NO. 791.—COURT OF SESSION, SCOTLAND (FIRST DIVISION).—4TH, 5TH AND 27TH JUNE, 1930.

HOUSE OF LORDS.—16TH AND 17TH MARCH AND 11TH MAY, 1931.

THE COMMISSIONERS OF INLAND REVENUE *v.* THE FORTH CONSERVANCY BOARD.[1]

Income Tax, Schedule D—Profits of a Conservancy Board from shipping dues.

The Respondent Board, which was constituted by statute to carry out the customary duties of conservators, was empowered to levy dues in respect of vessels, goods and passengers coming within its jurisdiction. It was required to apply its revenue in maintaining its undertaking, in meeting interest and sinking fund charges and in maintaining a reserve fund. Any balance was directed to be applied for the purposes of the undertaking. The Board did not own any heritable subjects other than a derelict harbour not used by shipping and a portion of foreshore purchased with a view to possible reclamation.

Held, *that the Board's surplus revenues from shipping dues were profits or gains assessable to Income Tax under Case* VI *of Schedule D.*

CASE.

At meetings of the Commissioners for the General Purposes of the Income Tax for the District of Stirling in the County of Stirling, held at Stirling on 25th and 28th January, 8th February and 4th March, 1929, the Forth Conservancy Board (hereinafter referred to as " the Board ") appealed against the under-noted assessments made upon it under the Income Tax Act, 1918, Schedule D, Case VI.

Year.	*Assessment.*
1921–22	£2,841
1922–23	4,083
1923–24	4,083
1924–25	7,624
1925–26	5,294

[1] Reported (C.S.) 1930 S.C. 850; and (H.L.) [1931] A.C. 540.
In a previous case between the same parties (14 T.C. 709) it was held that the Board was not liable to Income Tax under No. III of Schedule A in respect of the shipping dues.

I. The following facts were admitted or proved :—

(1) Following upon negotiations initiated by the Board of Agriculture for Scotland, with the local authorities interested in the development of the River and Firth of Forth, the Board was constituted under the Forth Conservancy Order, 1920, as confirmed by the Forth Conservancy Order Confirmation Act, 1921 (11 and 12 Geo. V, cap. V). A print of the Act is annexed hereto and forms part of this Case.(1) The Board exercises jurisdiction over that part of the River and Firth of Forth between Stirling and an imaginary line drawn across the Forth approximately a mile east of the Forth Bridge.

(2) The objects of the Board are the preservation, maintenance and improvement of the River and Firth of Forth.

(3) Under Section 8 of the Order, it is provided that the Board shall consist of 31 members, who are required to be appointed and elected as follows :—

(*a*) Appointed by local authorities	13
Appointed by government departments ...	5
Appointed by railway companies	4
(*b*) Elected by shipowners and persons paying dues to the Board	9
	31

(4) Under Section 27 of the Order, there was transferred to the Board the undertaking of the Commissioners of the Forth Navigation, which body had been previously constituted for the purpose of improving and regulating the navigation of the river from Alloa to Stirling, under the Forth Navigation Act of 1843 (6 and 7 Vic., cap. xlvii).

(5) With the exception of Stirling harbour, which is practically derelict, the Board up to 5th April, 1926, did not own any heritable subjects other than a portion of foreshore which was purchased by the Board in 1925. The foreshore in question was acquired with the view to its possible reclamation at some future date.

(6) Part IV of the Order gives to the Board the powers necessary to carry out its obligations. These powers, as enacted in Section 36, are as follows :—

> " Subject to the provisions of this Order the Board
> " may from time to time do all or any of the things
> " following (namely) :—
>
> " (*a*) Dredge cleanse and scour the river :

(1) Not included in the present print.

" (*b*) Alter deepen restrict enlarge widen
" diminish lengthen shorten straighten and
" improve the bed and channel of the river :
" (*c*) Reduce or remove any shoals shelves banks
" or other accumulations in the river :
" (*d*) Shorten any bend or remove any angle in
" the course of the river and for such pur-
" pose enter into agreements with the
" owners of land adjoining or in or near
" to the river for the purchase of land or
" otherwise to enable them to effect the
" same :
" (*e*) Abate or remove or cause to be abated or
" removed all impediments or obstructions
" in the river :
" (*f*) Dredge and raise from the river gravel sand
" and other substances for the purposes of
" making altering repairing and maintain-
" ing the banks and straightening and
" improving the course of parts of the
" river and constructing altering repairing
" and maintaining works executed or to be
" executed by or for them or belonging to
" them :
" (*g*) Carry away or deposit on the banks of the
" river or on lands adjoining the same by
" agreement with the owner thereof any
" materials obtained in dredging or other-
" wise deepening and improving the bed
" and channel of the river or sell or dispose
" of the same as they think fit :"

Section 37 gives power to make and maintain sea walls and embankments and such landing places, workshops, cranes and similar works as may be necessary for enabling the Board to exercise the powers conferred on it; to undertake reclamation works and to encourage industry or agriculture on any reclaimed land, it being provided that the Board shall not itself have authority to carry on any such industry or the business of agriculture on such lands.

Section 41 gives power to the Board to require the proprietors of wharves, piers, jetties, etc., to keep the said properties in repair, and, in default thereof, itself to execute the repairs which are necessary at the expense of such proprietors.

Section 42 provides that the Board shall provide for, manage and maintain the lighting and buoying of the river, and for this purpose may enter into agreements

with the Commissioners of Northern Lighthouses; and Section 43 provides that for the purpose of adjusting compasses of vessels, the Board may place and maintain buoys in the river in such places as it may determine.

Under Section 44 the Board has power to remove stranded or sunk vessels from the river; under Section 45 to acquire or provide ferries across the river; and under Section 46 to furnish vessels with a supply of pure and wholesome water.

Under Section 47 the Board may make bye-laws for the general regulation of traffic on the river. Under Sections 49 and 50 the Board may build, purchase, hire or otherwise employ vessels or machinery for dredging and for the towing of vessels in and out of the river. Under Sections 51, 52 and 53 the Board may, for the purposes of the Act, acquire quarries for use in connection with any works which the Board is authorised to construct, and may purchase any lands by agreement and sell or otherwise dispose of such lands.

(7) Part V of the Order empowers the Board to levy dues, rates and charges as specified in the Third Schedule in respect of vessels entering or using that part of the River and Firth of Forth which is within the Board's jurisdiction, and in respect of goods and passengers conveyed upon or shipped or unshipped in the river. Section 55 empowers the Board to recover rates for the use of any landing places, workshops, cranes, power stations, etc., and for mooring posts, buoys, etc., belonging to or provided by the Board, or in respect of any services rendered by it in connection with the river where no rates are specially fixed.

(8) Section 74 gives the Board power to set aside annually a sum not exceeding £2 10*s.* per centum of its revenue as a reserve fund, to be accumulated for the purpose of meeting any extraordinary demand. It is provided that the reserve fund shall not exceed the sum of £20,000.

(9) Section 75 provides that all the revenues of the Board shall be applied to the purposes of payment of the expenses incidental to the Order, the working and establishment expenses and the cost of maintenance, repair and renewal of the Board's undertaking, the payment of interest on borrowed monies, the provision for instalments and Sinking Fund payments, and to the establishment and maintenance of the above-mentioned Reserve Fund. It is provided that the

balance (if any) shall be applicable to such purposes and in such manner for the purposes of the undertaking of the Board as the Board may determine.

(10) The sole revenues of the Board, apart from interest on temporary investments in regard to which no question arises, have been derived from the shipping dues abovementioned, which dues have been fixed by resolution of the Board at one halfpenny per registered ton, and have been levied and collected by the Board since October, 1921.

(11) Assessments for the same years as those at present under review were made upon the Board under Schedule A of the Income Tax Act, 1918, Number III, Rule 3. On the 23rd July, 1926, the Board appealed against the said assessments under Schedule A, and the Board's appeal was sustained by the General Commissioners of Income Tax, and the assessments were discharged. In terms of Section 149 of the Income Tax Act, 1918, the Commissioners of Inland Revenue appealed against the said decision of the General Commissioners of Income Tax to the First Division of the Court of Session as the Court of Exchequer in Scotland, which Court dismissed the appeal (1928 S.C. 286).(1) The Commissioners of Inland Revenue thereafter appealed to the House of Lords, who refused their appeal, and adhered to the decision of the General Commissioners (*vide Commissioners of Inland Revenue* v. *Forth Conservancy Board*, 1929 S.C. (H.L.) 1).

(12) The operations of the Board in carrying out its conservancy duties have related entirely to matters connected with the navigation of the River and Firth of Forth such as the maintenance, improvement of the lighting and buoyage of the river; the removal of wrecks and other obstructions; the enforcement of bye-laws passed by the Board for vessels navigating the river and also the survey and charting of the river. A number of the powers conferred upon the Board under the Order, such as the provision of ferries (Section 45), the furnishing of vessels with supplies of water (Section 46) and the acquisition of quarries (Section 51) have not been exercised by the Board.

II. It was contended on behalf of the Board :—

(1) That the surplus revenues arising to the Board in connection with the fulfilment of its statutory obligations were not " profits or gains " either in the popular sense or within the meaning of Case VI of Schedule D;

(1) 14 T.C. 709.

(2) That while there was authority for the assessment under Case VI of profits of a casual nature, analogous to but not falling under any of the other Cases of Schedule D, there was no authority for the assessment under that Case of the annual surplus revenues resulting from the whole operations of an undertaking such as that of the Forth Conservancy Board, which was constituted under an Act of Parliament for the purpose of carrying out in perpetuity a public duty;

(3) That the true scope and intent of Case VI of Schedule D were explained and illustrated by the provisions of Section 27 of the Finance Act, 1927, and by the judgments of Mr. Justice Rowlatt in the cases of *Pearn* v. *Miller* (1928), 11 T.C. 610, and *Leeming* v. *Jones* (1928), 7 A.T.C. 215[1]; and that the profits properly assessable under that Case were not the profits of a continuing trade, nor the general revenues of a statutory body, but profits or gains resulting from a transaction or series of distinct transactions;

(4) That the position of the Board for the purposes of taxation was indistinguishable in principle from that of the Severn Fishery Conservators (*vide Board of Conservators of Severn Fishery District* v. *O'May*, [1919] 2 K.B. 484; 7 T.C. 194; 121 L.T. 371); and

(5) Alternatively, that the Board did not carry on any trade, manufacture, adventure or concern of the nature of trade.

III. H.M. Inspector of Taxes (Mr. J. A. Aitken), on behalf of the Commissioners of Inland Revenue, contended :—

(1) That the surplus revenues of the Board were profits or gains within the meaning of Schedule D of the Income Tax Act, 1918, and were assessable either under Case I or under Case VI of that Schedule : *Coman* v. *Governors of Rotunda Hospital*, [1921] 1 A.C. 1; 7 T.C. 517; *Eglinton Silica Brick Coy., Ltd. (in Liquidation)* v. *Marrian*, 1924 S.C. 946; 9 T.C. 92; *Kirke's Trustees* v. *Commissioners of Inland Revenue*, 1927 S.C. (H.L.) 56; 11 T.C. 323;

(2) That the Board's operations were part and parcel of the general mercantile operations carried on in connection with the River Forth for the benefit of a limited class;

(3) That there was no statutory exemption in favour of the Board; and

(4) That the assessments were correct and should be confirmed.

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[1] 15 T.C. 333.

IV. Having considered the whole facts and arguments, the Commissioners found that there were surplus revenues; that the whole operations of the Board were covered by the assessments made upon it; and that the Board was not assessable to Income Tax under Schedule D, Case VI, in respect of its income from shipping dues for the years in question; sustained the appeal and discharged the assessments.

V. The assessments having in fact been made under Case VI of Schedule D, the Commissioners found it unnecessary to deal with the argument that the surplus revenues of the Board were assessable either under Case I or under Case VI of Schedule D of the Income Tax Act, 1918.

VI. Whereupon H.M. Inspector of Taxes, on behalf of the Commissioners of Inland Revenue, expressed his dissatisfaction with the determination of the Commissioners as being erroneous in point of law, and having duly required the Commissioners to state and sign a case for the opinion of the Court of Session as the Court of Exchequer in Scotland, pursuant to the provisions of the Income Tax Act, 1918, Section 149, this Case is stated and signed accordingly.

VII. The question of law for the opinion of the Court is whether the surplus revenues of the Appellant Board are profits or gains within the meaning of the Income Tax Act, 1918, Case VI of Schedule D, and assessable to Income Tax under that Case.

J. DEAN LESLIE,
ROBT. D. FRASER,
F. TOD,
} Commissioners.

Stirling, 7th January, 1930.

The case came before the First Division of the Court of Session (the Lord President and Lords Sands, Blackburn and Morison) on the 4th and 5th June, 1930, when judgment was reserved. On the 27th June, 1930, judgment was given unanimously in favour of the Crown, with expenses.

The Solicitor-General (Mr. J. C. Watson, K.C.) and Mr. A. N. Skelton appeared as Counsel for the Crown, and Mr. Graham Robertson, K.C., Mr. T. M. Cooper, K.C., and Mr. G. A. Montgomery for the Respondents.

I.—INTERLOCUTOR.

Edinburgh, 27th June, 1930. The Lords having considered the Case and having heard Counsel for the parties, Answer the Question of Law in the Case in the Affirmative; Sustain the Appeal; Reverse the determination of the Commissioners, and Decern; Find the Appellants entitled to the expenses of the Case, and remit the Account thereof when lodged to the Auditor to tax and to report.

(*Signed*) J. A. CLYDE, I.P.D.

II.—OPINIONS.

The Lord President (Clyde).—In a former case between the same parties[1] (1928 S.C. 286; 1929 S.C. (H.L.) 1), it was decided that the Respondents were not liable to be assessed to Income Tax under Rule 3 of No. III of Schedule A of the Income Tax Act, 1918, in respect of the annual balances of shipping dues collected by them during the five years ended 1925-26. The question in this case is whether the Respondents have been rightly assessed in respect of the same annual balances under Case VI of Schedule D.

The decision of the former case, both in this Court and in the House of Lords, turned on the view that the shipping dues and the annual balances arising therefrom were not themselves " lands, " tenements, hereditaments, or heritages " within the meaning of No. III of Schedule A, and did not represent " the annual " value of any such lands, tenements, hereditaments or heritages ". The decision of the present case turns on whether the said annual balances are " annual profits or gains not charged under Schedule " A, B, C or E, and not specially exempted from tax " within the meaning of paragraph 1 (*b*) of Schedule D, and more particularly whether they are " annual profits or gains not falling under any of " Cases I to V inclusive of Schedule D " and not charged by " virtue of any other Schedule ", within the meaning of Case VI of Schedule D.

The Respondents are a statutory body whose function is to preserve, maintain and improve the river Forth between Stirling and a line drawn across the Firth from Inverkeithing to Hound Point on the Dalmeny Estate. They are the conservators and—more or less, according to the extent of their operations—the creators of a navigation which is of high public utility and is open not only to local shipping but to the commerce of the world.

Of their membership thirteen members are appointed by the County and Town Councils whose areas are situated in the Forth basin within the area above defined: five are appointed by the Admiralty, the Board of Trade, the Ministry of Transport and the Scottish Board of Agriculture: and four are appointed by the two railway companies which own or serve the docks and harbours

[1] 14 T.C. 709.

(The Lord President (Clyde).)

within the area, especially Grangemouth and Bo'ness. In addition, there are nine elected members, the qualification of the electors being that they are owners of tonnage registered at Grangemouth, Bo'ness or Alloa, to the extent of at least a hundred tons, or have paid at least ten pounds of rates in the year to the Conservancy Board.

The Board is thus fully representative of the commercial interests on the Forth. But the services they render to navigation and commerce are by no means confined to their own constituents or to the area of their immediate jurisdiction. Moreover, the revenue they collect is raised not from any body of ratepayers within the jurisdiction, but by dues, rates and charges exacted from all and sundry who use the navigation conserved by them. It is not, therefore, possible to regard the Respondents as in the same position as a local administrative body (like a county council or a town council) serving the interests of their own constituents within their own area, by means of the proceeds of local rates. To such bodies and to their revenues the principles of domesticity and mutuality—which are most evident in the case of corporations, clubs and mutual insurance companies—apply. The revenue of the county or town council is the collective revenue of their own respective constituents, and a surplus of annual revenue from rates over annual expenditure remaining in their hands is no more an annual profit or gain than the surplus of the householder's allowance to his housekeeper in any year over the cost incurred by the latter in running the household in that year.

It is no doubt true that the Respondents' powers and functions are derived from what may be described as a monopoly created in their favour by the legislature, with the assent of the Sovereign as owner of the navigable river and estuary, and are not referable to any right in the nature of property—such as the grant of port and harbour—which was called in aid of the taxable character of the profits in *Attorney General* v. *Black*(1), (1871) 6 Ex. 78; or in *Mersey Docks* v. *Lucas*(2), (1883) 8 A.C. 891; or in *Humber Conservancy Board* v. *Bater*(3), [1914] 3 K.B. 449. But there is no reason for excluding income, otherwise taxable, in the fact that it is derived from the exercise of statutory powers, even if those powers are monopolistic in character.

If the Revenue had assessed the annual balance of the rates, dues and charges collected by the Respondents under Case I of Schedule D, I should have found it very difficult to sustain the assessment. I could not regard the exercise of the Respondents' functions under the Forth Conservancy Order (Confirmation) Act, 1921, as a trade carried on by them within the meaning of paragraph 1 (*a*) (ii) of Schedule D or within the meaning of Case I of that Schedule. On the other hand, the Respondents are deriving

(1) 1 T.C. 52. (2) *Ibid.* 385 and 2 T.C. 25. (3) 6 T.C. 555.

(The Lord President (Clyde).)

a surplus of revenue over expenditure from the provision of a high public utility in respect of which they are entitled to charge all those who avail themselves of it with certain dues. The Respondents are not a department of government in any sense, notwithstanding that their powers are derived from Parliament.

If it is of any relevancy to the taxable character of the Respondents' annual balances, it may, I think, be said that those balances are analogous to the balance of profits and gains accruing or arising on the conduct of a trade or business, although they do not, in my opinion, fall so clearly within that category as to justify their being assessed to Income Tax *eo nomine*. I think it is enough to make them liable to assessment to Income Tax under paragraph 1 (*b*) of Schedule D, that they are profits or gains derived from the exercise of a statutory power to charge rates, dues and charges against all and sundry who avail themselves of the public utility which it is the business of the Respondents to provide for all those who desire to avail themselves of it.

I am not clear that in *Severn Fishery Board* v. *O'May*(1), [1919] 2 K.B. 484, the Board was domestically distinct from the community of fishing owners on the Severn. If it was not, I do not think Mr. Justice Rowlatt's judgment is inconsistent with the conclusion at which I arrive in the present case. If it was, then I respectfully dissent from the decision pronounced in that case.

In the result, I am for answering the question put to us in the affirmative.

Lord Sands.—When any body of men, whether a corporation or not, and whether constituted by statute or not, carry on an enterprise, or, to use the latest expression, an " activity ", and the receipts in the year are greater than the expenditure, the surplus is *prima fâcie* profits and assessable to Income Tax.

It has always, however, been recognised that this does not apply to the ordinary public rating authorities, such as town councils and county councils. Any surplus which their accounts may show at the expiry of the year is not subject to Income Tax. Two suggestions at least have been made as to why this is so. One suggestion is that the inhabitants of the area of the rating authority are a community like a club, that any surplus is not a profit but a pool into which is collected their own money which has already borne Income Tax. Another suggestion is that the authority is entitled to rate in each year only for the expenditure of the year, and that any surplus must be regarded as inadvertent and accidental. Neither explanation seems quite satisfactory or to cover every case. But, however this may be, it is recognised that a surplus in any year in the hands of such an authority is not profit liable to assessment to Income Tax.

(1) 7 T.C. 194.

(Lord Sands.)

Now, if there were any authoritative decision by which it had been found that, for reasons stated and explained, the surplus income of such rating authorities was not profit liable to taxation as such, it would be our duty in such a case as the present to determine whether such considerations applied to the surplus income of such a body as is before us in the present appeal. There is no such case. It has always been a matter of understanding that local public bodies levying rates are not amenable to assessment for Income Tax owing to a surplus of the return from rates in any year over the outgoings of the year. This exemption has been judicially recognised as beyond question. It is now of the nature of a positive law so fixed as to be independent of reasons. In the absence of any authoritative guide in the matter, as it seems to me, it is our duty to be careful in acceding to any extension upon analogy.

In the *Mersey Docks* v. *Lucas*(1), (1883, 8 A.C. 891) the House of Lords confirmed an assessment against the Board under Schedule A. As that was a Schedule A assessment I should have doubted as to the applicability of that judgment as regards a matter arising under Schedule D. But in the former *Forth Conservancy* case(2), 1929 S.C. (H.L.) 1, it was authoritatively explained that so far as the ratio of the judgment in the *Mersey* case was concerned, it was matter of indifference whether the assessment was under Schedule A or Schedule D. It is hardly possible in a matter of this kind to find two bodies which correspond exactly as regards their responsibilities, duties and powers. But, as it appears to me, the Respondents in the present case approximate much more nearly in all important particulars to a statutory authority like the Mersey Dock Board, discharging certain duties for the benefit of a certain trade or industry, than to a popularly elected body like a town council collecting and administering rates in the general public interest of their locality. In the absence, therefore, of the formulation of any general principle, the effect of which is to equiparate the Respondents to a town or county council, and to differentiate them from such bodies as the Mersey Dock Board, I am of opinion that the Respondents have failed to show cause why their surplus income should not be treated as profits or gains liable to be charged with Income Tax under Case VI.

I recognise that the result at which I have arrived appears to run counter to the conclusion reached by Mr. Justice Rowlatt in *Severn Fishery Board* v. *O'May*(3), [1919] 2 K.B. 484. In that case, however, the learned judge discards the *Mersey* case as having proceeded upon Schedule A. This course could not have been taken after the explanation of that case in the first *Forth*

(1) 1 T.C. 385 and 2 T.C. 25. (2) 14 T.C. 709.
(3) 7 T.C. 194.

(Lord Sands.)

Conservancy case to which I have already referred. Having discarded the *Mersey* case, Mr. Justice Rowlatt proceeds upon the ground that the surplus revenues of the Severn Fisheries Board were dissimilar in character to the surpluses dealt with as assessable profits in the Cases I to V of Schedule D, and were not, therefore, caught as profits under Case VI. I should have had some sympathy with this view but for the decision in the *Mersey* case as explained in the former *Forth Conservancy* case.

Lord Blackburn.—When this case was formerly before us I cannot say that I entertained any doubt that the surplus revenue of the Forth Conservancy Board represented profits and gains which were subject to taxation. The tolls paid to the Board are charged on and paid by a limited class of the general public, which is assisted in carrying on its business by the Board's undertaking, and any surplus must be applied in maintaining and possibly increasing the advantages which the users of the undertaking derive from it. The fact that the Board is constituted by Act of Parliament cannot, in my opinion, entitle them to exemption from any form of taxation on income to which they would have been liable had they been in a position to obtain by agreement with the owners of the alveus and banks of the River Forth the same powers and rights which have been conferred upon them by statute. Had they done so I do not think it doubtful that their surplus would have been subject to Income Tax, and in that event they would probably have been properly assessed under Schedule A. The surplus is none the less income although the Board may use and apply it for capital purposes. It was only because their statutory powers gave them no right of property in the alveus or banks of the river that I held in the former case, with some hesitation, that the Board had been assessed under the wrong Schedule, and the only question to my mind which we have now to consider is whether they have now been properly assessed under Schedule D. It is worthy of observation that in Sections 112, 113 and 121 of the Act of 1918, which deal with the notices to be given by the Assessor to the party assessed, the Assessor is only required to refer to the Schedule under which liability to tax is incurred. If he selects the wrong Schedule, as formerly he did in attempting to recover the tax in this case under Schedule A, that provides a complete answer to the assessment which fails. But if he selects the right Schedule it does not seem to be necessarily a good objection to the assessment that the Assessor has in addition indicated the Case or the Rule under the Schedule which he conceives to justify the assessment (see *Edinburgh Southern Cemetery Coy.*(1), (1889) 17 R. per Lord President Inglis at p. 163). I am still of the opinion which I entertained at the former hearing of the case that the surplus of the Board represents profits and gains not

(1) Edinburgh Southern Cemetery Co. *v.* Kinmont, 2 T.C. 516 at p. 527.

(Lord Blackburn.)

charged under Schedule A, B, C or E, and which are not specially exempted from tax under Schedule D, and that opinion is not in any way adversely affected by the terms of Lord Buckmaster's speech in disposing of the former appeal to the House of Lords. So long as the profits are assessable under Schedule D, I do not think that it matters much under which Case they may fall. But I do not think that the Board can be described as carrying on a trade and that the profits are therefore assessable under Case I. In my opinion they carry on an undertaking earning profits and gains *ejusdem generis* of those earned by a trader which come within Schedule D, and are expressly provided for by the very wide terms of Case VI. In my opinion the question should be answered in the affirmative.

Lord Morison.—I agree with your Lordship.

An appeal having been entered against the decision in the Court of Session, the case came before the House of Lords (Lord Buckmaster, Viscount Dunedin and Lords Warrington of Clyffe, Thankerton and Russell of Killowen) on the 16th and 17th March, 1931, when judgment was reserved. On the 11th May, 1931, judgment was given unanimously in favour of the Crown, with costs, confirming the decision of the Court below.

Mr. A. M. Latter, K.C., Mr. T. M. Cooper, K.C., and Mr. G. A. Montgomery appeared as Counsel for the Appellants, and the Lord Advocate (the Rt. Hon. C. M. Aitchison, K.C.), Mr. R. P. Hills and Mr. A. N. Skelton for the Crown.

JUDGMENT.

Lord Buckmaster (read by Lord Macmillan).—My Lords, the Forth Conservancy Board are the Appellants on this appeal, brought from an Interlocutor of the First Division of the Court of Session, which decreed that the Appellants had been properly assessed under the Income Tax Act of 1918, Schedule D, Case VI, for the years 1921 to 1926 inclusive, and reversed the decision of the Commissioners for the General Purposes of Income Tax, which had held that the Board were not so assessable.

The figures of the assessments are immaterial for the present purpose.

The income in question arises from shipping dues, which the Appellants are entitled to charge upon ships using the River Forth in the following circumstances.

By statute known as the Forth Conservancy Order Confirmation Act, 1921, confirming an order of the Secretary for Scotland, the Appellant Board was constituted for the purpose of the preservation,

(Lord Buckmaster.)

maintenance and improvement of the River and Firth of Forth. By this it was declared that the Board should consist of thirty-one members, nine of whom should be elected by shipowners and persons paying dues to the Board. The circumstances which led to the passing of this Act and a full examination of the powers that it conferred are to be found in the former *Forth Conservancy* case(1), reported in [1929] A.C. at page 213. For the purposes of this appeal it is sufficient to say that the Board were empowered to do everything necessary for the purpose of maintaining the river as a navigable river, and to levy dues as specified in the Third Schedule in respect of vessels entering or using that part of the river within the Board's jurisdiction and in respect of goods and passengers conveyed upon or shipped or unshipped in the river.

These dues had been fixed by the Board at a halfpenny a ton, and it is the balance of such monies, after providing for all expenses, which is the subject of the present assessment.

Such balance is subject to the express provision that it shall be applicable to such purposes and in such manner for the purpose of the undertaking as the Board may determine.

The Commissioners of Inland Revenue charge the matter as alternatively arising under Case I or Case IV, Schedule D, 2. The Interlocutor appealed from declared that the assessment was properly made under Case VI.

The two Cases, as is well known, respectively provide that tax under the Schedule should be charged as to Case I " in respect of any trade not contained in any other Schedule," and under Case VI " in respect of any annual profits or gains not coming under any of the foregoing Cases, and not charged by virtue of any other Schedule," and the Rule applicable provides that the trade under Case I should be a trade, manufacture, adventure, or concern in the nature of trade.

In my opinion, the judges of the First Division were right in holding that the assessment could not be supported under Case I. To manage the navigation of a river, and to charge dues for the ships, is not a trade, nor a concern in the nature of a trade. For trade involves something in the nature of a commercial undertaking, of which the buying and selling are the most obvious characteristics.

At the same time, I am clearly of opinion that the monies received are annual profits or gains, and in the case of the *Mersey Docks* v. *Lucas*(2), 8 A.C. 891, it was clearly decided that the purpose to which annual profits or gains are applied could not affect the liability to tax. It is quite true that in that case the assessment was made under Schedule A, and the Mersey Docks Authority in fact owned a large quantity of real estate in the

(1) 14 T.C. 709. (2) 2 T.C. 25.

(Lord Buckmaster.)

nature of docks and quays, but this fact did not affect the principle of the decision, and indeed Lord Blackburn pointed out that it really did not matter in that case under which head the assessment fell. The fact that the Appellants could not be held to hold property similar to that in the *Mersey Docks* case enabled them in the former case to escape the assessment which for some reason was expressly limited to that head, but it left unaffected the question as to liability under Schedule D.

Apart even from the statement of Lord Blackburn, to which I have referred, the principle of the *Mersey Docks* case appears to me completely to cover the present, but it is argued that it was not an express decision upon the point, and that by analogy to the principle that exempts public rating authorities, the Appellants ought also to be exempted here.

The principle of exemption for the surplus of rates is, I think, to be found in this, that the rating authority collects money from the inhabitants of the district for the purpose of application to the expenses incurred on behalf of the inhabitants, and that any surplus rightly belongs to the inhabitants themselves, who receive its benefits in case of any surplus because it is carried forward towards the expenses of the ensuing year.

It was contended by the Appellants that the shipping community as a whole occupied a similar position to that of the ratepayers, but I find the analogy too far drawn to be acceptable. The people who have paid the dues may or may not use the river again, and those who have never contributed to them may get the benefit of the expenditure. A class of persons, connected only by the fact that they own shipping, cannot possess the same characteristics as a body of people like ratepayers, each one of whom receives in some form direct benefit from the money he has provided.

Different considerations arise where the local authority does carry on an undertaking like a tramway or even a waterworks, and the *Glasgow Waterworks* case(1), reported in 13 Rettie, page 487, shows that, at any rate where the area of their activities extends beyond the rateable area, the liability to tax at once arises in respect of profits, and this has been accepted in numerous cases. If a local authority carries on an industrial undertaking it stands in the same position for Income Tax as a company or an individual. The earlier decision in 2 Rettie, page 708(2), held them exempt where the water was only supplied to their own ratepayers. It is unnecessary for the purpose of this decision to examine the soundness of that case, but it was determined before the case of the *Mersey Docks* v. *Lucas*, and the two cases appear difficult of reconciliation.

(1) Glasgow Corporation Water Commissioners *v.* Miller, 2 T.C. 131.
(2) *In re* Glasgow Corporation Waterworks, 1 T.C. 28.

(Lord Buckmaster.)

The nearest case to the present is that of the *Severn Fisheries Board* v. *O'May*(1), [1919] 2 K.B. 484. There, power had been given to conserve a river, to make bye-laws and fine people for the breach, as well as to issue licences for fishing. It might be urged that the annual profits and gains arising from the fines correspond to the monies arising from fines in the Courts of Summary Jurisdiction, and that the levying of fines does not constitute annual profit or gain. It is at least a distinction from the present case, and I do not think, in order to support the Interlocutor appealed from, that it is necessary that it should be declared overruled.

I therefore express no opinion as to its validity. I think the Interlocutor appealed from was correct and that this appeal should be dismissed.

Viscount Dunedin.—My Lords, it is with the greatest reluctance that I find myself compelled to concur with your Lordship in the judgment proposed : I say this, not only because were it not for authority I should wish to decide the case otherwise, but still more because I think that the effect of the judgment will be disastrous to the proper efficiency of the statutory body concerned, and will, to a great extent, defeat the object for which the Act of Parliament under which they exist was passed. What was the object of the Act? It was to improve the navigation of the Forth and encourage trade, by way of shipping, on that river. In order to effect that object the statutory body is brought into existence to dredge the river and, from time to time, to improve the navigation by means of cuts in the channel, by deepening the water, and by abrasion of the banks.

In order to do these things the body are entitled to levy dues upon vessels using the river. Not a penny of the dues so levied can be employed for any other purposes except only for the necessary expenses of the trust. No one makes a personal profit out of any of the monies received. But, after this judgment, more than one-fifth of the money which may, at the end of the year, have stood at their credit is to be paid over as Income Tax. The only result will be that the trustees will take care to have as small a surplus as possible, and any saving of money in order to execute any larger work which would have excellent results will obviously be discouraged. Such a result is, I think, utterly foreign to the proper idea of an Income Tax, which is meant to be a levy on what the person who pays would otherwise use for his own purposes, whether of business or enjoyment, and, in my view, a public body of this sort ought not to be subjected to any such tax.

(1) Board of Conservators of the Severn Fishery District *v.* O'May, 7 T.C. 194.

(Viscount Dunedin.)

Of course, I do not go the length of saying that in some cases Income Tax ought not to be levied on a public body. If, for example, landed property is held by such a body, I do not think that that fact would justify what would be the removing from the natural incidence of the tax a subject which, held by anyone else, could give rise to no question.

But there is nothing of that sort here. The only property of the Board is the money raised by dues and the dues are totally expended on the objects for which the Board is by Act of Parliament created.

Now, as to what ought to be the decision, I can myself see no true distinction between this case and the case of any public body raising rates for public service. Yet, it is common ground that such rates are not liable to Income Tax. It has been sought to distinguish those cases from this, and I think it is done in one of the judgments which are about to be delivered, and which I have had the advantage of reading: that, in those cases, it is the ratepayers' own money which has already paid Income Tax. The same thing might fairly be said in this present case, if you view the shipowners who use the river as a body, just as you view the taxpayers as a body. It may be said that a foreign ship might use the Forth, and that that owner has not paid Income Tax. Equally, it may be said that if any hereditament in a town belonged to a foreigner who was not personally present in the country for more than six months, his contribution to the rates would be from money on which he had not paid Income Tax.

I would, had I been free, have decided this case upon the ground that the surplus dues which might be found to exist at the end of any year were not, in the sense of the Income Tax Acts, a profit or gain. It is trite law that all gains are not gains in the sense of the Income Tax Acts, and I would hold that these monies were not of that sort.

But I am bound by authority, and I cannot resist the authority of the *Mersey Docks* case. The case itself was different, because the dock owners in that case held actual real property. But it was most definitely laid down in this House that the purpose to which the money collected was applied could not be considered in settling whether it was a gain or profit, or not. I regret what was laid down in that decision. I think it would have been better to have followed what had been said before, viz., that once it was settled that a sum was a profit or gain the question of how it was employed did not matter, yet it was permissible to look at how it was to be expended in order to judge of the question whether it was a true profit or gain.

There is, I think, no question that the same line of reasoning which appeals to me appealed to Lord President Inglis in the

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first *Glasgow* case(1). It is possible to doubt the soundness of that decision in the light of the *Mersey Docks* case, which was subsequent and of higher authority.

I think the decision can be saved by considering the supply of water, not in the light of supplying a commodity, but of rendering a public service, just as lighting or cleaning are public services, and this view is helped by the fact that you could not escape the water rate by offering to prove you had used no water. That Lord President Inglis had to consider whether the judgment would stand after the *Mersey* case is, I think, shown by the ground on which the second *Glasgow* case(2) was distinguished from the first, and indeed in that case he distinctly said that he had reconsidered his first judgment and still remained of the same opinion.

But whether I am right as to this or not, the fact remains, as I have stated, as to what was laid down in the *Mersey* case, and, if I may not look at the ultimate destination of the monies as affecting the question of whether they are properly profit or gains in the sense of the Income Tax or not, there is no more to be said.

I, therefore, cannot dissent from the motion made.

Lord Warrington of Clyffe.—My Lords, the Appellants, the Forth Conservancy Board, are a statutory body incorporated by a Provisional Order confirmed by Act of Parliament passed on the 12th May, 1921.

The objects with which the Board was incorporated were the preservation, maintenance and improvement of the River and Firth of Forth from Stirling to an imaginary line drawn across the Firth approximately one mile east of the Forth Bridge.

The Board is invested with extensive powers for the carrying into effect the objects of its incorporation, and it is authorised to levy dues, rates and charges specified in the Third Schedule to the Order in respect of vessels entering or using that part of the River and Firth of Forth which is within the Board's jurisdiction and in respect of goods and passengers conveyed upon or shipped or unshipped upon the river. The Board is also empowered to recover rates for the use of certain conveniences and in respect of services rendered in connection with the river.

So far the sole revenues of the Board as to which the present question arises have been derived from shipping dues.

By Section 75 of the Order it is provided that all monies received by the Board in the nature of revenue are to be applied in payment of expenses, of interest on borrowed money, in providing a sinking fund in respect of borrowed monies, in

(1) *In re* Glasgow Corporation Waterworks, 1 T.C. 28.
(2) Glasgow Corporation Water Commissioners *v.* Miller, 2 T.C. 131.

(Lord Warrington of Clyffe.)

establishing a reserve fund not exceeding at any time £20,000, and the balance if any is to be applicable to such purposes and in such manner for the purpose of the undertaking of the Board as the Board may determine.

The Board having been assessed to Income Tax under Case VI of Schedule D for the years 1921–22 to 1925–26 inclusive upon their surplus revenues for those years, appealed to the General Commissioners, who allowed the appeal and discharged the assessments. The Commissioners at the request of the Crown stated a case for the opinion of the Court of Session on the question of law whether the surplus revenues of the Board are profits and gains within the meaning of the Income Tax Act, 1918, Case VI of Schedule D, and assessable to Income Tax under that Case.

The First Division of the Court of Session by their Interlocutor dated the 27th June, 1930, answered the question of law in the affirmative and reversed the decision of the Commissioners. Hence this appeal.

The Respondents contended before the Commissioners and the Court of Session and again in this House that the Appellants are assessable either under Case I or Case VI. I agree, however, with the opinions expressed by their Lordships in the Court of Session that the undertaking in question cannot properly be regarded as trade, or as an adventure or concern in the nature of trade (see Section 237).

It is, however, an undertaking which produces surplus revenues in each year remaining as a balance after satisfying the purposes to which under the Order the gross receipts in the nature of revenue are made applicable. I have a difficulty in understanding how on the plain reading of Case VI this annual balance of revenue can be anything but annual profits or gains within the meaning of Case VI. If this is so, then it is settled by the decision of this House in *The Mersey Docks and Harbour Board* v. *Lucas*(1), 8 A.C. 891, that the fact that the balance in question is applicable only for the purposes of the Board's undertaking can make no difference.

But it was insisted that the Board in this case is not carrying on an undertaking analogous to those mentioned under other heads in the Schedule, and in particular that of trade, and that it ought to be treated as if it were on the same footing as a local body raising rates for public purposes, and having a surplus of revenue at the end of a financial year. That such a body ought to be regarded as not making a profit or gain within the meaning of the Income Tax Acts has been recognised as good law. See *Attorney-General* v. *Black*(2), 6 Exch. 308, and particularly the judgment of Mr. Justice Blackburn, page 309(3). A public body making and administering rates collected from the ratepayers in the locality is

(1) 2 T.C. 25. (2) 1 T.C. 52. (3) *Ibid.* at p. 54.

(Lord Warrington of Clyffe.)

not making a profit, but simply collecting in a particular financial year by prudent budgeting more than it actually required, leaving a balance which goes towards reducing the amount required to be collected in the following year.

In the present case the Board is collecting dues and tolls from persons using the river, but those persons are in no sense their constituents as are the ratepayers in the case of a local body. The profits here are those of the Board itself arising from an undertaking analogous to a trade and, as I have already pointed out, the fact that the application of those profits is regulated and limited by the Order cannot, on the authorities, prevent those profits from being taxable.

As to the decision of Mr. Justice Rowlatt in the *Severn Fishery Board* v. *O'May*(1), [1919] 2 K.B. 484, I have read and considered carefully the judgment of the learned Judge. The ground of his decision was that the surplus there in question was not the result of activities analogous to trade and was for that reason not liable to tax. On that footing the case is, on its facts, distinguishable from the present.

The case of the *Glasgow Water Commissioners* v. *The Inland Revenue*(2), 2 Rettie 708, was decided in the Court of Session before the decision in this House of the *Mersey Docks and Harbour Board* v. *Lucas*, *u.s.*, and the question whether, in view of that decision, it can now be treated as an authority, must, I think, be left open. At any rate, it is not binding on this House and is, I think, on its facts, distinguishable from the present case.

The result is that, in my opinion, the appeal fails, and ought to be dismissed with costs.

Lord Thankerton.—My Lords, the facts in the case and the statutory provisions have already been sufficiently stated by your Lordships, and I agree with the conclusion at which your Lordships have arrived.

During the years here in question the Appellants were undoubtedly carrying on a statutory undertaking and derived revenues from shipping dues in excess of their expenditure in each year. They have been assessed to Income Tax in respect of the surplus revenue so arising in each year under Case VI of Schedule D of the Income Tax Act, 1918, and in the present appeal they challenge these assessments on two grounds, viz.—(1) that these surplus revenues are not " profits or gains " within the meaning of the statute, and (2) that, in any event, they fall within Case I of Schedule D, and not Case VI. I will deal with these contentions in their order.

(1) 7 T.C. 194. (2) *In re* Glasgow Corporation Waterworks, 1 T.C. 28.

(Lord Thankerton.)

The Appellants maintained that the surplus revenues of a body administering public duties under the authority and directions of an Act of Parliament were not in the nature of profits or gains. This appeared to rest on two separate grounds; first, that they were bound by the provisions of their statute to apply these annual surplus revenues for the purposes of the undertaking, and secondly, that the dues charged by them were *ejusdem generis* with such things as local rates, which have invariably been regarded as not being profits or gains.

The first of these grounds is clearly not open to the Appellants in view of the decision of this House in *Mersey Docks* v. *Lucas*(1), 8 A.C. 891. Lord Selborne (Lord Chancellor) says(2) (at page 905): "If it could reasonably be contended that the "word 'profits' in these Acts has reference to some advantage "which the persons carrying on the concern are to derive from it, "it might be said perhaps that the same argument might have "been raised upon the word 'gains,' but to my mind it is "reasonably plain that the gains of a trade are that which is "gained by the trading, for whatever purposes it is used, whether "it is gained for the benefit of a community or for the benefit "of individuals. Whether the benefit is to be obtained by "dividends, or whether it is to be obtained by lightening . . . . "public burdens, it is the same."

The attempt to assimilate the imposition of these dues to the imposition of local rates equally fails, in my opinion. The Appellants founded on the decision of the First Division of the Court of Session in *Glasgow Water Commissioners* v. *Inland Revenue*(3), 2 Rettie 708, and a decision of Mr. Justice Rowlatt in *Severn Fishery Board* v. *O'May* [1919] 2 K.B. 484(4). It is important to ascertain the reason for the exemption of local rates from Income Tax. In my opinion it is because the ratepayers are really levying a rate on themselves through their representative body, and, as complete accuracy is impossible in budgeting for the future, there is almost bound to be either a surplus or a deficiency, but such surplus is still the money of the ratepayers and cannot be described as a profit or gain. In the present case, the Lord President's analogy of the surplus of a householder's allowance to his housekeeper in any year over the latter's expenditure in running the household in that year appears to me most apt. The distinction is well expressed by Lord President Inglis in the case of the *Glasgow Water Commissioners* when he says (at page 713)(5): "The case is entirely different from those "that have been cited which have been decided in the Court of

(1) 2 T.C. 25. (2) *Ibid.* at p. 29.
(3) *In re* Glasgow Corporation Waterworks, 1 T.C. 28.
(4) Board of Conservators of the Severn Fishery District *v.* O'May, 7 T.C. 194. (5) 1 T.C. at p. 49.

(Lord Thankerton.)

" Exchequer in England, because in those cases the statute which " gave the right to levy the assessment did not impose it upon the " citizens of the particular burgh or locality which obtained the " Act. It was not an authority to the citizens of a particular " locality to assess themselves. On the contrary, it was a right or " privilege given to a particular corporation to assess everybody— " the whole public who happened to import, in the one case, coals " into the burgh, and, in the other case, to import something else— " I forget what it was." As appears from the opinion of the Lord President, the case was decided on the footing that the cost of the water supply was met by two compulsory rates, the public and domestic water rates levied within the area of the city, and payable by the ratepayer whether he used the water or not, any surplus being carried forward in reduction of future rates. No attempt was made in that case to distinguish between the rates raised within the limits of compulsory supply and the revenue which was raised outside those limits, and the Lord President expressly reserved any question as to the assessability of the latter; this question was subsequently raised in *Glasgow Water Commissioners* v. *Miller*(1), 13 Rettie 489, in which Lord President Inglis again delivered the judgment of the Court and in which the case of the *Mersey Docks* v. *Lucas* was before the Court. It was held that the Commissioners were assessable to Income Tax under Schedule D in so far as surplus revenue arose from either non-compulsory rates outside the compulsory limits of supply, or supplies of water by measure, or in terms of special agreements, for manufacturing or other trading purposes. Referring to the earlier case, Lord President Inglis said(2) : " We were all of opinion that within the " limits of compulsory supply the concern or undertaking as defined " by the local Act was of this nature, that the citizens of Glasgow " undertook to assess themselves for accomplishing the important " public purpose of supplying the city (being the limits of " compulsory supply) with a good supply of pure water; that in " doing so they had and could have no view of making profit, for " that would have been equivalent to paying out of one pocket " and into another pocket of the same individual or class; that they " paid these assessments for no other purpose than that of obtaining " the particular contemplated benefit, and when that benefit is fully " attained and secured for the future the assessment and the " authority to levy it come to an end. I have reconsidered that " judgment and have not seen any reason to doubt its soundness." He added later that the principle and rule of construction laid down in his judgment were confirmed by the more recent case of the *Mersey Docks*. In my opinion these statements of Lord President Inglis precisely define the reasons why local rates are not profits

(1) Glasgow Corporation Water Commissioners *v.* Miller, 2 T.C. 131.
(2) *Ibid.* at pp. 140/1.

(Lord Thankerton.)

or gains for the purposes of Income Tax, and they clearly show that the dues charged by the Appellants are not *ejusdem generis* with local rates, for they are levied by a particular corporation on all and sundry the vessels that take advantage of the navigation in their statutory area. The payers of dues have only a very limited representation on the Appellant Board, and in no sense can this be called an undertaking in which the payers of dues undertake to levy the dues on themselves.

In *Attorney-General* v. *Black*(1), 6 Exchequer 308, Brighton Corporation were held liable to pay Income Tax in respect of dues which under local Acts they levied on all coal landed on the beach or brought into the town. Mr. Justice Keating says (at page 311): "Mr. Manisty does not contend that harbour and port dues, and "other revenues of that description, are not taxable; and the "Attorney-General admits that a district rate is not. The question "then is, does the rate in question partake more of the nature of "the one or the other? I am of the opinion that it does not "partake of the character of a district rate imposed by the "inhabitants of a place upon themselves; and that on the other "hand, it is very difficult to distinguish it from harbour dues." In *Mersey Docks* v. *Lucas*, *supra cit.*, Lord Fitzgerald says (at page 913)(2): "There is nothing to be found in this income in the "nature of a district or local rate, or of a rate or tax which could "be considered as a payment by which the inhabitants of the "locality procure for themselves some local benefit. The dues "are in effect levied on the whole world coming to the Mersey or "to Liverpool, and on those taking advantage of the docks or other "property of the appellants."

There remains the case of the *Severn Fishery Board*, *supra cit.*, the facts in which appear to be very similar to the present case. The Board in that case was a statutory one, invested with the power and duty of protecting the salmon fishings in the river and to do such acts as they might deem expedient for the protection and improvement of these fishings. Their receipts were derived from fishing licences and fines for offences against the Salmon and Freshwater Fisheries Acts. Mr. Justice Rowlatt says (at page 490)(3): "Now what is the position of this Board? The "receipt of money by them has nothing to do with any sort of "property, or any sort of undertaking in connection with which "the subject of profit could be thought of. They have no "property. They have no tolls nor any of the other things "mentioned in the Act; they have no trade or concern in the "nature of trade. They are simply acting as a public body "protecting the fisheries for a particular locality, in the same way "that the Government might protect them, and raising for that "purpose a revenue by taking licences from the people who enjoy

(1) 1 T.C. 52. (2) 2 T.C. at p. 36. (3) 7 T.C. at pp. 205/6.

(Lord Thankerton.)

" those fisheries. It is not like a profit-making concern at all. " The revenue authorities have treated them as carrying on " something analogous to trade, and as making a profit out of the " balance of the receipts over and above the expenses of upkeep. " I do not think that is the right view at all. I think they make " no profit. As in my view the resulting balance is not a profit " it becomes unnecessary to consider whether the fact that they " expended the balance under the statutes in making improvements " to the rivers and fish passes relieves them from liability to " taxation." In my opinion that statement is inconsistent with the decision in the *Mersey Docks* case in so far as (*a*) it implies that revenues raised by a public body intrusted with the discharge of a public duty cannot be profits or gains for the purposes of Income Tax, and (*b*), it assumes that the purpose to which the revenues are applied can procure relief from taxation which would otherwise be due. But further, I am unable to agree that the Severn Board were not carrying on an undertaking or concern, and I am unable to find any facts in the case which would place the Board's sources of revenue in the same category as local rates; I therefore cannot regard the learned judge's conclusions as sound.

Accordingly, I am of opinion that the surplus revenues of the Appellants are annual profits or gains within the meaning of the Income Tax Acts. I am further of opinion that these surplus revenues were rightly assessed under Case VI of Schedule D, and not under Case I. In my opinion the Appellants do not carry on a trade, which is defined by Section 237 to include every trade, manufacture, adventure or concern in the nature of trade, but they do carry on an undertaking or concern which is analogous to a trade. It is one of those somewhat unusual cases such as that of *Cooper* v. *Stubbs*(1), [1925] 2 K.B. 753.

I therefore agree that the decision of the Court of Session should be affirmed and the appeal dismissed.

Lord Russell of Killowen (read by Lord Macmillan).—My Lords, the question for decision in this case is whether the Appellants were rightly assessed to Income Tax under Schedule D of the Income Tax Act, 1918, in respect of each of the five years ending with the 5th April, 1926.

In each of those years there has been a surplus of revenue income of the Appellants over revenue expenditure by the Appellants; and it is in respect of such surplus that the assessments were made. The General Commissioners, having discharged the assessments, stated a Case pursuant to Section 149 of the Act for the opinion of the Court of Session as the Court of Exchequer in Scotland, upon the question of law : " whether the surplus revenues " of the Appellant Board are profits or gains within the meaning " of the Income Tax Act, 1918, Case VI of Schedule D, and " assessable to Income Tax under that Case."

(1) 10 T.C 29.

(Lord Russell of Killowen.)

The Judges of the First Division answered the question in the affirmative, and with that answer I agree.

There is no necessity for me to recapitulate the other facts in the case, or to refer to the provisions of the Forth Conservancy Order, 1920. They have already been sufficiently stated.

From them it is established that the Forth Conservancy Board during the period in question were habitually engaged in activities which resulted annually in an excess of revenue receipts over revenue expenditure. Such excess falls within the plain wording of Clause 1 (*b*) of Schedule D, as "annual profits or gains not "charged under Schedule A, B, C or E, and not specially exempted from tax." It is therefore *prima facie* chargeable to tax under Schedule D, and the particular case under which it is chargeable must necessarily be Case VI; for while the activities of the Appellants cannot, I think, be properly described as a trade or in the nature of a trade, they are such that the Appellants can properly be said to carry on an undertaking analogous to a trade.

The reasons urged before your Lordships by the Appellants as justifying the view that this surplus was not chargeable to tax were two in number.

First, it was said that the surplus revenue of a body such as this, which was bound to apply such surplus for the purpose of its undertaking, could not be profits or gains within the meaning of the Income Tax Acts. This point appears to me to have been concluded against the Appellants by the decision of your Lordships' House in the *Mersey Docks* case (8 A.C. 891).

Secondly it was contended that the surplus revenues of this body were on the same footing as local rates, which have never been treated as profits or gains assessable to tax. In relation to this argument I desire to add nothing to the remarks which my noble and learned friend Lord Thankerton has addressed to your Lordships upon this point. They exactly express my own views.

I agree that this appeal fails and should be dismissed, and I further agree that your Lordships' decision in the present case must be taken to overrule the decision of Mr. Justice Rowlatt in relation to the Severn Fishery Board.

Questions put:—

That the Interlocutor appealed from be reversed.

The Not Contents have it.

That the Interlocutor appealed from be affirmed and this appeal dismissed with costs.

The Contents have it.

[Agents:—Grahames, Chapple and Co., for Laing and Motherwell, W.S., Edinburgh, and James Learmonth, Stirling; Solicitor of Inland Revenue, England, for Solicitor of Inland Revenue, Scotland.]