No. 36*.—High Court of Justice (King's Bench Division).—25th November, 1921.

Court of Appeal.—3rd and 4th May, 1922.

House of Lords.—18th, 19th and 20th April, and 11th May, 1923.

The Commissioners of Inland Revenue *v.* The Gas Lighting Improvement Co., Ltd.[1]

Excess Profits Duty—Computation of capital—Investments made by company in other companies for the purposes of its trade—Finance (No. 2) Act, 1915 (5 & 6 *Geo.* V, *c.* 89), *Sections* 40 *and* 41, *and Fourth Schedule, Part* I, *Rule* 8, *and Part* III, *Rule* 2.

The Respondent Company, which carried on the business of refining and distributing petroleum and petroleum products, held certain shares in a Belgian company formed for the purpose of selling petrol, and certain shares and debentures in two Roumanian oil producing companies. The shares in the Belgian company were acquired as part of an arrangement under which the Respondent Company transferred its existing business in Belgium to the Asiatic Petroleum Company for which the Belgian company was to act as distributor. The shares and debentures in the Roumanian companies were acquired for the purpose of securing a supply of crude oil.

Held, *that the shares and debentures in the Belgian and Roumanian companies were "investments" of the Respondent Company within the meaning of the word in Rule* 8 *of Part* I *of the Fourth Schedule to the Finance (No.* 2) *Act*, 1915, *and that, in accordance with the provisions of Rule* 2 *of Part* III *of that Schedule, they must be deducted in computing the capital of the Respondent Company for the purposes of Excess Profits Duty.*

(1) Reported C.A., [1922] 2 K.B. 381, and H.L., [1923] A.C. 723.

CASE

Stated by the Commissioners for the General Purposes of the Income Tax for the City of London under Section 45 (5) of the Finance (No. 2) Act, 1915, and Section 149 of the Income Tax Act, 1918, for the determination of the King's Bench Division of the High Court of Justice.

1.—At a meeting of the Commissioners for the General Purposes of the Income Tax for the City of London held at Gresham College, Basinghall Street, in the City of London, on the 15th day of July, 1919, the Gas Lighting Improvement Company, Limited, of Salisbury House, in the City of London (hereinafter called " the Company ") appealed against an assessment made upon them to Excess Profits Duty by the Commissioners of Inland Revenue for the accounting period from the 1st day of January, 1917, to the 31st day of December, 1917, as follows :—

Net amount of Excess Profit.	Rate at which assessed.	Excess Profits Duty payable.
£11,977	80 per cent.	£9,581 12*s.* 0*d.*

2.—The Company was incorporated on the 10th day of December, 1888, as a company limited by shares with a capital of £20,000 divided in 20,000 shares of £1 each. By special resolution of the Company passed on the 15th day of April, 1919, and confirmed the 1st day of May, 1919, the capital of the Company was increased to £250,000 and reorganised so that it now consists of 235,000 ordinary shares of £1 each and 15,000 preference shares of £1 each, of which 136,672 ordinary shares and all the preference shares have been issued and are fully paid.

3.—By the Memorandum of Association of the Company, it is provided (*inter alia*) as follows :—

(3) The objects for which the Company is established are :—

(i) To purchase or otherwise acquire and undertake all or any part of the business, property, assets, and liabilities of any company, firm, or person carrying on any business or engaged in any undertaking which the Board may consider it desirable in the interest of the Company to purchase, acquire, or undertake.

(ii) To acquire upon such terms as the Board of the Company might from time to time determine any invention whatsoever which the Board might consider it desirable to acquire. . . .

(iii) To work, develop, exercise, promote the use of, or otherwise turn to account any inventions, letters patent, concessions, privileges, or other rights whatsoever, and to undertake, transact, and carry on any business whatsoever which the Board may consider necessary or desirable in the interests of the Company.

* * * * *

(vi) To adopt, ratify, and confirm a certain Provisional Agreement, bearing date the 4th day of December, 1888, and made between Hiram Stevens Maxim of the one part and George Stanley Sedgwick (on behalf of this Company then about to be incorporated) of the other part, for the sale by the said Hiram Stevens Maxim of a certain invention of the said Hiram Stevens Maxim of "Improvements in apparatus for naphthalising or carburetting illuminating and other gas."

4.—By the Articles of Association of the Company it is provided (*inter alia*) as follows:—

118. The Board may, before recommending any dividend, set aside out of the profits of the Company such sums as they think proper as a sinking fund and as a reserve fund to meet depreciation or contingencies, or for repairing or maintaining any property of the Company, or for the redemption of any debentures of the Company, or for any other like purpose of the Company, and the same may be applied accordingly from time to time in such manner as the Board shall determine. Any such fund as aforesaid may be invested in any manner the Board may think fit, or may be employed in the business of the Company, and it shall not be necessary to keep any such fund separate from the other assets of the Company.

Copies of the Memorandum and Articles of Association of the Company containing copies of special resolutions from time to time passed affecting the constitution of the Company are attached hereto, marked "1" and "1A" respectively, and may be referred to as part of this Case.(1)

5.—The Company originally proposed to trade in and turn to account the improved process of enriching or carburetting gas referred to in paragraph 3 (vi) of the Memorandum of Association. The results did not prove as satisfactory as had been anticipated, and the Company accordingly turned its attention to the refining and distribution of petroleum spirit and other petroleum products.

(1) Omitted from the present print.

A refinery was set up at West Ham, depots for distribution purposes established throughout the United Kingdom, and the Company thereby and therefrom made the refining of petroleum and its distribution its principal business and trade.

6.—In 1904 the Company started and organised a distributing business in Belgium and until 1908 carried on the business of distributing petroleum spirit in Belgium. In 1908, together with two other distributors of petroleum products, it came to an arrangement with the Asiatic Petroleum Company, whereby the Company sold to the Asiatic Petroleum Company, the goodwill of its business of distributing petroleum spirit in Belgium, together with the works and plant, fixed and moveable (excepting certain plant for the production of white spirit), and undertook to discontinue its business in Belgium, and that neither it nor any of its directors would be interested directly or indirectly in the sale or distribution of petroleum spirit in Belgium. The agreement also provided that the Company in conjunction with two Belgian concerns interested in the distribution of petroleum spirit in Belgium, should form with them a Belgian Joint Stock Company, in which each should hold one-third of the share capital, which Company when formed was to have the sole *del credere* agency for the sale and distribution of the Asiatic Company's oil.

The agreements under which this arrangement was carried out are referred to in the next succeeding paragraph.

7.—By an Agreement dated the 29th day of July, 1908, and made between The Asiatic Petroleum Company, Limited, of the first part, the Company of the second part, Messrs. J. & F. de Keyser Frères, of the third part, and Gustave Ferdinand Demets, of the fourth part, it was agreed (*inter alia*) as follows :—

> " (1) The Gas Lighting Company, Messrs. de Keyser and Mr. " Demets, shall form a Belgian Joint Stock Company, " under the name of the Belgian Benzine Company " (Société Anonyme), hereinafter called 'The " Société,' having for its object the carrying on of " business in Belgium in petroleum spirit, and any " other products derived from petroleum and similar " products and all operations tending to the realisa- " tion of that object."
>
> * * * * *
>
> " (3) The Capital of the Société shall be 510,000 francs, in " 510 equal shares and shall be subscribed for and held " by the Gas Lighting Company, Messrs. de Keyser, " and Mr. Demets equally."
>
> * * * * *

" (8) The Gas Lighting Company, Messrs. de Keyser, and " Mr. Demets undertake to use their votes as share- " holders and directors of the Société to procure the " Société to enter into an Agency contract with the " Asiatic in the form annexed hereto."

* * * * *

" (10) The Gas Lighting Company, Messrs. de Keyser, and " Mr. Demets will enter into a covenant with the " Société that they respectively will not, during the " continuance of the Agency agreement herein " referred to, be interested directly or indirectly as " principals or agents in the sale in Belgium of " petroleum spirit or act as or be Directors, Managers, " Managing Directors, or individual shareholders in " any Company interested in the sale thereof in " Belgium."

" (11) (*c*) That they will as from the date of the constitu- " tion or registration of the Société discontinue their " own business in petroleum spirit except as herein " provided."

* * * * *

" (13) The Gas Lighting Company, Messrs. de Keyser, " and Mr. Demets undertake to transfer to the " Société as soon as the Société is formed, without " consideration, the goodwill of their respective busi- " nessses in Belgium so far as relates to Petroleum " Spirit together with all trade marks connected " therewith."

" (14) The Gas Lighting Company shall as soon as the " Société is formed sell to the Asiatic free and clear " of all incumbrances, mortgages, charges, and liens

" (*a*) The whole of the land and buildings which " constitute its works situate at Neder over " Heembeke . . . .

" (*b*) All tanks, fixed plant, and machinery (excepting " tanks, apparatus, and fixed or moveable plant " used in the manufacture of white spirit) " situated upon the said premises. Book debts " and cash in hand are to be excluded from the " sale."

" (15) The purchase price for the land, buildings, works " and tanks, fixed plant and machinery as aforesaid " shall be the sum of one hundred and ten thousand " eight hundred and thirty-nine francs (110,839 " francs), and the purchase shall be completed as " soon as possible after the date of the incorporation " of the Société when the purchase money shall be " payable in exchange for a legal conveyance of the " property. . . . . "

A copy of the said Agreement marked " 2," together with copies or drafts and translations of the documents therein referred to, is annexed hereto, and may, with the documents annexed thereto, be referred to as part of this Case.(1)

8.—In the report of the Directors of the Company upon the accounts for the year ended 31st December, 1908, the transaction is referred to in the following terms :—

> " During the year the Directors disposed of the Company's " business in Belgium to the Belgian Benzine Co., " in which the Gas Lighting Improvement Co. holds " one-third of the capital. This Company was paid " in cash for the premises, stock in trade, etc., and " the improved financial position arising therefrom is " clearly shown in the balance sheet."

9.—The Belgian Benzine Company was duly incorporated in accordance with the said agreement and has since carried on the business of distributing in Belgium, as *del credere* agents for the Asiatic Company, petroleum spirit and other products derived from petroleum, which spirit and products are supplied to it (excepting small quantities to be supplied by Messrs. de Keyser Frères and Mr. F. Demets) by the Asiatic Company in accordance with the terms of an Agreement dated 19th October, 1908, and made between the Belgian Benzine Company of the one part and the Asiatic Petroleum Company, Limited, of the other part, a copy of which marked " 3 " is annexed hereto and may be referred to as part of this Case.(1)

10.—The Articles of Association of the Société, a copy and translation of which are annexed hereto(1) and marked " 4," provided (*inter alia*), by Article 4, that the Société should terminate on the 31st day of December, 1913, unless it should be prolonged.

11.—By an Agreement dated the 30th day of December, 1913, and made between the same parties as the said Agreement of the 29th day of July, 1908, it was agreed (*inter alia*) that the duration of the Société should be prolonged for a period of five years from the said 31st day of December, 1913, and that a further agency agreement should be entered into between the Belgian Benzine Company and the Asiatic Company for that period. The said Agreement is in all matters material to this case similar to the said Agreement of the 29th day of July, 1908, and a copy of it is annexed hereto marked " 5," and may be referred to as part of this Case.(1)

On the 31st December, 1913, the Belgian Benzine Company entered into an Agreement of that date with the Asiatic Petroleum Company, Limited, under which the former Company became *del credere* agents for the sale and distribution of the spirit

(1) Omitted from the present print.

and products of the Asiatic Petroleum Company, Limited, in Belgium for the period from 1st January, 1914, to the 31st December, 1918, upon terms similar to those contained in the Agreement of the 19th October, 1908, referred to in paragraph 9 of this Case.

12.—The Company hold 170 shares of the Belgian Benzine Company, being one-third of the capital of that Company, as provided by clause 3 of the Agreement of the 29th of July, 1908.

To meet the requirements of Belgian law the Company paid up in cash 10 per cent. of the nominal value of their shares in the Société upon its formation, such payment amounting to £675 sterling, and a further 10 per cent. upon its prolongation on the 30th December, 1913. The total amount so paid in cash by the Company is £1,344.

The said shares are only transferable by consent of the Board of Directors and by a unanimous resolution. The public could not invest in the shares of the Belgian Benzine Company. The Company proved in evidence that the capital of the Belgian Benzine Company was fixed at the figure of 510,000 francs for the purpose of defining the interests of the three parties by whom it was founded, and that the Belgian Benzine Company only required a nominal capital because in its business as agent for the Asiatic Petroleum Company money from customers was usually in its hands before the goods delivered to such customers had to be paid for by it.

13.—For many years the Company obtained their supplies of petroleum spirit in Great Britain from the Asiatic Petroleum Company, Limited, but in or about the month of February, 1913, the latter Company declined to renew their contract for supplying oil to the Company in Great Britain upon terms which the Company were prepared to accept, and accordingly it was decided that steps should be taken to ascertain from what other source it would be possible to get supplies of petroleum spirit.

14.—With the above object in view a representative of the Company was sent to Roumania. The result of his visit is summarised in a resolution of the Board of Directors of the 2nd of May, 1913, which ran as follows :—

" Mr. Thompson reported on his visit to Roumania in the " Company's interests. Having heard his opinion on " the Beciu (Roumania) Oil Fields, Limited, and the " Stavropoleo Moreni (Roumania) Oil Properties, " Limited, the Managing Director was authorised to " conclude arrangements with both these Companies " on the following lines :—

" BECIU COMPANY.—A further £50,000 to be raised, " one half to be guaranteed by the G.L.I. Co. " for a commission of 5 per cent. in cash, and " call on £25,000 shares at par for not less than

" twelve months. The G.L.I. Co. to have
" call on crude oil at market prices. The
" G.L.I. Co. to have the right to nominate if
" possible two directors.

" STAVRO. COMPANY.—The G.L.I. Co. to take £2,000
" in 6 per cent. debentures, with bonus of
" £5,000 ordinary Shares. The G.L.I. Co. to
" have the right to join in the contemplated
" reconstruction of the Companies, and to have
" the call on the crude oil at market prices."

15.—Agreements embodying these arrangements were in June, 1913, entered into between the Company and the Beciu (Roumania) Oil Fields, Limited, and the Stavropoleo Moreni (Roumania) Oil Properties, Limited, respectively.

In pursuance of those agreements the Company took up in 1913, 25,000 £1 ordinary shares in the Beciu Company, paying in cash for such shares the sum of seven shillings and sixpence per share, and the Company also took up in 1913, 18,825 £1 ordinary shares in the Stavropoleo Company, paying therefor the sum of £1 per share in cash and further advanced the sum of £2,000 to the latter Company upon security of debentures issued by that Company.

16.—It was proved in evidence that the Company would have been unable to obtain from the Roumanian Companies above mentioned the supplies of oil required for the purposes of the Company's trade unless they had agreed to assist the finances of the Roumanian Companies on the lines above stated.

17.—The holdings of the Company in the Belgian Benzine Company and the Companies mentioned in paragraph 15 above at all material dates and the dividends received therefrom were as follows :—

Year.	Shares in Belgian Benzine Company.	Dividends received.	Shares and Debentures Beciu (Roumania) Oil Fields, Limited, and Stavropoleo Moreni (Roumania) Oil Properties, Limited.	Dividends and interest received.
	£	£	£	
1910	675	1,402	—	—
1911	675	3,117	—	—
1912	675	4,794	—	—
1913	1,344	6,527	14,231	Nil.
1914	1,344	3,712	21,921	Nil.
1915	1,344	Nil.	27,335	Nil.
1916	1,344	Nil.	27,595	Nil.
1917	1,344	Nil.	27,831	Nil.

Copies of the Reports of the Directors of the Company covering the years from 1908 to 1917 inclusive and of the

published accounts of the Company for those years are annexed hereto marked " 6," and form part of this Case.(1)

18.—The Company contended that the capital employed to acquire their holdings in the Belgian Benzine Company and the two Roumanian Oil Companies was capital employed in the trade or business of the Company and should be included in computing the amount of capital of the trade or business.

19.—It was contended on behalf of the Commissioners of Inland Revenue on the other hand—

(1) That it was not the principal business of the Company to make investments, and that whether the money represented by the shares and debentures in the Belgian and Roumanian Companies was capital employed in the business of the Company or not, such shares and debentures were an investment within the meaning of the Finance (No. 2) Act, 1915, Fourth Schedule, Part I, Rule 8;

(2) That under the said Rule the income from such investments fell to be excluded in estimating profits for Excess Profits Duty purposes; and

(3) That accordingly the capital in question was by virtue of Part III, Rule 2, of the said Schedule to be deducted in computing the amount of capital for the purposes of Part III of the said Act.

20.—The following cases were referred to :—

Bolands, Limited *v.* Commissioners of Inland Revenue(2), E.P.D. Cases No. 10.

Dunlop Rubber Company, Limited *v.* Commissioners of Inland Revenue, [1919] 2 K.B. 794.

The Commissioners held that the money employed in the foreign companies referred to was employed in the business of the Company as capital and not as an investment within the meaning of the Finance (No. 2) Act, 1915, and they accordingly allowed the appeal.

Dissatisfaction with the finding of the Commissioners as being erroneous in point of law having been duly expressed on behalf of the Commissioners of Inland Revenue, a Case was duly demanded for the opinion of the King's Bench Division of the High Court of Justice, which Case we have stated and do sign accordingly.

H. COSMO O. BONSOR,
EBURY,
W. P. TRELOAR,
RICHARD WHITE,
} Commissioners of Taxes for The City of London.

COPLEY D. HEWITT,
Clerk to the Commissioners.

(1) Omitted from the present print.
(2) Unreported, C.A. Ireland, June 13, 1918.

The case came before Sankey, *J.*, in the King's Bench Division on the 25th November, 1921, when judgment was given against the Crown with costs.

The Solicitor-General (Sir Ernest Pollock, K.C.) and Mr. R. P. Hills appeared as Counsel for the Crown, and Sir John Simon, K.C., and Mr. A. M. Latter for the Respondent Company.

JUDGMENT.

Sankey, J.—In this case the Commissioners of Inland Revenue are the Appellants and the Gas Lighting Improvement Company, Limited, are the Respondents.

A point arises similar to the point which was before the Court in the last two cases(1) and which has been before the Court in other cases, that is to say, how to compute the capital employed by the Gas Lighting Improvement Company, Limited, for the purpose of ascertaining and assessing Excess Profits Duty. I do not want, in this case, to proceed to a long examination of the Statute, as I did in the previous two cases, and both the learned counsel who appear on behalf of the parties, the learned Solicitor-General and Sir John Simon, have agreed with that, and it has been taken as if all the sections had been read and referred to. As I pointed out in the last case, Section 40 of the Finance (No. 2) Act, 1915, was a section as to the determination of profits and the pre-war standard. That provides for two methods of ascertaining profits, namely, the profit standard and the percentage standard. Also, as I pointed out in the last case, there are special rules in the Fourth Schedule of the Act of Parliament—Part I of the Fourth Schedule containing rules for the computation of profits, Part II containing rules for the computation of the pre-war standard, and Part III containing rules for the ascertainment of capital.

It is only necessary to refer to one other section, namely, Section 41, which provides for adjustments for increased or decreased capital. I will simply read Sub-section (1) again:—
"Where capital has been increased during the accounting period, "a deduction shall be made from the profits of the accounting "period at the statutory percentage per annum on the amount "by which the capital has been increased, for the whole account-"ing period if the increased capital has been employed for the "whole accounting period, and if the increased capital has been "employed for part only of the accounting period, for that part "of the accounting period."

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(1) Bourne & Hollingsworth *v.* The Commissioners of Inland Revenue, page 483 *ante*, and the Lincoln Wagon and Engine Co., Ltd., *v.* The Commissioners of Inland Revenue, page 494 *ante*.

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Sub-section (2) deals with a decreased capital, and Sub-section (3) applies both to increases and decreases; I read that in the last case(1), and I refer to my judgment in that case; I need not read that again.

I think, as I ventured to say in the last case(1), that what you have to decide is this: What was the capital employed in the business? and there may be a subsidiary question, which I will point out in a minute, after I have dealt with the facts.

This Company had shares in a Belgian Benzine Company and also shares in two Roumanian Oil Companies; and the Company contended that the capital employed to acquire their holdings in the Belgian Benzine Company and in the two Roumanian Oil Companies was capital employed in the trade and business of their Company, and that it ought to be included in computing the amount of capital of the trade or business. The Commissioners of Inland Revenue contended that it was not the principal business of the Company to make investments, and that whether the money represented by the shares and debentures in the Belgian and Roumanian Companies was capital employed in the business of the Company or not, such shares and debentures were an investment within the meaning of the Finance (No. 2) Act, 1915, Fourth Schedule, Part I, Rule 8; and secondly, that under the Rule, the income from such investments fell to be excluded in estimating profits for Excess Profits Duty purposes; and that accordingly the capital in question was by virtue of Part III, Rule 2, of the said Schedule, to be deducted in computing the amount of capital for the purposes of Part III of the said Act.

The Commissioners held that the money employed in foreign companies, that is, in the Belgian Benzine and in the Roumanian Companies, was employed in the business of the Gas Lighting Improvement Company, Limited (that is the Respondent Company), as capital, and not as an investment within the meaning of the Finance (No. 2) Act, 1915. Consequently they decided in favour of the Company, and from that decision this appeal is brought.

I again say this, although I am afraid it is only a repetition of what I have said in at least half a dozen other cases, because one has to say it in order that if this case should find its way to the Court of Appeal and not the other cases, it may be clear how I put my judgment, but those who have been in Court and who have argued these cases have heard it stated by me, that it is only a limited right of appeal which is given in these cases, and unless the Commissioners have come to a wrong decision in point of law, or unless they have found findings of fact for which there

(1) Bourne & Hollingsworth *v.* The Commissioners of Inland Revenue, page 483 *ante*.

(Sankey, J.)

is no evidence (which is a point of law) this Court will not interfere with the conclusions at which they have arrived. Therefore it is necessary to see how the matter stands.

Now it appears that this Gas Lighting Improvement Company, which is called throughout " the Company," was incorporated as far back as the 10th day of December, 1888. The capital was subsequently increased and the shares and the amount of capital are set out in paragraph 2 of the Case. Paragraph 3 contains the necessary clauses from the Memorandum of Association of the Company, showing the objects for which the Company was established; and paragraph 4 is a necessary Article from the Memorandum of Association, which provides that: " The Board " may, before recommending any dividend, set aside out of the " profits of the Company such sums as they think proper as a " sinking fund and as a reserve fund to meet depreciation or " contingencies or for repairing or maintaining any property of " the Company, or for the redemption of any debentures of the " Company, or for any other like purpose of the Company, and " the same may be applied accordingly from time to time in such " manner as the Board shall determine. Any such fund as " aforesaid may be invested in any manner the Board may think " fit, or may be employed in the business of the Company, and " it shall not be necessary to keep any such fund separate from " the other assets of the Company."

Now, if I remember rightly, the matters in which the Company first traded did not lead to the success which the Company anticipated, and they therefore turned their attention to another sphere of business, namely, the refining and distribution of petroleum spirit and other petroleum products. They set up a refinery at West Ham. They set up depots for distribution purposes throughout the United Kingdom, and consequently they made the refining of petroleum and its distribution their principal business and trade. In 1904 the Company extended its operations. I assume that up to that time its operations had been chiefly in England, at any rate the United Kingdom. In 1904 they started and organised a distributing business in Belgium and until 1908 they carried on the business, in that country, of distributing petroleum spirit. I do not want to set out the whole of the facts, because I want to keep my judgment within reasonable limits; but, as I understand it, there were at that time two other distributors of petroleum in Belgium. Therefore I assume the Company were, to some extent, competing with those other petroleum distributors. I dare say that led to undercutting; I do not know; but at any rate, in 1908 an arrangement was come to with a large company called the Asiatic Petroleum Company (the name is not unfamiliar to those who read the Law Reports) whereby the Company I am dealing with sold to the Asiatic Petroleum Company the goodwill of their business, together with

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the works and plant, and undertook to discontinue its business, and so forth; and the agreement also provided that the Company, in conjunction with two Belgian concerns interested in the distribution of petroleum spirit in Belgium, should form a Belgian joint stock company, in which each should hold one-third of the capital, and the Belgian Company, when formed, was to have the sole *del credere* agency for the sale and distribution of the Asiatic Company's oil. The agreement whereby that was done was set out in the Case. It was dated the 29th day of July, 1908, and by Clause 3 it was agreed that the capital of that Company, the Belgian Benzine Company, should be 510,000 francs, in 510 equal shares, and should be subscribed for and held by the Gas Lighting Improvement Company and the two other companies or two other distributors, Messrs. de Keyser and Mr. Demets, equally.

The transaction which took place then is referred to in the Report of the Directors of the Gas Lighting Improvement Company for the year ended 31st December, 1908, in the following terms. The Directors say in their Report: "During the year the "Directors disposed of the Company's business in Belgium to "the Belgian Benzine Company, in which the Gas Lighting "Improvement Company holds one-third of the capital. This "Company was paid in cash for the premises, stock in trade, "etc., and the improved financial position arising therefrom is "clearly shown in the balance sheet."

So the then position was this. The Company held one-third of the shares in the Belgian Benzine Company, as provided by Clause 3 of the agreement to which I have just referred. Now, in order to meet the requirements of the Belgian law, a certain amount had to be paid up in cash on the nominal value of the shares on its formation, and each of this one Company and the two distributors was to have one-third of the shares, and each had to pay £675 sterling and subsequently had to pay another amount on the 30th December, 1913, when the life of the Company was prolonged.

Therefore the position was this: that the Company held one-third of the shares in the Benzine Company, and the total amount in cash paid up was £1,344. The shares were of a peculiar character. They were not like ordinary shares of ordinary companies, which can be sold by the holders at their will, but they were shares of a character which you do find in some companies; they were only transferable by consent of the Board of Directors and by a unanimous resolution. The public could not invest in the shares of this Belgian Benzine Company; so they were shares, I will not say of a very extraordinary character, but not of the ordinary character.

It is those shares which are the first part of this case. Can those shares be counted as part of the capital employed in the trade or business of the Company? The Commissioners have said

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they are to be. The other shares are shares and debentures in the Roumanian Company, which were created in the following manner. For many years the Company obtained their supplies of petroleum spirit in Great Britain from the Asiatic Petroleum Company, but shortly after the beginning of the year 1913, the Asiatic Company declined to renew the contract for supplying oil to the Company in Great Britain; at any rate, they declined to renew the contract upon terms which the Company were prepared to accept. Therefore the position was this. The Company wanted to get an oil supply. They had got a method of distributing in Belgium; they now wanted to get a method of obtaining oil, being no longer minded to get it from the Asiatic Petroleum Company, and they fixed upon Roumania as the place where they were likely to succeed, and they did. They entered into negotiations with two companies, one called the Beciu Company and the other called the Stavropoleo Moreni Company; and in respect of the Beciu Company they wanted to make and did make this agreement. £50,000 was to be raised by that Company, part of which was guaranteed by the Respondent Company in this case for a commission of 5 per cent. in cash and a call on 25,000 shares at par for not less than twelve months. Then the Respondent Company was to have a call on the crude oil at market price and the right of nominating, if possible, two Directors. Similar, not quite the same, terms were arranged for the Stavro. Company, the important thing being that the Respondent Company was to have a call on the crude oil at market prices. The agreements embodying this transaction were made out in June, 1913; in fact, I think I am right in saying that those debentures carried a bonus of ordinary shares, with the result that the holdings of the Respondent Company in those two Companies consist partly of shares and partly of debentures; but no point is taken as to there being any difference between the shares and the debentures in the case of those two companies, or, indeed, between the holdings in those two Companies and the holdings in the Benzine Company.

Now, that is the second lot of shares and debentures. Are those shares and debentures to be counted as capital employed in the trade or business of the Company? I should hesitate to lay down any general proposition such as that shares in Company A should never be counted as part of the capital of Company B, or that debentures granted by Company A should never be counted as part of the capital of Company B. I am sure it is not desirable to do so; I do not think it is possible to do so; and I do not think any judge has a right to anticipate the decision of his successors.

I cannot help thinking, although perhaps it is not a very courageous method of dealing with the case, that most of these cases depend upon the facts; and I think it is impossible for any

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Parliamentary draughtsman to anticipate every fact; and I think the only thing one has to see in all these cases is, as I have already stated, whether the Commissioners have gone wrong in law or whether they have found facts upon no material at all.

I am now using the word " shares " to apply to the holding both in the Belgian Company and to the shares and debentures in the Roumanian Company; I am treating them all as one; I start by observing that these shares stand in an entirely different position, in my opinion, from the War Loan which I dealt with in a previous case(1). That War Loan was really, according to the finding of the Commissioners in that case, not used for the purpose of the business; the object of the investment in War Loan was to preserve a certain capital during the time it was being used; but quite other considerations apply here. I think Sir John Simon was right in saying that you may have capital employed in a taxpayer's business even though the money representing the capital is laid out to provide what is needed for the business. In the case of *Usher's Wiltshire Brewery* v. *Bruce*(2) there are some relevant remarks by Lord Atkinson at page 450 of [1915] A.C. He reads paragraph 7 of the Case, referring to certain tied houses, which the Brewery Company in that case acquired for the purpose of their business, that is to say, as mediums for the distribution of their beer. The Case found " that these houses are not acquired by the Appellants as invest- " ments; that if any house lost its licence the Appellants would get " rid of it; that except for the purpose of employing these houses " in their business the Appellants would not possess them at all; " that they have acquired and hold them solely in the course of " and for the purposes of that business, and as a necessary inci- " dent to the carrying it on, and that the possession and employ- " ment of the houses in the manner described is necessary to " enable the Appellants to earn the profits which it is sought " to tax; and, further, that without these houses, used in the " manner described, the profits, if any, of the Appellants' trade " would be much less in amount."

Now, of course, Income Tax is not the same as Excess Profits Duty in certain aspects. Just stopping for a moment and reading the finding there: " the possession and employment of the houses " in the manner described is necessary to enable the Appellants " to earn the profits which it is sought to tax." Now we are not for a moment on Income Tax, but at any rate it is pretty certain that in the case before me the possession of the shares in the Belgian Company is necessary for the purpose of distributing the oil in Belgium; and even if that is not quite so clear as the next point, the next point is certainly clear in my view:

(1) Bourne & Hollingsworth *v.* The Commissioners of Inland Revenue, page 483 *ante*.

(2) 6 T.C. 399, at p. 423.

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that the possession of the shares and the controlling interest in the Roumanian Companies is vital to the carrying on of the business of the Respondent Company in England, because it is its source of supply. Lord Atkinson continues :—" The meaning " of all these written statements when condensed appears to me " to be simply this, that the Appellants acquired and let these " houses in the manner described for the purposes of their trade, " and for no other purpose whatever, which is precisely the same " as saying they acquired and let them solely and exclusively for " the purposes of their trade, that they are necessary for those " purposes, and that by means of their acquisition and use in the " manner indicated the profits on which the Appellants are to " be taxed are earned."

I think, as I have already stated, that in the case before me the shares in the Belgian Company and the shares in the Roumanian Company were not only incidental to the purpose and business of the Respondent Company, but vital to its existence. I was referred by the Solicitor-General to the case of *Bolands, Ltd.* v. *The Commissioners of Inland Revenue*(1). I am not going into that case at any length, but it seems to me to be a case of this sort, where the Court was unable to say that there was no evidence upon which it could be found that certain shares there were used for the purpose of the Appellants' business or were part of the capital of the business of the Company. The Appellant Company in that case was formed in 1888 for the purpose of acquiring a business. " Part of the consideration for " the transfer of the business was satisfied by the issue to the " vendor of ordinary shares in the Company, and for this purpose " the shares were valued at par." I need not trouble about that. " The remainder of the ordinary shares were offered to the public " and subscribed for in cash at par. Within a few months the " fully paid up shares were dealt in at a substantial premium." I need not trouble about that. " At the end of the last pre-war " trade year, the Company held Consols and other securities " which had been purchased out of profits and were at the time " deposited with the Company's bankers as security for an over- " draft. In computing capital for the purpose of the percentage " standard, the Commissioners of Inland Revenue—(*a*) valued " the vendor's shares at par; (*b*) deducted the amount of the " perpetual debentures; and (*c*) excluded the price of the securi- " ties. The Company appealed to the Special Commissioners " and claimed that—(*a*) the vendor's shares should be valued " at par; (*b*) no deduction should be made in respect of the " perpetual debentures; and (*c*) the securities represented capital " employed in the business and should not be excluded. The " Special Commissioners found, as a fact, that the vendor's " shares had no higher value than their face value and decided

(1) Unreported, C.A., Ireland, June 13th, 1918.

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" against the Company on the other two questions. The Com-
" pany demanded a Case, the matter was argued in the High
" Court (King's Bench Division) and Court of Appeal, Ireland,
" and judgment given in favour of the Crown in both Courts "—
that is to say, that the debentures had to be deducted and the price of the securities had to be excluded. It was sought to say they were used in the Company's business because they had been deposited with the bank as security for the Company's overdraft, and it looks a taking argument to say: " Oh, they are employed in the Company's business." But Lord Justice Ronan at once demolished that argument by saying that if you had deposited shares worth £10,000 for the purpose of getting £5,000, and wanted to say that the shares you deposited were used in the Company's business for the purpose of the Company's business, or formed part of the capital rather, you would be increasing the capital of the Company to £15,000. He says: " You deposit securities for
" £10,000 with your bankers to obtain a loan of £5,000, that is,
" employing it in the business; therefore the capital employed
" in the business is £10,000 and the £5,000 is also employed in
" the business. Therefore by the transaction of executing a
" mortgage to raise £5,000—and that is all you do because the
" investment remains intact—you increase the capital in the
" business by £15,000."

It may be put in the way suggested in the argument that if as a security you deposit a chattel, during the time the chattel is in the bank it is not being used in your business, and it is not employed, to use the words of the section, in the business during the accounting period. That is a case one way.

A case in the opposite way is the case of *Waldie & Sons* v. *The Commissioners of Inland Revenue*(1), reported in 56 S.L.R., at page 602. It is only necessary to read the head-note to ascertain the facts: " Coal merchants with a controlling interest
" in a coal mining company had the sole disposal of its output
" at a fixed commission on their sales and took the risk of bad
" debts. The Company being in difficulties, the merchants for
" some years made payments to it in excess of the coal received,
" to enable it to maintain its output. Those payments were
" without interest, security or document of debt, and were wiped
" off automatically as coal was received. In a question of Excess
" Profits Duty, held that the payments were part of the capital
" of the merchants' business in the sense of the Finance (No. 2)
" Act, 1915, Fourth Schedule, Part III, Rule 1 (*b*), and that
" the capital of the merchants' business has not been diminished
" by those payments in the post-war period in the sense of
" Section 41 (2) and (3) of this Act."

(1) Page 113 of the present Volume.

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Now it is perfectly true that there were no shares in that case as there are in the present case. The argument for the Appellants (and the Appellants' argument was successful) was: "That the "sums paid to the Company bore no interest, were without "security and untouched by any document. They had no per- "manency but were wiped off as coal was supplied and were "replaced by other payments. That had been the practice for "years before the war. They were in sharp contrast to admitted "investments of capital, namely, the shares and debentures held "by the Appellants in the Company."

Now although the facts were different, and in my mind it is not very helpful to cite either on one side or the other, to my mind the expressions used by the learned Judges in Scotland are helpful in this case. Lord Salvesen sets out the facts as I have already stated them, and says(1): "These being the facts "and the respective arguments, I am of opinion the Appellants "are right. I think in a commercial sense the sums in question "were employed in the Appellants' business." That is the question I have to decide. "It was on purely business grounds "that they made the advances and if they had had no other busi- "ness than that of agents for the Hirst Coal Company there would "have been no profits to assess. It is conceded that if they "gave their customers long credits for payment of their accounts "and so needed a much larger working capital than if they had "been able to get cash on delivery of the coal which they sold, "the additional capital so used would have been employed in "their business. Equally I think they were entitled to use their "capital in financing for business reasons the sellers from whom "they derived the raw material in which they deal." I stop there for a moment; I do not want to go on any further in that particular passage.

I now go on to the end of the judgment, where the learned Judge says: "I think in a reasonable and commercial sense "money so advanced is employed in their business of coal brokers "and coal merchants, and that accordingly the decision of the "Special Commissioners was wrong."

Now supposing in the present case the money which was placed by the Respondent Company in the Belgian and in the Roumanian Companies had remained as a loan of money, I do not see very much distinction between the Scotch case and the present one. But does it make any difference that the money was put in and then—I do not like to call it a receipt— but anyhow a document of title to the money was in the form of shares and debentures? I think that is nothing more than machinery. I think there were facts upon which the Commissioners in this case could find that this money (and that is the way they state

(1) Page 117 *ante*.

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it) which was advanced to the Belgian Company or to the Roumanian Companies was capital employed in the business of the Respondent Company. They state it in this way: "The Commissioners held that the money employed in the foreign "companies referred to was employed in the business of the "Company as capital." Now I think there was evidence upon which they could come to that conclusion. I asked the learned Solicitor-General, who a little cavilled at the way the Case was stated, whether he would like it sent back, and he said, No, he would stand rather on the Case as it was, and standing on the Case as it is, I think the Commissioners were right, in this particular case, in coming to that conclusion, and also in coming to the conclusion, in this particular case, that it was not an investment within the meaning of the Schedule of the Finance Act. I think there is nothing wrong here in law in the findings of the Commissioners, and as I am of opinion that there were facts upon which they could have come to the conclusion to which they have come, this appeal must fail.

Mr. Latter.—The appeal will be dismissed, with costs?

Sankey, J.—Yes.

The Crown having appealed against the decision in the King's Bench Division, the case came before the Court of Appeal (Lord Sterndale, *M.R.*, and Scrutton and Younger, *L.JJ.*), on the 3rd and 4th May, 1922, and on the latter day judgment was given unanimously in favour of the Crown with costs, reversing the decision of the Court below.

The Attorney-General (Sir Ernest Pollock, K.C.) and Mr. R. P. Hills appeared as Counsel for the Crown, and Sir John Simon, K.C., and Mr. A. M. Latter, K.C., for the Company.

JUDGMENT.

Lord Sterndale, M.R.—We need not trouble you, Mr. Hills.

I think this appeal must be allowed, and I think it must be allowed because I do not think the conclusion to which the Commissioners came, as a question of fact, and in which conclusion the learned Judge upheld them, is one which can be arrived at when the terms of this Act of Parliament and its Schedules are regarded. I wish to emphasise the fact that that, and that alone, is the matter to which we have to look, namely, whether this is or is not within the words and the proper meaning of the enactments. We have not to consider whether we think that the contention of the Respondents may have a foundation in good sense, or in business or in accountancy. We have not to decide

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whether such an investment as this ought or ought not to be included in the capital of the business; and we have not to consider whether it would or would not have been right, in the enactments, to have so framed them that an investment which is made for the purpose of being utilised in the business should be an investment outside the provisions of the enactment. We have nothing to do with any of those considerations. All we have to see is whether, according to the words of the Act and of the Schedule, the decision before us is one at which the Commissioners could arrive.

I need not trouble very much about the facts. It is enough, I think, to read a paragraph or two of the Case to see the way in which the matter arises. They say in paragraph 5: "The "Company originally proposed to trade in, and turn to account, "the improved process of enriching or carburetting gas referred "to in paragraph 3 (vi) of the Memorandum of Association. The "results did not prove as satisfactory as had been anticipated, "and the Company accordingly turned its attention to the re-"fining and distribution of petroleum spirit and other petroleum "products. A refinery was set up at West Ham, depots for "distribution purposes established throughout the United King-"dom, and the Company thereby and therefrom made the "refining of petroleum and its distribution its principal business "and trade. 6. In 1904 the Company started and organised a "distributing business in Belgium and until 1908 carried on the "business of distributing petroleum spirit in Belgium."

Then it goes on to say that in 1908 the Company, with two other distributors of petroleum, came to an arrangement with the Asiatic Petroleum Company, by which the Company agreed to give up its business in Belgium; and it was provided that the Company, in conjunction with two Belgian concerns, should form a Belgian Company, of which this Company was to have one-third of the share capital and that Belgian Company, when formed, was to have the sole *del credere* agency for the sale and distribution of the Asiatic Company's oil.

That is the first alleged investment with which we have to deal. I say alleged, because it was contended by the Respondents that it was not an investment within the meaning of the Act because, in accordance with that agreement which I have read, the Company did take one-third of the share capital of the Belgian company which was formed and, in accordance with Belgian law, paid up some part, at any rate, of the value of the shares in cash.

The Company still continued to carry on its business in the United Kingdom, and for a long time it got its supplies of oil from the Asiatic Company; but in consequence of some difference between the Company and the Asiatic Company, they ceased to get their supplies of oil from the Asiatic Company, because they

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were not satisfied with the terms on which the Asiatic Company were only prepared to supply them; and in consequence they took shares in two Roumanian companies. I need not trouble about their names; they are a little difficult to pronounce. They took shares in two Roumanian companies, and then found " that the " Company would have been unable to obtain from the " Roumanian Companies above mentioned the supplies of oil " required for the purposes of the Company's trade unless they " had agreed to assist the finances of the Roumanian Companies " on the lines above stated." We need not trouble about " the " lines above stated " except to say, as I have already pointed out, that it involves taking shares in the Roumanian Companies. That is the second alleged investment.

The Crown contend that the amount of money which is involved in the shares of the Belgian Company and the two Roumanian Companies is not to be counted as capital of the business for the purposes of excess profits; or rather, to put it more accurately, that amount is to be deducted from the computation of capital in order to arrive at an amount with which the Revenue Authorities have to deal in ascertaining the excess profits.

That makes it necessary to look at the Finance (No. 2) Act, 1915, in order to see how the capital of the Company is to be ascertained in accordance with that Act. I need not read Sections 40 and 41, which have been referred to, but I will just notice that Section 41 does speak of " capital employed in the trade or " business." Section 40, in speaking of profits, refers to the Fourth Schedule of the Act, and also provides that: " The " provisions contained in the Second Part of the Fourth Schedule " to this Act shall have effect with respect to the computation " of the profits of a pre-war trade year, and the provisions con- " tained in the Third Part of the Fourth Schedule shall have " effect with respect to the ascertainment of capital for the " purposes of this part of this Act." Looking at that, " capital " and " capital employed in the trade or business " are the same things; and, therefore, the amount of capital employed in the trade or business has to be ascertained in accordance with the Third Part of the Fourth Schedule to the Act. That Schedule provides this: " The amount of the capital of a trade or business " shall, so far as it does not consist of money, be taken to be," and then there follow three categories (*a*), (*b*) and (*c*). " (*a*) so " far as it consists of assets acquired by purchase," a certain value; " (*b*) so far as it consists of assets being debts due to the " trade or business," a certain value; and " (*c*) so far as it " consists of any other assets which have not been acquired by " purchase," a certain value also. Then it provides this, in Rule 2: " Any capital the income on which is not taken into " account for the purposes of Part I of this Schedule, and any

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" borrowed money or debts, shall be deducted in computing the " amount of capital for the purposes of Part III of this Act."

Therefore it seems to say, look at what is the capital of the business, ascertained in accordance with Rule 1. If you find that any part of that capital is capital the income of which is not taken into account for the purposes of Part I of the Schedule, then you must deduct so much as answers that description. It seems to me that it is dealing with capital employed in the business and then saying, if you find that in that is contained something described in Rule 2, you must deduct that part.

Now, in order to see what Rule 2 means, one has to turn to Part I and see what capital it is the income on which is not taken into account for the purposes of Part I of the Schedule. Part I is : " Computation of Profits," and turning to that I find this in Rule 8 : " In estimating the profits no account shall be " taken of income received from investments except in the case " of life assurance businesses and businesses where the principal " business consists of the making of investments." It is sought to read into that, this : " ' investment ' in this clause means an " investment in something wholly disconnected from the busi- " ness or an investment of moneys not immediately required " for the business." I have already pointed out that the total from which you are deducting what is required by Rule 2 of Part III is the capital employed in the business. Therefore, to say that this is employed in the business is no answer to the claim of the Crown to make the deduction at all. That is the thing you are dealing with—the capital employed in the business as ascertained by Part III of the Schedule.

Now, are these participations, if I may so call them, in the shares of the Belgian Company and the Roumanian Companies, investments or are they not? It is admitted that in the ordinary sense of the word they are investments. Learned Counsel have kindly handed to me a number of definitions from various dictionaries which, so far as they deal with the business meaning of the word " investment "—of course, it has a primary meaning nothing to do with business, and it also has a military meaning which has nothing to do with business—but so far as they deal with the business meaning, the word " investment " exactly describes what these holdings (to use a neutral word) of the Respondents are. I see in the Oxford English Dictionary that " investment " is defined as " The conversion of money or " circulating capital into some species of property from which " income or profit is expected to be derived in the ordinary course " of trade or business," and then it goes on to distinguish it from speculation. I need not enter into the question of when an investment becomes a speculation or when a speculation becomes an investment. Another one defines it as " Putting out " of capital "—that is, establishing an investment in it, " for

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" the purpose of obtaining interest for it." And Webster describes it as " Laying out of money in the purchase of some " species of property, the amount of money invested, or that in " which money is invested."

According to those definitions, which after all are not conclusive, and according to the ordinary meaning of the words, these were undoubtedly investments. I do not think any dividends were received, as a matter of fact, in respect of the shares in the Roumanian Companies, but considerable dividends were received in respect of the holding in the Belgian Company; and if there had been dividends to be divided of the Roumanian Companies, the Respondents would have been entitled, by virtue of their holding in those Companies, to receive the dividends.

Therefore, in order to show that these are not investments, either some words or some necessary implication must be found in Rule 8 of Part I of the Schedule to exclude these things. I can find nothing. As I have said, what " investment " is said to mean here is " an investment in something wholly discon- " nected from the business." Now, I cannot find any such words in Rule 8; you have to read something into Rule 8 which is not there. And what is more, in looking at Rule 8 it seems to me that that is obviously not what it means because, having said that no account shall be taken of income received from investments, it then goes on to except from that provision the case of life assurance businesses and businesses where the principal business consists of the making of investments. Now, if the meaning of " investment " is an investment unconnected with the business, those exceptions are absolutely useless; they are ridiculous. It is said they may be put in *ex abundanti cautela*, and that is possible, I suppose; but it is certainly the more natural meaning that " investment " is to be taken in its ordinary sense, and it is to be taken in its ordinary sense as being an investment whether it be or be not connected with the business that is carried on by the investor. Then, in order to exclude some businesses from the clause as to investments, this exception is put in. That is the natural and ordinary meaning of the clause; and I can see no reason for not adopting it. It may be that many people may think—I do not know that I need say whether I think myself or not—that an investment which is made for the purpose of the business or with the motive of benefiting the business, might have been so treated as not being one which ought to come within Rule 8. That may or may not be the case, but I have only to look at Rule 8 and to see whether any such limitation is imposed upon the word by the clause. In my opinion it is not.

I should say the real true way of looking at these holdings in these companies is this—that they are investments in every ordinary sense of the word, but that they are investments which are made with the motive, and for the purpose of, benefiting the

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business which is carried on by the investor. And I can find nothing, as I say, in the Rule, to exclude those from the operation of it.

I think, therefore, that the contention of the Crown is right, and the appeal should be allowed, with costs here and below.

Scrutton, L.J.—I would content myself with concurring with the judgment delivered by the Master of the Rolls but for the fact that we are differing from the Commissioners of the City of London, and from the learned judge below. Therefore, I shall shortly express my judgment in my own words.

The question arises in this way. The Gas Lighting Improvement Company started business by improving gas lighting. For reasons which we need not trouble with, finding that not sufficiently profitable, it converted its sphere of operations into refining and distributing petroleum. To refine and distribute petroleum it was necessary to procure crude petroleum, and to obtain opportunities for distributing it, and for the purpose of getting oil and getting chances of distributing it, it, I was going to say, invested its capital, but I will not; it employed part of its funds in purchasing (1) certain shares in a Belgian distributing company, (2) certain shares in two Roumanian companies; and the effect of those purchases was undoubtedly to assist the Company in obtaining oil and opportunities of distributing it.

On those facts the question which comes before the Court is: "Are the dividends from those shares to be accounted as profits "of the Company for the purposes of Excess Profits Duty, and "is the money used in purchasing those shares, or the value of "the shares, to be treated as capital of the Company also for "the purpose of the Excess Profits Duty?"

One has to be quite clear, when dealing with this and similar cases, that we are not here to legislate; we are not here to settle what is fair and reasonable; we are not here to explain what is the business meaning of capital or profits. We are here to administer an extremely artificial and conventional system laid down by the wisdom of the Legislature in the Finance (No. 2) Act, 1915, which taxes persons and companies on the excess of the profits of an accounting year over the pre-war standard of profits, which primarily is the average of two out of three pre-war trade years selected by the taxpayer, with this alternative, that if he can show that it is better for him to have a percentage standard, namely, a statutory percentage fixed on the capital employed in the last pre-war trade year, he can have that percentage standard instead of the average of the actual profits in the two pre-war trade years.

To get at what the arithmetical result of that is, one has to do complicated sums as to capital and complicated sums as to profits, in accordance with certain directions contained in the

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Statute. The profits are to be " determined on the same " principles as the profits and gains of the trade or business are, " or would be, determined for the purpose of income tax "—which again lets in a whole mass of statutory provisions—" subject to the modifications set out in the First Part of the " Fourth Schedule to this Act."

Capital is to be ascertained in accordance with the provisions contained in the Third Part of the Fourth Schedule. One has, therefore, to interpret the language used by Parliament as to capital in the Third Part, as to profits in the First Part; and if Parliament has said in clear language a certain thing, it does not matter that it does not seem to us fair and reasonable or that it does not seem to us in accordance with the business meaning of capital or profit; that is a matter for the Legislature, and not for us.

When we turn to the definition of " capital " we find that the amount of the capital of a trade or business—and it is that that we have to assess—is to be made up of certain items valued in a way specified in 1 (*a*), 1 (*b*), 1 (*c*) and 3 of that Schedule. But we find an express provision that " Any capital the income " of which is not taken into account for the purposes of Part I of " this Schedule . . . shall be deducted in computing the amount " of capital for the purposes of Part III of this Act." It appears to me that the Rule contemplates that the capital which it is talking about would, but for this provision, come into the capital of the trade or business, but is taken out by the express direction, the express direction being, if the profits on that capital do not come into the profits for the purpose of Excess Profits Duty, neither shall the capital, from which the profits are derived, come into the capital for the purpose of Excess Profits Duty. The source and the fruit must both be in or both be out, and if the fruit is out the source must be out, though it is capital of the trade or business otherwise.

That sends us to Part I of the Schedule to see whether the income on the funds which were used in purchasing these shares is, or is not, to come into the profits of the trade or business; and we are sent to Rule 8 of Part I. " In estimating the profits " —that must mean the profits of the trade or business—" no " account shall be taken of income received from investments " except in the case of life assurance businesses and businesses " where the principal business consists of the making of invest- " ments," of which a very ordinary case is a trust investment company.

Prima facie one would think that there would be no need to say that you are not to take account of income derived from investments which have nothing to do with the trade or business. Of course, they would not come into the profits of the trade or

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business if they had nothing to do with the trade or business, and were not employed in it; therefore, prima facie, one would have the reading—and I think it is the right reading—" In " estimating the profits of a trade or business no account shall " be taken of income received from investments in the course " of the trade or business." It is not necessary to provide for investments which have nothing to do with the trade or business, except in two cases—in the case of a life assurance business which, receiving funds against unexpired risks, has to invest them, and in the case of a business where the principal business consists of the making of investments, an exception which does not bring in the case of businesses where there is a subsidiary business consisting of the making of investments.

Now, reading the section in that way, which I think is the true construction of it, there is an express provision for not taking account of income derived from investments in the course of the trade or business, except in two cases, neither of which is this case. Mr. Latter suggests that the right reading is not " income received from investments in the course of the trade or " business," but " income received from investments not con- " nected with the trade or business." With great respect to him, I cannot see why it should be thought that it was necessary for Parliament to say that you were not to bring into the profits of a trade or business investments which have nothing to do with it. It seems so obvious that one can hardly conceive why Parliament should say it, and, having said it, why they should put in the case of certain exceptions, which are cases where the investment is clearly connected with the trade or business.

For those reasons I think the decision of the Commissioners, which is expressed in the language, " the money employed . . . " was employed in the business of the Company as capital and " not as an investment," does not appreciate properly, and does not put the true construction on the language of Rule 8. Of course, once one has got it that under Rule 8 dividends from these shares are not to be taken into account in the profits of the trade or business, Rule 2 of Part III then forbids the capital invested in purchasing these shares from being taken into account as capital for the purpose of Excess Profits Duty.

I think the view of the Commissioners, which I think was a conclusion of law and construction, was wrong in construction and in law; and, with great respect, I am not able to understand the view of the learned Judge that it was really a decision of fact, and that there was some evidence on which they could come to that conclusion of fact.

For these reasons I agree that the appeal should be allowed, with the results stated by the Master of the Rolls.

Younger, L.J.—I am of the same opinion. If the question before us on this appeal were the question whether the sums expended by the Respondent Company in the purchase of these shares and securities ought to be described as, or can properly be described as, part of the capital of the trade or business as existing at the taxable date (I am using the wording of the second paragraph of Section 40 (2) of the Act), I should myself be of opinion, on the facts stated by my Lord and found by the Commissioners, that the money so expended would be, in every ordinary sense of the words, part of the capital employed by this Company in its trade or business. But the Statute does not, as I read it, authorise the Court, in determining that question, to stop at the words of the Statute which I have read, but it requires the Court, under the last paragraph of the same Section, to go to the provisions of the Third Part of the Fourth Schedule to the Act, in order that there the Court of construction may find the provisions which are to be regarded as ascertaining what is capital of the business for the purposes of this Part of the Act. It seems to me impossible, on the language of Section 40, to escape from the conclusion that any general words contained in that Section cannot prevail against any express provisions which are to be found upon the subject in the Schedule to the Act, to which the Court of construction is referred by the terms of the Section itself.

Now, when you go to that Third Part of the Fourth Schedule in order to answer the question which is here put, the immediately relevant provision of that Part of the Schedule is Rule 2, which provides that "Any capital the income on which is not taken "into account for the purposes of Part I of this Schedule, and "any borrowed money or debts, shall be deducted in computing "the amount of capital for the purposes of Part III of this Act." Accordingly, if we find in Part I of the Schedule any capital the income on which is not taken into account for the purposes of that Part, that ceases to be capital for the purposes of Part III of the Statute.

Now, it is not contested I think, by Mr. Latter on behalf of the Respondents, that there is in Rule 2 of Part III in the words which I have read, a direct reference to Rule 8, to which I am now about to refer. The question accordingly is whether the particular things which, in Rule 8, are called investments, the income of which is not to be taken into account, are capital within the meaning of Rule 2 of Part III which, by reason of the income of it not being taken into account, is, under that Rule 2, to be excluded from what otherwise would be capital.

I should wish for myself to express my very great obligations to Mr. Latter for the extremely powerful argument which he put before us with a view of showing that it was possible so to read Rule 8 of Part I of this Schedule as to enable him to say that these so-called investments were still to be regarded as part of the capital

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of this trade or business. As I understood his way of putting it (and if it were open to me to accept it, it would command my own personal adhesion), he said that investments within the meaning of Rule 8 were confined to, or at least were mainly aimed at, the investments of money not immediately required by the owner of the business in question for the purposes of his business, and presumably selected as eligible on their own merits as investments, and that they did not extend to or include investments acquired and held solely in the course of and for the purposes of that business and as a necessary incident to the carrying of it on. And he said that the so-called investments in question here, all of them, came under the second of these two descriptions and not under the first, and that accordingly they were not investments within the meaning of the Rule at all.

There would, I think, be very great force in that view if it were not that, as it seems to me, the words of the Rule are too strong to enable the Court to give effect to it. It is, I think, in this connection a fair observation to make that although the Rule, as all these Rules, (and Mr. Latter pointed this out) cuts both ways, the Rule itself is a rule of exemption. It appears in a part of the Act where, by the application of this Rule the subject will, in respect of the investments included in it, be relieved from the obligation of Excess Profits Duty so far as proceeds of the income from these investments are concerned. If one were to approach the consideration of this Rule as an instance where the Crown were seeking to say, as against the Respondent Company here, that these investments ought to be brought into account in order that the income received from them might be taxable for and in respect of excess profits, I think, looking at the Rule from that point of view, one would feel that the Crown would be confronted with the greatest difficulty in saying that any such limitation on the words which has been suggested by Mr. Latter should be accepted. One must, I think, adopt the same construction when the subject comes, as against the Crown, and seeks to say that there is to be a limitation placed upon the words of the Section when peradventure it suits him to say so; but, as I began by saying, I think the words are too strong. I think the strength of the words is to be found in the exceptions. There are not excepted from investments which are referred to in this Rule, the investments of a fire or of a marine insurance office, although in principle I can see very little difference between the investments of such insurance offices and the investments of a life office, which are in express terms excepted from the operation of the Rule. Again, the Rule does not except investments which are made for the purpose of a trade or business where the principal business of the person making these investments does not consist in making investments. Accordingly, it seems to me difficult to say that when you find words used which

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exclude that category you can, for any purpose at all, introduce the limitation that investments which are to be made for the trade or business are to be excepted from the operation of the Rule.

In other words, if I may be allowed to do so, I concur most respectfully with the view which has just been expressed by Lord Justice Scrutton, and I think that the true construction of the Rule is that the investments which are there referred to are investments made in the course of the trade or business in question, with the exceptions which are there set out.

If that be the true construction of the Rule, it seems that the more direct the necessity for the investment in the interest of the trade or business which was made, the more clearly is it brought within the operation of the Rule.

On these grounds, although I myself personally regret the result, because I should have been glad to attribute to the general words of the Statute their true force and effect as applied to the present case, it appears to me that the true construction of the Rule to which we are driven precludes the Court from attributing that effect. Accordingly, I think that the appeal should be allowed.

The Master of the Rolls.—I wish to say that I entirely agree with what Lord Justice Younger has said about Mr. Latter's argument.

The Attorney-General.—I am informed that we have paid over the costs. I ought to ask that the Order of the Court should include the Order to repay.

The Master of the Rolls.—That will follow. Any costs that have been paid over must be repaid.

Sir John Simon.—Yes, my Lord; I am not quite sure how it stands.

The Master of the Rolls.—If they have.

Sir John Simon.—Yes, my Lord.

The Company having appealed against the decision in the Court of Appeal, the case was argued before the House of Lords (Viscount Cave, *L.C.*, Viscount Finlay, and Lords Atkinson, Sumner, and Phillimore) on the 18th, 19th and 20th April, 1923, when judgment was reserved.

Sir John Simon, K.C., and Mr. A. M. Latter, K.C., appeared as Counsel for the Company, and the Attorney-General (Sir Douglas Hogg, K.C.), Sir Ernest Pollock, K.C., and Mr. R. P. Hills for the Crown.

Judgment was given on the 11th May, 1923, unanimously in favour of the Crown, with costs, confirming the decision of the Court below.

JUDGMENT.

Viscount Cave, L.C.—My Lords, this appeal from the Court of Appeal in England raises the question whether, in computing the capital of the Appellant Company for the purposes of Excess Profits Duty, certain holdings of the Appellants in foreign companies ought or ought not to be excluded.

The Appellants, for some time before and down to the year 1908, carried on the business of refining and distributing petroleum, and had (among other branches) a distributing business in Belgium. In that year the Appellant Company, with two Belgian distributing firms who had been their competitors, agreed to sell their distributing businesses in Belgium to the Asiatic Petroleum Company upon the terms that the sole agency for the sale of the Asiatic Company's oil in that country should be entrusted to a new Belgian joint stock company in which the Appellants and the two Belgian firms should each hold one-third of the shares. It was provided by the agreement that the vendors should, as from the formation of the new Belgian Company, discontinue their business in Belgium, and should not during the continuance of the agency be interested in the sale of petroleum in that country. A Belgian Company was accordingly formed under the name of the Belgian Benzine Company (Société Anonyme) with a nominal capital of 510,000 francs divided into 510 shares of 1,000 francs each, which were subscribed for and held as to one-third (or 170 shares) by the Appellant Company and as to the remaining two-thirds by the two Belgian firms equally. The amount originally paid up by the Appellants on their shares in the Belgian Company was one-tenth of their nominal amount (or £675); but, in December, 1910, on the term of existence of the Belgian Company being prolonged under Belgian law for a further period, a further sum was paid up, making £1,344 in all. The Belgian Company duly took over and carried on the agency for the Asiatic Petroleum Company, and paid large dividends upon its shares until the commencement of the war, but thenceforth ceased to pay any dividend.

In the year 1913 the Appellant Company entered into another and a different transaction. Having difficulty in obtaining supplies of petroleum, they sent a representative to Roumania, and, as a result of his mission, agreed to take shares and debentures in two Roumanian oil companies upon the terms that the Appellants should have a call on the crude oil at the disposal of those companies at market prices. The amounts paid by the Appellants for these shares and debentures in the year 1913 and the following years amounted to upwards of £27,000, but nothing was received by them in respect of dividends or interest on these shares and debentures.

In the year 1919 it became necessary to assess the Appellant Company to Excess Profits Duty under the Finance (No. 2) Act, 1915; and the question then arose whether, for that purpose, the

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amounts paid by the Appellants on the shares in the Belgian Company and on the shares and debentures in the two Roumanian Companies were or were not to be counted as part of the capital of the Appellant Company. The Commissioners of Inland Revenue took the view that these shares and debentures were " investments " within the meaning of Rule 8 of Part I of the Fourth Schedule to the Act, and accordingly were, under Rule 2 of Part III of the same Schedule, to be deducted in computing the amount of the Appellant Company's capital for the purposes of the Act. The Appellants, whose interest it was that the statutory capital should not be so reduced, appealed on this question to the Commissioners for General Purposes of the Income Tax for the City of London; and the last-mentioned Commissioners, after hearing the parties, allowed the appeal, but, on the application of the Crown, stated a Special Case for the opinion of the King's Bench Division of the High Court of Justice. The finding of the Commissioners for General Purposes on the above question was expressed in the Special Case as follows : " The Commissioners held that the money employed in " the foreign companies referred to was employed in the business " of the Company as capital and not as an investment within the " meaning of the Finance (No. 2) Act, 1915, and they " accordingly allowed the appeal." The Case Stated was argued before Mr. Justice Sankey, who treated the above finding of the Commissioners for General Purposes as a finding of pure fact, and, holding that there was some evidence upon which those Commissioners could come to their conclusion, dismissed the appeal from their decision. On appeal to the Court of Appeal, that Court (consisting of the Master of the Rolls and Lords Justices Scrutton and Younger) took a different view; and, holding that the question determined by the Commissioners for General Purposes was one of mixed fact and law and was accordingly open to review by the Court, they held unanimously that the holdings in question were "investments " within the meaning of Rule 8, and accordingly should for the purposes of the Act be deducted from the Company's capital. Hence the present appeal.

My Lords, I feel no doubt that the point is appealable. If the finding of the Commissioners for General Purposes were indeed one of pure fact, then it could not be reviewed except on the ground that there was no evidence upon which they could as reasonable men have come to their conclusion. But the finding involves not only a conclusion of fact, but the construction of the statute. It is a finding of mixed fact and law, and, as such, is open to review by the Courts.

The following are the material provisions of the Act : Section 40, Sub-section (1), provides that the profits arising from any trade or business to which the Act applies shall be determined on the same principles as they would be determined for the

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purpose of Income Tax, subject to the modifications set out in the First Part of the Fourth Schedule to the Act. Sub-section (2) of the same Section enacts that the provisions contained in the Third Part of the Fourth Schedule shall have effect with respect to the ascertainment of capital for the purposes of Excess Profits Duty. Rule 8 of Part I of the Fourth Schedule declares that in estimating the profits no account shall be taken of income received from investments except in the case of life assurance businesses and businesses where the principal business consists of the making of investments. Rule 2 of Part III of the same Schedule provides that any capital, the income on which is not taken into account for the purposes of Part I of the Schedule, and any borrowed money or debts, shall be deducted in computing the amount of capital for the purposes of Part III of the Act. The effect of these provisions taken together is that in estimating profits for the purposes of the Act no account is to be taken of income received from investments except in the special cases referred to, and that in estimating capital for the same purposes, investments are to be deducted and excluded. The reason for this exclusion may have been that, the intention being only to tax excess profits arising out of the actual carrying on of a trade or business, it was thought right to exclude from the calculation profits from investments, which might rise or fall for causes wholly unconnected with the trade, and (as a consequence) to exclude from the capital the investments themselves. But whatever the reason, the enactment is clear that " investments " are not to count as capital; and the question, therefore, is whether the holdings which are in question in this case are, or are not, " investments " within the meaning of Rule 8 of Part I of the Schedule.

That they are investments in the ordinary sense of the term, probably no one would deny. They are money put out in the shares and securities of undertakings other than the undertaking of the Appellant Company itself, with the expectation of receiving dividends or interest upon them; and they satisfy any one of the definitions quoted by the Master of the Rolls from well-known dictionaries and any other definition of an investment which I am able to conceive. In all the balance sheets of the Appellant Company issued since these holdings were acquired, they were classified as investments; and although this circumstance is not conclusive to show that they are investments within the meaning of Rule 8, it has some weight as showing that they are investments in the ordinary sense. But it is argued on behalf of the Appellants that on the true construction of the Act a restricted meaning must be put upon the word " invest- " ments " as used in Rule 8; that (to quote the language of the Appellants' case) " the income excluded by that Rule is " income arising from capital employed otherwise than in the " trading operations for which the business was constituted;

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" that is to say, income from capital which is invested outside " such operations with the object of obtaining a return thereon " either by way of income or capital appreciation independently " of the result of such trading operations " ; and that the investments here in question do not fall within that definition.

My Lords, I find nothing in the Act which compels or admits of such a limitation of the meaning of the word " investments." The expression cannot be intended to apply to investments wholly unconnected with the business to be assessed; for investments of that character could in no case be regarded as capital of the business, and it would be quite unnecessary to direct their exclusion. It must therefore refer to investments connected with the business, and I see no reason why it should not include an investment of part of the business capital in an outside security, though made with the object of forwarding the trading operations for which the business was constituted. Part III of the Fourth Schedule deals, as the Master of the Rolls pointed out, entirely with the capital employed in the business, and provides (by Rule 2) that if there is found in that capital some part, the income of which is not taken into account under Part I, then that part is to be deducted. Investments fall within that category; and accordingly the direction is to deduct from capital any capital which takes the form of an investment. The point was put by Lord Justice Scrutton as follows : " When we turn " to the definition of ' capital ' we find that the amount of the " capital of a trade or business—and it is that that we have to " assess—is to be made up of certain items valued in a way " specified in 1 (*a*), 1 (*b*), 1 (*c*) and 3 of that Schedule. But we " find an express provision that ' Any capital the income on " ' which is not taken into account for the purposes of Part I of " ' this Schedule . . . shall be deducted in computing the " ' amount of capital for the purposes of Part III of this Act.' " It appears to me that the Rule contemplates that the capital " which it is talking about would, but for this provision, come " into the capital of the trade or business, but is taken out by the " express direction, the express direction being that, if the profits " of that capital do not come into the profits for the purpose of " Excess Profits Duty, neither shall the capital from which the " profits are derived come into the capital for the purpose of " Excess Profits Duty. The source and the fruit must both " be in or both be out, and if the fruit is out the source must be " out, though it is capital of the trade or business otherwise."

I respectfully agree with the reasoning of the majority of the Court of Appeal. The finding of the Commissioners for General Purposes, upon which the Appellants rely, appears to assume that, if an investment is capital employed in the business, it cannot be an investment within the meaning of Rule 8; and the judgment of Mr. Justice Sankey seems to proceed on the same footing. In my opinion it may be both. Of course the term

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" investments " does not include all money embarked in the business itself, for that would be to reduce the rule to an absurdity; but I think that it includes money embarked in the business and with a view to the advantage of the business invested in an outside security. In my opinion, therefore, this argument fails.

Apart from the general contention with which I have been dealing, and which was put forward in connection both with the Belgian shares and with the Roumanian shares and debentures, Counsel for the Appellants put forward certain special arguments as to each of the two classes of holdings; and I will deal separately with these special points.

As to the Belgian shares, it was said that the transaction was not an investment at all, but was mere machinery for defining the interests of the Appellant Company and the two Belgian firms in the profits of the distributing business proposed to be carried on by the Belgian Benzine Company (Société Anonyme); that the last-mentioned Company was nothing but a shell or shadow; and that in substance and in fact the Appellant Company continued after the transaction to carry on its distributing business in Belgium, and to receive the profits of that business. I cannot take that view. The documents show that there was a real sale to the Asiatic Company of the Appellant Company's distributing business in Belgium, and that the Appellant Company wholly discontinued that business and agreed no longer to be interested in the distribution of petroleum in that country, except of course as a holder of shares in the Belgian Company. It has been pointed out in many cases, of which *Gramophone and Typewriter Co., Limited* v. *Stanley*(1), [1908] 2 K.B. 89, is an example, that the business and profits of a limited company are not the business or profits of the shareholders; and it would be an infringement of that principle to treat the Appellant Company as continuing to carry on its Belgian business through the agency of the Belgian Company. The Appellants ceased in 1908 to have any business in Belgium and became shareholders in the Belgian Benzine Company and nothing more. This view is confirmed, if confirmation is necessary, by a reference to Rule 6 of Part I of the Fourth Schedule to the Act of 1915, which provides that where any company owns the whole of the ordinary capital of any other company carrying on the same trade or business, the provisions of the Act as to Excess Profits Duty shall apply as if that other company were a branch of the first-named company. If the Appellants' argument now under consideration were sound, no such provision would be required.

As to the shares and debentures of the Roumanian Companies, a different point is made. It is said that the Appellant Company put money into those Companies with no other motive except to

(1) 5 T.C. 358.

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obtain a supply of crude oil for its own trading operations; and accordingly that the money so applied was not money invested but money employed in the Appellants' business. In my opinion the motive of an investment cannot be the determining factor on the question of its being an investment within the meaning of Rule 8. A motor company may invest part of its capital in shares of a tyre company, or a tyre company may take shares in a rubber company, not with a view to the return in the shape of dividends (although that consideration would probably not be put entirely out of sight) but mainly with a view to obtaining a supply of tyres or of rubber as the case may be; but the transaction in each case would none the less be an investment and Rule 8 would apply. And so in the present case the fact (which I take as established) that the Appellant Company would not have embarked its funds in the shares and securities of the two Roumanian Companies except for the purpose of obtaining supplies of oil, does not prevent that transaction from being an investment of those funds. In plain language, the Appellants invested money in Roumanian shares and securities with a view to getting the control of oil for their trade; and that was for all purposes an investment, though made with a view to a collateral advantage.

For these reasons I am of opinion that the decision of the Court of Appeal was right both as to the Belgian and as to the Roumanian holdings, and that this appeal should be dismissed with costs.

Viscount Finlay.—My Lords, this is a Special Case stated by the Commissioners of Taxes for the City of London on an appeal from an assessment made to the Excess Profits Duty upon the Gas Lighting Improvement Company, the Appellants in the present case, by the Commissioners of Inland Revenue for the accounting period from 1st January to 31st December, 1917. The assessment stated the net amount of excess profits as £11,977, the rate at which assessed as 80 per cent., and the Excess Profits Duty payable as £9,581 12*s*. The Commissioners of Taxes for the City allowed the appeal, and their decision was confirmed by Mr. Justice Sankey upon the Case stated by them. The decision, however, was reversed by the Court of Appeal and the appeal of the Commissioners of Inland Revenue was allowed. Your Lordships are now asked to restore the decision arrived at by the City Commissioners and by Mr. Justice Sankey.

The business of the Company as latterly conducted was the refining and distribution of petroleum spirit and other petroleum products. This appeal relates to two separate matters, namely, arrangements made by the Company with another Company named the Belgian Benzine Company, and arrangements made by the Company with two Roumanian Companies. It is convenient to take the case of the Roumanian Companies first, as

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the facts there are simpler and bring out very clearly the question of principle at issue.

I. For many years the Company had obtained its supplies of petroleum spirit from the Asiatic Petroleum Company, but early in 1913 they failed to agree upon terms with that Company and made arrangements with two Roumanian Companies, the Beciu Company and the Stavropoleo Company, on the terms of two agreements made in June, 1913, with these two Companies respectively. In pursuance of these agreements the Company took up in 1913 25,000 £1 ordinary shares in the Beciu Company, paying in cash for such shares the sum of 7*s*. 6*d*. per share, and further 18,825 £1 ordinary shares in the Stavropoleo Company, paying therefor the sum of £1 per share in cash, and also advancing to the Stavropoleo Company the sum of £2,000 upon the security of debentures issued by that Company.

The Case states as a fact that the Company would have been unable to obtain from these Roumanian Companies the supplies of oil required for the purposes of the Company's trade unless they had agreed to assist the finances of the Roumanian Companies on these lines. During the year of assessment the Company accordingly held in the two Roumanian Companies shares and debentures to the amount of £27,831. No dividends or interest were paid on these holdings in any of the years 1914, 1915, 1916 and 1917. The Company contended that the capital employed to acquire these holdings should be included in computing for the purposes of the Excess Profits Duty the amount of capital in the business of the Company. The Commissioners and Mr. Justice Sankey held that this was so, while the Court of Appeal took the contrary view and held that they should be excluded.

The question to be decided depends upon the construction to be put upon the Finance (No. 2) Act, 1915, and particularly Rule 8 of Part I and Rule 2 of Part III of the Fourth Schedule.

Part I relates to the computation of profits for the purposes of Excess Profits Duty, and Rule 8 of that Part provides as follows : " In estimating the profits no account shall be taken of " income received from investments except in the case of life " insurance businesses and businesses where the principal " business consists of the making of investments."

Part III relates to capital and provides by Rule 2 as follows : " Any capital the income on which is not taken into account " for the purposes of Part I of this Schedule, and any borrowed " money or debts, shall be deducted in computing the amount of " capital for the purposes of Part III of this Act."

The ground of the decision of the City Commissioners is stated in the last paragraph but one of the Special Case, pages 10 and 11 :—" The Commissioners held that the money employed

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" in the foreign companies referred to was employed in the " business of the Company as capital and not as an investment " within the meaning of the Finance (No. 2) Act, 1915, and they " accordingly allowed the appeal." This is in reality a finding in point of law that investments made in the course of the business of a company are not investments within the meaning of Rule 8. In other words, the Commissioners held that Rule 8 applies only to investments made outside of the conduct of the Company's business, such as investments of profits which have been realised in the business, or have accrued to it *aliunde*.

I am unable to concur with this construction of Rule 8. The Rule must, on the face of it, have been intended to deal with cases in which but for its provisions the income of these investments would have formed part of the profits of the business. The Rule is meaningless if it was intended to apply only to income which formed no part of the profits of the business, as such income would be already outside the scope of the Excess Profits Duty. I do not see how it is possible to escape from the conclusion that Rule 8 includes within its operation cases in which the money, from which the income was derived, was employed in the business of the Company assessed to Excess Profits Duty. If it does not, the Rule has really nothing to operate upon.

It is indeed clear that in the present case the debentures and shares of the Roumanian Companies were taken merely because this was made a condition of the supply of oil by the Roumanian Companies. The investment was made purely for the purpose of carrying on the business by enabling the Company to acquire the oil it wanted, but it remains none the less an investment. To qualify the rule in the sense suggested by the Gas Lighting Improvement Company is really to introduce into it words which are not there. There are no words to exempt from the operation of this Rule 8 cases in which the investment has been made, as here, merely for the purposes of the business. It appears to me that it must have been intended by this Rule to lay down a rule of general application subject only to the exceptions specified in the Rule itself, namely, the case of life assurance businesses and businesses where the principal business consists in the making of investments. This is the broad rule which the Legislature has laid down. It may be that the principle on which the City Commissioners have acted would be more correct, but it can be reached only by treating the Act as amended. I cannot see how it can be adopted on the construction of the language of the clause.

It is, of course, for the advantage of the taxpayer that certain classes of income should be excluded from the profits on which Excess Profits Duty is to be paid, and he gets such an advantage

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under Rule 8. It is also to the advantage of the taxpayer that the capital in the business should be increased, as this may diminish very greatly the amount on which the Excess Profits Duty is to be charged. The higher the standard, the less the excess liable to Excess Profits Duty. But it would not be fair that the standard should be raised by including in its capital any sums the income on which is excluded from the computation of profits for the Excess Profits Duty. It was no doubt for this reason that the Act adopts the exclusion under Part III of any capital the income on which is not taken into account for the purpose of computation of profits liable to the Excess Profits Duty under Part I.

I think that the finding of the City Commissioners as to the investments in the Roumanian Companies cannot be supported in point of law. These are admittedly investments, and they do not fall within the exceptions specifically provided for in Rule 8. There is no exception for investments in the course of the business. The Rule must have been intended to deal with such investments; indeed it is only in the case of such investments that the rule could have any operation.

II. The finding in the penultimate paragraph of the Special Case was arrived at with regard to the investments in the Belgian Benzine Company as well as those in the Roumanian Companies.

The shares in the Belgian Benzine Company acquired by the Gas Light Company and held by them in the year of assessment are represented by a capital amount of £1,344. There is no doubt that these shares were acquired and held merely for the purpose of carrying on business in Belgium, and it is not necessary to go into the facts in detail; they are set out in the Special Case. In this case, as in the case of the Roumanian Companies, with which I have already dealt, the City Commissioners found that the money was employed in the business of the Company as capital and not as an investment within the meaning of Rule 8. For the reasons I have given in dealing with the Roumanian investments the decision appears to me to be erroneous, and in my opinion the Court of Appeal were right in reversing in both instances.

I am therefore of opinion that this appeal should be dismissed with costs.

Lord Atkinson.—My Lords, I have had the pleasure and advantage of reading the judgment which has just been delivered by my noble and learned friend Lord Finlay. I have not only had that advantage but I have had the advantage of having discussed with him before he wrote the judgment the lines on which he intended to write it. I thoroughly concur with it and I have nothing to add.

Lord Sumner.—My Lords, the Commissioners of Taxes held " that the money employed in the foreign companies referred to " was employed in the business of the Company as capital and " not as an investment within the meaning of the Finance " (No. 2) Act, 1915." This is a conclusion of law. The facts never were in dispute and they are fully set out in the Case. I think the evidence is all one way and shows that the money employed in the foreign companies was not employed in the business of the Company as capital or at all, but the really material part of the finding is, that the money was not employed as an investment within the statutory words, and this is in my view a matter of law. The whole case is therefore open to consideration.

The question is whether the capital sunk (to use a neutral word) in the shares of the three foreign companies in question falls to be deducted in computing the amount of the Appellants' capital for the purposes of Part III of the Fourth Schedule to the Act, which depends in turn on this question, whether it is capital the income on which, if any, is not taken into account for the purposes of Part I of the Fourth Schedule; that is whether it is within the words " in estimating the profits no account shall be " taken of income received from investments, except in the case " of life assurance businesses and businesses where the principal " business consists of the making of investments."

In the sense in which the word investments is commonly used among men of business I think there can be no doubt that the Appellants' holdings of shares now under discussion were " investments "; indeed I note that the Appellants themselves brought them into account in a series of annual balance sheets under this very term. I am not treating this as conclusive, or relying on it as an admission, but I think it is an illustration of the ordinary and proper use of the word. It is for the Appellants now to show cause why these investments, though they are " investments," should not be treated as Rule 8 of Part I of Schedule IV of 5 & 6 Geo. V, ch. 89, prescribes.

I understand the reason given to be that the money paid for the shares was really employed as part of the Appellants' trading capital in their own business carried on in this country, or (possibly) in Belgium as regards their holding in the Belgian Benzine Company, and that, truly considered, the words above quoted only refer to investments extraneous to that active business, whose profits are chargeable with Excess Profits Duty; that they only refer to inactive investments made for the purpose of utilising in a suitable manner funds not for the time being required in any chargeable business.

My Lords, it is plain that this reason might be expressed in the terms of an implied exception in Rule 8, or of an implied qualification upon the word " investments " therein contained.

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In the first case there might be implied, after the word " invest- " ments," such words as " other than investments made for the " purpose of furthering the business under charge "; or before it in the second case the word " extraneous " or the word " non- " trading." The Appellants were not, however, desirous of resting their case on the implication of any words in the Rule, and naturally so. It already contains express exceptions, in the cases of two named kinds of business, of investments, which are at least made for the purpose of furthering the business and even may be made as the principal business carried on, and any implication applicable to other cases is impossible. Equally impossible to my mind is the suggestion that these two kinds of businesses are expressly referred to merely, *ex abundanti cautela*, to quiet the apprehension of those interested in them. Taxing Acts are not so considerate of the feelings of taxpayers. It is said that any form of property, into which a trading company puts its money while acting *intra vires*, is to it an investment of that money, and so, if the word " investments " is an unqualified word in computing the appropriate datum for Excess Profits Duty, nothing would ever be " capital " except unexpended cash. I think it may equally be said on the other hand that, in the case of such a company, no property is ever purchased except for the purpose of furthering its business, and, therefore, everything it owns, as the result at any rate of purchases with its money, would to it always be a constituent part of its capital, as well as its unexpended cash. Both contentions really rest on the meaning of the word " investments," and I think the Appellants were right in resting their argument on the mere construction of this word.

My Lords, it is quite plain on the facts that the money " employed in the foreign companies referred to," that is, employed by the Appellants, was employed by them in buying shares in those companies and no further. After that, the money was employed by those companies, along with the rest of their subscribed capital, in their own business and not in the Appellants' business. After the Belgian Benzine Company was organised the Appellants carried on no business in Belgium. On the contrary they actually and under covenant abandoned that field in the Belgian Benzine Company's favour. In Roumania they never carried on any business at all, except, perhaps, that they bought from the Roumanian Companies, in which they held shares, crude Roumanian oil, though where they contracted for it and where it became their property we do not know.

It is said that all this was " machinery," but that is true of all participations in limited liability companies. They and their operations are simply the machinery, in an economic sense, by which natural persons, who desire to limit their liability, participate in undertakings which they cannot manage to carry on

(Lord Sumner.)

themselves, either alone or in partnership; but, legally speaking, this machinery is not impersonal though it is inanimate. Between the investor, who participates as a shareholder, and the undertaking carried on, the law interposes another person, real though artificial, the company itself; and the business carried on is the business of that company, and the capital employed is its capital, and not in either case the business or the capital of the shareholders. Assuming of course that the company is duly formed and is not a sham (of which there is no suggestion here) the idea that it is mere machinery for effecting the purposes of the shareholders is a layman's fallacy. It is a figure of speech, which cannot alter the legal aspect of the facts.

The truth is that these investments were made, as I suppose all good traders' investments are made, with a sound business motive. They may well have been forced on the Appellants by circumstances, which they could not otherwise deal with, and the prospect of dividends may have had little to do with the matter, but a noun substantive in a statute does not take its colour, like a chameleon, from such surroundings as the motives of the persons, whose property it correctly describes, and I think the whole question comes to this; " Does the context cut down the meaning of " the word investments, which it bears and which prima facie " would include the holding of the shares in question? "

My Lords, it is true that the words " invest " and " invest- " ment " are often used loosely for the act of buying and for the thing bought, whatever it be, but we have nothing to do with that. I accept what the Appellants urged, that not all " invest- " ments " proper are stocks and shares, though it does not follow that, in the case of a trading company, not all stocks and shares are investments. What, however, is the context in which the word is used here? The schedule prescribes rules for an operation closely akin to preparing a balance sheet of the assets and liabilities of a trading company. It does so for the purpose of ascertaining, sometimes the trading capital, sometimes its trading profits or gains. The provisions as to charging Excess Profits Duty are only concerned with profits which are trading profits, and they are taxed with reference to a pre-war standard depending upon the one or the other. In such a connection why should an ordinary business term be used in any but its ordinary business sense? It is practically necessary that the sense should be definite, neither enlarged figuratively nor controlled by some notion about the scheme or the policy, if there was one, of this emergency tax. These words may in some cases operate to relieve the taxpayer and in some to enhance his charge. I think that in such a statute the plain meaning is the true one, and I am unable to see any ground here for adopting any construction which is less than plain. My Lords, I should dismiss the appeal.

Lord Phillimore.—My Lords, I agree with the Court of Appeal and with your Lordships that this is not a case in which we are concluded by the finding of the Commissioners. The matter involves a question of construction of the Statute and is therefore one of mixed law and fact.

I agree also that the expression " income received from invest- " ments " and the word " investments " taken by themselves need receive no restriction other than those necessarily imposed by the consideration of the rest of the Statute. Those restrictions are (as I can see them) three. You must not include as an investment the capital put into the business itself, because that is the very matter on which excess profits are to be considered; nor money already in the business and merely shifted from one limb or branch of the business to another; nor new capital put into the business, because that is provided for by Section 41.

All else is an investment, to be treated as separate from the business, and the income from it is not to be taken into calculation in arriving at profits.

So far, I see my way clear; but when the question comes to be considered, as in this case, of an incorporated company shifting some part of its assets into some cognate business for the purpose of furthering its original business, a decision that this is an investment within the meaning of Part I, Rule 8, and Part III, Rule 2, of the Fourth Schedule, and therefore removed from the calculation of profits, and not a mere shifting from one branch or limb of the business to another, seems to me an almost arbitrary one. Considerations could be urged on either side; and I have difficulty in finding any guiding principle of law or business; though I see more force in the contention for the Crown as to the Belgian matter than in the contention as to the Roumanian matter.

Upon the whole, however, I do not dissent, even in the Roumanian matter, from the conclusions at which the Court of Appeal have arrived, and of which your Lordships have now expressed your approval, and I agree that this appeal should be dismissed.

Questions put.

That the Order appealed from be reversed.

The Not Contents have it.

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

The Contents have it.