1939 *Present :* **Poyser S.P.J. and Hearne J.**

ROWAN *v.* COMMISSIONER OF INCOME TAX.

114—D. C. (Inty.) Special.

Income tax—Solicitor employed as assistant in firm—Admission as partner—No cessation of employment or commencement to carry on profession—Income Tax Ordinance, 1932, ss. 11 (b) and 11 (3).

Where the assessee, a solicitor, was employed until March 31, 1936, as an assistant by a firm of Proctors and Notaries and was paid by way of remuneration a monthly salary and a certain percentage of nett profits as commission, and on April 1, 1936, he was admitted a partner of the firm under a deed of partnership according to which he was to get as his remuneration a share of the profits,—

***Held,* that, on the admission of the assessee as a partner in the firm, there did not occur the cessation of an employment within the meaning of section 11 (6) of the Income Tax Ordinance and the commencement of the exercise of a profession within the meaning of section 11 (3) of the Ordinance.**

THIS was a case stated for the opinion of the Supreme Court by the Board of Review under section 74 of the Income Tax Ordinance.

The assessment of the assessee, who is an English solicitor, for the year of assessment April 1, 1934—March 31, 1935, was revised under the provisions of section 11 (6) (*b*) of the Income Tax Ordinance under the following circumstances. He was employed till March 31, 1936, as an assistant by a firm of Proctors and Notaries practising in Ceylon and was paid by way of remuneration a monthly salary and a certain percentage of the profits. On April 1, 1936, he was made a partner of the firm under a deed of partnership according to which he was to get as his remuneration a share of the profits of the firm.

The assessor treated him as having ceased an employment on March 31, 1936, and as having commenced to carry on or exercise a profession as from April 1, 1936, within the meaning of section 11 of the Ordinance. He accordingly revised the assessment for the Income Tax Year 1934—1935. The assessee appealed to the Income Tax Commissioner who confirmed the revision of the assessment. On appeal to the Board of Review, the latter allowed the appeal.

The Commissioner of Income Tax thereupon requested the Board of Review to state a case for the opinion of the Supreme Court.

E. G. P. Jayetileke, K.C., S.-G. (with him *S. J. C. Schokman, C.C.*), for appellant.—The point for consideration is whether there was a cessation of employment within the meaning of section 11 (6) of Ordinance No. 2 of 1932.

Until March 31, 1936, the assessee was clearly engaged in a contract of service. There was a relation of master and servant between Messrs. Julius & Creasy and the assessee, and the latter cannot be deemed to have practised his profession as a Proctor during that time. The difference between "profession" and "employment" is fully discussed in *Davies v. Braithewaite* [1].

[1] *(1931) 2 K. B. 628.*

[POYSER S.P.J.—Is there not a case dealing with a barrister's position when he becomes a King's Counsel?]

Yes, it is *Seldon v. Croom-Johnson*[1]. That case is not in point because there was no cessation of employment. According to *Davies v. Braithewaite* (*supra*) a professional man can enter an employment. Rowlatt J. says that if a professional man taken a situation for years and makes it his life occupation it would be no answer to a claim to assess him on the footing that he is in employment that he is a very skilled and distinguished person because he would be exercising an employment. The present case can well be compared with the position of a Crown Counsel.

[POYSER J.—Is not the case of a Crown Counsel different?]

No. He does the work of the Crown for a salary. By joining the firm of Messrs. Julius & Creasy the assessee did not carry on his profession in the way in which his profession is carried on. To work for another proctor on a monthly salary was not an incident in the conduct of his professional career.

[POYSER J.—Was he not practising his profession all along?]

In a colloquial sense, yes. He was, in fact, working as the paid servant of the firm. He did not exercise independently the profession of a proctor. Section 76 (6) of our Ordinance throws light on the point in question. The word "employment" presupposes an employer. "Profit and income" and "profits from any employment" are separately mentioned in section 6 (1) (*a*) and section 6 (1) (*b*) respectively. Thus, there are two categories. The source of the assessee's income was the contract of service.

As soon as the assessee became a partner of Messrs, Julius & Creasy, he was liable to be assessed on a different footing (*Humphries v. Cook*[2]).

Section 76 was amended in 1934 to grant an employee certain privileges. The assessee has availed himself of those privileges and thus admitted his position as an employee. He cannot now take up the position that he comes under section 6 (1) (*a*) and not under section 6 (1) (*b*). There are further provisions in section 6 (2) regarding employees.

Section 76 was amended in 1934. The Board of Review have, however, followed the judgment of Drieberg J. in *Commissioner of Income Tax v. Rodger*[3], which was decided in 1933. That judgment dealt with the interpretation of section 11 (4) and not of section 11 (6). If that judgment is followed, it will be difficult to understand what "employment" means. Drieberg J. gives no reasons for stating that the word "employment" refers to occupation other than trades, businesses, professions or vocations.

H. V. Perera, K.C. (with him *Van Geyzel*), for respondent.—The one point for consideration is that which is set out in the case stated. There is no question of estoppel. A consideration of the provisions of section 76 does not, therefore, arise in the present case.

Mr. Rowan was exercising his profession in Ceylon from the commencement of his employment as an assistant by the firm of Julius & Creasy

[1] (1932) *1 K. B. 759.* [2] (1934) *19 Tax Cases 127.*

[3] (1933) *35 N. L. R. 169.*

and it is impossible to say that merely because he becomes a partner in that firm he ceases to exercise his profession. The Commissioner took the view that on April 1, 1936, when Mr. Rowan became a partner, he commenced the exercise of his profession. If that view is correct it must follow that Mr. Rowan was not acting as a proctor prior to that date—which is obviously not the case. The profits from the exercise of a profession may be derived from contracts of service or employment but these are mere incidents of the professional work. The case of *Davies v. Braithewaite*, cited by the appellant, is in my favour.

The respondent is also entitled to succeed on the strength of the case of *The Commissioner of Income Tax v. Rodger*[1], where the Supreme Court was of opinion that the word "employment" in section 11 of the Income Tax Ordinance is used in reference to occupations other than "trades, businesses, professions or vocations".

E. G. P. Jayetileke, K.C., S.-G., in reply.— *Davies v. Braithewaite* is in my favour. Miss Braithewaite, who was an actress, earned her living by accepting and fulfilling engagements. She had contracts to act in various plays in England, America and other places. It was held that such contracts were nothing but incidents in the conduct of her professional career. The position of the assessee would have been similar if he had entered into agreements with a large number of clients to attend to their work. He has not done that. On the contrary, he has accepted a post resting on a contract.

Cur. adv. vult.

January 24, 1939. POYSER S.P.J.—

This is a case stated by the Board of Review under the provisions of section 74 of the Income Tax Ordinance, 1932.

The material facts are as follows :—

The assessee, Mr. Rowan, is an English solicitor and a proctor of the Supreme Court of Ceylon. He was employed as an assistant by Messrs. Julius & Creasy, a firm of Proctors and Notaries, carrying on business in Colombo, until March 31, 1936, and received as remuneration a salary and a percentage of the nett profits.

On April 1, 1936, he was made a partner in the firm under a duly executed deed of partnership, and from that date ceased to receive any salary but only a share of the profits.

The assessor considered that Mr. Rowan had ceased an employment on March 31, 1936, and commenced to exercise a profession; he accordingly revised Mr. Rowan's assessment for the Income Tax Year 1934-35.

Mr. Rowan appealed first to the Commissioner, who confirmed the revision, and then to the Board of Review. The latter decided that there had been no cessation of employment and commencement of the exercise of a profession and accordingly allowed the appeal.

The short question for this Court to decide therefore is whether there was "a cessation of employment" on March 31, 1936, when Mr. Rowan ceased to be an assistant, and "the commencement of the exercise of a profession" on April 1, when he became a partner in the firm of Julius & Creasy.

[1] *35 N. L. R. 169.*

In my opinion the Board of Review came to a correct conclusion. The case they relied on was *Commissioner of Income Tax v. Rodger* [1].

In that case Drieberg J. held that an accountant who terminated his contract with one employer and entered into another contract with another employer for the same kind of employment did not "commence to carry on an employment".

The material part of the judgment which strongly supports the case for the assessee is as follows :—

(Page 173.) "I do not think the word "employment" is here used in that sense to indicate a particular contract of service but that it refers to occupations other than trades, businesses, professions or vocations. The assessee must be regarded as having commenced an employment as an accountant . . . . when he first began to do the work of an accountant taking remuneration for his services".

Another case which supports the decision of the Board of Review is *Davies v. Braithewaite* [1], in which it was held that an actress who accepted engagements for which her professional qualifications fitted her was assessable in respect of the profits she derived from her profession or vocation as an actress and not in respect of the profits of her employment. Rowlatt J. in the course of his judgment stating, "I think that whatever she does or whatever contracts she makes are nothing but incidents in the conduct of her professional career".

In my opinion, Mr. Rowan commenced to exercise his profession when he first began to do the work of a proctor and receive remuneration for his services. The fact that his remuneration has been increased and his status altered does not in my opinion affect the matter; nor do I think, having regard to the cases above referred to, that he would cease to carry on his profession if he severed his connections with Messrs. Julius & Creasy and entered into a contract on a salary basis with another firm of Proctors.

His position is similar to that of the actress. His professional qualifications fit him for a certain class of work and whatever contracts he makes must be regarded as incidents in his professional career.

The Solicitor-General urged that Mr. Rowan had the benefit of the provisions of section 76 of the Ordinance and other benefits, and having elected to receive such benefits cannot now say that his status has not altered.

On the other hand, as Mr. Perera pointed out, the question of estoppel does not arise. The only question before this Court is set out in paragraph 8 of the case stated, viz., whether there was a cessation of employment on March 31, 1936, and the commencement of the exercise of a profession on April 1, 1936, and, for the reasons above stated, I consider Mr. Rowan has at all material times exercised his profession.

The decision of the Board of Review is accordingly confirmed and I order that the Commissioner of Income Tax do pay to Mr. Rowan his costs of the proceedings in the Supreme Court.

HEARNE J.—I agree.

Appeal dismissed.

[1] *(1931) 2 K. B. O. 628.*