(Lord Tomlin.)

For the purpose, however, of the assessments appealed against the profits of the Respondents were computed by taking the total of their receipts from all sources, including the rents received by them from the lettings of rooms in Salisbury House, and deducting therefrom their expenses and the amounts of the assessments under Schedule A made upon the Respondents in respect of the premises.

The Special Commissioners confirmed the assessments, stating that they did so following a previous decision of the Commissioners and in deference to opinions expressed in the Court of Session in the case of the *Rosyth Building and Estates Company*(1), 1921 S.C. 372.

The sole question upon which the opinion of the Court was desired by the Special Commissioners was whether the rents received by the Respondents on letting the offices in Salisbury House were properly to be included in the assessments as trade receipts of the Respondents for the purposes of Case I of Schedule D of the Income Tax Act, 1918.

Mr. Justice Rowlatt apparently took the view that the Respondents were carrying on a trade in the nature of an hotel business and that the assessments were rightly made.

The Court of Appeal however, rejected this view of the case and in substance held that a landowner who happens to make taxable profits by rendering certain services to his tenants cannot for that reason be treated as carrying on a trade in respect of the receipt of rents so as to be chargeable with Income Tax under Schedule D upon the excess of the actual rents over the annual assessments to tax under Schedule A.

The arguments presented to your Lordships' House on behalf of the Appellants as I understand them may be stated as follows :— (1) It is true that tax under Schedule A is necessarily charged in every case in respect of the property in all lands, tenements and hereditaments. (2) Where, however, besides receiving his rents the landowner, by means of rendering services to his tenants or otherwise in relation to the management of his land, makes profits taxable under Schedule D there may come a point where his activities which earn profits and his perception of rents must be treated as a business concern in the nature of an indivisible trade taxable under Schedule D, and this is inevitably the case if the landowner is a limited company formed to acquire and manage land. (3) In the condition of affairs last supposed the Revenue Authority has an option so far as the lands are concerned either to rely upon the Schedule A assessments or to require the rents to be brought in as part of the gross trade receipts, a deduction of the Schedule A assessment being allowed where the rents exceed such assessment.

(1) 8 T.C. 11.

(Lord Tomlin.)

My Lords, in my view the scheme of the Income Tax Act, 1918, properly understood does not afford support for these arguments but leads to an opposite conclusion.

Section 1 of the Act provides that "Where any Act enacts "that income tax shall be charged for any year at any rate, the "tax at that rate shall be charged for that year in respect of all "property, profits, or gains respectively described or comprised "in the schedules marked A, B, C, D, and E, contained in the "First Schedule to this Act and in accordance with the Rules "respectively applicable to those Schedules."

Schedule A begins with the following words:—"Tax under "Schedule A shall be charged in respect of the property in all lands, "tenements, hereditaments, and heritages in the United Kingdom, "for every twenty shillings of the annual value thereof."

The Rules under Schedule A prescribe (No. VII, Rule 4) that "Tax under this Schedule shall be charged on all lands, tenements "and hereditaments, whether occupied at the time of assessment "or not."

For lands outside the Administrative County of London as for lands within that county rent or rental value is the measure of annual value (see Schedule A, No. 1, and cf. Section 45 of the Metropolis (Valuation) Act, 1869).

Now Income Tax is one tax. There is not a separate tax under each Schedule (see *Attorney-General* v. *London County Council*(1), [1901] A.C. 26).

Further there is admittedly no double taxation. A subject matter of taxation properly assessed to the tax under one Schedule cannot be brought again into assessment under another Schedule.

Land in regard to its property quality is assessable to tax under Schedule A and in regard to its occupation quality is assessable to tax under Schedule B. There may also be such utilization of the land attributable neither to the property quality nor to the occupation quality producing profits assessable to tax under Schedule D (see *Coman* v. *Governors of the Rotunda Hospital, Dublin*(2), [1921] A.C. 1).

Putting aside the special cases dealt with in Schedule A, No. III, tax in respect of the property quality in land is exigible under Schedule A on the annual value measured by reference to rental value. The tax is a charge on the property and is inescapable. Neither the Revenue authority nor the tax-payer can demand to exclude the subject matter from the Schedule.

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(1) 4 T.C. 265. (2) 7 T.C. 517.

(Lord Tomlin.)

When once the annual value has been ascertained and fixed for the purposes of Schedule A it is irrelevant to consider whether the landlord in fact receives by way of rent more or less than, or the same as, the assessed annual value.

The subject matter, namely land in respect of its property quality, being necessarily taxed under Schedule A, cannot be brought again under any other Schedule. To do so would offend the rule against double taxation.

The option which the Revenue authority sets up here is in my judgment inconsistent with the scheme of the Act and in particular with the obligation of the authority to tax under Schedule A. If such an option existed it would be reasonable to expect machinery whereby upon the exercise of the option in the direction of some Schedule other than Schedule A allowance could be made in respect of the tax necessarily exigible under Schedule A. No such machinery is in fact provided by the Statute and the Revenue authority has been driven in this case to invent it to meet the objection of double taxation. It is noteworthy that where a land-owner carries on a trade on his own property the computation of tax is to be made exclusive of the annual value of lands occupied for the purpose of the trade and separately assessed and charged under Schedule A (see Schedule D, Cases I and II, Rule 5).

I am therefore of opinion that as between Schedule A and other Schedules the Revenue authority has no option to select the Schedule to be applied, and in this respect I disagree with the reasoning upon which the decision in the *Rosyth Building and Estates Company, Limited* v. *Rogers* (1), 1921 S.C. 372, is based.

Further, in my view, the perception of rents as land-owner is not an operation of trade within the meaning of the Act. If this be so, I am unable to appreciate how the existence of ancillary activities which produce profits taxable under Schedule D can effect the nature of the operation, or how the legal significance of the perception is altered for the purpose of Income Tax if the recipient is a limited company rather than an individual.

My Lords, for the reasons which I have endeavoured to indicate I reach the conclusion that the decision of the Court of Appeal was correct and I think that this appeal should be dismissed with costs.

Lord Macmillan.—My Lords, the Respondent Company owns a large block of buildings in the City of London known as Salisbury House, containing some eight hundred rooms. These rooms the Company lets unfurnished singly or in suites to tenants as business

(1) 8 T.C. 11.

(Lord Macmillan.)

offices, and derives therefrom a large revenue in rents. Certain services are rendered by the servants of the Company such as cleaning, watching and lighting for which charges are made to the tenants. The Company has no other activities beyond acting as landlords of the premises and performing the services mentioned.

The broad question raised by the appeal now under your Lordships' consideration is as to the proper method of assessing the Company to Income Tax, although the actual issue relates to the validity of assessments made upon the Company under Schedule D for the four years ending 5th April, 1928.

The first step taken by the Inland Revenue authorities in each of the years in question was to assess Salisbury House to Income Tax under Schedule A upon the gross value as appearing in the Valuation List in accordance with the Valuation (Metropolis) Act, 1869, Section 45. The assessments were made upon the Company as landlords under Schedule A, No. VII, Rule 8, which provides that "The assessment and charge shall be made upon the landlord in "respect of . . . (*c*) any house or building let in different apart-"ments or tenements, and occupied by two or more persons "severally. Any such house or building shall be assessed . . . as one "entire house or tenement." The tax exigible upon these assessments was duly demanded by the Crown and duly paid by the Company.

The Inland Revenue authorities, taking the view that the Company were not only landlords but also traders, proceeded in addition to assess the Company under Schedule D on the annual balance of its profits or gains, claiming that on the credit side of the computation there should be entered the rents received and the receipts from services rendered while on the debit side it was conceded that the assessments under Schedule A should be entered as well as all expenses incurred by the Company in earning their profits. The Company challenged the validity of this assessment, but admitted that it was liable to be assessed under Schedule D on any profit apart from rents which it earned from rendering in connection with the premises the various services mentioned.

The Commissioners decided that the assessments under Schedule D were rightly made to include the amounts by which the total receipts of the Company (including its rents from offices) less expenses exceeded the Schedule A assessments. This decision was affirmed by Mr. Justice Rowlatt, but was reversed by the Court of Appeal. The Crown now appeals to your Lordships' House and asks that the decision of the Commissioners and Mr. Justice Rowlatt be restored. Important questions of principle not hitherto directly the subject of consideration in this House are involved in the determination of the case.

(Lord Macmillan.)

As I approach the problem the first question which presents itself is whether the Revenue authorities were bound to assess the premises under Schedule A. They did so, but had they any option in the matter? In my opinion they had none and the assessments made under Schedule A were not only proper but obligatory. Section 1 of the Act of 1918 enacts that Income Tax is to be charged "in respect of all property, profits, or gains respectively described "or comprised in the schedules marked A, B, C, D, and E, contained "in the First Schedule to this Act and in accordance with the "Rules respectively applicable to those Schedules." Turning to Schedule A, I find that it opens with the words "Tax under "Schedule A shall be charged in respect of the property in all lands, "tenements, hereditaments, and heritages in the United Kingdom, "for every twenty shillings of the annual value thereof." The Rules applicable to Schedule A provide (No. VII, Rule 4) that "Tax under this Schedule shall be charged on all lands, tenements "and hereditaments." I may refer also to Section 110 (1) which enacts that "The assessments under Schedules A and B for any "parish shall contain—(*a*) the full and just annual value of all lands, "tenements, hereditaments and heritages estimated in each "particular case as directed by this Act; and (*b*) the names of the "occupiers and proprietors thereof." It is clear from these and other provisions of the Income Tax code, which it is unnecessary to refer to in detail, that it is obligatory to assess to Income Tax under Schedule A all lands, tenements, hereditaments and heritages in the United Kingdom, and that the Revenue authorities have no option in the matter. If they have an option as regards other sources of income in the matter of the Schedule under which they may charge them, upon which I do not consider it necessary for the present purpose to pronounce, it is at least certain that they must charge tax in respect of property in land under Schedule A. An examination of the Income Tax Acts past and present establishes that a clear distinction has always been drawn between income from land and income from all other sources.

The subject of tax is all property as well as all profits or gains, and indeed the tax under Schedule A is designated property tax not only colloquially but on official forms. Schedules A and B in combination contain, and in my view contain exhaustively and exclusively, the charge upon landed property, the former containing the tax on the owners of land and houses in respect of the property in them and the latter containing the tax on the benefit derived from the occupation of land.

The consequences of this are far-reaching for the present purpose. If the Revenue authorities must assess Salisbury House under Schedule A they must do so on the annual value thereof ascertained in the manner prescribed by the Rules applicable to that Schedule.

(Lord Macmillan.)

The premises being situated within the Administrative County of London the annual value with respect to Schedules A and B is by Section 45 of the Valuation (Metropolis) Act, 1869, to be deemed to mean the gross value stated in the Valuation List under that Act, and by Section 4 gross value means "the annual rent which a tenant "might reasonably be expected, taking one year with another, "to pay for an hereditament" on ordinary letting terms. Rent or rental value is thus the criterion of annual value for the purpose of the tax on property under Schedule A. Similar provisions apply to lands outside the Metropolis under "No. 1.—General Rule for estimating the "annual value of Lands, Tenements, Hereditaments or Heritages". Here also rent or rental value is the criterion of annual value for the purposes of taxation.

Once it is determined that the annual value of all lands and houses must be assessed to Income Tax under Schedule A it follows that this annual value cannot be assessed to Income Tax under any other Schedule, for it is elementary that the same source of income cannot be twice taxed. Income Tax is one tax, not several taxes (*Attorney-General* v. *London County Council* (1), [1901] A.C. 26), and the annual value of a particular property having been once assessed to Income Tax cannot be re-assessed to the same tax.

The explanation of the assessments under appeal is obvious. If the rents received by the Respondent Company were the exact equivalent of the annual value of the property in the Metropolitan Valuation List the Crown would have no interest in seeking to assess the Company under Schedule D because it would receive under Schedule A all the tax to which the rents were liable, while any profits from services rendered are admittedly assessable under Schedule D. Thus the whole income derived by the Company in respect of its property would yield tax. But the Company, in fact, lets out its rooms at rents which are in excess of the annual value of its premises and consequently if the Company is assessed only under Schedule A the excess of the rents received over the annual value escapes taxation.

This circumstance in my opinion affords no justification for the attempt to treat the Company as a trading concern whose profits are assessable under Schedule D. Landowning, however profitable, is not a trade within the meaning of the Income Tax code. Property in land as a source of income is dealt with, and can only be dealt with, under Schedule A, and the Rules of that Schedule prescribe how the income from landed property is to be ascertained and measured. If the measure is an imperfect one and when applied does not ascertain the actual income derived from the property, so much the worse for the Revenue. Discrepancies one way or the

(1) 4 T.C. 265.

(Lord Macmillan.)

other between actual income and statutory income for tax purposes are familiar features of Income Tax law. Theoretically, the annual value and the rental should correspond, for annual value is based on rent. If they part company one way or the other the fault lies with the imperfection of the statutory machinery for ascertaining the income from landed property, and the Inland Revenue authorities are not entitled to resort to a different measure, designed for a different source of income, if the actual rents happen to exceed the annual value.

It is necessary, however, to make it quite clear that the income from property which is taxable under, and only under, Schedule A is income derived from the exercise of property rights properly so called.

Property is regarded as yielding income from the exercise by the proprietor of the right either of himself enjoying the possession or of parting with the possession by letting his property to tenants. The owner of property may make profit out of it in other ways and by doing so he may render himself liable to taxation under Schedule D. The case of *Governors of the Rotunda Hospital, Dublin* v. *Coman*, [1921] 1 A.C. 1, is an excellent example. There, as Lord Chancellor Lord Birkenhead pointed out at page 8 (1), the arrangements between the owners of the premises and the persons who paid for their use for the purpose of entertainments were not such as to constitute the relation of landlord and tenant, and the owners remained in possession and occupation of their property.

The receipts derived from hiring out their premises along with various movable fittings, and affording services in the way of heating, lighting and attendance, were receipts of an enterprise quite distinct from the ordinary receipts which a landlord derives from letting his property.

Consequently the owners of the premises were rightly held to be engaged in the carrying on of a trade or business in their premises, "the trade or business", in Lord Shaw's language at page 37 (2), "of providing, or providing for, public entertainments." There is nothing to prevent a landlord who has been assessed under Schedule A in respect of his income as a property owner being also assessed under Schedule D in respect of a trade, business or other enterprise carried on by him on his premises.

It is not without significance that in the case of certain kinds of property the annual value under Schedule A is directed to be ascertained in accordance with the Rules applicable to Schedule D, that is to say, on a profits basis. Under the Rules applicable to Schedule A, No. III (1) quarries, (2) mines and (3) an enumerated series of undertakings, mostly of a public utility character and

(1) 7 T.C. 517 at p. 576. (2) *Ibid.* at p. 593.

(Lord Macmillan.)

" other concerns of the like nature ", are directed to be assessed on an annual value based on profits, not rental, and the profits are to be arrived at as if they were trading concerns. In the case of *The Edinburgh Southern Cemetery Company* v. *Kinmont* (*Surveyor of Taxes*)(1), (1889) 17 R. 154, where it was held that a cemetery company should be assessed under Schedule A, No. III, 3, as a " concern of the like nature " with the enumerated concerns, Lord McLaren said at page 165 : " It is certainly not sufficient to bring " a particular use of land within the scope of Rule 3 that the " proprietor of the land is using it in connection with his trade or for " purposes of trade ; because in such cases it is generally possible " to separate the income into two parts, the one representing the " rent or annual value of the heritable property, and the other " representing the commercial profit. Where this can be done, " the proper mode of assessing seems to me to assess under Schedule A " in respect of annual value, and also under Schedule D for the " commercial profits of the business or manufacture carried on " within the heritable subjects. But there are cases where it is very " difficult to separate the income of a proprietor into rental and " commercial profits. Rule 3 appears to have been devised to meet " such cases." His Lordship proceeds to point out that the income of the company was " neither derived from the location nor from " the occupation of land " but from " a trade which is carried on " by the use of land ", namely, the sale of perpetual rights of sepulture in specified portions of the company's land.

The present case does not fall within any of the classes of concerns where by the Rules under No. III of Schedule A the annual value of property is to be determined on the basis of profits in conformity with the Rules of Schedule D. The income of the Company being derived from the location of land, or in other words in the normal manner in which property in land yields revenue, it is in my opinion inadmissible to characterise this income as the income of a trade. Where a trade is carried on by a proprietor in his own premises Rule 5 of the Rules applicable to Cases I and II of Schedule D provides for the exclusion from the tax computation of the annual profits or gains of the property occupied for the purpose of the trade. This clearly contemplates a separation between the two characters of landowner and trader. A landowner may conduct a trade *on* his premises, but he cannot be represented as carrying on a trade of owning land because he makes an income by letting it. The relatively insignificant services for which the Company makes charges to its tenants are not in my opinion sufficient to convert the Company from a landowner into a trader, though the profits so made may quite properly be charged with tax under Schedule D.

(1) 2 T.C. 516.

(Lord Macmillan.)

To hold otherwise would be to invert the rule that the principal follows the accessory.

The circumstance that the Crown has proposed in assessing the Company under Schedule D to deduct the assessments under Schedule A affords to my mind strong evidence of the illogicality of the whole proceeding. I do not understand how an assessment to Income Tax can ever be a proper deduction from an assessment to Income Tax for the tax is one tax. It is nothing to the purpose to say that under Schedule D it is proposed to tax actual rents while under Schedule A it is the annual value which has been taxed. The source of the rents and of the annual value is one and the same, namely, the property in Salisbury House.

It follows from the views which I have above expressed that I do not agree with the reasoning on which the decision in the case of the *Rosyth Building and Estate Company* v. *Inland Revenue* (1), 1921 S.C. 372, is based. In my opinion the principles applicable to this case are accurately expounded in the judgments of the Court of Appeal, and I concur in the motion that the appeal be dismissed.

This should also be the fate of the other appeal before your Lordships in the case of the *City of London Real Property Company, Limited*, which it was admitted is indistinguishable.

Questions put:

In *Fry (Inspector of Taxes)* v. *Salisbury House Estate, Ltd.*

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.

In *Jones (Inspector of Taxes)* v. *City of London Real Property Company, Ltd.*

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.

[Solicitors:—(Salisbury House Estate Limited *v.* Fry) Messrs. Holmes, Son and Pott, (City of London Real Property Co., Ltd. *v.* Jones) Messrs. Vincent and Vincent; the Solicitor of Inland Revenue.]

(1) 8 T.C. 11.

VOL. XV.—PART V.

No. 753.—High Court of Justice (King's Bench Division).—18th June, 1928, and 15th January, 1929.

Court of Appeal.—19th, 20th, 21st and 24th June, 1929.

House of Lords.—18th February and 18th March, 1930.

Leeming *v.* Jones (H.M. Inspector of Taxes).[1]

Income Tax, Schedule D, Case I *and Case* VI—*Trade—Concern in the nature of trade—Isolated transaction.*

The Appellant was a member of a syndicate of four persons formed to acquire an option over a rubber estate with a view to re-sale at a profit. The option was secured but the estate was considered too small for re-sale to a company for public flotation. An option over another adjoining estate was accordingly secured and it was decided to resell the two estates to a public company to be formed for the purpose. Another member of the syndicate undertook to arrange for the promotion of this company.

The vendors of the second estate gave an abatement of 5 per cent. on the purchase price of that estate, this sum (£1,750) *being stated in the form of a commission for introducing a purchaser but being claimed by the Appellant to be in reality a deduction from the purchase price. The syndicate's rights were transferred to a company for* £1,250. *This company promoted a further company to which the properties were sold.*

The syndicate's total receipts thus amounted to £3,000, *and the balance remaining after deduction of certain expenses was divided between the members.*

The Appellant was assessed to Income Tax, Schedule D, in respect of his share. The General Commissioners, on appeal, were of opinion that he acquired the property or interest in the property

(1) Reported (K.B.D. and C.A.) [1930] 1 K.B. 279 and (H.L.) [1930] A.C. 415.

in question with the sole object of turning it over again at a profit, and that he at no time had any intention of holding it as an investment. They confirmed the assessment.

The case was remitted to the General Commissioners, after its first hearing in the King's Bench Division, for a finding as to whether there was or was not a concern in the nature of trade. The Commissioners found that the transaction in question was not a concern in the nature of trade.

Held, *that there was no liability to assessment.*

CASE

Stated under Section 149 of the Income Tax Act, 1918, by the Commissioners for the General Purposes of the Income Tax Acts for the Division of Leath Ward of the County of Cumberland for the opinion of the King's Bench Division of the High Court of Justice.

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1. At a Meeting of the Commissioners for the General Purposes of the Income Tax Acts for the Division of Leath Ward of the County of Cumberland held at 21, King Street, Penrith, on the 12th April, 1927, the appeal of Mr. James Leeming (hereinafter called " the Appellant ") was heard against an assessment for the year ended 5th April, 1926, to Income Tax under Schedule D in the sum of £623 10*s.* on the ground that there was no liability under Case I or under Case VI of Schedule D.

2. The following facts were admitted or proved :—

In July, 1925, the Appellant was invited to join a syndicate for the acquisition of an option over a rubber estate called Saskpow Estate, near Ipoh, in the Federated Malay States, on the basis of his paying one-fourth of the cost of securing the option paying option money and the cost of reports on the property and receiving one-fourth of the profit made on the re-sale. The Appellant agreed by cablegram to join the proposed syndicate and to take one-fourth. The other three-fourths were held by Messrs. Brown Phillips & Stewart, Ipoh, Messrs. Macphail & Company Limited, Ipoh, and Mr. David Carruthers, Junior, Solicitor, Kilmarnock.

No formal agreement was entered into among the parties and practically the whole of the correspondence was conducted by cablegram. The negotiations in the East were conducted

by Messrs. Brown Phillips & Stewart and in the United Kingdom by Mr. Carruthers. Messrs. Brown Phillips & Stewart obtained a report and valuation on Saskpow Estate and on 10th August, 1925, entered into an option agreement between the owner of Saskpow Estate, Chin Ah Pow of Ipoh, on the one part and Mr. Carruthers on the other part. Although the option was taken in the name of Mr. Carruthers for convenience and was executed in Ipoh by his Attorney on his behalf, the agreement was entered into on behalf of the four participants on the footing above explained. This applies to all the subsequent negotiations, Mr. Carruthers acting throughout on his own behalf and as Trustee for the other members of the syndicate.

As it was considered that the Saskpow Estate which extends to 542 acres was too small for re-sale to a company for public flotation, it was agreed amongst those interested that Messrs. Brown Phillips & Stewart should endeavour to acquire other properties with a view to combination, but as this had not been accomplished by the end of August, the Appellant himself proposed to acquire the estate or alternatively to take a controlling interest in a private company formed to acquire the estate and this question was under consideration when negotiations were commenced for the acquisition of an immediately adjoining estate called Dusun Bertam, an option to acquire which was obtained on 16th September, 1925. The option to secure Saskpow Estate was at the price of $225,000 Straits dollars equal to £26,250 and the option to acquire the Dusun Bertam Estate was at the price of £35,000. It was thereupon decided to re-sell the two estates to a public company to be formed to acquire them, and Mr. Carruthers undertook to find people to promote a public company for this purpose. Considerable negotiations took place with the owners of Dusun Bertam Estate with a view to their reducing their purchase price and it was ultimately agreed that the Vendors would give an abatement on the price of £1,750 (*i.e.* 5 per cent.) which was stated in the form of a commission for introducing a purchaser, but it is claimed by the Appellant was in reality a deduction from the price.

On 9th October, 1925, Mr. Carruthers transferred the joint rights to the Oceanic Investment Company for a sum of £1,250 retaining also on behalf of himself and the three others interested the 5 per cent. allowance made on the price of Dusun Bertam Estate, and the Oceanic Investment Company thereupon promoted a Company called Ipoh Rubber Estate Limited to whom they resold the properties at the price paid by it, the Oceanic Investment Company. After deducting from

the £1,250 and £1,750 making together £3,000, the expenses incurred in connection with the sale of the estates and a fee to Messrs. Brown Phillips & Stewart for carrying out the acquisition of the properties, the net profit was divided in four and the Appellant's fourth share of it amounted to £623 9*s*. 4*d*. The Appellant was consulted for his interest from time to time by Mr. Carruthers, but took no active part in the negotiations for the purchase or sale of the rights. A copy of the accounts of the transactions are annexed hereto and form part of this case.

3. Mr. David Carruthers, Junior, Solicitor, Kilmarnock, for the Appellant, contended :—

(1) (*a*) That the sum in respect of which the assessment had been made was not a profit or gain within the meaning of the Income Tax Acts or an assessable profit at all.

(*b*) That the mere fact that the Appellant acquired the property or an interest in it for the purpose of its being re-sold at a profit did not bring the case within Case I, Schedule D, Income Tax Act, 1918.

(*c*) That there was no liability to tax unless the sum in question was a profit or gain arising from the carrying on by the Appellant of a trade or business and there was no trade or business.

(*d*) That the sum in question arose from a casual or isolated transaction and not from any systematic course of dealing.

(*e*) That there was in the transaction one sale only, and one sale does not constitute or make a trade.

(*f*) That Case VI did not apply and that an assessment made under it was invalid and erroneous.

(2) That the cases of *Ryall v. Hoare*, 8 T.C. 525, *Cooper* v. *Stubbs*, 10 T.C. 29, *Martin* v. *Lowry*,(1) [1927] A.C. 312, *Cape Brandy Syndicate* v. *Commissioners of Inland Revenue*,(2) [1921] 2 K.B. 403, *Californian Copper Syndicate* v. *Harris*, 5 T.C. 165, and *Commissioners of Inland Revenue* v. *Livingston and Others*,(3) (Court of Session 18th December, 1926) were all distinguishable and did not apply and that the sole question in this case was whether the transaction was carried out in the course of and as part of a trade or business:

(1) 11 T.C. 297. (2) 12 T.C. 358 (3) 11 T.C. 538.

4. His Majesty's Inspector of Taxes (Mr. R. H. B. Jones) on behalf of the Crown contended *inter alia* :—

(*a*) That the acquisition by the Appellant of the interests was, on the evidence, with the sole object of combining them together and selling again in order to make a profit thereby.

(*b*) That a profit was admittedly made by him.

(*c*) That such a profit was a revenue profit and not a capital profit.

(*d*) That the Appellant was assessable in respect of the profit so made by him.

(*e*) That the assessment was correctly made and should be confirmed (subject to any necessary adjustment of figures).

5. The Commissioners after due consideration of the facts and arguments submitted to them were of opinion that the Appellant acquired the property or interest in property in question with the sole object of turning it over again at a profit and that the Appellant at no time had any intention of holding the property or interest in property as an investment and reduced the assessment to £603 10*s*. to allow agreed deductions in respect of certain expenses incurred by the Appellant himself in the course of the transactions.

6. The Appellant having expressed dissatisfaction with the determination of the appeal as being erroneous in point of law and having duly required the Commissioners to state the case for the opinion of the King's Bench Division of the High Court of Justice, this Case is stated and signed accordingly.

(*Sgd.*) G. A. RIMINGTON,
,, T. FETHERSTONHAUGH,
,, WM. SALKELD,
,, J. SHARPE OSTLE,
,, JOHN NOBLE,

Commissioners of Income Tax for the Leath Ward of the County of Cumberland.

17th April, 1928.

SASKPOW AND DUSUN BERTAM ESTATES.

STATEMENT OF HOME TRANSACTIONS.

	£	s.	d.	$		£	s.	d.	$
To cost of Cables	66	2	8	566 86	By profit on sale of Saskpow	1,250	0	0	10,714 28
„ Travelling expenses	100	0	0	857 14	„ Commission on sale of Dusun Bertam ...	1,750	0	0	15,000
„ Special remuneration to Messrs. B. P. and Stewart	400	0	0	3,428 57					
„ Loss in exchange				47 30					
„ Net profits divisible as follows :—									
	£	s.	d.						
„ MacPhail & Co., Ltd.	608	9	4						
„ J. W. Leeming ...	608	9	4						
„ D. Carruthers ...	608	9	4						
„ Brown Phillips and Stewart	608	9	4	2,433 17 4					20,814 41
				£3,000 0 0					$25,714 28
						£3,000	0	0	$25,714 28

The case came before Rowlatt, *J.*, in the King's Bench Division on the 18th June, 1928, when it was remitted to the General Commissioners for further findings.

Mr. A. M. Bremner appeared as Counsel for the Appellant and the Solicitor-General (Sir F. Boyd Merriman, K.C.) and Mr. R. P. Hills for the Crown.

In the course of Mr. Bremner's reply :—

Rowlatt, J.—Mr. Bremner, I do not think I can decide against you, but I doubt if I can do any more than send this case back to the Commissioners.

Mr. Bremner.—May I say one word, my Lord?

Rowlatt, J.—Yes.

Mr. Bremner.—If there was any suggestion or evidence here of a trade or dealing or course of dealing sufficient to justify an assessment, then your Lordship might say—

Rowlatt, J.—I cannot say there is no evidence.

Mr. Bremner.—I say there is not a rag of evidence in support of it, and if your Lordship sends it back, there will still be no evidence.

Rowlatt, J.—I do not know whether, when you have got a finding clean against you, then you can argue anything on that, but you would not succeed before me on that case. I would not like to say there is no evidence. You have got these four gentlemen associating together, and then they get this and then they get the other, and then there is a considerable amount of negotiation and management, and so on, and then the property merges. I do not want to say anything about it except that I could not say there is no evidence.

Mr. Bremner.—If your Lordship takes that view—I have put my point.

JUDGMENT.

Rowlatt, J.—This case is one of those in which the question is whether the difference between the price for which an article is sold and the price at which it was bought, it being an isolated transaction, can be regarded as an annual profit and gain taxable to Income Tax.

It is said that an isolated pair of transactions by purchasing and selling, if they show a profit, does not show a profit in the nature of income liable to tax—it is an accretion of capital value. If you repeat it habitually it may become a trade that would be liable to tax. But even with regard to isolated transactions there are several cases in the books where they have been held to afford an income

(Rowlatt, J.)

which is taxable. Where an important and large asset is bought and it is subdivided and so made more marketable and the subdivision is advertised, and so on, as in the linen case (*Martin* v. *Lowry*, 11 T.C. 297), that is one thing; where you get a thing altered and treated and dealt with in an expert way and also subdivided, such as the *Cape Brandy Syndicate* case, 12 T.C. 358, that is another; and where you get a thing, although it is not altered or subdivided, yet it is in this sense, that it is thoroughly repaired and converted into a new and better article, like the steam drifter case (*The Commissioners of Inland Revenue* v. *Livingston*, 11 T.C. 538), that is another case.

Now, what is the dividing line between the case of a man buying and selling in an isolated transaction and buying and selling in a transaction which is also isolated but which can be said to yield a taxable income?

I venture to refer, with respect, to what the Lord President, Lord Clyde, said in the case of *The Commissioners of Inland Revenue* v. *Livingston*. He is dealing with this very point and he says this(1): " I think the test, which must be used to determine " whether a venture such as we are now considering is, or is not, " ' in the nature of trade ', is whether the operations involved in it " are of the same kind, and carried on in the same way, as those " which are characteristic of ordinary trading in the line of business " in which the venture was made ".

That covers all the cases. In the *Cape Brandy* case, what they had was in the ordinary line of business as brandy importers, and so on; what they had in the linen case was what is done in the ordinary case of merchants buying a thing, advertising it and so on; and what was done in the ship case was in the ordinary course of the business of ship dealers and repairers, and so on. That is what was done in all the cases, and I think it ought to be applied in this case; but I am not going to apply it; I am going to send it back to the Commissioners, for these reasons. I think it is quite clear that what the Commissioners have got to find is whether there is here a concern in the nature of trade. Now what they have found they say in these words (I am reading it short): That the property was acquired with the sole object of turning it over again at a profit and without any intention of holding the property as an investment. That describes what a man does if he buys a picture that he sees going cheap at Christie's, because he knows that in a month he will sell it again at Christie's.

That is not carrying on a trade. Those words will not do as a finding of carrying on a trade or anything else. What the Commissioners must do is to say, one way or the other, was this, I will not

(1) 11 T.C. at p. 542.

(Rowlatt, J.)

say carrying on a trade, but was it a speculation or an adventure in the nature of trade. I do not indicate which way it ought to be, but I commend the Commissioners to consider what took place in the nature of organising the speculation, maturing the property and disposing of the property, and when they have considered all that, to say whether they think it was an adventure in the nature of trade or not.

The Solicitor-General wishes to keep open the point—he will be able to make that good when the answer comes back—that you can get a profit resulting from the difference between an isolated sale and purchase into the scope of the Income Tax Act as an annual profit or gain without it being an adventure in the nature of trade, but by means of Case VI, the Court of Appeal, by a majority, having decided that although Case I is negatived, you can still have Case VI. So that in this case if they negative Case I, he will be still able, on the facts, as it was in *Cooper* v. *Stubbs*, 10 T.C. 29, to make it Case VI, though what element there can be in a case of that kind, of an isolated transaction of purchase and sale which would also bring it within Case VI and differentiate it from a naked purchase and sale to secure an accretion such as a private person might do, I do not for the moment understand.

The result is that the case must go back with this intimation to the Commissioners.

Mr. Bremner.—In *Pearn* v. *Miller*, 11 T.C. 610, when your Lordship sent the case back, you directed that the costs before your Lordship should be paid by the Crown.

Rowlatt, J.—Why?

Mr. Bremner.—Because on the case they were not entitled to succeed.

Rowlatt, J.—They have not got Case VI here. If the Crown had come and put this on Case VI, I should have sent it back and I think you would have been entitled to costs. But it is not for me to say and I cannot say that the Crown are wrong; they are possibly right; it is the fault of the Commissioners not giving a better finding. As the Crown came and argued Case VI and I said they were wrong, I sent it back because I did not want it to be too technical.

Mr. Bremner.—They have been reserving Case VI all the afternoon.

Rowlatt, J.—I know they have. If Case VI has that interpretation, the Solicitor-General will go about the country taxing people right and left.

The case was accordingly remitted to the General Commissioners who found " that the transaction in question was not a concern in " the nature of trade ".

SUPPLEMENTARY CASE.

Stated under Section 149 of the Income Tax Act, 1918, by the Commissioners for the General Purposes of the Income Tax Acts for the Division of Leath Ward of the County of Cumberland for the Opinion of the King's Bench Division of the High Court of Justice.

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1. Pursuant to the Order of the Court dated the 7th day of August, 1928, whereby the Court did order that the case stated by the said Commissioners in this matter be remitted to the said Commissioners for them to find whether there was or not a concern in the nature of trade, a meeting of the Commissioners was held at 21, King Street, Penrith, on the 4th day of September, 1928.

2. Mr. Carruthers for the Appellant contended that the transactions in question were not a concern in the nature of trade and referred to the case of *Pickford* v. *Quirke*, 13 T.C. 251.

3. On behalf of His Majesty's Inspector of Taxes it was contended that the transactions in question were in the nature of trade.

4. The Commissioners having considered the evidence and arguments submitted as to what took place in the nature of organising the speculation, maturing the property and disposing of the property and after due consideration of the facts and arguments submitted to them find that the transaction in question was not a concern in the nature of trade and they sign this Supplementary Case accordingly.

G. A. RIMINGTON,
T. FETHERSTONHAUGH (Col.),
WM. SALKELD,
J. SHARPE OSTLE,
} Commissioners of Income Tax for the Leath Ward of the County of Cumberland.

Dated the twentieth day of November, 1928.

The case came again before Rowlatt, *J.*, in the King's Bench Division on the 15th January, 1929, when judgment was given in favour of the Appellant with costs.

Mr. A. M. Bremner appeared as Counsel for the Appellant and the Solicitor-General (Sir F. Boyd Merriman, K.C.) and Mr. R. P. Hills for the Crown.

JUDGMENT.

Rowlatt, J.—The result is that I must abide by my own decision in *Pearn* v. *Miller*(1), and this appeal must be allowed. That is what it comes to.

The Solicitor-General.—Quite, my Lord, and my opposition is with regard to both points.

Rowlatt, J.—Yes; that both this case and *Pearn* v. *Miller* are wrong?

The Solicitor-General.—What I mean is that my opposition is open on both points, and in regard to Case I, I am entitled to your Lordship's judgment notwithstanding.

Rowlatt, J.—Certainly.

Mr. Bremner.—I ask your Lordship to allow the appeal with costs.

Rowlatt, J.—Yes.

The Crown having appealed against this decision, the case came before the Court of Appeal (Lord Hanworth, *M.R.*, and Lawrence and Slesser, *L.JJ.*) on the 19th, 20th, 21st and 24th June, 1929, and on the last date judgment was given unanimously against the Crown, with costs, confirming the decision of the Court below.

Sir F. Boyd Merriman, K.C. and Mr. R. P. Hills appeared as Counsel for the Crown and Mr. A. M. Latter, K.C. and Mr. A. M. Bremner for the Respondent.

JUDGMENT.

Lord Hanworth, M.R.—This is a case of some difficulty by reason of the course which it has taken and by reason of the findings that have been made by the Commissioners. Now I desire to call attention to the facts, for they are the foundation of the law which is applicable to them. The Respondent was one of four persons who joined together in what is sometimes called a syndicate and bought a property called Saskpow, which is near Ipoh in the Malay Peninsula; it consisted of about 542 acres, so was not large enough for resale to a public company to be floated. So these four persons acquired an option to acquire another property which was called Dusun Bertam, and for that property they were to pay a larger sum. In the first place, for Saskpow they were to pay £26,250; for this Dusun Bertam estate they were to pay £35,000. Now when they got those two properties they had got something which was worth the attention of a new company which would be formed. We find that in the latter part of paragraph 2 this is stated. Mr. Carruthers was the agent who acted for them, and it is said that " On the 9th October, 1925,

(1) 11 T.C. 610.

(Lord Hanworth, M.R.)

" Mr. Carruthers transferred the joint rights to the Oceanic " Investment Company "—which seems to be a mere intermediary —" for a sum of £1,250, retaining also on behalf of himself and the " three others interested the 5% allowance made on the " price of Dusun Bertam Estate." Then the Oceanic Investment Company promoted a company called the Ipoh Rubber Estate Company, Limited, and these two properties were ultimately taken over by the Ipoh Rubber Estate Company, Limited. Now through the instrumentality of Mr. Carruthers and of this Oceanic Investment Company the estates were resold, and had never been held by these four persons who had originally acquired first the one and then the other, but in the course of these transactions there had been a sum totalling £3,000 which had inured to them as a profit. It does not matter whether one looks at whether it was a deduction from price or whether it was five per cent. or how it arose, but still in the hands of the four persons there was this sum of £3,000. From that sum of £3,000, however, there had to be deducted the expenses incurred in connection with the sale of the estates, and a fee for Messrs. Brown, Phillips & Stewart for carrying out the acquisition of the properties. I have closely examined those statements and by computation discovered that those payments must have amounted to the sum of £506 2*s*. 8*d*. When those expenses and deductions had been made from the £3,000 there was then left a total sum of £2,493 17*s*. 4*d*., and as we are told in the Case, the profit divided into four left the Appellant's share one-fourth of that sum, namely, £623 9*s*. 4*d*. The Commissioners say this : " The Commissioners, " after due consideration of the facts and arguments submitted to " them, were of opinion that the Appellant acquired the property " or interest in property in question with the sole object of turning " it over again at a profit and that the Appellant at no time had " any intention of holding the property or interest in property as " an investment, and reduced the assessment to £603 10*s*. 0*d*. to " allow agreed deductions in respect of certain expenses incurred by " the Appellant himself in the course of the transactions." It is interesting that as an addendum to the Case there is a statement of the figures.

Now upon those facts I agree with the learned Judge that there was evidence of trading, and evidence of trading even though this one enterprise in relation to the two properties might be called an isolated transaction in the sense that these four persons were not constantly employing themselves in the buying and selling of properties; but having regard to the two properties, the expenses incurred and the negotiations involved, it appears to me that there was clear evidence for submission to the Commissioners of trading. Now the Commissioners' finding is not conclusive.

(Lord Hanworth, M.R.)

The matter then came before Mr. Justice Rowlatt and he gave judgment on the 18th June last year. In that judgment he made a number of relevant observations, pointing out that if there is an engagement in an isolated transaction which affords an accretion of capital value, that is not liable to tax; but if there are several transactions so that the isolation can no longer be insisted upon, then there may be a trade; and he gave the well known illustrations of a single transaction or a single enterprise which attracted tax, namely, the *Cape Brandy Syndicate*(1), *Martin* v. *Lowry*(2), and the *Livingston*(3) cases; but he said that in the present case he did not know what the Commissioners meant. He said of the finding which I have read(4): "That is not carrying on a trade. Those "words will not do as a finding of carrying on a trade or anything "else. What the Commissioners must do is to say, one way or the "other, was this, I will not say carrying on a trade, but was it a "speculation or an adventure in the nature of trade. I do not "indicate which way it ought to be, but I commend the Commis- "sioners to consider what took place in the nature of organising "the speculation, maturing the property and disposing of the "property, and when they have considered all that, to say whether "they think it was an adventure in the nature of trade or not." Now all those observations made by the learned Judge appear to me to be both relevant and right. The Commissioners' finding was insufficient. It was necessary for them to determine the facts and the summation of the facts, and Mr. Justice Rowlatt, in calling their attention to the several points which I have read out, indicated, I think, to them that it was quite possible for them to find that this was an adventure in the nature of trade. Now at the time when that judgment was given the Solicitor-General (as he then was), Sir Boyd Merriman, desired to keep open the case as to whether or not, even if it was not found to be a trade falling within Case I of Schedule D, he might be able to argue that it was a transaction which was taxable under Case VI of Schedule D, and that point was reserved to him. The case went back to the Commissioners, and on November 20th of last year they stated a Supplementary Case, and they say this: "The Commissioners "having considered the evidence and arguments submitted as to "what took place in the nature of organising the speculation, "maturing the property and disposing of the property"—those are the points to which Mr. Justice Rowlatt had invited their attention

(1) The Cape Brandy Syndicate *v.* The Commissioners of Inland Revenue, 12 T.C. 358.

(2) 11 T.C. 297.

(3) The Commissioners of Inland Revenue *v.* Livingston and others, 11 T.C. 538.

(4) See pages 340 and 341 *ante*.

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—" and after due consideration of the facts and arguments sub- " mitted to them, find that the transaction . . . . was not a " concern in the nature of trade "; and they signed this Supplementary Case accordingly. The matter then came before Mr. Justice Rowlatt again on the 15th January of this year, and he held that inasmuch as it had now been definitely found that there was not a trade or adventure in the nature of trade, the case could not fall under Case I of Schedule D, and he held that the Commissioners in imposing a tax at all, as they had done, upon this assessment of £603 10*s*. 0*d*. must have imposed a tax upon what could only be an accretion of capital value, for they had not once but twice considered the matter, and in their second judgment made it abundantly plain that there was no trading and no adventure in the nature of trade. What, then, could this operation be except the buying of a property and the selling of it and an accretion of capital? Now Mr. Justice Rowlatt, and I think this Court, might perhaps have taken the course of saying that having regard to what he had called attention to in this case, the particular facts, of organising the speculation, of maturing the property, and the diligence in discovering a second property to add to the first, and the disposing of the property, there ought to be and there must be a finding that it was an adventure in the nature of trade; but Mr. Justice Rowlatt withheld his hand from so doing and I think he was right, for however strongly one may feel as to the facts, the facts are for the decision of the Commissioners. It would make an inroad upon their sphere if one were to say in a case such as the present that there could only be one conclusion. The Commissioners are far better judges of these commercial transactions than the Courts, and although their attention has been drawn to what happened, they have in their final Case negatived anything in the nature of an adventure or trade. Now that being so, Mr. Justice Rowlatt then had the matter before him, and the Solicitor-General (as he then was) desired to keep open the point that still it was possible to intercept this profit under Case VI. Mr. Justice Rowlatt declined to accede to that view. He said this: " I must abide by my own decision in *Pearn* v. *Miller*, and " this appeal must be allowed." The meaning of that decision is this, that relying upon what had been said by him in *Pearn* v. *Miller*, he was so to speak bound by himself to hold that there was no liability to tax. Now the case of *Pearn* v. *Miller* is in 11 T.C. at page 611. That was a case in which there had been seven properties purchased and four had been sold; the man was a builder's foreman; and the question that arose there was whether or not there could be taxation made upon him under Case VI. Mr. Justice Rowlatt had said(1): " If it is desired to tax the difference

(1) 11 T.C. at p. 614.

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" between what a man has bought goods for, or property for, and " sold them for, you can only tax it, in my judgment, if you can " say that what he did was a trade or adventure or concern in the " nature of trade. I think you cannot get under Case VI a tax out " of appreciation of property; you have got to get it under Case I." Now that is perhaps too large a statement. I think that what Mr. Justice Rowlatt meant was that in a case where you have got either an adventure or trade or an appreciation of capital value, if you do not get it as a trade you cannot get it as an appreciation of capital value. Now in that I think that in the decision which Mr. Justice Rowlatt reached he was right. I think we have got to take the facts in this way. Inasmuch as after due deliberation the Commissioners have definitely held that what at first sight would seem to affect the matter does not alter their decision, namely, the way in which they have dealt with the property and found the second property and the like, that that was not a trade or adventure in the nature of a trade, one must put out of one's mind altogether a trade and Case I, and it appears to me by that negative of the Commissioners they must have meant that it was the accretion of a capital which had been put upon this property, and nothing else. But it is said that Case VI would apply. Now Case VI is found among the Cases which are embedded in Schedule D, and it must be remembered that Schedule D is dealing with annual profits or gains, and Case VI says " in respect of . . . . . annual profits or gains not " falling under " the purview of the other Schedules. Now I quite agree that for the purpose of " annual " you may have a transaction which takes place in the year and is not recurrent. The main ground upon which this appeal has been argued was that in *Cooper* v. *Stubbs* (1) it had been decided that you could use Case VI to apply to a profit, and even a profit obtained by an accretion of capital, and that the two judges, Lord Justice Warrington and Lord Justice Atkin, in that case, in contradistinction to the judgment which I had given, used Case VI for that very purpose. Now bear in mind the distinction that we have to deal with in this case, that there is no adventure at all in the nature of trade. *Cooper* v. *Stubbs* is reported in [1925] 2 K.B., and I think both the judgments which are relied upon clearly indicate that the learned Judges in dealing with Case VI were definitely holding that there must be some profits or gains in the nature of revenue as contradistinguished from a profit arising upon capital. Lord Justice Warrington says this on page 769(2): " The question " therefore is simply this, were these dealings and transactions " entered into with a view to producing, in the result, income or " revenue for the person who entered into them? If they were,

(1) 10 T.C. 29. (2) *Ibid.* at p. 52.

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" then in my opinion profits arising from them were annual gains " or profits within the meaning of paragraph 1 (*b*) of Schedule D. " On the findings of the Commissioners themselves they were " contracts entered into with a view to making a profit on a rise " or fall, as the case might be, in the market price of the contracts. " They extended over a considerable number of years. There " were large numbers of transactions in each of those years, from " which in some years the Appellant derived considerable revenue; " and for myself I cannot see what there is to exclude that " revenue from the tax which is charged under Schedule D. It " seems to me, therefore, that, in this case, whatever may be the " case under different facts, at all events the profits made by these " transactions are annual profits or gains, and must be assessable " to Income Tax." Observe, therefore, that he speaks of the profits arising from these dealings and transactions, and these dealings and transactions were the gambling transactions which had taken place over a long period of years; but those words of Lord Justice Warrington to my mind clearly show that he was not thinking of a case of capital accretion. Lord Justice Atkin makes the matter even plainer. He says this on page 775[1]: " It may " very well be that transactions may be so carried out as to be " nothing but in the nature of temporary investments repeated " several times over, and resulting in something in the nature of " capital accretions which could not be brought within the title " or meaning of ' annual profit or gain ', which to my mind must " mean something which is of the nature of revenue or income ". With those passages in mind I think it would be wrong to say that the decision of the Court in making use of Case VI was to say that where there were capital accretions, as in the present case, Case VI applied to them. In the present case, as I repeat, we have got necessarily by the finding of the Commissioners capital accretion, and there was evidence on which they could come to that conclusion. Now what is not trade is not taxed. Schedule D I think intends to attach tax to something which is a profit as distinguished from capital accretion. In view of the argument that has been presented to us I will just call attention to some of the cases which establish that quite clearly. Lord Young's words in *Assets Company, Limited* v. *Forbes*, 3 T.C. 542, at page 548, have often been referred to: " I should say that I have really no " doubt that any person, or any company making a trade of " purchasing and selling investments, will be liable in Income " Tax upon any profit which is made by that trade. It is quite an " intelligible business, just as intelligible as a trade consisting in " the purchase and sale of goods in the ordinary trade of a " merchant or shopkeeper. The trade is good or bad according

[1] 10 T.C. at p. 57.

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" as it is carried on profitably or not, in purchasing goods at the " trader's price and in selling them at a retail price, or wholesale " price, or larger price than that which he paid for them; and the " profit or loss on his business consists in selling them at a profit " or not. But it is another proposition altogether that, where " that is not a trade, a gain or loss upon the purchase and re-sale " of property comes within the meaning of the Income Tax Acts." In the case of *Hudson's Bay Company* v. *Stevens*, where there was a trading company which held a lot of land but sold a part of the land, it was held to be selling its capital and not trading in the land. That case is reported at 5 T.C. 424. Also at 5 T.C. 658 there is the case of *Tebrau Rubber Syndicate* v. *Farmer* which I will refer to for one moment. Lord Salvesen said on page 665 : " . . . . no inference can be drawn from the fact that another " estate was subsequently purchased, the price of which, taken " along with the amount spent on development, substantially " exhausted the assets at the disposal of the Syndicate. In any " event I cannot find sufficient evidence from this single trans- " action, which at the same time brought the Syndicate to an end, " that the profits so made are to be treated as income or gains " made by trade ".

Those cases show that some limitation has to be placed upon Case VI. It cannot be that it ought to be treated as an addendum to the Income Tax Act, a separate section by itself, quite independent of Section 1, quite independent of all the Schedules and to be used outside the Schedules for the purpose of taxing, the manner of which is otherwise so carefully de-limited in the Schedules and their several Rules. Now some limitation must be put upon Case VI, just as it was held in the case to which we had to refer the other day, *Foley* v. *Fletcher*(1), or in other cases, that you must not take the words, or take the section and deal with it independently from its setting. The case to which our attention was drawn in particular on this point was the case of *The Attorney-General* v. *Black*(2), 6 Ex. 308, in which Lord Blackburn, dealing with this point and the wide net which is spread by Schedule D, says this : " The question then is, whether " this income does come within the description of ' property and " ' profit '; and . . . . I have come to the conclusion that it does. " The mention of ' rights of markets and fairs ' and ' tolls ' in " Schedule A, No. III, shows the intention of the Legislature to " include in the general sweeping words of Schedule D sources " of income similar to these." With great respect to Lord Blackburn, it appears to me that he has expressed there what is a cardinal feature of the Income Tax Acts. There must be a source.

(1) 3 H. & N. 769. (2) 1 T.C. 52.

(Lord Hanworth, M.R.)

Now it is said in the present case that there is a source because there were these properties, the buying of them and the selling of them, but all that is swept away when trade is negatived and you have got nothing but an accretion of capital. Is that a source? Now in *Colquhoun* v. *Brooks* (I refer again to what Lord Blackburn has said) at page 516(1) Lord Macnaghten in passages that I will not read fully on that page says this(2): " I use the expression " ' source of income ', because it is as a source of income that the " Act contemplates and deals with property, and everything else " that a person chargeable under the Act may have, and the Act " itself, in Section 52, uses the expression ' sources chargeable " ' under the Act ' ". The importance of that was reaffirmed in the case of *Brown* v. *The National Provident Institution*(3), [1921] 2 A.C. 222, Lord Haldane there pointing out in a number of passages the importance of there being a source, and that if there is not a source then there is no possibility of taxation. Perhaps Lord Atkinson puts that point best in concert with all the other noble Lords, on page 246 where he says(4): " It was a tax assessed, " levied, and collected yearly on the profits and gains arising and " accruing during the year in which it was collected from one or " more of the sources named. If this be so, as in my opinion it " clearly is, it necessarily follows that if in the year of assessment " a source of income should dry up and no income accrue, then " no tax could be levied or collected in respect of a non-existing " income." But the passages in the case relying upon there being a source of income are too many for me to refer to them individually.

In the case of *Grainger* v. *Maxwell*(5), [1926] 1 K.B. 430 at page 439, I referred to what had been said in the previous cases. I refer to the importance again of there being a source, following the case of *Brown* to which I have referred. Finally, I think Mr. Justice Rowlatt, whose experience in these cases is so large, in the case of *Ryall* v. *Hoare*(6) puts it quite accurately as showing what must be the limitation; but before I refer to that case I will say a word or two more. It is said that if you are looking for a source you can have a source, one which would be sufficient for Case VI if you cannot have one that brings the profits within Case I. You may say, as Sir Boyd Merriman and Mr. Hills have done, that it was a scheme for making a profit. Now I am not satisfied at all that that is a good test. A scheme is a sort of metaphorical term to which I cannot attach any precise meaning. We have to bear in mind what I think Mr. Justice Rowlatt has rightly said in the case of *Ryall* v. *Hoare*, [1923] 2 K.B. 447 at

(1) 14 App. Cas. at p. 516. (2) 2 T.C. 490, at p. 508. (3) 8 T.C. 57.
(4) 8 T.C. at p. 91. (5) 10 T.C. 139. (6) 8 T.C. 521.

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page 454(1): " Two kinds of emolument may be excluded from " Case VI. First, anything in the nature of capital accretion is " excluded as being outside the scope and meaning of these Acts " confirmed by the usage of a century. For this reason, a casual " profit made on an isolated purchase and sale, unless merged " with similar transactions in the carrying on of a trade or business " is not liable to tax. ' Profits or gains ' in Case VI refer to the " interest or fruit as opposed to the principal or root of the tree." Now that seems to me quite sound, particularly illustrated by the cases on which reliance was placed by the Counsel for the Appellant. Take the case of *Malcolm* v. *Lockhart*(2). That was the case where the stallion not only stood at the farm but in the ordinary course was walked round in the breeding season; but the Lord President said there that they applied, or thought the Case that applied to the profits of a stallion was Case I, and the Lord President says(3): " I " accordingly think that the First Case applies directly." Lord Johnston said, 7 T.C. at page 104: " That would appear compre- " hensive enough to cover the Appellant's adventure in the service " for profit or gain of other owners' mares. . . . . I do not think " that recourse to this Case "—that is Case VI—" is required for " the inclusion under the First Case is clear." Lord Mackenzie says(4): " It appears to me that it falls directly under the First " Case of Schedule D ". So I should have thought, and I confess myself that I should have thought it quite unnecessary to refer to Case VI in that case at all. When the judgment came to be given by Lord Buckmaster, he gave it, holding that the case was one of fact and he makes no distinction between Case I and Case VI. Then we come to the case of *Carlisle and Silloth Golf Club* v. *Smith*(5), [1913] 3 K.B. 75. There it was an appeal from Mr. Justice Hamilton, who held that the club was carrying on an enter- prise which was beyond the scope of the ordinary functions of the club, and as to which separate accounts might be kept so as to ascertain whether there were any profits, and that any profits derived from the visitors' green fees were therefore taxable under Schedule D of the Income Tax Act, 1842, Case I or Case VI. Now in the judgment Lord Justice Buckley says on page 81(6): " If other conditions therefore are satisfied the Club are, I think, " assessable under the First Rule "—he means the First Case— " of Schedule D. But as I have already said, it is, I think, " unnecessary to determine whether that is so or not, for if it were " not a ' concern in the nature of trade ', yet, other things being " satisfied, the Club would be assessable under the Sixth Rule." The importance of that reservation, "other things being satisfied", is very great. There are two good illustrations of what can be brought

(1) 8 T.C. at p. 525. (2) 7 T.C. 99. (3) *Ibid.* at p. 102.
(4) 7 T.C. at p. 105. (5) 6 T.C. 48 and 198. (6) *Ibid.* at p. 199.

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under Case VI and where Case VI is of importance; one is in the case of *Coman* v. *The Governors of the Rotunda Hospital* where, in his well-known judgment, Lord Birkenhead shows that you may have to go to Case VI in matters which fall properly within Schedule D. He says on page 13(1) : " The question is whether the " utilisation of these rooms and the provision of facilities and " services in the way set out in the Case, yielding, as it does, a " regular annual income to the Respondents above the letting value " as a property and over and above the profit assessable to " Schedule A, amounts either to the carrying on of a trade or " business under Case I of Schedule D, or to a profitable activity " which is assessable under Case VI of that Schedule. . . . . It " is true that the Special Commissioners have not expressly stated " whether they found that Case I or Case VI applied, but having " regard to the contention of the Surveyor of Taxes, as set out in " paragraph 6 of the Case Stated, I think it is clear that they were " of opinion that the Respondents were in fact carrying on a " business, and intended so to hold. The point however is not of " great moment, as in my opinion one or other of these Cases " applies, and the assessments if not valid under Case I could in " any case be supported under Case VI ", and he gives illustrations of what does fall under Case VI.

Now in my view a close examination of all these cases brings us to this point, that although it is quite unnecessary to lay down any rigid rule which is to circumscribe Case VI in contradistinction to Case I, although you may have cases which fall properly within Schedule D and in respect of which Case VI may be usefully applied, yet if you are to apply Case VI it must be in respect of something to which Schedule D applies; it must be something in the nature of profits or gains in contradistinction to capital, and I think that the words which are used by Lord Justice Atkin in the case which I have already referred to, *Cooper* v. *Stubbs*, are quite useful, for he made it plain there that when he was using Case VI he was using something which was in the nature of revenue or income as opposed to capital. Now I do not desire to go further at all than that; that seems to be sufficient for this case. It appears to me therefore that in the present case, in which we have anything in the nature of an adventure of trade negatived, and the Commissioners have applied themselves to the fact that there were two properties purchased and they were the business side of it, and yet negative trade, we can hold, and only hold, that they meant to say that this was a matter on which there had been a capital accretion and that that capital accretion, whatever else might fall within Case VI, does not fall within Case VI, and it is not taxable

(1) [1921] 1 A.C. 1, at p. 13; 7 T.C. 517, at p. 579.

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for the reason that it is not a source; and by reason of the interpretation given by Lord Justice Atkin in *Cooper* v. *Stubbs* and the summary of it to which I have referred which Mr. Justice Rowlatt gives in *Ryall* v. *Hoare*, it appears to me that this single profit of £603 10*s*. cannot form the subject of an assessment.

For these reasons I am of opinion that the appeal fails and must be dismissed, with costs.

Lawrence, L.J.—I agree, and will only add a few words of my own.

In the original Case the Commissioners found that the Respondent acquired the property or an interest in the property in question with the sole object of turning it over again at a profit, and that the Respondent at no time had any intention of holding the property or interest in the property as an investment. The learned Judge, and I think rightly, considered that that finding left it doubtful whether the Commissioners had intended to find that the transaction was one of trade, as defined by the Act. Now, the definition of " trade " in the Act in Section 237 is this : " ' Trade ' " includes every trade, manufacture, adventure or concern in the " nature of trade ". The learned Judge, therefore, sent back the Case to the Commissioners, and in the Supplemental Case the Commissioners found that the transaction in question was not a concern in the nature of trade. Sir Boyd Merriman admitted that, in view of the decision in *Cooper* v. *Stubbs*(1) he could not in this Court contend that that finding was not a finding of fact, and that therefore he could not ask this Court to disturb that finding, though he desired to reserve the point if the case went to the House of Lords. Now, the finding of the Commissioners having stripped the transaction in question of all the attributes of an adventure in the nature of trade, Mr. Justice Rowlatt came to the conclusion that all that was left was an isolated transaction of purchase and resale of an interest in real estate or property, and that the profit resulting from such an isolated transaction was a capital profit and did not fall within the words of Case VI—" any annual profits or gains."

On the whole, though not without some hesitation, I have come to the conclusion that the learned Judge was right. Speaking for myself, I have the greatest difficulty in seeing how an isolated transaction of this kind, if it be not an adventure in the nature of trade, can be a transaction *ejusdem generis* with such an adventure and therefore fall within Case VI. All the elements which would go to make such a transaction an adventure in the nature of trade would, in my opinion, be required to make it a transaction *ejusdem*

(1) 10 T.C. 29.

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generis with such an adventure. It seems to me that in the case of an isolated transaction of purchase and resale of property there is really no middle course open. It is either an adventure in the nature of trade, or else it is simply a case of sale and resale of property. If in such transaction as we have here the idea of an adventure in the nature of trade is negatived, I find it difficult to visualise any source of income, or to appreciate how such a transaction can properly be said to have been entered into for the purpose of producing income or revenue.

Now, there are many cases, of course, in which a case not falling within Case I may well fall within Case VI; *Cooper* v. *Stubbs* furnishes an example; but there are many others. In all of those cases there is some element analogous to trade, and the distinction which seems to me to exist between those cases and the present one is that here we have an isolated transaction of a purchase and resale, and not a transaction or a series of transactions which could properly be said to have been entered into for the purpose of producing revenue and income.

For these reasons, although I fully realise that the question is a difficult one, I have come to the conclusion that the learned Judge was right and that this appeal fails.

Slesser, L.J.—I agree. Although this appeal has been argued at great length, in the end it really resolves itself into a question of what have the Commissioners, who have twice considered this matter, actually found. As has been pointed out by my Lord, in the event when the Case was sent back to them they found, in terms, that this was not a concern in the nature of trade, and, whatever ambiguity there might have been in their finding on the first occasion that the transaction was carried on with the sole object of turning it over again at a profit, those words must now be read in conjunction with the express finding that this transaction was not carried on as a concern in the nature of trade. In those circumstances, once it is established that there is nothing here in the nature of trade, then the question arises, what is really the nature of the transaction, and as my Lord has said, and I agree, it must come to this, that it is in effect and in reality a capital accretion; there is no taxable source of income or revenue to come within Schedule D at all. I adopt the words of Mr. Justice Rowlatt in *Ryall* v. *Hoare*(1) where he distinguishes between the fruit which might be caught under Case VI and the root which would come within Schedule D as something taxable. Here, as it seems to me, we have no root from which this fruit may come. As was said in the *Hudson's Bay* case(2) by the Master of the

(1) 8 T.C. 521.
(2) The Hudson's Bay Company, Ltd. v. Stevens, 5 T.C. 424.

(Slesser, L.J.)

Rolls, the landowner may lay out part of his estate with roads and sewers and sell it in lots for building, but he does it as owner, and not as a land speculator. Here it appears upon the finding that there was no concern in the nature of trade. What was done here was done not in the nature of trade, but as owner, and not by way of profitable income. I think that the findings of the Commissioners really determine the matter, and I agree that the appeal must be dismissed.

The Crown having appealed against this decision, the case came before the House of Lords (Lord Buckmaster, Viscount Dunedin and Lords Warrington of Clyffe, Thankerton and Macmillan) on the 18th February, 1930, when judgment was reserved. On the 18th March, 1930, judgment was given unanimously against the Crown, with costs, confirming the decision of the Court below.

The Attorney-General (Sir W. A. Jowitt, K.C.) and Mr. R. P. Hills appeared as Counsel for the Crown, and Mr. A. M. Latter, K.C., and Mr. A. M. Bremner for the Respondent.

JUDGMENT.

Lord Buckmaster.—My Lords, to examine the question raised on this appeal it is necessary to follow closely its history before the Commissioners and Mr. Justice Rowlatt. The following is a summary of the facts as stated in the Special Case. Mr. James Leeming, the Respondent, joined with a limited company, a business firm, and a solicitor named Carruthers in acquiring two options to purchase certain rubber estates in Malay. The option on the first estate and presumably on both, though it is not so stated, was taken in the name of Mr. Carruthers but on behalf of all four participants.

It appears, though again it is not definitely found, that the intention throughout was to acquire the rights for the purpose of resale to a company for public flotation, and to carry this scheme into effect Mr. Carruthers transferred the joint rights to a company known as the Oceanic Investment Company, who thereupon promoted another company called Ipoh Rubber Estate Limited, to whom the properties were resold. The transaction resulted in a profit, of which the Respondent's share was £623, and in respect of this sum he was assessed to Income Tax. Upon appeal to the Commissioners this assessment was reduced to £608 10*s.* 0*d.*, and so reduced was confirmed. Upon appeal from the Commissioners to Mr. Justice Rowlatt, he was of opinion that the Commissioners had not found sufficient facts to enable him to decide the question, and he ordered that the case be remitted to them to find whether there was or was not a concern in the nature of trade.

(Lord Buckmaster.)

The learned judge was clearly right in the course he took. There were no findings whatever in the Special Case to enable the Court to know whether the Respondent was a company promoter and whether this transaction stood alone, or was one of a series of transactions capable of being linked together so as to constitute a business or to produce income. Nor was the original purpose of the transaction ever set out—it was only to be inferred by the subsequent dealings.

In obedience to the order of the learned judge the Commissioners in a supplementary case found that the transaction " was " not a concern in the nature of a trade " and thereupon Mr. Justice Rowlatt following, as he stated, his own decision in *Pearn* v. *Miller*, 11 T.C. 610, allowed the appeal. His judgment was affirmed by the Court of Appeal from whom the Crown has brought the case before this House.

The decision necessarily depends upon the construction of certain Sections in the Income Tax Act. These Sections are few in number and short in terms, but none the less they are not easy to construe.

Section 1 of the Act is well known; it provides that Income Tax shall be charged " in respect of all property, profits, or gains " described or comprised in the schedules marked A, B, C, D, " and E and contained in the First Schedule to this Act and in " accordance with the Rules respectively applicable to those " Schedules ".

This, which is the governing Section of the Act, needs no comment beyond that which has often been made before, namely that the tax is an income tax and charged on income as distinct from capital. Schedule D, the only one suggested as applicable to the present case, opens by saying the tax is charged on " The " annual profits or gains arising or accruing " to certain named classes of persons " from any trade, profession, employment, or " vocation . . . . . within the United Kingdom ", and " All " interest of money, annuities and other annual profits or gains " not otherwise charged and " not specially exempted from tax ". By Sub-section 2 it is provided that " Tax under this Schedule " shall be charged under the following cases respectively; that is to " say,—Case I.—Tax in respect of any trade not contained in any " other Schedule; Case II.—Tax in respect of any profession, " employment, or vocation not contained in any other Schedule; " Case III.—Tax in respect of profits of an uncertain value and " of other income described in the rules applicable to this Case; " Case IV.—Tax in respect of income arising from securities out " of the United Kingdom, except such income as is charged under " Schedule C; Case V.—Tax in respect of income arising from " possessions out of the United Kingdom; Case VI.—Tax in respect

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" of any annual profits or gains not falling under any of the fore-
" going Cases, and not charged by virtue of any other Schedule;
" and subject to and in accordance with the rules applicable to
" the said Cases respectively." Rules applicable to Case III state that " The tax shall extend to—any interest of money, whether
" yearly or otherwise, ... or other annual payment " and to
" all discounts ", while Section 237 declares that " ' Trade '
" includes every trade, manufacture, adventure or concern in the
" nature of trade ".

It is necessary to set out these familiar provisions in order to give full weight to the contention of the Crown. The supplementary finding of the Commissioners excludes Case I of Rule 2, but that leaves open the possibility of the claim being included under Case VI, and it is under that Case that it is sought to establish the appeal. The word " annual ", it is said, must be either disregarded or so limited as to enable a solitary isolated transaction such as that in the present case to be within the phrase. It is unnecessary to consider what is the right interpretation of this word, but I am not prepared to disregard a word designed to qualify the burden of taxation and I cannot see how on any interpretation of its meaning it can cover the present case. The words of the Rule relating to interest on which the Attorney-General relied as showing that any receipt under that head for any period was taxable do not seem to me to advance the argument; they apply to a totally different case. All interest is expressly taxed by the words of the Rule, and discount is in reality only interest in another form and under another name. Further, Case III itself contemplates in accordance with the scheme of the Act that it is as " income " that the moneys are made liable.

This brings the argument back to the original position. Can the profits made in this case be described as income? Were the Respondent a company promoter or were his business associated with purchase and sale of estates, wholly different considerations would apply, but this is negatived: the transaction in this case stands isolated and alone. It is to my mind, in the circumstances, purely an affair of capital. I can see no difference between it and what might have happened had the Respondent bought shares in two companies which were going to be amalgamated, and then sold equivalent shares in the amalgamated company at a profit; an accretion to capital does not become income merely because the original capital was invested in the hope and expectation that it would rise in value; if it does so rise, its realisation does not make it income. If the Crown's contention were sound the same result would have arisen had the Respondent taken shares in the company instead of cash, even though unrealised.

(Lord Buckmaster.)

No authority could be quoted in support of the appeal; the nearest was the case of *Cooper* v. *Stubbs*(1), [1925] 2 K.B. 753, and its distance away, were such computation possible, could be measured in miles. Although the Commissioners there found that the man sought to be charged did not carry on a trade his profits were none the less held liable to tax under Rule 2, Case VI. The reasons for this conclusion are clearly stated by Lord Warrington, who was then sitting in the Court of Appeal, in these words (see page 769): "The question therefore is simply this, were these "dealings and transactions entered into with a view to producing, "in the result, income or revenue for the person who entered into "them? If they were, then in my opinion profits arising from "them were annual gains or profits within the meaning of para- "graph 1 (*b*) of Schedule D. On the findings of the Commissioners "themselves they were contracts entered into with a view to "making a profit on a rise or fall, as the case might be, in the "market price of the contracts. They extended over a considerable "number of years. There were large numbers of transactions in "each of those years, from which in some years the appellant "derived considerable revenue; and for myself I cannot see what "there is to exclude that revenue from the tax which is charged "under Sch. D. It seems to me, therefore, that, in this case, "whatever may be the case under different facts, at all events the "profits made by these transactions are annual profits or gains, "and must be assessable to income tax."

No one of the conditions there mentioned applies here.

Lord Justice Lawrence appears to me to have accurately stated the difficulty in the Appellant's way in the following words(2):— "It seems to me in the case of an isolated transaction of purchase "and resale of property there is really no middle course open. "It is either an adventure in the nature of trade, or else it is "simply a case of sale and resale of property."

To that proposition I can see no adequate answer and for that reason and those I have given, I think this appeal must fail.

Viscount Dunedin.—My Lords, this case is a striking example of the class of appeal in Income Tax cases, which on a recent occasion I felt bound to deprecate. There is no new question of law involved in it, merely the application of old principles to the particular facts. There has been an unanimous judgment of the judge of first instance and of the three judges of the Court of Appeal against the Crown, and the sum at stake is £130 12*s.* 0*d.* The case itself is one of the simplest. The Respondent, with three

(1) 10 T. C. 29. (2) See page 354 *ante*.

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other persons, went into a speculation of buying a piece of real property and reselling it. It was, as far as he was concerned, an isolated transaction, and when I say isolated I mean that there was no evidence to show that the Respondent had done anything like this before, or was likely to do it again. The Commissioners had found generally that he must be taxed on the profit which arose to him out of the transaction, amounting to £630, but had not specified whether they thought the case fell under Case I or Case VI of Schedule D. Mr. Justice Rowlatt, before whom the case came, was particularly careful in the matter. He returned the case to the Commissioners to specify whether they considered there was or was not a concern in the nature of trade. Doubtless he remembered his own dictum in *Ryall* v. *Hoare*(1), [1923] 2 K.B. at page 454 " a casual profit made on an isolated purchase and " sale, unless merged with similar transactions in the carrying on " of a trade or business is not liable to tax " and thought there might have been circumstances within the knowledge of the Commissioners which had not been stated in the Case. They returned answer that there was not. That took the matter out of the provisions of Case I. The Counsel for the Crown then said that the case fell within Case VI. Now, Case VI sweeps up all sorts of annual profits and gains which have not been included in the other five heads, but it has been settled again and again that that does not mean that anything that is a profit or gain falls to be taxed. Case VI necessarily refers to the words of Schedule D, that is to say it must be a case of annual profits and gains, and those words again are ruled by the first Section of the Act which says that when an Act enacts that Income Tax shall be charged for any year at any rate, the tax at that rate shall be charged in respect of the profits and gains according to the Schedules.

The limitations of the words " profits and gains " were pointed out by Lord Blackburn long ago in the case of the *Attorney-General* v. *Black*(2), L.R. 6 Ex. 308, when he said that profits and gains in Case VI must mean profits and gains *ejusdem generis* with the profits and gains specified in the preceding five cases. And then there came the memorable and often quoted words of Lord Macnaghten in the *London County Council*(3) case, when he begged to remind people " that income tax was a tax on income." The only question, therefore, here was—Was there in any sense income? It is quite true that, as the Counsel for the Crown said, the word " annual " does not mean something that recurs every year, but none the less the receipt must be of the nature of income. Lord Justice Lawrence put the matter very succinctly when he

(1) 8 T. C. 521 at p.525. (2) 1 T. C. 52. (3) 4 T. C. 265 at p. 293.

(Viscount Dunedin.)

said(1): "It seems to me that in the case of an isolated trans- "action of purchase and resale of property there is really no middle "course open. It is either an adventure in the nature of trade, "or else it is simply a case of sale and resale of property." It was sought to assail this dictum by quoting *Cooper* v. *Stubbs*(2), [1925] 2 K.B. 753, where there was a finding, as here, that no trade had been carried on and yet the tax was imposed. But the answer is simple; the whole point of *Cooper* v. *Stubbs* was that the transaction was not an isolated transaction. Lord Justice Warrington says that the transactions extended over a considerable period of years, and Lord Justice Atkin says that an annual profit or gain must be something which is of the nature of revenue or income, and he points out that the transactions in that case had been going on for eight years running. The last argument of the Counsel for the Crown was that there was a finding that the Respondent never meant to hold the land bought as an investment. The fact that a man does not mean to hold an investment may be an item of evidence tending to show whether he is carrying on a trade or concern in the nature of trade in respect of his investments but *per se* it leads to no conclusion whatever.

I therefore concur in the motion made and beg to add that it is an exceedingly simple case.

Lord Warrington of Clyffe.—My Lords, this is an appeal by the Crown from an Order of the Court of Appeal affirming an Order of Mr. Justice Rowlatt, whereby he discharged an assessment to Income Tax for the year ended the 5th April, 1926, made against the Respondent in respect of a sum of £603 10*s*. The assessment was made under Schedule D, the Crown contending that the Respondent was liable either under Case I or Case VI.

In August, 1925, the Respondent and certain other persons acquired an option over a certain rubber estate at Ipoh with a view to the subsequent transfer thereof at a profit to a company to be formed for the purpose. In September of the same year the Respondent and the same persons acquired an option over an adjoining estate with the object of enlarging the area of property at their disposal. They subsequently transferred their rights over both estates to a company called the Ipoh Rubber Estate, Ltd., making on the whole transaction a profit of which the share of the Respondent was the sum of £603 10*s*., hereinbefore mentioned.

The material provisions of the Income Tax Act, 1918, are as follows:—"Schedule D. 1. Tax under this Schedule shall be "charged in respect of—(*a*) the annual profits or gains arising "or accruing— . . . . (ii) to any person residing in the United

(1) See page 354 *ante*. (2) 10 T.C. 29.

(Lord Warrington of Clyffe.)

" Kingdom from any trade, profession, employment, or vocation, " whether the same be respectively carried on in the United " Kingdom or elsewhere . . . . (*b*) All interest of money, annuities, " and other annual profits or gains not charged under Schedule A, " B, C or E and not specially exempted from tax . . . . 2. Tax " under this Schedule shall be charged under the following cases " respectively; that is to say,—Case 1.—Tax in respect of any trade " not contained in any other Schedule; . . . . Case VI.—Tax in " respect of any annual profits or gains not falling under any of " the foregoing Cases, and not charged by virtue of any other " Schedule; "

" Trade " is defined as including " every trade, manufacture, " adventure or concern in the nature of trade."

The Commissioners being required to state a Case did so on the 17th April, 1928, and expressed their conclusion in the following terms: " That the Appellant " (the present Respondent) " acquired the property or interest in property in question with the " sole object of turning it over again at a profit and that the " Appellant at no time had any intention of holding the property " or interest in property as an investment " and made the assessment above mentioned.

The only finding of fact was that above stated.

On the matter coming before Mr. Justice Rowlatt he made an Order that the case be remitted to the Commissioners for them to find whether there was or not a concern in the nature of trade. By the Supplementary Case, stated in pursuance of the said Order, the Commissioners found that the transaction in question was not a concern in the nature of trade, but they did not alter the assessment.

On the Supplementary Case coming before him, Mr. Justice Rowlatt discharged the assessment. The finding of the Commissioners excluded the profit in question from Case I, and in the learned Judge's opinion it was a mere accretion to capital and was not an annual profit or gain under Case VI. On appeal to the Court of Appeal, consisting of the Master of the Rolls and Lord Justice Lawrence and Lord Justice Slesser, the appeal was dismissed on substantially the same grounds. In this House the Crown did not dispute that the findings of the Commissioners on the issues of fact are binding, but insisted that the assessment was properly made under Case VI.

There have been a great many cases in which similar questions have arisen, but I think it is quite unnecessary to discuss them. I think it is settled that the mere fact that the profit arises in the course of one calendar year only and does not recur is not sufficient to exclude it from the category of annual profits. The nature of

(Lord Warrington of Clyffe.)

the profit must in each case be considered. If it arises from a trade within the definition of the Act no difficulty occurs. If it does not, I know of no better criterion than that adopted by the majority of the Court of Appeal in *Cooper* v. *Stubbs*, [1925] 2 K.B. 753, and by Lord Justice Lawrence in the present case. This is expressed by Lord Justice Atkin(1) in *Cooper* v. *Stubbs, ubi supra*, as follows : " Annual profit or gain is to my mind something which is of the " nature of revenue or income ".

Here we have a case of the acquisition of an item of property and a profit made by the transfer thereof to another. In this I can find nothing but a profit arising from an accretion in value of the item of property in question and the realisation of such enhanced value. There is in this nothing in the nature of revenue or income. The fact that the parties intended from the first to make a profit if they could does not in my opinion affect the question we have to determine. The case seems to me to be a clear one against the Crown and I agree that the appeal fails and should be dismissed.

Lord Thankerton.—My Lords, the Respondent was one of a syndicate of four who in August, 1925, secured an option of purchase —apparently without any payment for the option—of a rubber estate in the Federated Malay States at the price of £26,000; their object was the promotion of a company to whom the estate should be sold at a profit to the syndicate. Finding the estate too small for their purpose, they acquired in September, 1925, an option of purchase on a neighbouring estate, again apparently without any payment, at the price of £35,000. The company was thereafter formed and the options transferred to it. The result of the syndicate's operations was a net profit, after deduction of expenses, of which the Respondent's share was £603 10*s*., which is claimed by the Crown as chargeable to Income Tax as being profits or gains comprised in Schedule D of the Income Tax Act, 1918, that is to say, either profits or gains from a trade, adventure, or concern in the nature of trade within the category of Case I of Schedule D, or other profits or gains within the category of Case VI of Schedule D.

The General Commissioners upheld the assessment, but their finding was inconclusive as to whether the case fell within Case I or Case VI of Schedule D, and Mr. Justice Rowlatt, before whom the Respondent's appeal came, remitted the Stated Case to the Commissioners for them " to find whether there was or not a con- " cern in the nature of trade." The Commissioners then made a supplementary finding as follows, viz. : " The Commissioners " having considered the evidence and arguments submitted as to

(1) 10 T. C. 29 at p. 57.

(Lord Thankerton.)

" what took place in the nature of organising the speculation, " maturing the property and disposing of the property and after due " consideration of the facts and arguments submitted to them find " that the transaction in question was not a concern in the nature " of trade ".

I agree with the view taken in both the Courts below that the finding was a finding in fact which excludes the application of Case I of Schedule D.

There remains Case VI, which brings into charge " any " annual profits or gains not falling under any of the foregoing " Cases, and not charged by virtue of any other Schedule ".

It is now settled that annual profits and gains taxable under Schedule D may be satisfied by profits falling within the year of charge and accruing during a period of less than a year; *see Martin* v. *Lowry*(1), [1927] A.C. 312, in which the opinion of Mr. Justice Rowlatt on this point in *Ryall* v. *Hoare*(2), [1923] 2 K.B. 447, was approved. In that case Mr. Justice Rowlatt said(3), at page 455 : " The word ' annual ' here can only mean ' calculated in any one " ' year,' and ' annual profits or gains ' mean ' profits or gains " ' in any one year or in any year as the succession of years comes " ' round.' " While this is so, the isolated nature of a transaction, as opposed to a series of transactions of the same kind, will have a material bearing not only on the question as to whether it was a " trade, adventure or concern in the nature of trade," but also as to whether the profit arising therefrom was an accretion of capital or " profits or gains " within the meaning of the Income Tax Act, which connotes the idea of revenue or income.

In the present case two options for the purchase of real estate were acquired and disposed of within two months; the estates themselves were not taken up or dealt with in any way. This was a simple case of purchase and sale, once the Commissioners had decided that the transaction was not a concern in the nature of trade. I agree with Lord Justice Lawrence when he says(4) : " I have the greatest difficulty in seeing how an isolated transaction " of this kind, if it be not an adventure in the nature of trade, " can be a transaction *ejusdem generis* with such an adventure and " therefore fall within Case VI. All the elements which would go " to make such a transaction an adventure in the nature of trade " would, in my opinion, be required to make it a transaction *ejusdem* " *generis* with such an adventure. It seems to me that in the case " of an isolated transaction of purchase and resale of property there " is really no middle course open. It is either an adventure in the

(1) 11 T.C. 297. (2) 8 T. C. 521. (3) *Ibid* at p. 526.
(4) See page 353 *ante*.

(Lord Thankerton.)

" nature of trade, or else it is simply a case of sale and resale of " property." I further think that the law is correctly stated by Lord Sands in his judgment in the recent Scottish case of *Inland Revenue* v. *Livingston*(1), [1927] S.C. 251, at page 256, where he says: " According to understanding, practice, and, I think, " authority, ever since the income tax was introduced, it has been " recognised that the profit of an isolated transaction by way of " purchase and resale at a profit, not within the ambit or trade of " the party making the profit, is not assessable to income tax as " ' profits or gains arising or accruing ' to any person residing in " the United Kingdom from any trade." He goes on to point out that a transaction may be treated as of the nature of trade where, although there may have been only one initial purchase there has been a series of sub-sales of an ordinary market nature, and that, even if there is an isolated purchase and an isolated resale, the subject of purchase and sale may be so treated in the interval as to bring the transaction within the category of carrying on a trade. In that case a cargo steamer was purchased and converted and refitted as a steam-drifter and resold within four months at a profit, and the Court held such profit assessable under Case I of Schedule D on the ground that the operations on the ship were in the nature of trade. That case affords a useful contrast to the present case.

The case of *Cooper* v. *Stubbs*(2), [1925] 2 K.B. 753, was relied on by the Crown, but that was not the case of an isolated purchase and resale of property. The Appellant in that case was a member of a firm of cotton brokers, but, in accordance with a practice common to persons engaged in that trade, he had dealings on his own account and independently of his firm in future delivery contracts, which, at all events so far as he was concerned, were simply speculations in future differences. The assessments in question were in respect of such transactions over three Income Tax years, the average number of transactions per annum being about fifty. Further, the Appellant had been entering into such transactions in every year from 1915 to 1922. The Commissioners held that the Appellant did not deal in future delivery contracts so habitually and systematically as to constitute those dealings the carrying on of a trade and that the profits were therefore not assessable under Case I. They further held that the dealings were gambling transactions and were not assessable under Case VI. Mr. Justice Rowlatt reversed the decision of the Commissioners, and his decision was affirmed by the Court of Appeal. Sir Ernest Pollock, Master of the Rolls, held that the Commissioners had misdirected themselves and that these transactions were such as to constitute a trade, adventure

(1) 11 T. C. 538 at p. 543. (2) 10 T. C. 29.

(Lord Thankerton.)

or concern in the nature of trade under Case I, which had been the ground of the decision of Mr. Justice Rowlatt. On the other hand, Lord Justice Warrington and Lord Justice Atkin held that the Commissioners' finding under Case I raised no question of law with which the Court could deal, but that they were wrong in holding that they were wagering transactions, and held that the profits arising from them were chargeable under Case VI. Lord Justice Warrington says(1) (at page 769): "The question therefore is simply "this, were these dealings and transactions entered into with a "view to producing, in the result, income or revenue for the person "who entered into them? If they were, then in my opinion profits "arising from them were annual gains or profits within the meaning "of paragraph 1 (*b*) of Sch. D. On the findings of the Commissioners themselves they were contracts entered into with a view "of making a profit on a rise or fall, as the case might be, in the "market price of the contracts. They extended over a considerable "number of years. There were large numbers of transactions in "each of those years, from which in some years the appellant "derived considerable revenue; and for myself I cannot see what "there is to exclude that revenue from the tax which is charged "under Sch. D. It seems to me, therefore, that in this case, "whatever may be the case under different facts, at all events the "profits made by these transactions are annual profits or gains, "and must be assessable to income tax." In my opinion, that case also affords a contrast to the present case, where the transaction was an isolated one, for the fact that there were two options acquired does not appear to me to deprive the transaction of that character.

Accordingly, I am of opinion that the profit here in question was in the nature of a capital accretion and was not "profits or "gains" chargeable to Income Tax under Case VI and I concur in the motion proposed.

Lord Macmillan.—My Lords, the Commissioners, having had their attention specially directed to the point by a remit from Mr. Justice Rowlatt, have found that "the transaction in question was "not a concern in the nature of trade." This finding has not been challenged at your Lordships' Bar. The learned Attorney-General indeed submitted that in strict logic it did not exhaustively exclude from Case I of Schedule D the profits or gains arising from the transaction, inasmuch as under Case I tax is chargeable in respect of any trade not contained in any other Schedule and "trade" by Section 237 of the Income Tax Act, 1918, "includes every trade, "manufacture, adventure or concern in the nature of trade." Therefore, he argued, a finding that the transaction was not "a

(1) 10 T. C. at p. 52.

(Lord Macmillan.)

" concern in the nature of trade " still left it open to him to maintain that it was an " adventure." But the Commissioners have not found that it was an " adventure." On the contrary, inasmuch as an " adventure " in this context must plainly be a trading adventure, their general finding that the transaction was " not a " concern in the nature of trade " is sufficient to negative the suggestion that it was a trading adventure.

The transaction being thus excluded from charge under Case I, it was maintained that it fell within Case VI which subjects to tax any annual profits or gains not falling under any of the preceding Cases and not charged by virtue of any other Schedule. The difficulty which here confronts the Crown is that the profit made by the Respondent was the result of an isolated transaction of sale but not of a transaction of sale by way of trade, and it is not easy to see how the profit on an isolated sale which is not a trading transaction can be other than a capital accretion and so outside the category of annual profits or gains. The case of *Cooper* v. *Stubbs*(1), [1925] 2 K.B. 753, on which the Attorney-General relied, differs widely in its facts from the present case. The Court was there dealing with the profits of transactions in cotton " futures " extending over a considerable number of years and involving numerous transactions in each year, but which the Commissioners had found not to be profits resulting from the carrying on of a trade. As both Lord Justice Warrington and Lord Justice Atkin (as they then were) pointed out, the profits made were plainly " annual profits or gains." Consequently, if they were not otherwise charged they necessarily fell under Case VI.

I am content to hold that the profits of the particular transaction here in question were not annual profits or gains within the meaning of Case VI. The result is that in my opinion the appeal of the Crown fails and should be dismissed with costs.

Questions put:

That the judgment appealed from be reversed.

The Not Contents have it.

That this appeal be dismissed with costs.

The Contents have it.

[Solicitors :—The Solicitor of Inland Revenue; Messrs. Wansey Stammers & Co. for Messrs. D. & D. Carruthers of Kilmarnock.]

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(1) 10 T.C. 29.