the Appellants, which limit is unknown to the customer. The question in this case is not whether the customer could recover from Roederer on any breach of the contract by reason of the limit of authority, but whether, as a matter of fact, Roederer is exercising his trade, in other words carrying on business, in England. I am very clearly of opinion on the facts, that he is exercising his trade in England, and I consider the insertion in the Directory is a most material and important fact, for the Appellants, with whom we are dealing, authorise the statement in the Post Office Directory under the head of “ Trades,” wine merchants, as follows:—" Roederer, Louis, Rheims, “ champange merchant, Grainger and Son, agents, 21 Mincing Lane, E.C .”— an averment by the Appellants that Roederer carries on the business of a wine merchant at 21, Mincing Lane, and that they are his agents there. On the facts stated in the special case, I entertain no doubt, as the Queen’s Bench Division and the Court of Appeal entertain no doubt, but that Louis Roederer exercised his trade of a wine merchant within the United Kingdom, to wit, in London.

 (Lord Morris.) On the other question, whether the Appellants were agents within the terms of section 41 of 5 & 6 Vjct. c. 35, I am not prepared to hold that the words " having the receipt of any profits or gains,” are applicable only to their immediate antecedent word, a " receiver,” and are not applicable to the word “ agent.” I consider they are applicable to and control the word “ agent,” as well as the word '* receiver,” and there is no reason why an agent should be chargeable who was not in receipt of profits or gains; but in the present case the Appellants were in fact as agents of their principal, Roederer,

in receipt of moneys which included profits and gains, and being so come within the operation of section 41 of 5 & 6 Viet. c.

. Lord Davey.—My Lords, I ' am of opinion that this appeal should be allowed, for the reasons which have been already stated by your Lordships who first addressed the House, and were it not that we are differing from the Court below, and that your Lordships are not unanimous, I should not find it necessary to add any observations of my own. The question is whether, on the facts found in the original and amended cases stated by the Commissioners, Mr. Roederer exercises a trade within the United Kingdom within the meaning of section 2, Schedule D., of the Income Tax Act, 1853. I need not again analyse in detail the statements in the cases, but I will merely state that the substance and effect of them appears to my mind to be shortly this: Firstly, neither Messrs. Grainger, and Company nor the sub-agents appointed by them, have any authority to make contracts for the sale of Mr. Roederer's wines. Their function in this part of the business is confined to soliciting and collecting orders for wine, which are forwarded to him in Rheims for execution by him if he thinks fit.

2nd. All contracts for the sale of wine are made in Rheims by Mr. Roederer himself, and the goods are invoiced in his name to the customer. In every instance they are delivered free on board at Rheims at the expense and risk of the customer. The ordinary course is for the customers to pay Mr. Roederer direct in Rheims by cheques or drafts to his order. But Messrs. Grainger and Son receive some cash and cheques on Mr. Roederer's account in London, though to an amount which rarely exceeds the commission due to them. Receipts for all money paid, either to Mr. Roederer or through Messrs. Grainger and Son, are sent by Mr. Roederer to the customers direct. A form of receipt is annexed to the amended case. Now what does one mean by a trade, or the exercise of a trade? Trade in its largest sense is the business of selling, with a view to profit, goods which the trader has either manufactured or himself purchased. I cannot doubt, upon the facts found, that all Mr. Roederer's sales to his English customers are made at

Rheims for delivery in that place, and the goods sold are in fact delivered to the customers in Rheims. So far as I can see, not a single bottle

P a r t LII] G o u g h (S u r v e y o r o f T a x e s) 475 (Lord Davey.) of wine is ever sold or delivered by Mr. Roederer either personally or through his agents in this country. It was, I think, admitted, and it cannot, in my opinion, be denied, that the mere fact of a foreigner selling his goods to English customers, does not constitute an exercise of his trade within this country, although he is trading with this country. But it was argued, that the habitual employment of agents to obtain orders, and transmit them abroad, constitutes the act pf selling to English customers, and an exercise of trade in this country. I am uiwble'to accede to that argument. Canvassing for custom is no doubt ancillary to the exercise of trade, and it may be assumed that Mr. Roederer's trade with this countiy is increased by the employment of agents for that pur pose, as it might be by systematic advertisement. But Mr. Roederer's trade is selling his champagne, and he exercises that trade where he makes his sales, and the profits come home io him. Nor do I think it makes any difference that it is within the scope of Messrs. Grainger's authority to collect moneys for Mr. Roederer to the extent stated in the case. It is, in my opinion, no more than if Mr. Roederer were, for the convenience of his customers, to open a banking account in London to which they might pay what they owe to him. I forbear to comment on the earlier cases which have been decided on this section, because they all differ in the vital respect that sales of goods were in those cases made in England. The case of Sulley v. Attorney-General(*) so far as it goes, is in the Appellant's favour. In the view which I take it is not necessary to decide the other point which has been raised, whether Messrs. Grainger and Company are such agents as described in section 41 of the Act of 1842. I will only say that I think 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. I feel great doubt whether, on the facts of the present case, Messers. Grainger and Son were such agents, but it is not necessary to decide that. Questions put and agreed to That the Judgment appealed from be reversed. That it be declared that Louis Roederer was not a person exercising a trade within the United Kingdom in the terms of Schedule D. of 16 & 17 Viet, c. 34; and that the determination of the Commissioners of Income Tax be accordingly reversed; and that the Respondents do pay the costs of this Appeal, and the costs in the Courts below.

(77C44)

(*) 2 T.C.,. B