NO. 1171—HIGH COURT OF JUSTICE (KING'S BENCH DIVISION)—19TH, 22ND AND 26TH MAY, 1939

COURT OF APPEAL—3RD, 6TH AND 7TH NOVEMBER AND 20TH DECEMBER, 1939

HOUSE OF LORDS—27TH AND 28TH FEBRUARY, 3RD MARCH AND 27TH MAY, 1941

BOMFORD *v.* OSBORNE (H.M. INSPECTOR OF TAXES) [1]

Income Tax, Schedule B—Occupation of land—Farm worked as one unit—Arable land used mainly for growing vegetables and fruit for sale—"Lands occupied as nurseries or gardens for the sale of the "produce"—Basis of assessment—Income Tax Act, 1918 (8 & 9 *Geo.* V, *c.* 40), *Schedule B, Rule* 8.

The Appellant occupied 550 *acres of land, which he worked as a mixed farm in one unit. On the arable land which (excluding an area used for growing hops) amounted to* 229 *acres he grew vegetables and fruit for sale, and (on* 16 *acres) wheat. On the remaining land he had mowing grass, grazing, and osiers. He kept horses, for work on the farm, and cattle, sheep, pigs and poultry, for fattening and sale.*

The methods of cultivation were ordinary accepted agricultural methods on up-to-date mechanized lines. 109 *regular employees were engaged indiscriminately over the whole farm. There were no glass-houses on the land and no nursery work was carried on. Fruit and vegetables were sold through agents in various towns.*

The Appellant was assessed to Income Tax (Schedule B) for the year 1936–37 *under Rule* 8 *in respect of the profits derived from the* 229 *acres of arable land and on the assessable value in respect of the remaining land. On appeal to the General Commissioners the Appellant contended that the assessments were bad in law as they did not enable him to ascertain to which part of the lands they referred, and that no part of his land was occupied as gardens for the sale of the produce.*

The General Commissioners decided that the assessments under appeal sufficiently described the lands concerned, that the total holding could be divided for the purposes of assessment under Schedule B and they found that the arable land (except that used for growing hops) was occupied as gardens for the sale of the produce, the ordinary farming operations thereon being ancillary to the market garden operations. They confirmed the assessments in principle.

Held, *that the whole of the farm was assessable on the annual value under the ordinary Rules applicable to Schedule B.*

[1] Reported (K.B.) [1939] 3 All E.R. 259; (C.A.) [1940] 1 All E.R. 91; (H.L.) 165 L.T. 205.

CASE

Stated under the Income Tax Act, 1918, Section 149, by the Commissioners for the General Purposes of the Income Tax acting for the Division of Pershore West in the County of Worcester, for the opinion of the King's Bench Division of the High Court of Justice.

1. At a meeting of the Commissioners for the General Purposes of the Income Tax for the Pershore West Division in the County of Worcester for hearing and determining appeals against assessments to Income Tax, held at Pershore on 14th July, 1937, James Ferguson Bomford (hereinafter called "the Appellant") appealed against the following assessments made on him for the year ended 5th April, 1937, in respect of profits derived from the occupation of land situate in the parishes of Fladbury and Hill and Moor in the County of Worcester :—

Assessment in respect of profits from lands occupied as nurseries or gardens for the sale of the produce.

Name or situation of the lands	*Amount of assessment*
Fingerpost Ground ditto Lower Moor Springhill	£2,000

(This assessment was made under Rule 8 of Schedule B.)

Assessment in respect of the occupation of lands etc.

Name or situation of lands etc.		*Amount of assessment*
Springhill	£450	£495
Willspit	£45	

(This assessment was made under the ordinary Rules of Schedule B.)

Copies of the said assessments are annexed to and form part of this Case (1). At the hearing of the appeals, Counsel for the Appellant requested the production of the assessments to enable him to ascertain their subject matter. As no previous notice of the Appellant's desire to have the original assessments produced at the appeal had been received by the Commissioners such original assessments were not available at the hearing, but it was agreed that the Appellant or his solicitor should have access to them at a later date and such inspection was subsequently made by Appellant's solicitor.

2. The following facts were proved and admitted :—

(*a*) For the year in question the Appellant was the occupier of 550 acres.

(1) Not included in the present print.

(i) Part of the land at Springhill and the land at Fingerpost Ground and Lower Moor was arable (excluding land utilised for the cultivation of hops) upon which the following crops were growing during 1936 :—16 acres wheat, 7 acres potatoes, 3 acres mangolds, ½ acre lucerne, 26½ acres peas, 18½ acres beans, 44½ acres brussels sprouts, 4 acres savoys, 18½ acres cauliflower, 3½ acres leeks, 4 acres carrots, 6 acres parsnips, 2 acres asparagus, 5 acres plants, 1 acre rhubarb, 17 acres plums, 1½ acres black-currants, 32 acres strawberries, 5 acres raspberries, 2 acres loganberries, 11½ acres *fallow*.

(ii) The remainder of the land at Springhill and land at Willspit consisted of :—82 acres mowing grass, 178½ acres grazing, 40 acres hops, 7 acres osiers.

(*b*) The following live-stock was kept by the Appellant :—16 horses, 90 cattle, 232 sheep, 1,012 pigs, 8,045 poultry. The horses worked upon the farm. Cattle, sheep, pigs and poultry were produced and bred by the Appellant upon the land.

(*c*) The whole acreage occupied by the Appellant was worked as a single mixed farm in one unit. The Appellant employed ordinary farm labourers who were not highly skilled.

(*d*) The Appellant used very up-to-date appliances and practised mechanized farming over the whole farm. The minimum amount of hand labour was used in producing crops upon the arable land, much of it being machine planted and machine hoed.

(*e*) The Appellant was a registered producer under the Pigs Marketing Scheme.

(*f*) Wheat was grown upon 16 acres of the arable land, partly to obtain the subsidy payable under the Wheat Act, and partly to provide straw litter for the pigs. The mangolds, parsnips and lucerne were grown to provide feed for the stock and horses.

(*g*) The live-stock, pigs and poultry were kept not for the purpose of providing manure for the arable and pasture land but for their fattening and sale.

(*h*) During the winter the poultry had access to the arable land.

(*i*) The purchases and sales of live-stock in 1936 were £5,386 1*s*.6*d*. and £22,147 10*s*. 7*d*. respectively.

(*j*) The wages for the year amounted to £9,684 17*s*. 10*d*. A big proportion of this expenditure was incurred in relation to the pigs and hops. The numbers of regular employees

were 80 men and 29 women. These workers worked indiscriminately upon the whole farm, whether upon the sheep, pigs, cattle and poultry or upon the pasture and/or the arable land, often being engaged upon different parts of the farm at different times in the same day.

(*k*) The cost of labour over the whole farm was £12 per acre and for the land upon which fruit and vegetables were grown £18 per acre.

(*l*) The purchases of artificial manures amounted to £1,471 8*s*. 6*d*. only and had been progressively reduced year by year as the manure produced by the pigs increased.

(*m*) The purchase of feeding stuffs amounted to £10,939 4*s*. 2*d*.

(*n*) There are no glass-houses on the land occupied by the Appellant and no nursery work was done upon any part of the land.

(*o*) The methods of cultivation were the ordinary accepted agricultural methods.

(*p*) The Appellant styles himself a "Farmer and Fruit and Vegetable Grower" on his notepaper and bill heads.

(*q*) Some of the produce of the land used for growing fruit and vegetables was sold in various towns through an agent in the usual manner in the district.

(*r*) In order to obtain continuity of supplies not always possible from Appellant's own land, produce is sometimes obtained from other growers and sold by the Appellant under commission.

3. For the Appellant it was contended :—

(1) That the assessments were bad in law as they did not identify or enable the Appellant to ascertain to which part of the farm lands occupied by him each such assessment purported to refer;

(2) That the assessment made under Rule 8 of Schedule B (if in fact it related to the arable land other than that devoted to the growth of hops) was bad in that no part of the farm lands occupied by the Appellant were occupied as a garden for the sale of the produce, and

(3) That the assessment made under the ordinary Rules of Schedule B should be amended so as to embrace all the land occupied by the Appellant in that the Appellant occupied the whole of such lands wholly for the purpose of husbandry.

4. The Inspector of Taxes contended :—

(1) That all the arable land (except that used for the growth of hops) was occupied as gardens for the sale of the produce ;

(2) That the farming operations on the arable land (apart from the hops) were ancillary to the market garden business, and

(3) That the profits from the arable land (apart from hops) were assessable under Rule 8.

5. We, the Commissioners, have come to the conclusion that the lands occupied by the Appellant can be divided for purposes of assessment under Schedule B, and accordingly find as a fact :—

(1) That the farming operations on the arable land (apart from that used for the growth of hops) are ancillary to the market garden operations ;

(2) That the whole of the arable land (apart from that occupied for the growth of hops) is occupied as gardens for the sale of produce, and

(3) That the remainder of the land occupied by the Appellant is devoted to farming operations and is assessable under the ordinary Rules applicable to Schedule B.

We also find that the assessments which form the subject of the appeal sufficiently describe the lands comprised in such assessments.

The appeals will therefore be dismissed so far as the principles at issue are concerned, but in arriving at this decision the Commissioners are not confirming the amount of the assessments and in the event of the actual liability for the year in question not being agreed between the Inspector of Taxes and the Appellant the appeals are to be regarded as being kept open for the question of the amounts of the liability to be argued before the Commissioners.

6. The Appellant immediately after the determination of the appeal declared to us his dissatisfaction therewith as being erroneous in point of law and in due course required us to state a Case for the opinion of the High Court pursuant to the Income Tax Act, 1918, Section 149, which Case we have stated and do sign accordingly.

FRANCIS DAVIES,
E. C. CHOLMONDLEY,
H. W. DAVIES,
H. B. EMERSON,
GEORGE WHITAKER,
} Commissioners of Taxes for the Division of Pershore West in the County of Worcester.

The case came before Lawrence, J., in the King's Bench Division on 19th and 22nd May, 1939, when judgment was reserved. On 26th May, 1939, judgment was given in favour of the Crown, with costs, it being held that there was evidence on which the General Commissioners could come to the conclusion that part of the arable lands were gardens but that their findings did not support their decision regarding that part of the arable lands which they held to be ancillary to the gardens.

Sir William Jowitt, K.C., and Mr. L. C. Graham-Dixon appeared as Counsel for the Appellant, and the Solicitor-General (Sir Terence O'Connor, K.C.) and Mr. Reginald P. Hills for the Crown.

JUDGMENT

Lawrence, J.—This is an appeal against assessments for the year ending 5th April, 1937, in respect of 553 acres said to have been occupied by the Appellant, 238 acres of which have been found to be occupied as gardens. The acreages stated in paragraph 2 of the Case amounting to 229 arable and 307½ pasture total 536½ acres and it was, I understood, common ground before me that the difference between 553 acres, the number of acres assessed and 536½, the number of acres described in paragraph 2, was probably due to the omission of all farm and other buildings.

The Commissioners have upheld the assessment which assesses the Appellant in respect of all land under the plough in 1936, namely, 229 acres, as being occupied as gardens within Rule 8 and in respect of the remainder of his lands (all of which they find were worked as a single mixed farm in one unit) under Rule 1. The question which I have to decide is whether in view of their findings of fact this decision can stand.

It is common ground that the question whether the lands are occupied as gardens must be determined by the nature of the occupation in the year of assessment, but that the computation of tax must be made by reference to the profits of the year before.

This consideration raises questions of importance where a mixed farm is being assessed, on which, in the course of rotation of crops, produce such as wheat may be followed by strawberries. Can it be said that a part of a mixed farm is occupied as gardens when, in the course of rotation it is occupied in one year for what may be called a farm crop and in the other for what may be called a garden crop? The Appellant contends that it cannot. He argues that the case raises three points: (1) that it was not permissible to split up the assessment of a mixed farm worked as one unit, (2) that the nature of the produce grown is not the sole consideration under Rule 8, and (3) that there was no proper identification of the lands said to be occupied as gardens in the present case.

In my opinion, there is no substance in the third point, as, if the Appellant had wanted to know which particular fields were being assessed under Rule 8 he could have asked, but he does not appear to have done so.

The only authorities which have been cited upon the question of splitting up an assessment are *Dennis* v. *Hick*, 19 T.C. 219, at page 228, where Finlay, J., said: "It may be that in some cases "the proper course is to split up the thing and to say: 'Well,

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" ' these are two quite distinct things, you occupy part of your " ' land as a garden, and you occupy another part of your land as " ' a farm; you have to be separately assessed in respect of these " ' two things ' ", and *David Lowe & Sons, Ltd.* v. *Commissioners of Inland Revenue*, 21 T.C. 597, where although the question was not argued (*see per* Lord Carmont, at page 607) the Court of Session held that the Commissioners can apportion the assessment even where lands are held and worked as one unit. I think I must follow this decision, although in my own view the dictum of Finlay, J., is to be preferred to the view of the Court of Session.

In my own opinion the finding in the present case that the whole acreage was worked as a single mixed farm (paragraph 2 (*c*) of the Case) is inconsistent with the decision to uphold an assessment upon one part as gardens and another part as farm lands. In my view, lands to be assessed as gardens must be distinct and separable from the farm and it cannot be said on the present findings that they are. Any other view would, I think, lead to the conclusion that each field can be picked out and separately assessed regardless of how it was occupied in the years preceding the year of assessment and regardless of the occupation of lands held and worked with it. Such a method of assessment appears never to have been adopted before in England (*see Monro & Cobley* v. *Bailey*, 17 T.C. 607, *Dennis* v. *Hick*, 19 T.C. 219, where Rule 8 was invoked because it was held that gardening was the dominant purpose of the whole occupation) and may involve that every farmer who grows one field of potatoes for sale may be assessed thereon as a garden. But, as I say, I consider myself bound by the decision of the Court of Session.

The next question is whether the Commissioners were right in finding that the arable lands were occupied as gardens. The findings contained in paragraph 2 ((*b*) to (*o*)) all appear to me to be relevant and to point to a conclusion that the land was not occupied as gardens, with the possible exception of (*k*), and it is argued that the Commissioners must therefore have decided solely upon the ground that vegetables were grown upon certain parts of the arable lands.

I am, however, not prepared to overrule the Commissioners upon this point, because I think that the nature of the produce is one of the things which the Commissioners are entitled to consider in arriving at their decision that the lands are or are not gardens, and there was, therefore, evidence upon which they might come to their conclusion that some, at any rate, of the arable lands were gardens. There is one subsidiary point upon which I think the Commissioners' decision cannot be supported: that is with reference to that part of the arable land which they have held is ancillary to the gardens. This appears to me to be inconsistent

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with their findings in paragraph 2 ((*f*) and (*g*)). I cannot see how this land is ancillary to the gardens any more than the other land used for feeding stock.

Subject to this point I think the appeal must be dismissed, with costs, and the Case remitted to the Commissioners. Is that the right Order?

The Solicitor-General.—My Lord, that is the right course. There is only the question of costs.

Lawrence, J.—Yes; the appeal must be dismissed, with costs.

The Solicitor-General.—If your Lordship pleases.

Lawrence, J.—I beg your pardon, Mr. Graham-Dixon; perhaps you want to address me about that.

Mr. Graham-Dixon.—I do not think I do, my Lord. There are encouraging parts of your Lordship's judgment which will promote the further investigation of this matter before another tribunal.

The Solicitor-General.—Your Lordship has been threatened with that from the opening.

Mr. Graham-Dixon.—I do not know that it was in the nature of a threat.

Lawrence, J.—Very well.

An appeal having been entered against the decision in the King's Bench Division, the case came before the Court of Appeal (Scott, Clauson and Goddard, L.JJ.) on 3rd, 6th and 7th November, 1939, when judgment was reserved. On 20th December, 1939, judgment was given in favour of the Crown (Scott, L.J., dissenting), with costs, it being held that there was evidence to support the decision of the General Commissioners that the whole of the arable land (excepting only that used for growing hops) was occupied as gardens.

Sir William Jowitt, K.C., and Mr. L. C. Graham-Dixon appeared as Counsel for the Appellant, and the Solicitor-General (Sir Terence O'Connor, K.C.) and Mr. Reginald P. Hills for the Crown.

JUDGMENT

Scott, L. J.—This is an appeal by the taxpayer from a judgment of Lawrence, J., dismissing an appeal, except on one point, on a Case stated by General Commissioners of Income Tax for the Pershore West Division of Worcestershire, who had, on appeal to them, affirmed original assessments, in respect of an area of land in that county containing 553 acres gross and 536 net (after deduction for house, farm buildings, etc.), of which the Appellant was both owner and occupier. The assessments against which he was appealing

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had divided the total net area of land—that is, the 536 acres—into two categories—arable, 229 acres, and "the remainder"—that is, 307 acres, made up of 40 arable acres under hops, 82 acres mowing grass, 178 acres of grazing and 7 acres of osiers. The original assessments treated the whole of the arable land (other than the 40 acres under hops) as land occupied by the Appellant as "a "nursery or garden", and, therefore, as falling to be assessed under the provisions of Rule 8 of Schedule B of the Income Tax Act, 1918, on the actual profits thereof made in the preceding year and not on the ordinary basis of Schedule B, that is, the annual value of the land. That Rule is as follows: "The profits arising from lands "occupied as nurseries or gardens for the sale of the produce (other "than lands used for the growth of hops) shall be estimated "according to the provisions and rules applicable to Schedule D, "but shall be assessed and charged under this Schedule as profits "arising from the occupation of lands." Lawrence, J., if he had felt free to exercise his own judgment would, I think, have decided that on the Commissioners' findings, viewed as a whole, there was no evidence of the land being "occupied as nurseries or gardens"—the phrase of the Rule, but he felt bound by a Scottish case (1) to affirm the decision of the Commissioners as to the larger part of the arable, although disagreeing with them as to a part which they had included as "nursery or garden" only because they thought it "ancillary" to the nursery or garden. On that part he held there was no evidence. I find myself in agreement with that minor decision and also with the main decision he would have liked to give, and I do not think that he need have regarded the Scottish decision as applicable, but both my colleagues have come to the conclusion that the appeal should be dismissed.

The occupation of land under hops as well as of nurseries and gardens was by the Income Tax Acts of 1806 and 1842 specially charged on profits, but hop-lands were removed from that category and made chargeable for Schedule B under the general rule of annual value by the Income Tax Act, 1853, Section 39, and have remained so chargeable ever since. It was, therefore, properly placed by the Commissioners in the same category with the rest of the land which had been treated in the original assessment as ordinary farming land and accordingly assessed on annual value. The taxpayer contended throughout that he should have been so assessed on the whole 536 acres and not only on the 307. The two figures of the original assessments were respectively £2,000 for the arable land, and £495 for the rest. The appeal Commissioners, however, dealt only with questions of principle and kept open all questions of amount so that this Court is not concerned with money figures. Sir William Jowitt in opening the appeal before us said that the case was of great general importance to farmers. I agree,

(1) David Lowe & Sons, Ltd. *v.* Commissioners of Inland Revenue, 21 T.C. 597.

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but would add that the question raised is also of importance to the whole community; for if the decision stands it will, in my belief, lead indirectly to a serious decrease in the total supply of culinary vegetables and small fruit available to our urban populations. The reasons for my belief are these. Farmers as a class attach great importance to their present statutory privilege of being taxed on the annual value of the land they occupy. It saves them from the complications of agricultural accountancy for tax purposes, and that is probably the main reason why so few farmers have elected for Schedule D under Rule 5 of Schedule B, for Schedule B itself protects them from the risk of the Schedule B basis being an unfair measure of their taxable profit, since Rule 6 enables a farmer who can prove a loss or a smaller profit than the figure of his annual value to claim assessment—or even repayment—on his actual pecuniary results. The more skilful farmer, on the other hand, whose profits often exceed the figure of his annual value, derives substantial fiscal benefit from his Schedule B basis. The advantages thus conferred by the ordinary Rule of Schedule B on all farmers, whatever their profits, accounts for their dislike of being compulsorily charged on profits. They have enjoyed the annual value basis ever since 1806, when the occupation of land was first definitely separated from ownership and made a separate charge by Addington's Income Tax Act of that year. From 1806 to 1930—a century and a quarter—there is no record in any law report (that I have found) of any attempt to tax farmers under Rule 8. During the last half century there has been an enormous improvement of marketing facilities for farmers through the development of quick motor transport, over our wonderful system of good country roads, accompanied by competitive improvement of railway facilities. The direct consequence has been that British farmers have been enabled to include small fruits and culinary vegetables in their list of ordinary farm crops, wherever the conditions of soil, climate and altitude are favourable and the indirect consequence has been a very great increase in the available supplies of both to our urban populations, with corresponding benefit to the health of the nation. If Rule 8 is rightly construed and applied by my colleagues, I fear that no farmer will feel safe in growing even a few fields of fruit or vegetables, lest those fields should be held to constitute a "garden", or "gardens", and expose him to the necessity not only of keeping separate accounts in respect of those fields, but of producing completed accounts, for the year preceding the year of assessment upon which the estimate of "garden" profits would have to be based as required by Section 29 (1) of the Finance Act, 1926—although during that year corn or other ordinary farm crops may have been grown on those very fields. This risk will, I am convinced, tend to deter farmers from growing such crops, to the detriment of the supplies of vegetables and fruit to the population at large. Of

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course, if the Rule *clearly* had the meaning which in my respectful opinion would alone justify my colleagues' decision, the considerations I have mentioned would be irrelevant; but if it is not clear in their sense, those considerations, in my opinion, do have materiality in connection with the statutory and judicial history of the provision, and particularly in ascertaining its original object and meaning when first introduced in 1806, for there has been no change of language, material to the present question of interpretation, since 1806, except a quite minor change in the language referring to hop-lands which, for a reason I will mention presently, can be disregarded. If the language of the Rule is not clear beyond reasonable doubt, the principle of construing a taxing Act strictly, in my opinion, should also apply to protect the taxpayer here. Having regard to my colleagues' opinion I need hardly say I express my own dissentient view with diffidence, however strongly I may hold it. Rule 8 of Schedule B does not appear to me on its true interpretation to be capable of bearing the meaning attributed to it in the present case by the Commissioners and my colleagues; but at least if it is ambiguous, its statutory history and the material circumstances commonly known at the time of its introduction in 1806, appear to me sufficient to establish the construction which I put upon it. I feel bound, however, as I am differing, to explain my reasons fully, and in any event perhaps my analysis of the policy which appears to me to have dictated the very limited scope of the original enactment (as I construe it) may be of some use should any question of legislation arise.

Although the substance of the Rule was enacted as long ago as 1806, I know of only five reported cases under it, the first of which began in 1930, and ended in 1933, when the House of Lords held that in that case it was not possible to say that there was no evidence upon which the Commissioners could apply Rule 8. I shall return to that case in a moment, but the other four cases all seem to me to disclose an absence of any clear and definite interpretation of the Rule; at any rate I find it impossible to deduce from them any plain meaning of the statutory phrase "nurseries or gardens". I do not suggest that the interpretation is easy; but one cannot help being struck by the apparent inconsistencies in either interpretation or application of the words as between the different tribunals of fact—that is, the Commissioners—and Sir William Jowitt was instructed to say that the case was important just because of such inconsistencies "as between Commissioners up and "down the country, who seem to arrive at opposite findings without "any plain difference in the facts". I know of no case where the meaning and scope of the word "garden" in the Rule has been the subject of judicial explanation, and I can find, in the decisions there are, no clear criteria for answering the basic question: "What "does Rule 8 mean by a 'garden'?" In *Monro & Cobley* v. *Bailey*,

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17 T.C. 607, the case to which I have just referred, the Court of Appeal and the House of Lords both held that the question of the character of the occupation was one of fact for the Commissioners, and that it was impossible to say in that case that there was no evidence before the Commissioners to support their finding that the whole of the land in question was occupied as a garden ; but neither Court found it necessary for the purpose of that case to interpret the words " nurseries or gardens " in the Rule. The only light upon their meaning is therefore to be gathered from the Commissioners' findings of fact which were in the minds of their Lordships, namely, that the holding was wholly arable ; that it covered 200 acres, of which 60 were under bulbs ; that there was one acre covered by 13 glass-houses which the taxpayer conceded was chargeable under Rule 8 ; that the main purpose of the occupier was the growing and selling of bulbs, and in a secondary degree of their flowers ; that the whole 200 acres were essential for that business because of the horticultural necessity of transplanting bulbs to fresh ground each season ; that the sales of bulbs and flowers realised, in the year in question, nearly £14,000, against £1,600 from general farm crops, and that the cost of labour was £27 per acre on the bulbs, which was " far in excess " of the average price of ordinary farming in the locality. On these findings it was held that there was *prima facie* evidence of " occupation as a garden ", but I venture to think that the actual decision goes no further towards defining the word " garden " than holding that with such concomitant facts as were there present bulb-growing may satisfy the meaning of the word " garden " in the Rule, so far as the crop produced is concerned.

Before discussing the legal position it is necessary to state carefully the chief findings of fact in the present case.

The lands composing the " holding " (as I will call it in order not to beg any question by calling it the " farm ") lay in Worcestershire. The main part was called Springhill, and covered 508 acres out of the total of 553. The Appellant, however, had a further 10 acres called Fingerpost Ground, 7 called Lower Moor and 28 called Willspit, thus making the grand total 553 acres ; but as that figure included the 17 acres occupied by buildings or the precincts of buildings, which were excluded from these assessments, the case is only concerned with 536 acres. Apart from the 40 acres of hops, all the arable land was in Springhill, except for the 17 of Fingerpost Ground and Lower Moor. In the year of assessment there were on the holding 229 acres of arable (apart from hop-lands), namely, 11½ acres of fallow, 40½ of ground and bush fruit, 17 of plums, and the following acreages of various other crops : wheat 16, potatoes 7, mangolds 3, lucerne ½, peas 26½, beans 18½, brussels sprouts 44½, savoys 4, cauliflower 18½, leeks 3½, carrots 4, parsnips 6, asparagus 2, plants 5, rhubarb 1. There were no glass-houses ; there was no nursery ; and there was no bulb-growing. The Commissioners did

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not suggest that there was any separation in fact which would enable them to split the holding geographically into separate and self-contained units of occupation, and to point out which unit they considered farm land, and which they considered garden. On the contrary, in order to arrive at the total acreage of what they called garden they merely added up the acreages of the fields actually *in the particular year of assessment* appropriated for longer or shorter periods of cultivation to fruit-growing, or to such green or root crops as they thought were distinctively garden crops and then they said that the rest of the arable land was "ancillary" to the gardening, with the result that they considered all the arable fields to be occupied as "garden". There is nothing in their findings of fact to indicate that the fields they added together were not scattered over the whole holding, so as to be interspersed with mowing grass or pasture fields, and indeed, it was common ground, as we were informed, that the arable fields were in fact so interspersed. Included in the Commissioners' garden acreage were about 20 acres of indisputable farm crops, wheat, mangolds, and lucerne; nearly 80 acres under vegetable crops of sorts which are commonly seen up and down the country growing on various fields of farms, where the soil is suitable, often in the ordinary course of farm crop rotation, such as potatoes, peas, beans, brussels sprouts, savoys, cauliflower, etc., not to mention another 6 acres devoted to parsnips, a common feed for stock, as we were told, and stated in the Case to have been grown on this holding for that purpose; and finally the 11½ acres of fallow.

The Case is stated in considerable detail, and it is not possible to do it justice without quoting the actual language of the salient findings of fact. They are as follows: "2(*b*) The following live-"stock was kept by the Appellant:—16 horses, 90 cattle, 232 sheep, "1,012 pigs, 8,045 poultry. The horses worked upon the farm. "Cattle, sheep, pigs and poultry were produced and bred by the "Appellant upon the land. (*c*) The whole acreage occupied by the "Appellant was worked as a single mixed farm in one unit. The "Appellant employed ordinary farm labourers who were not highly "skilled. (*d*) The Appellant used very up-to-date appliances and "practised mechanized farming over the whole farm. The minimum "amount of hand labour was used in producing crops upon the "arable land, much of it being machine planted and machine hoed. "(*e*) The Appellant was a registered producer under the Pigs "Marketing Scheme. (*f*) Wheat was grown upon 16 acres of the "arable land, partly to obtain the subsidy payable under the "Wheat Act, and partly to provide straw litter for the pigs. The "mangolds, parsnips and lucerne were grown to provide feed for "the stock and horses. (*g*) The live-stock, pigs and poultry were "kept not for the purpose of providing manure for the arable "and pasture land but for their fattening and sale. (*h*) During the

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"winter the poultry had access to the arable land. (*i*) The pur-"chases and sales of live-stock in 1936 were £5,386 1*s.* 6*d.* and "£22,147 10*s.* 7*d.* respectively. (*j*) The wages for the year amounted "to £9,684 17*s.* 10*d.* A big proportion of this expenditure was "incurred in relation to the pigs and hops. The numbers of regular "employees were 80 men and 29 women. These workers worked "indiscriminately upon the whole farm, whether upon the sheep, "pigs, cattle and poultry or upon the pasture and/or the arable "land, often being engaged upon different parts of the farm at "different times in the same day..... (*l*) The purchases of "artificial manures amounted to £1,471 8*s.* 6*d.* only and had been "progressively reduced year by year as the manure produced by "the pigs increased. (*m*) The purchase of feeding stuffs amounts "to £10,939 4*s.* 2*d.* (*n*) There are no glass-houses on the land "occupied by the Appellant and no nursery work was done "upon any part of the land. (*o*) The methods of cultivation "were the ordinary accepted agricultural methods." Of the facts so found the most significant is (*c*)—that the whole acreage of 536 acres "was worked as a single mixed farm in one "unit", especially when supplemented by the further finding in (*d*) as to the method of cultivation—that the Appellant "practised "mechanized farming over the whole farm." The finding marked (*g*) is a little ambiguous, but I think its effect is that the keeping of live-stock, pigs and poultry, was not merely ancillary to the vegetable-growing. This inference is borne out by sub-paragraphs (*b*), (*i*) and (*m*), which disclose live-stock farming on a large scale. Sub-paragraph (*l*) seems to show that the pig manure produced was in fact used throughout the holding, and helps to explain sub-paragraph (*g*) which, I think, should be construed as if it had read, that "the "live-stock, pigs and poultry were kept primarily for the sake of "fattening and selling them, although they also served the purpose "of providing manure". Sub-paragraph (*h*) is equally important with (*l*) in its indication of the economic inter-action between the two farming activities prosecuted by the Appellant—live-stock rearing and arable cultivation—which made it a "mixed farm". As the former furnished manure to, and consumed waste-products of the arable crops, so the "fruits of the arable land" throughout the winter supplied food to the large head of poultry which were run over it, an aspect which the Court of Session in *Lean and Dickson* v. *Ball*, 10 T. C. 341, thought an important characteristic of husbandry. Sub-paragraph (*k*) contains an obvious arithmetical error as £12 x 536 acres equals £6,432 and not £9,684 as stated in sub-paragraph (*j*) for wages over the whole farm.

The Commissioners' conclusions were as follows: "(1) That the "farming operations on the arable land (apart from that used for "the growth of hops) are ancillary to the market garden operations. "(2) That the whole of the arable land (apart from that occupied

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" for the growth of hops) is occupied as gardens for the sale of " produce. (3) That the remainder of the land occupied by the " Appellant is devoted to farming operations and is assessable under " the ordinary Rules applicable to Schedule B."

The issues before us are whether conclusions Nos. (1) and (2) involve errors of law. In my opinion they do, and I think it will be convenient at once to formulate the questions which seem to me to call for decision, and to state with reasons the opinions which I have reached, for I do not think that the points raised are covered by any judicial decision binding on this Court.

Of the detailed findings upon which the Commissioners purported to base their conclusions, sub-paragraphs (*c*) and (*d*) are the most far-reaching. Read together I regard them as a finding of fact that the whole area of 536 acres was farmed as one unit and that that unit was in fact a single mixed farm, partly arable, partly grass ; and these positive findings considered with due regard to the absence of any finding either that there was a physical line of local demarcation between what was admittedly farm, and what the Commissioners held to be garden, or that the Appellant was conducting two businesses, one farming and the other market gardening, show that the Commissioners themselves did not regard the farm as being really severable into two separate units of occupation. Indeed they find expressly in sub-paragraph (*o*) that the whole of the arable was cultivated by " ordinary accepted agricul- " tural methods "—or in other words that the gardener's art—horticulture—was *not* practised or even attempted. I do not, and could not in the light of the decision in *Monro's* case(1), suggest that finding (*o*) is conclusive, but it does seem to me to indicate the absence of one important characteristic of gardening, especially when accompanied by the positive findings in sub-paragraphs (*c*) and (*d*). For these reasons I think that the facts found in the Case rule out any possibility in law of the legitimate " splitting " of the total area into a farm unit and a garden unit. But if to the cultivation of fruit or vegetables the gardener's art was not applied, but only the arable farmer's art, on what definition of the word " garden " is it to be said that any individual field carrying potatoes or cabbages or fruit and lying between grain crops or meadows is a garden ? And if it cannot be said of one field the proposition cannot in either fact or law be predicated of twenty fields picked out here and there from surrounding farm lands and added together by a sum in arithmetic to make up a notional " garden". There are, in my opinion, other reasons why the Commissioners' method of approach to the problem of Rule 8 is wrong in law, but it has seemed to me convenient, first of all, to emphasize the impossibility of " splitting " in such a case as the present, especially as this aspect of the appeal is one of such practical importance to farmers. The

(1) 17 T.C. 607.

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Commissioners' conclusions must depend primarily on whether the facts found can bring the congeries of individual fields totalling 236 acres which in the year of assessment were carrying certain vegetables, bush and ground fruits, and fruit trees, within the word "garden". In my opinion they cannot for more reasons than one. Parenthetically I would point out that we are not concerned with the words "for the sale of the produce",—for there is no doubt that that requirement was fulfilled here. It was a necessary condition in framing the Rule as some pleasure gardens make profits of another kind.

I have no wish to attempt any exhaustive definition of the word "garden", but I do not see how any Court asked to apply Rule 8 can avoid forming an opinion on some aspects of what a Rule 8 garden is, or what it is not. Such a garden connotes geographically, as it seems to me, a more or less defined and self-contained whole, or unit of area, cultivated according to the gardener's art. Hence the recognition by the Commissioners in the reported cases of the need, first, of deciding whether all the non-garden land within the total unit of occupation is, in either a cultural sense or a business sense or both, necessary to and used for the purpose of the garden;—"ancillary" is the dubious word sometimes employed—and if it is not, secondly, as to the possibility of "splitting"—that is, of dividing the total area of occupation into two separate and self-contained parts—a farm and a garden. Acting on the legal hypothesis that the 236 acres here *could* constitute a garden, with which I disagree, the Commissioners have been forced to resort to the "splitting" solution within the 236 acres, because of the obvious impossibility of treating the 307 acres of pure farm area, with its large live-stock business, as "ancillary" to their "garden", although by treating the total acreage of fields which, in the year of assessment, were arable as if it could be regarded as a true unit of occupation, they did have occasion to pray in aid the "ancillary" principle *within that unit of area*, because some fields carried obvious farm crops; hence their first conclusion "that the farming operations on the arable land. . . . are "ancillary to the market garden operations".

So much for the principle of self-contained unit of area as a necessary element in a "garden". That is a limitation in space. But I think there is also a limitation in time—in this sense, that there is a moment when the garden begins and another when it ends, and that some degree of permanent existence from year to year is connoted by the garden of Rule 8. The general rule under Schedule B makes the valuation for Schedule A the basis for estimating annual value and that is usually a more or less lasting figure. So too in "the provisions and rules applicable to "Schedule D", incorporated for estimation by Rule 8, the profits, formerly estimated on a three years' average, are now under the

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Finance Act, 1926, estimated on the yield of the preceding year. In either case the contemplation of the Income Tax Statutes is that the *same* source of profit was flowing in the preceding period, whether three years or one, as is flowing throughout the year of assessment, unless the source only came into existence during the year of assessment, or during the preceding year, when special provisions for reckoning the profit apply. Here let me assume for the moment that the reasoning of the Commissioners *can* apply in law to a mere arithmetical total of discrete fields ; even so, how could it be supposed that a *farm* profit of last year was intended by the Rule to be the measure for estimating the quantum of a *garden* profit this year ? And for the purpose of the question let me assume that every vegetable crop is a "garden" crop (although again I disagree with that assumption). In the common practice of agricultural rotation each field may change its annual crop each of the three to five years of the rotation cycle. In my view that feature alone makes it impossible to suppose that Parliament intended that a field bearing cabbages this year should constitute a "garden" when its crop was last year and may be next year a patently farm crop—wheat last, and clover next year. And if the reasoning of the Commissioners was right as to their congeries of odd fields, it would lead inexorably to the conclusion that each individual field, bearing a vegetable crop, or fruit, of itself constitutes a garden within the Rule ; inexorably, because I can see no logical halting place between 20 such individual fields constituting a big garden and one field being a little garden. But I cannot think it was the intention of Parliament in the Rule to expose to the burden of separate accountancy and separate assessment every farmer, who here and there on his farm grows one or a few, or even a good many fields of potatoes or cabbages or indeed any one of the vegetable or fruit crops mentioned by the Commissioners in the present case, and that brings me to another important aspect of the appeal.

It seems to me that in ultimate analysis the real reason the Commissioners came to their conclusion No. (2) is that they thought the true determining characteristic or feature of a garden intended by the Rule was the kind of crop grown, and that if it was a kind of crop that persons who are beyond dispute market gardeners do grow, then that the land on which it is grown *must* be a garden within Rule 8. A similar view appears in two of the decided cases to which I will return later (1). In my view that is wrong, and wrong for more than one reason. In the first place the natural meaning of the language of the Rule appears to me to be such that Parliament must have intended to tax on profits only those who carried on the business of a market gardener, and also cultivated their land in the way characteristic of market gardeners—namely, in accordance with

(1) Dennis *v.* Hick, 19 T.C. 219, *and* David Lowe & Sons, Ltd. *v.* Commissioners of Inland Revenue, 21 T.C. 597.

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the gardener's art. That art is often very different in its methods and objects from the farmer's art. The gardener's methods, for instance, of treating soil and crop differ, regarded as a whole, from the farmer's. I say this quite apart from the difficulty in many gardens of using those mechanical methods which are characteristic of soil cultivation on the larger scale possible in farming and some of which indeed are not economically practicable at all in the narrower limits of many market gardens. In the second place as agricultural knowledge advances new crops appear on farms. This probably accounts for some of the increased cultivation of vegetables on farms. Why should that of *itself* constitute each such field a garden ? Why should not an innovation in farming practice, when it has once become usual, turn what was a garden crop into an ordinary farm crop ? That is, in my opinion, undoubtedly what happened long ago with potatoes. In other words the type of produce cultivated on a farm, although admittedly one element in the problem, and in the case of a crop like bulbs an important element (as it certainly was in *Monro's* case (1)), can afford *by itself* but little guidance, where the crop is not exceptional in character ; and where the crop is one *ancipitis usus*, because quite commonly grown on farms, it affords no guidance, because of the general rule of logic and therefore of law that a fact equally explicable by either of two explanations is no evidence of either. The potato is a good illustration of this rule of the law of evidence. Anyone who knows the countryside well knows that it is a very usual farm crop, so usual as to justify judicial notice of the fact. Everyone who shot partridges in the eighties and nineties will remember walking them up in ridged potato fields. In *Back* v. *Daniels*, [1924] 2 K.B. 432 ; [1925] 1 K.B. 526, and 9 T.C. 183 (discussed and approved in *Fry* v. *Salisbury House Estate, Limited*, [1930] A.C. 432, by Lord Dunedin at page 442 and Lord Atkin at page 456 (2)) potatoes were the only crop and were treated throughout as an ordinary farm crop. The contest in the case was whether the Revenue could charge the profits under Schedule D as the profits of a business. The Court of Appeal held unanimously that the Daniels were farmers in occupation of the land and must be charged under the general Rules of Schedule B. No one suggested that the crop was of a kind to make Rule 8 apply, and it looks as if the Revenue had never imagined that it could apply. In *Monro's* case the crop, although peculiarly a garden or even a nursery crop, was not the only feature which led both the Court of Appeal and the House of Lords to say that the applicability of the Rule was a question of degree in each case, for there was there a defined unit and the whole unit was occupied for the one main object of cultivating and multiplying on a large scale that one particular crop, namely, bulbs, and of selling their flowers. The finding was that the whole 200 acres were a

(1) 17 T.C. 607. (2) 15 T.C. 266, at pp. 309 and 319.

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necessity for growing 60 acres of bulbs. Bulbs had not, at least at that date, ceased to be a characteristic nursery or garden crop—if it ever will, which I doubt—for bulbs are grown either for the sale of their blooms, or for sale as bulbs directly or indirectly to those who possess gardens—private or public ; and I confess that they do seem to me to constitute a true garden or even nursery produce, and that may well be the reason that in *Monro's* case(1) neither this Court nor the House of Lords thought it necessary, having regard to the other findings of fact, to say anything about the meaning of the word " garden ".

For the purpose of construing the present Rule 8, and particularly for ascertaining the kind of garden to which the Rule was originally addressed, it is important (1) not merely to see what other light is shed by the scope of the Rule itself in its setting and wording to-day, but also (2) to consider the statutory history of the provision, what its original form was, and what were the known facts to which it was originally applied, for (2) has, I think, a direct bearing on (1).

On the first point it is to be observed that two other subjects of taxation are expressly mentioned—nurseries and hop-lands. As to the word " nursery " I see no reason why the dictionary definition should not have been in the mind of the Legislature. Johnson's Dictionary (1st Edition, 1755), gives it as : " A plantation of young " trees to be transplanted to other grounds " ; the Century Dictionary (Volume V, 1899) as : " A place where trees are raised " from seed or otherwise in order to be transplanted ; a place where " vegetables, flowering plants, and trees are raised (as by budding or " grafting) with a view to sale " ; " Your *nursery* of stocks ought " to be in a more barren ground than the ground is whereunto you " remove them " (Bacon) ; the Oxford Dictionary as : " A plot or " piece of ground in which young plants or trees are reared until fit " for transplantation ; a collection of such plants. Now usually a " piece of ground of considerable extent in which the plants or trees " are reared for sale ; a nursery-garden " ; and I think these coincide with the ordinary understanding of the word. It is therefore worth noting that the word associated with garden connotes (1) a definite horticultural purpose and method of growing, and (2) a self-contained and homogeneous area devoted to that purpose. *Noscitur a sociis* may be overdone, but whatever light the word " nursery " throws on the word " garden " supports a limited and definite meaning.

Dictionary definitions of the word " garden " are : (1) (Johnson) : " A piece of ground enclosed, and cultivated with extraordinary care, " planted with herbs or fruits for food, or laid out for pleasure " ; (2) (Century) : " A plot of ground devoted to the cultivation of " culinary vegetables, fruits or flowering and ornamental plants " ; " *Garden husbandry,* the careful cultivation of land for profit,

(1) 17 T.C. 607.

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" according to the methods pursued by gardeners, so as to secure " the largest possible production "; (3) (Oxford): " An enclosed " piece of ground devoted to the cultivation of flowers, fruit, or " vegetables; often preceded by some defining word, as *flower*, " *fruit*, *kitchen*, *market*, *strawberry-garden*, etc."

Hop-lands were and are farm-lands and not gardens. Their only common measure with nurseries and gardens was their original profit-making character. But their bearing on the word " garden " is best considered after looking at the earlier form of the Rule.

I now turn to the historical side. We were told by Counsel for the Inland Revenue that Rule 8 was first introduced in the 1842 Act; that is not so. The five Schedules A, B, C, D and E were first introduced in 1803 (by the Act of 43 Geo. III, c. 122), very much in their present form, but Schedule B did not then contain the equivalent of the present Rule 8. Addington's Act passed in 1806 (46 Geo. III, c. 65) re-enacted the five Schedules (with some changes), and the substance of Rule 8 was then introduced by Section 75 which dealt with the operation of Schedule B under the two " numbers ", No. VII—the ordinary rule of annual value—and No. VIII the special rule about nurseries, gardens and hop-lands, which was worded as follows: " Lands occupied as nurseries or gardens for the sale " of the produce, and lands occupied for the growth of hops, shall " be charged to the duties in Schedule B on the profits of one year, " on an average of the three preceding years, except where the lands " so occupied for the growth of hops shall be part of a farm held " under one demise, or by the same person as owner, and shall not " exceed one-tenth part of such farm, in which case the duty thereon " under this Schedule shall be charged, together in one sum as for " a farm, by the said general rule in Schedule A mentioned." The 1806 Act having lapsed after the peace which followed Waterloo, the 1842 Act re-enacted it substantially, including No. VIII of Schedule B, but with one difference, in that the measure of the profits was to be in accordance with Schedule D, which included the basis of the average of the three preceding years (First Case, Rule 1). " The profits arising from lands occupied as nurseries or gardens " for the sale of the produce, and lands occupied for the growth of " hops, shall be estimated according to the rules contained in " Schedule D, and the duty shall be charged at the rate contained " in the said Schedule; and when the said duty shall have been so " ascertained, the same shall be charged under Schedule B as profits " arising from the occupation of lands, except " (and then the exception in regard to hop-lands of the 1806 Act was repeated). It will be noticed also that the 1806 paragraph said that the lands occupied should be *charged* on the profits whereas in the 1842 paragraph it sufficed to say that the profits should be *estimated*, etc., as the lands had already been charged by Section 63 and Schedule B itself. The words in both " lands occupied as nurseries or gardens "

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are the same as in Rule 8 of the Income Tax Act, 1918, but whilst those two subjects are associated together hop-lands were in 1806 and 1842 added as a wholly separate subject, prefaced by " and ". All hop-lands were put back into the general category of Schedule B by Section 39 of the Income Tax Act, 1853, and the excepting provision ceased to operate. The bracketed words of Rule 8 to-day, " other than lands used for the growth of hops ", were presumably added in 1918 only to prevent doubt arising from the repeal of the 1853 Act. Thus to infer on an *ejusdem generis* principle from the grammatical effect of the words " other than " in the present Rule 8 that because the " lands " where hops are grown are usually fields lying here and there within a farm, therefore nurseries and gardens may also consist of such scattered fields would be a false construction.

One might have expected help towards understanding the word " garden " from the facts of the reported cases; all being since the House of Lords decision in 1933 in *Monro & Cobley* v. *Bailey* (1), but the difficulty in extracting help from them is, first, that the different tribunals of fact seem to me to have had in mind, consciously or unconsciously, wholly different and in some ways almost opposite conceptions of what the word " garden " in the Rule really means, and, secondly, that the judgments contain no definition of it. In view of the degree of doubt thus attaching to the word, I have tried to learn historically what type of gardens were earning such profits in 1806 as to make their retention under the general rule of Schedule B appear wasteful to a Chancellor of the Exchequer in need of revenue to fight Napoleon. In short I have looked for the mischief or defect in the old law for which the new law of 1806 was to provide ; for I think that the aid to interpretation of looking back in history to ascertain the mischief at which the statutory provision was originally directed, particularly if the provision has been re-enacted in a series of statutes in *pari materia*, may properly be applied here, as it was by Lord Lindley, as Master of the Rolls in *In re Mayfair Property Company*, [1898] 2 Ch. 28, at page 35, and by Lord Atkin to an Income Tax question in *Birmingham Corporation* v. *Barnes*, 19 T.C. 195, at page 216. There was published in London in 1798 a most interesting book, Middleton's " Agricultural Survey of Middlesex ". It was still a standard work in 1843 when Knight's " London ", Volume III, was published, containing his account of Covent Garden and the sources of supply for London's fruit, flowers and vegetables : he cited Middleton's facts and figures largely. The following excerpts from Middleton give a good idea of the market gardens round London at the very end of the 18th century. (Page 48) " Size " of Farms. The farms of this county are in general small. Near " great towns, small farms of good land are so much better suited " to the purpose of a gardener than a husbandman (his art being " more beneficial to the public, to his landlord, and to his family),

(1) 17 T.C. 607.

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" that the gardener should in such situations have the preference ". (Page 51) " Character of the Farmers. In the vicinity of London " the ground is mostly rented by gardeners and nurserymen ". (Chapter IX) " Gardens and Orchards. Section 1. Fruit Gardens. " From Kensington, through Hammersmith, Chiswick, Brentford, " Isleworth and Twickenham, the land on both sides of the road for " seven miles in length, or a distance of ten miles from market, may " be denominated a great fruit garden, north of the Thames, for the " supply of London. . . . The fruit gardeners have what they call " *upper and under crop* growing on the same ground at one time ". (Page 256) " I suppose there are upwards of 3,000 acres of land " under this most excellent and valuable management. The quantity " of productive labour depending on these gardens is surprising. " Estimating their produce in money it cannot be less than £100 " per acre, or £300,000 per annum ". (Page 261) " Observations on " the gardens at the Neat Houses lying between Westminster and " Chelsea ". (Page 262) " This land has been as long, or perhaps " longer, in the occupation of kitchen-gardeners, than any other land " in Britain ". (Page 264) " The very great expenses, in labour, " manure, etc., which kitchen-gardeners are at, is evident to everyone " who lives in the neighbourhood of them. Probably their expenses " may be thus divided, namely, in labour £35 ; teams and dung £25 ; " rent, taxes and tithes £12 ; marketing and expenses £8 ; together " £80 which, taken from the foregoing sum of £200, leaves £120 " per acre as interest on capital and profit. The farming gardeners, " or those who work their soil principally with the plough, are " situated rather more distant from London ; occupy larger tracts " of land ". (Page 266) " I think there are about 8,000 acres in " four counties cultivated in this manner " (by farming gardeners) " producing per acre about 50 pounds ". On page 267, Middleton recapitulated acreages and values of produce of the vegetable gardens wholly cultivated by the spade thus : 200 acres at the Neat Houses at £200 per acre ; on the Surrey side of the Thames 500 acres at £150 ; round the outskirts of London 1,300 acres at £100, making in all 2,000 acres at an average output of £120 10*s.* per acre, or £245,000 in all. To these he added first his " farming gardener " (their land cultivated partly by the spade, but mostly by the plough)—8,000 acres at £50 per acre—say £400,000, and then his fruit gardens whose produce he put at another £400,000, making £1,045,000 in all. He then made this comment : " I think these several estimates " cannot be too high for the produce raised by the labour of the " kitchen-gardeners round London, as they are known to live, and " provide as well for their families, on five acres of the best ground, " nine acres of the second best, or twenty acres of an inferior soil, " as the generality of farmers can on 150 or 200 acres. This cannot " fail of placing *the gardener's art* in the most favourable point of " view, as no other application of land, or of labour, does, or can

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" supply, so large a surplus revenue towards supporting the non-
" productive part of the community ". (Page 269) " Section III.
" Nursery Grounds. At Chelsea, Brompton, Kensington, Hackney,
" Dalston, Bow and Mile End much ground is occupied by nursery-
" men, who spare no expense in cultivating the choicest sort, and
" the greatest variety, of fruit-trees and ornamental shrubs and
" flowers, from every quarter of the globe ; and which they cultivate
" to a high degree of perfection ". (Page 272) " It is supposed there
" are about 1,500 acres of nursery ground in this county ; and that
" including the hot-houses and green-houses belonging to them, they
" produce nearly £70 (out of) each (acre) or £100,000 a year ".
Extract from Knight's " London ", Volume III, published 1843,
Chapter CIX. Covent Garden. Page 140. " Since Middleton's work
" was published the population of the metropolis has just doubled,
" and it probably will not be far wrong to double his estimates ;
" the mode of cultivation and of preparing the produce for market
" remains much in the same state as it was fifty years ago." One
distinction between gardener and farmer in Middleton's mind seems
to have been the greater intensity of cultivation in the garden,
achieved no doubt in part by the closer attention to the needs of
the individual plant, rendered possible by hand cultivation as
distinguished from horse cultivation. I wonder what he would
have said about the mechanical methods of farming to-day as applied
to vegetable growing. The facts stated by Middleton must have
been well-known to the Government of 1806, and the profits made
would naturally attract fiscal attention. I think it is a reasonable
inference that No. VIII of the Act of 1806 was directed to that
" mischief ", and that the inclusion of it in the Act was due to the
realisation by the Government and Parliament that a particular class
of cultivator, observable widely in the gardens round London, was
getting off too lightly compared with the profession and trade or
business taxpayer. If this presumption be justified, it affords
material guidance in interpreting and resolving any ambiguity in
the undefined words "nurseries or gardens for the sale of the produce".
The line of demarcation intended to be drawn between the nursery
or garden on the one hand and the farmer on the other may in the
concrete case be difficult to draw, and where there is some evidence
on each side the question must be one of degree and therefore of
fact for the Commissioners, as was said in *Monro's* case by Lord
Romer in the Court of Appeal and by Lord Buckmaster in the House
of Lords (1). But the descriptions of nurseries and market gardens
contained in the above passages from Middleton seem to me illumi-
nating, because they help towards a fair understanding of the words
" nursery " and " garden " in the 1806 Act, and tend to show that
the " nursery " or " garden " there intended was as definite a unit
of cultivable area and business as the word " farm ". Had it been

(1) 17 T.C. 607, at pp. 622 and 623.

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intended to tax the farmer on profits made by the growing of fruit or vegetables not in a definite " garden ", and not as a separate business, but on fields or in orchards of the farm itself, and in spite of the management, cultivation, labour, expenses and receipts forming an integral part of his business of farming, other and clearer provisions would have been inserted in the Act. It would have been so simple for instance to add a proviso that " where table or " culinary fruit or vegetables are grown for sale on a farm for the " purpose of the farmer's business, those parts of the farm shall be " deemed to be a ' garden ' and the profits thereof shall be estimated " as provided in this Number ". Nursery stuff such as flowers, bulbs, flowering plants, etc., could have been treated analogously under the word " nursery ". There is no hint in No. VIII that the profit from growing fruit or vegetables on a farm was to be " charged" on the farmer, and if this interpretation of the Act of 1806 is right, I see no such difference of language in the 1842 Act, or the 1918 Act, as would justify a new and different interpretation of the word " garden ". It is perhaps important to repeat that No. VIII did not transfer the profits of a garden to Schedule D so as to charge the recipient of the income under that Schedule. It was not so transferred any more than the properties enumerated in Rules 1, 2 and 3 of No. III of Schedule A of the Acts of 1842 and 1918 (quarries, mines, ironworks, etc.) were transferred by Rule 8 of No. III—on which see *Coltness Iron Company* v. *Black*, 6 App. Cas. 315 (1), over-ruling *Knowles* v. *McAdam*, 3 Ex. D. 23 (2); *Wakefield Rural District Council* v. *Hall*, [1912] 2 K.B. 265, at page 275 *per* Hamilton, J.,(3) and the notes in Dowell (9th Edition), at pages 357 to 360. Schedule D was only brought into No. VIII in order to facilitate the ascertainment of quantum; it was for " estimation " and not for " charge ": it was still the " occupation " of the land which was taxed, and taxed under Schedule B. In *Back* v. *Daniels*(4) the whole dispute was whether the Daniels could be taxed under Schedule D on the profits from potato-growing on certain land of which they had the temporary use for fourteen months, and therefore the occupation under Rule 2 of No. VII of Schedule A, on the ground that they were carrying on a business separate from the occupation of the land. It was decided that as they were occupiers they could only be charged under Schedule B.

Where, from the point of view of the activity conducted or the art applied, the line of distinction between farming and gardening should be drawn in any particular case must, no doubt, whatever the definition of the word " garden ", remain a question of degree and therefore of fact for the Commissioners; but I cannot help thinking that the distinction which Middleton drew between (1) " gardeners " and (2) " farmers who garden ", as described by him

(1) 1 T.C. 287.
(2) 1 T.C. 161.
(3) 6 T.C. 181, at p. 188.
(4) 9 T.C. 183.

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in the citations I have read, throws a good deal of light on the line of demarcation intended by the restricted and definite language of Schedule B, No. VIII, of 1806, and that his " farming gardeners ", for instance, who produced only £50 per acre, would not in 1807 have been held to be occupiers of gardens but still of farms in spite of their growing a proportion of vegetable crops, although I recognise that in the penumbra between the farmer who gardens as well as farms, and the gardener who also farms must lie an area of pure fact for decision by the Commissioners.

If my reasoning about the interpretation of the word " garden " is well founded, it supports very strongly my previous conclusions, which I have endeavoured to explain, and which I venture to summarise thus: (1) the statutory " garden " must be within reasonable limits a defined unit of occupation in relation to space, and also time, for it must have some degree of permanence and continuity, so as to permit in the normal case of the gardening profits of the year of assessment being measured by gardening profits of the preceding three years, as it used to be, or one year as it is now (except where a permanent garden has begun so recently as to make the year of assessment the measure under the Act); (2) the " splitting " of a farm into two separate units of the kind indicated in (1) is only legitimate if such a division is present in fact; (3) a finding that a farm is " worked as a single mixed unit " *prima facie* means that it is one in management, cultivation, labour, business accounting and so on and therefore that it *is* a single farming unit, and if so, that fact must necessarily exclude the possibility of " splitting "; (4) if any given unit of occupation is worked in part as a farm and in part as a garden, but is not susceptible of splitting within conclusion (2), it must be held to be either wholly a farm, or wholly a garden; and it cannot be held to be a garden unless gardening is the dominant purpose of the whole; and such a conclusion is not legitimate, unless the farming part is found as a fact to be truly a necessity of and for the garden—as it was in *Monro's* case [1]; (5) but odd fields, or fields scattered over a farm amongst what are plainly farm fields cannot be added up arithmetically into a " garden ", whatever crops they carry, either for the purpose of splitting or for the purpose of conclusion No. (4); in other words such arable fields in a farm, being usually subject to rotation, sometimes bearing vegetables or fruit crops of kinds which may also regularly be seen growing in market gardens, do not constitute a unit " occupied as a garden ", and have no such permanence of " garden " occupation as the Acts of 1806, 1842, 1918, and 1926 must have contemplated as essential, when they required the profits to be estimated on the preceding three years or one year.

[1] **17 T.C. 607.**

(Scott, L.J.)

Since *Monro's* case so far as I know there have been only four cases reported under Rule 8. In both the last two (*Kerr* v. *Davis*, 22 T.C. 515, and *Williams* v. *Rowe*, 22 T.C. 508) the Commissioners decided there was no garden, and Lawrence, J., dismissed the appeals. Of the other two one was English (1), the other Scottish (2). Neither is binding on us, and neither affords material assistance in the solution of the legal problem of the present case, but I think they both illustrate the need of judicial guidance on the interpretation of Rule 8. In the English case, *Dennis* v. *Hick*, 19 T.C. 219, the General Commissioners found that the whole area of 350 acres, in Bedfordshire, was occupied as a garden, and Finlay, J. (as he then was) came to the conclusion, though not entirely without hesitation, that he could not interfere. From him there was no appeal. Of the 350 acres in the year of assessment, 80 were pasture, 7 fallow and 263 carried crops. Of the 263 acres 51 were hired for the season of 12 to 14 months, on temporary agreements, but the tenant was occupier within *Back* v. *Daniels* (3). On the 51 he was growing brussels sprouts. On the rest of the 263 acres, namely, 212 acres, there were various vegetable crops, but potatoes accounted for 115 acres, beans 26, parsnips 12 and mangolds 2, making 155 acres in all. He also grew 52 acres of other vegetables, including 14 of cabbages. There were 7 horses, 32 cattle, 49 pigs and 100 poultry. The different fields carried different crops each year, though it would appear that the rules of agricultural rotation were not strictly followed. There was nothing in the method of cultivation which was peculiarly characteristic of gardening. Ordinary agricultural labour was employed, but it was found that the total labour cost per annum was £12 per acre, as against an average farm cost in the locality of £2 10*s*. 0*d*. The pasture was used for grazing the horses and stock which in turn produced £300 worth of manure for use on the land. The most important feature of all was the admission of the appellant that he did in fact carry on the business of market gardening. The Commissioners held that the 263 acres were cultivated as a garden, that the appellant's farming operations were ancillary to the business of market gardening, and that the whole 350 acres of the land in the appellant's occupation was in fact mainly devoted to market gardening. They accordingly dismissed the appeal. Finlay, J. (as he then was) came to the conclusion, not without hesitation, that he could not interfere. *Monro & Cobley* v. *Bailey*(4) had been cited to the Commissioners. The learned Judge says of the 263 acres(5): "I cannot doubt that . . . it was open "to any Commissioner to find that that part at least was occupied "as a garden". He recognises, however, the distinction from

(1) Dennis *v.* Hick, 19 T.C. 219.

(2) David Lowe & Sons, Ltd. *v.* Commissioners of Inland Revenue, 21 T.C. 597.

(3) 9 T.C. 183. (4) 17 T.C. 607. (5) 19 T.C. 219, at p. 226.

(Scott, L.J.)

Monro's case(1) in that there was the stock farm with its 80 acres of pasture land (in 19 T.C., at page 228, line 9, the word " arable " is a misprint for " pasture "), and, whilst saying that that too was a question of fact, he did make the important comment on page 228 about " splitting " which Lawrence, J., cited with approval in the present case(2) : " It may be that in some cases the proper course " is to split up the thing and to say : ' Well, these are two quite " distinct things, you occupy part of your land as a garden, and you " occupy another part of your land as a farm ; you have to be " separately assessed in respect of these two things ' ". In view of the finding that the rest of the land was " ancillary " to the garden he dismissed the appeal. I cannot help thinking that if the learned Judge had not felt bound by the Commissioners' view that the 155 acres were under market-garden crops, he would have decided the other way, and to my mind there was no evidence to justify that view of the Commissioners. All the crops grown on the 155 acres were of sorts which everybody has seen commonly grown on farms all over the country where the soil is suitable—especially potatoes, which seems to have been regarded by the Revenue in *Back* v. *Daniels* (3) as a farm crop ; beans also is very familiar as a farm crop, especially to those who hunt and have to keep off it if possible ; even cabbages are common, especially on farms carrying stock which will consume any waste or unsold surplus. I cannot understand the appellant's admission that the 80 acres of pasture which carried his stock were " ancillary " to the market garden. Whether the 100 acres carrying other kinds of vegetables could have been " split " off into a unit which could properly be regarded as a garden one cannot tell from the report. In the result I cannot see that that decision affords any direct guidance for the present case.

In the Scottish case of *David Lowe & Sons, Ltd.* v. *Commissioners of Inland Revenue* (4), the findings of fact were these : the appellants had 280 acres at *R*, 77 at *E.L.*, 21 at *N*. The appellants' managing director was President of the Edinburgh Market Gardeners' Association. All the holdings were managed and worked as one whole. The 280 acres were held on terms which bound the appellants generally to the most approved rules of good husbandry, and especially to put the whole under particular crops—one-quarter of it under turnips, potatoes or " other drilled green crop", one-half under grain, one-quarter under hay or grass. The Commissioners found as a fact that 170 acres were under farm crops (in which they included, rightly as I think, 55 acres of late potatoes) and that the remaining 110 acres were under various " drilled green " crops". The whole of the 98 acres (77 plus 21) were under peas, beet, savoys, sprouts, parsley, onions, leeks, broccoli, lettuce and early potatoes. There was a definite annual rotation, and the

(1) 17 T.C. 607. (2) *See* pages 647/8 *ante*. (3) 9 T.C. 183. (4) 21 T.C. 597.

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vegetable crops *were not confined to any one part of the land.* There were kept 9 horses, 100 cattle, 100 to 200 pigs, and poultry. Ordinary (meaning, I think, agricultural) methods of cultivation were followed in all three holdings. Average wages were £10 per acre. The Commissioners by a majority held that the holdings of 77 and 21 acres, and 110 of the 280 acres were "used as a garden", but the remaining 170 acres of *R* were "used for ordinary farming "purposes" and they divided the assessments accordingly, that is, split them. The Lord President at page 604, speaking of the 77 and 21 acres, said that Counsel for the appellants admitted that *if* using the land for the vegetables in question *could* be using it as a garden, then the 77 and 21 acres might properly be assessed as garden. He then held that growing vegetables for human consumption was using the land as a garden, and accordingly held that the Commissioners had evidence to justify their finding as to the 98 acres, that the 110 acres out of the 280 at *R* were on the same footing, and pointed out that Counsel made no objection to such a splitting. The division of the *R* holding of 280 acres into two categories by adding up the fields which happened to carry vegetable crops and calling that part a garden would not, in my respectful opinion, have been right, had the Court been deciding the question, but as they were merely acting on Counsel's admission, they were not giving any decision of their own. I find it difficult to treat the case as an authority on any of the questions which we have to decide, but the Court seems to me, if I may say so, to have come perilously near to expressing the opinion that wherever "vegetables" for human consumption are grown, the land must in law be regarded as being "occupied as a garden".

It is interesting to compare those conclusions of the Commissioners and the Judges of the Court of Session with those reached by the Commissioners and Lawrence, J., in the two recent cases I have already cited of *Kerr* v. *Davis* (1) and *Williams* v. *Rowe* (2). The contrast affords a striking illustration of the contradictory views entertained by Commissioners not only on what are garden crops and what are farm crops, but on the cost of cultivation as indicating the character of the occupation.

In the present case (3) Lawrence, J., on the question of "splitting", preferred the dictum of Finlay, J., in *Dennis* v. *Hick* (4) to the solution accepted by the Court of Session in *David Lowe's* case (5), and was evidently inclined to allow the appeal, but felt bound by the decision of the House of Lords in *Monro's* case (6) to decide as he did. In my humble opinion there is nothing in *Monro's* decision to prevent either him or this Court from allowing this appeal.

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(1) 22 T.C. 515. (2) 22 T.C. 508. (3) *See* pages 647/8 *ante*.
(4) 19 T.C. 219. (5) 21 T.C. 597. (6) 17 T.C. 607.

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There are two main questions of law for decision. (1) Was there any evidence of the 229 acres of arable land, or any part thereof, being occupied as a garden? To which my answer is: No. (2) Even *if* distinctively garden crops were, in the year of assessment, grown on some of the fields, were those fields so situate as to be capable of being "split" from the farm so as to constitute a garden unit of occupation, having regard to the absence of either finding or evidence of any local separation between them and the rest of the farm, or of those fields carrying garden crops permanently or even of their having carried them in the preceding year? Again my answer is: No. Besides these two main questions there are the various other legal aspects of the meaning of Rule 8 which I have already discussed but need not repeat, and on which, I think, the Commissioners have misdirected themselves in law, but they are really covered by the two main questions. I am of opinion that the appeal should be allowed, but my colleagues, whose judgments I have had the advantage of reading, are in agreement that the appeal should be dismissed, and dismissed it will be.

Clauson, L.J.—The taxpayer in this case occupies an area of 553 acres and has been assessed for the year ended 5th April, 1937, (*a*) in respect of profits from 238 acres (being arable), part of the 553 acres, occupied as nurseries or gardens for the sale of produce in the sum of £2,000, and (*b*) in respect of the occupation of the remaining 315 acres in the sum of £495. The figures of acreage which I mention are taken from the assessment. The £2,000 was an estimated figure of profit, which would admittedly require adjustment so as to represent the profits arising from the occupation of the 238 acres during the period from the 5th April, 1935, to the 5th April, 1936. The £495 is the admitted annual value of the 315 acres in the year ended 5th April, 1937. The assessment is based on the following propositions: first, that part of the 553 acres, consisting of the 238 acres, is occupied as nurseries or gardens for the sale of the produce other than lands used for the growth of hops, and that, accordingly, in respect of these 238 acres the tax payable under Schedule B in respect of profits arising from the occupation of these 238 acres is (under Schedule B, Rule 8) to be estimated according to the provisions and Rules applicable to Schedule D, that is, by reference to the profits of the year preceding the year of assessment (*see* Finance Act, 1926, Section 29); second, that the remainder of the 553 acres, consisting of 315 acres, is not occupied as nurseries or gardens for the sale of the produce (apart from the portion used for hops), and accordingly is not within Schedule B, Rule 8, and, being occupied for the purpose of husbandry only, falls to be assessed under the general provisions of Schedule B by reference to the annual value.

When the matter came before the General Commissioners, the taxpayer raised a technical objection that the assessments were

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bad for insufficiently identifying the subjects of the respective assessments, and also raised the substantial objection that no part of the 553 acres was occupied as a garden for the sale of the produce. He contended that the whole of the 553 acres should be assessed by reference to the annual value as being occupied for the purpose of husbandry only.

The General Commissioners rejected the taxpayer's technical objection, and held that the assessments sufficiently described the lands comprised therein. They also decided that the 553 acres could properly be divided for the purposes of assessment under Schedule B, and confirmed the assessments, subject to the token figure of £2,000 being adjusted so as to represent the true figure of profit.

The General Commissioners found the following facts: (1) That the farming operations on the arable land (apart from that used for the growth of hops) are ancillary to the market garden operations. (2) That the whole of the arable land (apart from that occupied for the growth of hops) is occupied as gardens for the sale of produce. (3) That the remainder of the land occupied by the Appellant is devoted to farming operations and is assessable under the ordinary Rules applicable to Schedule B.

A Case was then stated at the taxpayer's instance. From the Stated Case, it appears that before the Commissioners it was proved or admitted, (*a*) that the whole of the 553 acres was worked as a single mixed farm in one unit, and (*b*) that wheat was grown in the year in question upon 16 acres of the arable land, one purpose of its being grown being to provide straw litter for the pigs kept on the non-arable land, and that mangolds, parsnips and lucerne were grown on the arable land to provide feed for the stock (90 cattle, 232 sheep and 1,012 pigs) and the 16 horses kept on the non-arable land.

The Case Stated came up for consideration before Lawrence, J., who made an Order on 26th May, 1939, which as drawn up is as follows: "The Court is of opinion that the determination of the "said Commissioners is correct except so far as they held that "part of the arable land is ancillary to the gardens and dismissing "this Appeal the Court doth remit the matter to the said Commis- "sioners to be dealt with in the light of the order of this Court".

As I read this Order, the effect is that the Commissioners are directed to amend the assessments by taking out of the 238 acres (assessed on the profits principle) such acres as are used for farming operations as distinct from being used as "gardens for the sale "of the produce", and to add them to the 315 acres assessed on the annual value, that is, occupied for the purpose of husbandry only.

I can dispose shortly of the point raised as to insufficiency of identification. I cannot feel any doubt that the assessing authority

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ought to identify the subject-matter of the assessment sufficiently to enable the taxpayer to appreciate to what subject-matter it relates. It was said on behalf of the Crown that the question of the identity of the parcels in the two assessments was in fact cleared up in correspondence, and I am satisfied that after the exhaustive discussions before the Commissioners, before Lawrence, J., and in this Court, there is no substantial doubt left as to the identity. The leading Counsel for the Appellant told us that he did not desire to press the point, and I think he was wise in that regard. I do not propose to refer to this point any more.

Turning now to the substantial points which arise, it appears on reference to Lawrence, J.'s oral judgment that the Appellant argued before him (i) that in view of the fact stated in the Case that the whole of the 553 acres was worked as a single mixed farm in one unit, it was wrong to split the assessment of the 553 acres into two, and that the 553 acres should be assessed as a whole, and (ii) that the nature of the produce grown is not the sole consideration under Rule 8 which deals with gardens for the sale of the produce.

The learned Judge, as I read his judgment, was of opinion that the finding that the whole acreage was worked as a single farm made it impossible to uphold an assessment upon one part as gardens for the sale of the produce, under Rule 8, and another part as farm lands. In his view lands to be assessed as gardens must be distinct and separable from the farm and he thought it could not be said on the findings before him that the lands assessed as gardens were so separate.

He, however, felt himself bound to follow the decision of the Court of Session in *Lowe* v. *Commissioners of Inland Revenue*, 21 T. C. 597, which he regarded as a decision that the Commissioners can apportion the assessment even where lands are held and worked as one unit. For myself I have failed to extract any clear cut principle from that decision, and, as it cannot be suggested that the decision is binding upon us, I think it best to consider the question as one of principle.

On the question of principle, I find myself in agreement with the views, as I understand them, expressed by Finlay, J., in *Dennis* v. *Hick*, 19 T. C. 219, at page 228, and, as I read his judgment, approved by Lawrence, J. The assessing authority, as it appears to me, must address to itself the following questions: first, is the occupation of the area (in the present case the 553 acres) by the taxpayer an occupation of the whole as "gardens for the sale of "the produce"? If the answer to this question is in the negative, a second question must be put, namely: is there any part, and if so what part, of the area which is occupied as gardens for the sale of the produce? If the answer to the second question is in the affirmative, Rule 8 will apply to the part in regard to which the question is so answered.

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In my judgment the questions which I have formulated above are, to use the language of Finlay, J., questions "of fact and of "degree". In any particular case the question may arise, and may have to be determined by the Court, whether there was evidence to justify the answers given to the questions, but, as regards that, each case must stand by itself, and I do not see what general guidance can be given.

In the particular case before this Court there is a finding of fact that the whole 553 acres were worked as a single mixed farm in one unit. Lawrence, J., but for feeling bound by the case of *Lowe* v. *Commissioners of Inland Revenue* (1), cited above, would, as I understand his oral judgment, have construed this to mean that the Commissioners held that the taxpayer occupied the whole 553 acres for the purposes of one indivisible business, viz., husbandry. I am not surprised that he should so construe the finding, as, apart from the context the phrase "as a single mixed "farm in one unit" might well be understood to carry such an obligation. But on considering the Stated Case as a whole I cannot for myself so construe the finding. The Commissioners have clearly treated the taxpayer as occupying the separate parts for activities which are separately assessable, and that means, as I understand it, that notwithstanding that there may be unity of administration over the whole area, and though the labour may be used now in one part of the area and now in another, there is a portion of the area which, as a matter of business and common sense, is recognizably occupied as "gardens for the sale of the produce". In other words, the Commissioners have, notwithstanding their finding that the whole of the 553 acres were worked as a single mixed farm in one unit, addressed to themselves the right questions, and they were, as it appears to me, fully justified on the facts of the case in answering them on the footing that one part of the area could be properly treated as occupied as "gardens for the sale of the produce" and the remainder as occupied for ordinary husbandry.

Having dealt with the matter on the footing that he was bound to approve of the existence of two separate assessments, Lawrence, J., came to the conclusion that there was some evidence, viz., the gardening character of most of the crops grown on the arable land, which justified the Commissioners in holding the parts of the arable land occupied by those crops to be occupied as gardens for the sale of the produce, but as I understand it, he held that the Commissioners were wrong in law in treating the parts of the arable land which were under other than "gardening" crops as forming part of "gardens "for the sale of the produce". On a careful consideration of the Stated Case, I cannot satisfy myself that Lawrence, J., was right in this regard. The Commissioners' first finding, viz., "That the farming

(1) 21 T.C. 597.

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"operations on the arable land (apart from that used for the growth "of hops) are ancillary to the market garden operations", must, I think, mean that they consider that the whole of that arable land, viz., the 238 acres, is occupied substantially as "gardens for the "sale of the produce" notwithstanding that a small part of it in the particular year in question, about 26 acres, was cropped with other than what might be called strictly gardening crops. This again is a question of fact and of degree, and I am not prepared to say that their conclusion was wrong in law.

It is necessary now to deal with a question which was apparently argued below, and was certainly argued on the Crown's behalf before us, viz., whether the growth upon a particular area of ground of such a crop as is commonly grown in "gardens for the sale of "the produce" necessarily constitutes that area a "garden for the "sale of the produce". I agree with the opinion expressed by Lawrence, J., that the mere presence of such a crop is some evidence that the area occupied by it is a "garden for the sale of the produce", but, in my judgment, as a matter of construction, the test laid down by the Legislature for the application of Rule 8 is not merely the presence of what I will call for short a "gardening crop". The test is whether the locus in question is occupied as nurseries or gardens for the sale of the produce. I have little doubt that in 1842, or at the earlier date, if it is so, when this test was laid down, the application of it was easy. Modern developments, due not only to the application of mechanical methods but also to increased facilities for transmission of produce, have made the application of the test so difficult that it may well be, as was suggested in argument, that nothing will suffice to meet the position but the interposition of the Legislature. However that may be, the test laid down in or before 1842 must be applied in 1939, and in applying the test the question to be propounded seems to me to be: Is the locus in question occupied as nurseries or gardens for the sale of the produce? And while the nature of the produce is an important factor the test involves the due consideration of all other factors which may throw light on the question whether, within the ordinary meaning of the English language, the locus is occupied as nurseries or gardens for the sale of the produce. The matter, if I may again borrow the language of Finlay, J., is "a question of "fact and of degree" (1).

While this is my view, I see no reason to doubt that in this particular case the Commissioners have applied the right test. If I had thought that they considered themselves bound to hold a particular area to be a garden merely because it is cropped with garden crops, irrespective of any other consideration, I should have been in favour of sending the Case back to them for further consideration. But the very fact that in the area which they find to

(1) 19 T.C. 219, at p. 228.

(Clauson, L.J.)

be " gardens for the sale of the produce " they include an area which happens this year to be cropped with a crop of wheat is to my mind sufficient indication that they took no such narrow view. Again the question is one of fact and degree. It does not seem to me to be reasonable to lay down that if a market gardener happens to grow in any particular year in one portion of his market garden a comparatively small area of non-garden crop, that circumstance makes it necessary, as a matter of law, to treat that small area as separated for assessment purposes from the rest of the garden even if the area in question is so cultivated (as may quite possibly be the case) merely as a matter of convenient rotation.

For these reasons I am of opinion that the Commissioners reached a conclusion in this case which is not open to legal objection, and for my part I should affirm the Order of Lawrence, J., save in so far as relates to the exception therein contained, and save in so far as it remits the matter to the Commissioners. The costs of the appeal should, in my judgment, be paid by the Appellant.

Goddard, L. J.—The Appellant occupies lands in three adjoining parishes in Worcestershire, known respectively as Fingerpost Ground, Lower Moor, Springhill and Willspit. Springhill is a holding of just over 500 acres, the other three being much smaller. The Commissioners have found that these lands are all worked by the Appellant as a single mixed farm in one unit. They have upheld an assessment upon him under Schedule B in respect of the lands at Fingerpost Ground, Lower Moor and rather less than half of Springhill under Rule 8, finding that those lands, which comprise all the arable of the farm, other than that under hops, are a garden of which the produce is sold, or as I will call it for the sake of brevity, a market garden. The rest of the land comprising meadow, pasture, hops and osiers they assess under Rule 1. The principal question which arises is whether they are entitled so to split or apportion the assessment. If apportionment is permissible it cannot, in my opinion, be said that there was no evidence on which they could find that the part assessed under Rule 8 is a market garden. If it is not so permissible and the Case has to be remitted for assessment as a whole then the Commissioners would have to consider, as I understand the decisions, whether the holding is substantially a market garden or an ordinary farm, and assess accordingly.

Sir William Jowitt took three points, one of which can for the moment be left over. His first point was : Does the mere fact that vegetables to be sold for human consumption are grown on parts of an ordinary mixed farm justify a finding that those parts are used as a garden ? His second was : Is it permissible in such a case to split the assessment under Schedule B into two parts, assessing part as a garden under Rule 8, and part as a farm under Rule 1 ? The main argument was that to do so is inconsistent with the finding that the holding was worked as a single mixed farm in one unit.

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Mixed farming, as I understand what is quite a common expression, means no more than that the farmer does not confine his activities to one particular branch of agriculture. While one may carry on exclusively dairy farming and another confine himself to raising corn and ordinary rotation crops, others may combine the two So an arable farmer may grow in addition to corn and rotation crops, vegetables and fruit intended for sale in greengrocers' shops. A farmer engaged in mixed farming may or may not keep separate accounts for each variety of farming carried on. He would naturally use the manure from his farm yard indiscriminately over so much of his holding as required it. His carters and other workpeople would be engaged in one field or another as occasion may require, and there would be one direction or management over the whole, which is what I understand by working the farm as one unit. If he is minded to grow what I may call greengrocers' stuff as well as corn he would no doubt use the leguminous crops for rotation purposes in place of or in addition to swedes, mangolds, clover, sainfoin or the like. If his operations are such that it can fairly be said that he is carrying on a market gardener's business as well as that of a farmer I do not see that the fact that he works the two together, whether as a matter of good farming or for his own convenience, makes any difference. Whether he is carrying on a market gardener's business either exclusively or in addition to other business is, in my opinion, a question of fact. I am far from saying that because a farmer may in any year put a field under potatoes some or all of which are sold to greengrocers it would necessarily justify a finding that he was using his land as a market garden: it must be largely a question of degree—*see Ex parte Hammond, in re Hammond*, 14 L. J. Bcy. 14. But there is a body of authority which shows that a tribunal may regard the produce as the test to be applied in determining whether or not land is being cultivated as a garden and this not only in connection with the Income Tax Acts. In *Purser* v. *Local Board of Health for Worthing*, 18 Q.B.D. 818, a case under the Public Health Act, the Court of Appeal held that land used for the purpose of growing fruits or vegetables for sale was a market garden. In *Cooper* v. *Pearse*, [1896] 1 Q.B. 562, the question arose under the Allotments and Cottage Gardens Compensation for Crops Act, 1887, and Collins, J., said (1): "You have "a holding which may be used as a farm or a garden, and from "which in the ordinary course crops or fruit may be expected— "crops, I should suppose, from the farm, fruit from the garden. "Taking the definition of 'garden' found in a standard dictionary, "it is 'a piece of ground enclosed and cultivated for herbs or fruits "'for food, or laid out for pleasure'". In the Scottish case of *Stewart or Watters* v. *Hunter*, 1927 S.L.T. 232, the question was as to the validity of a notice to quit under the Agricultural Holdings

(1) [1896] 1 Q.B. 562, at p. 566.

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(Scotland) Act, 1923, and it had to be determined, *inter alia*, whether the holding was a market garden. It was held it was not, but the Lord President (Clyde) said (1) : " The trade or business of a " market gardener is, in my opinion, the trade or business which " produces the class of goods characteristic of a greengrocer's shop, " and which in ordinary course reaches that shop *via* the early " morning market where such goods are disposed of wholesale ". *Monro & Cobley* v. *Bailey*, 17 T.C. 607, was in some respects very like the present case except that there was no splitting of the assessment. The total acreage of the farm was 204½ acres, of which 60 were used for bulb and flower cultivation, 50 for potatoes and 94½ for general farm crops including cereals. The House of Lords held that there was evidence, which was that bulbs and flowers were grown on the holding, on which the Commissioners could hold that the whole farm was a garden within Rule 8, and I may also refer to *Dennis* v. *Hick*, 19 T.C. 219, where again a finding that the holding was a garden within Rule 8 was upheld. But it is said that in none of these cases was there a finding that the holding was a mixed farm. I confess I can attribute no magic to these words. In *Monro* v. *Bailey* (*supra*) the Case shews that it was a mixed farm—I have already mentioned the various cultivations and the respective acreages—and it is found in the Case that the whole acreage consisted of open fields worked as one farm by labourers using ordinary methods and implements of husbandry and, further, that the crops were changed each year according to the usual agricultural principle of rotation of crops. If that is not a mixed farm well might one ask : " What's in a name ? " I do not overlook the fact that the Commissioners in that case came to the conclusion that the main purpose of the holding was the growth of bulbs and that the farming operations were ancillary to the bulb business. This word " ancillary " occurs in many of these cases though not in the judgments. From the Commissioners' findings it is clear that what was meant in *Monro's* case was that it was the bulb-growing, and not ordinary farming, that was the principal object for which the farm was carried on. As Lord Buckmaster put it(2), it is all " a matter of degree ". With this case before me I do not feel able to say that if the Commissioners had assessed the Appellant's lands as a whole we could have interfered with the decision, whether they had assessed it as a farm under Rule 1 or as a garden under Rule 8 : to do so would, I think, be directly contrary to the decision of the House of Lords.

So I now deal with what I have already said is the main question : whether the assessment can be split or apportioned. Now what the Commissioners have done here, as I read their findings, is this : they have in effect taken the plan of the Appellant's holding and put a blue pencil round the arable, excluding the hops, and said :

(1) 1927 S.L.T. 232, at p. 235. (2) 17 T.C. 607, at p. 623.

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" We find the land inside the blue line is in substance a market " garden. True it is that on some of that land farm and not garden " crops are grown, but the principal object of the cultivation is the " raising of greengrocers' stuff and that part which is used for straw " crops or mangolds is only a subsidiary matter, or if you like, " ancillary to that main purpose in that it enables manure to be " produced which can be used on the garden land. The lands outside " the blue line are entirely different—they consist of hop-lands, " which by statute cannot be treated as garden, and pasture, " meadow and osiers which no one could consider to be a market " garden. So we find that the taxpayer has in effect two classes " of lands, one is in substance a market garden, assessable under " Rule 8, the other farm lands assessable under Rule 1 ". I confess that I can find nothing in the Act which prevents this being done, and the result seems to be fair both to the taxpayer and the Revenue. By this method the former does not escape taxation under the Rules of Schedule D on that part which he cultivates as a garden, while he gets the advantage of having what I may call ordinary agricultural land kept within the general provisions of Schedule B. This principle of splitting up the assessment was adopted in the case of *Lowe* v. *Commissioners of Inland Revenue*, 21 T.C. 597, in the Court of Session, where again the facts would amply justify the holding being described as a mixed farm. That case would perhaps have been of greater assistance had Counsel not admitted that it was open to the Commissioners to split the assessments. But none of their Lordships seemed to have any doubt that it could be done. Like them, I can find nothing in the Rules which prohibits this course and indeed it appears to me that in certain cases they directly contemplate and to some extent actually require a division of the taxpayer's lands for the purpose of Schedule B. A dwelling-house and a warehouse or trade premises have to be taken out. Then the taxpayer has an option to have his farm lands, or woodlands if managed on a commercial basis, assessed under Schedule D. So it is possible for the owner of an estate consisting of a mansion, a park, home farm and woodlands to have different assessments, differently calculated, made on him, which can be done only by a method of apportionment.

I may point out that, as I understand *Lowe* v. *Commissioners of Inland Revenue*, the Commissioners actually apportioned or split up the assessments on the various arable holdings, so that those on which ordinary farm crops were grown were assessed under the Rules of Schedule B, and those on which vegetable crops were grown fell under the Rules of Schedule D. In such a case I can with Lord Fleming well imagine that great administrative difficulties may arise because the vegetable crops appear to have been used, in part at least, as rotation crops for the corn land so that in one year a particular field might be under corn and in the next year under

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brussels sprouts. This aspect may well demand the attention of Parliament. But in the present case no such difficulty arises because a clean cut has been made between the arable and the rest of the lands.

Lawrence, J., following the decision of the Court of Session, held that apportionment was permissible, but he remitted the Case to the Commissioners to deal again with that part of the arable land which they held was ancillary to the market garden. He gave no direction as to how they were to deal with this portion, but I gather he thought less of the arable should have been apportioned to the garden assessment. I cannot agree to this course and do not think the Case should be remitted. The Commissioners have distinctly held that all the arable is a market garden and for the reasons given above there was, in my opinion, evidence on which they could so find. The finding that some portion, which I assume was that part not under vegetable crops, was ancillary to the market garden means, I think, no more than that the main purpose of the arable cultivation was gardening and not farm crops, and that if a market gardener grows some crops useful for the production of manure, as all straw crops are, they can be regarded as ancillary to the main operation. But there was exactly the same finding in *Monro* v. *Bailey* (1), a case which, considering that only 60 acres out of 204 were under a garden crop, may be considered stronger in favour of the taxpayer than the present. Yet this did not avail to upset a finding that the whole farm was a garden. With all respect to the learned Judge, in view of the finding that the whole of the arable was a garden I do not think that the Case can be remitted on the ground suggested without disregarding the decision of the final court of appeal. It is true that for some reason, which was not explained, the Crown has not entered a cross-appeal against this part of the Order, but this Court must make such Order as it deems the Court below ought to have made, and, in my opinion, the proper Order would have been simply to confirm the assessments appealed against.

It remains only to say a word on the third point taken by Sir William Jowitt, that the assessment must identify the particular lands which come under each category—I suppose by reference to the ordnance survey numbers. As all the arable other than hop-land has been included in the garden assessment there is nothing in this point so far as the particular assessments in this case are concerned, nor do I find anything in the Act which would make the assessment bad if the apportioned assessment states only the acreage and not the actual fields. But it is desirable that every information should be given to the taxpayer, as has been done in this case, as to which lands are claimed by the Revenue authorities to come under Rule 8, so that he and his advisers may have proper material upon which to decide whether to appeal or not.

(1) 17 T.C. 607.

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I think this appeal should be dismissed and concur with the Order proposed by Clauson, L.J.

The Solicitor-General.—My Lords, the appeal will be dismissed, and the Order of the learned Judge varied so far as he directed that the matter should be remitted to the Commissioners to be dealt with in the light of the Order of the Court ?

Scott, L.J.—My brethren will deal with your application.

Clauson, L.J.—I see the language I actually used is much the same the Solicitor-General has used. I said : " I should affirm the " Order of Lawrence, J., save in so far as relates to the exception " therein contained, and save in so far as it remits the matter to the " Commissioners ". If one is affirming his Order, I suppose one is dismissing the appeal. It is only a question of language.

The Solicitor-General.—If your Lordship pleases.

Clauson, L.J.—The costs of the appeal should be paid by the Appellant.

Mr. Graham-Dixon.—My Lords, I ask for leave to appeal to the House of Lords.

Scott, L.J.—Perhaps you would address that question to my learned colleagues.

Mr. Graham-Dixon.—With your Lordship's permission, I do.

Scott, L.J.—My modesty is saved : they both say " Yes ".

An appeal having been entered against the decision in the Court of Appeal, the case came before the House of Lords (Viscount Simon, L.C., Viscount Maugham, Lord Russell of Killowen, and Lords Wright and Porter) on 27th and 28th February and 3rd March, 1941, when judgment was reserved. On 27th May, 1941, judgment was given unanimously in favour of the Appellant, with costs, thus reversing the decision of the Court below.

Mr. A. T. Miller, K.C., and Mr. L. C. Graham-Dixon appeared as Counsel for the Appellant, and the Attorney-General (Sir Donald Somervell, K.C.) and Mr. Reginald P. Hills for the Crown.

JUDGMENT

Viscount Simon, L.C.—My Lords, the question to be decided arises on a Case Stated by General Commissioners under Section 149 of the Income Tax Act, 1918. The Appellant occupies about 550 acres of land in the Pershore district of Worcestershire, and the Commissioners reached the conclusion that the arable portion of the land (except that used for the growth of hops), amounting to about 230 acres out of the whole, should be separately assessed for

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the year ended 5th April, 1937, as "gardens" under Rule 8 of Schedule B, while the rest of the holding should pay tax under that Schedule in the ordinary way by reference to assessable value. The case came before Lawrence, J., who, if he had felt free to give effect to his own opinion, would have decided in favour of the taxpayer on the view that the facts before the Commissioners did not justify the separate assessment. The learned Judge, however, considered that he was constrained by the decision of the Court of Session in *David Lowe & Sons, Ltd.* v. *Commissioners of Inland Revenue*, 21 T.C. 597, to decide in favour of the Crown, but he struck out of the area classed as "garden" some twenty-six acres of arable carrying wheat, parsnips, mangolds, and lucerne on the ground (with which I thoroughly agree) that there was no justification for holding that this land was "ancillary" to the garden. In the Court of Appeal there was a difference of opinion. Clauson and Goddard, L.JJ., took the view that the General Commissioners were justified in deciding against the taxpayer, while Scott, L.J., in an elaborate judgment, involving both historical research and a full examination of the earlier cases which might bear on the matter, was of a contrary opinion. The taxpayer now appeals to this House.

Rule 8 of Schedule B runs as follows: "8. The profits arising "from lands occupied as nurseries or gardens for the sale of the "produce (other than lands used for the growth of hops) shall be "estimated according to the provisions and rules applicable to "Schedule D, but shall be assessed and charged under this Schedule "as profits arising from the occupation of lands."

As Scott, L.J., points out (1), the substance of this Rule, so far as it applies to gardens, may be traced back to its origin in Addington's Income Tax Act of 1806. At that distant date, and for long afterwards, it may be presumed that the distinction between gardens and farm land was easily made. "Gardens for the sale of the "produce" were market gardens, usually situated near large towns, cultivated for the most part by spade, rake, and hoe, and growing characteristically garden crops. The researches and quotations of Scott, L.J., make this plain. The qualification "for the sale of the "produce" is manifestly inserted so as to exclude from the Rule gardens where produce is grown for the supply of an adjoining house, belonging to the same occupier, or gardens where the profit is made by charging the public for admission. But a great change has come over the face of the country since 1806 in this respect, with the result that the distinction between garden and farm is not now so easy to draw. In consequence of a greater variety of products grown on farms, a better knowledge of the principles governing rotation of crops, and a revolution in transport as the result of which Covent Garden and similar markets can be supplied in bulk from a great distance with vegetables and fruit, much of the produce

(1) *See* page 661 *ante*.

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which was at one time confined to gardens may now be part of the output of a farm. The cultivation in open fields with a view to sale of what in earlier days would be regarded as a characteristically garden product cannot, in itself justify the conclusion that such fields have become " gardens ". Etymologically, the word appears to imply that the ground is enclosed, and in common understanding a method and intensity of cultivation specially suitable to an area set apart for horticulture is part of the general conception.

The present appeal, however, can be decided without adventuring upon the difficult task of precise definition. I am quite prepared to accept the view that a defined area may be a " garden ", for the purposes of Rule 8, even though it is not fenced round, as long as it is a distinct and separate unity devoted to gardening. On the other hand, as I have already said, a field, or fields, of farming land should not be called a " garden " merely because they grow products which used to be characteristic products of gardens or even products which are still mainly or largely found in gardens. The main test, in my opinion, is that the defined area should be subject to that nature and intensity of treatment which is characteristic of horticulture.

The Commissioners set out in a series of lettered paragraphs running from (*a*) to (*r*) the facts which were proved or admitted before them, and in order that my judgment may be complete and self-contained I must reproduce these paragraphs *in extenso* :—

" 2 (*a*) For the year in question the Appellant was the occupier " of 550 acres. (i) Part of the land at Springhill and the land at " Fingerpost Ground and Lower Moor was arable (excluding land " utilised for the cultivation of hops) upon which the following " crops were growing during 1936 :—16 acres wheat, 7 acres " potatoes, 3 acres mangolds, ½ acre lucerne, 26½ acres peas, " 18½ acres beans, 44½ acres brussels sprouts, 4 acres savoys, " 18½ acres cauliflower, 3½ acres leeks, 4 acres carrots, 6 acres " parsnips, 2 acres asparagus, 5 acres plants, 1 acre rhubarb, 17 acres " plums, 1½ acres blackcurrants, 32 acres strawberries, 5 acres " raspberries, 2 acres loganberries, 11½ acres *fallow*. (ii) The re- " mainder of the land at Springhill and land at Willspit consisted " of :—82 acres mowing grass, 178½ acres grazing, 40 acres hops, " 7 acres osiers. (*b*) The following live-stock was kept by the " Appellant :—16 horses, 90 cattle, 232 sheep, 1,012 pigs, 8,045 " poultry. The horses worked upon the farm. Cattle, sheep, pigs " and poultry were produced and bred by the Appellant upon the " land. (*c*) The whole acreage occupied by the Appellant was worked " as a single mixed farm in one unit. The Appellant employed " ordinary farm labourers who were not highly skilled. (*d*) The " Appellant used very up-to-date appliances and practised mech- " anized farming over the whole farm. The minimum amount of hand " labour was used in producing crops upon the arable land, much of it

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" being machine planted and machine hoed. (*e*) The Appellant was a " registered producer under the Pigs Marketing Scheme. (*f*) Wheat " was grown upon 16 acres of the arable land, partly to obtain the " subsidy payable under the Wheat Act, and partly to provide straw " litter for the pigs. The mangolds, parsnips and lucerne were grown " to provide feed for the stock and horses. (*g*) The live-stock, pigs " and poultry were kept not for the purpose of providing manure " for the arable and pasture land but for their fattening and sale. " (*h*) During the winter the poultry had access to the arable land. " (*i*) The purchases and sales of live-stock in 1936 were £5,386 1*s*. 6*d*. " and £22,147 10*s*. 7*d*. respectively. (*j*) The wages for the year " amounted to £9,684 17*s*. 10*d*. A big proportion of this expenditure " was incurred in relation to the pigs and hops. The numbers of " regular employees were 80 men and 29 women. These workers " worked indiscriminately upon the whole farm, whether upon the " sheep, pigs, cattle and poultry or upon the pasture and/or the " arable land, often being engaged upon different parts of the farm " at different times in the same day. (*k*) The cost of labour over " the whole farm was £12 per acre and for the land upon which " fruit and vegetables were grown £18 per acre. (*l*) The purchases " of artificial manures amounted to £1,471 8*s*. 6*d*. only and had " been progressively reduced year by year as the manure produced " by the pigs increased. (*m*) The purchase of feeding stuffs amounted " to £10,939 4*s*. 2*d*. (*n*) There are no glass-houses on the land " occupied by the Appellant and no nursery work was done upon " any part of the land. (*o*) The methods of cultivation were the " ordinary accepted agricultural methods. (*p*) The Appellant styles " himself a 'Farmer and Fruit and Vegetable Grower' on his " notepaper and bill heads. (*q*) Some of the produce of the land " used for growing fruit and vegetables was sold in various towns " through an agent in the usual manner in the district. (*r*) In order " to obtain continuity of supplies not always possible from " Appellant's own land, produce is sometimes obtained from other " growers and sold by the Appellant under commission."

After setting out the rival contentions, the Commissioners then express their conclusion, in paragraph 5 of the Case, in the following terms: " We, the Commissioners, have come to the conclusion " that the lands occupied by the Appellant can be divided for " purposes of assessment under Schedule B, and accordingly find " as a fact:—(1) That the farming operations on the arable land " (apart from that used for the growth of hops) are ancillary to the " market garden operations. (2) That the whole of the arable land " (apart from that occupied for the growth of hops) is occupied as " gardens for the sale of produce. (3) That the remainder of the " land occupied by the Appellant is devoted to farming operations " and is assessable under the ordinary Rules applicable to " Schedule B. . . . The appeals will therefore be dismissed so far

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"as the principles at issue are concerned, but in arriving at this "decision the Commissioners are not confirming the amount of the "assessments and in the event of the actual liability of the year "in question not being agreed between the Inspector of Taxes and "the Appellant the appeals are to be regarded as being kept open "for the question of the amounts of the liability to be argued before "the Commissioners."

The first question that arises is whether it is in point of law competent to "split" a single holding into two parts with a view to applying Rule 8 to one portion of it, while leaving the other portion to be assessed under the ordinary provisions of Schedule B. The possibility of this was affirmed by the Court of Session in *David Lowe & Sons, Ltd.* v. *Commissioners of Inland Revenue*, 21 T.C. 597, and was recognised by Finlay, J., in the course of his judgment in *Dennis* v. *Hick*, 19 T.C. 219, at page 228. I accept the possibility of such a division of a unit of occupation, provided that the distinction between the portion which is "occupied as gardens "for the sale of the produce" and the separate portion which is not so occupied is really made out. But in the present case, the facts found in paragraphs 2 (*a*) to 2 (*r*) do not, in my opinion, justify such splitting. As Scott, L.J., pointed out (1), there is nothing in the findings of the Commissioners to indicate that the fields which they added together and pronounced to be occupied as "garden", were not scattered over the whole holding, so as to be interspersed with mowing grass or pasture fields, and the learned Lord Justice goes on: "Indeed, it was common ground, as we were informed, that the "arable fields were in fact so interspersed." Moreover, an area which is to be classed as "garden" must have a certain permanence as such, for the assessment of profits under Rule 8 is by reference to the profits of the preceding year, and was formerly by reference to the average of three preceding years. If a field is subject to rotation of crops so that last year it was part of the ordinary farm but this year is pronounced by the Commissioners to be a "garden", merely because it is this year producing what they regard as a garden crop, there would be no past profits of the "garden" upon which the assessment under Rule 8 could be fixed. In short, a "garden" within the meaning of Rule 8, whatever else the word implies, must have some degree of fixity and local continuance and cannot come and go over different portions of the area according to the system of rotation employed.

I wish now to make an observation on the way in which the Case is stated. It is important for Commissioners, in drawing up a Case for the High Court, always to bear in mind that under Section 149 the Case is required in order to challenge the determination of the Commissioners "as being erroneous in point of "law". By Sub-section (1) (*d*) of Section 149 the Case is required to

(1) *See* page 654 *ante*.

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" set forth the facts and the determination of the commissioners " and the " determination " is the decision of law at which the Commissioners have arrived upon the facts proved or admitted before them. It is, of course, only a determination on a question of law which is liable to be corrected by the High Court : the Commissioners' statement of the facts is final. The High Court can only discharge its proper function in dealing with a Case Stated if the contents of the Case show with reasonable clearness what is the question of law, if any, which arises. Now, in the present instance (and the practice is not uncommon) the Commissioners, after carefully setting out exhaustively the facts proved or admitted, proceed in a subsequent paragraph to state their own conclusions as a finding of fact. Presumably the Commissioners mean to say that they deduce from the facts which were proved or admitted the three conclusions stated in paragraph 5, and that they regard these conclusions as matters of fact. No doubt there are many cases in which Commissioners, having had proved or admitted before them a series of facts, may deduce therefrom further conclusions which are themselves conclusions of pure fact. But in such cases the determination in point of law is that the facts proved or admitted provide evidence to support the Commissioners' conclusions. I think it would tend to clearness, and be in closer correspondence with the intentions of Section 149, if Commissioners in such a case as this would state that the question of law is whether the facts found or admitted can support their further conclusions of fact. This preferable way of stating a Case in such circumstances has often been followed, e.g., in *Lowe's* case, 21 T.C. 597, at page 603.

Coming now to the three numbered conclusions which the Commissioners consider they can, and should, deduce from paragraphs (*a*) to (*r*), the first conclusion seems to me entirely unsupported by the facts found. The contention that operations on an adjoining area are " ancillary " to the market garden operations appears to be copied from a contention of the Inspector of Taxes in *Dennis* v. *Hick*, 19 T.C. 219, at page 223, where the contention succeeded. But that was a case where 263 acres were found to be a garden, partly in view of the high cost of labour employed there, partly because of heavy manuring, and partly because of the nature of the crops. Finlay, J., felt that he could not interfere with this conclusion of fact, and the learned Judge further held that there was evidence to support the conclusion that the use of the remaining land was ancillary to, i.e., subservient to, and intended to assist, the market-gardening business. In the present case there appears to me to be no such supporting evidence at all, for the wheat was grown partly to obtain the subsidy under the Wheat Act and partly to provide straw litter for the pigs, while the mangolds, parsnips and lucerne were grown to provide feed for the stock and horses. Thus the facts found go to show that the area which the Commissioners deduce

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to be ancillary to the so-called garden, is in fact ancillary to the other part of the farm, which they admit is not garden at all.

The second conclusion of the Commissioners raises the question whether the facts proved or admitted can justify the view that the remainder of the arable land was "garden". Reading the findings as a whole, and applying the test above indicated that a "garden" implies, amongst other things, the use of special and intense methods of cultivation, I cannot discover how the facts could sustain the Commissioners' conclusion. The decision on this issue in *David Lowe & Sons, Ltd.* v. *Commissioners of Inland Revenue*, 21 T.C. 597, which influenced Lawrence, J., in rejecting the appeal, appears from the judgments to have largely turned on an admission by Counsel for the taxpayer. The Lord President says at page 604: "Counsel for the Appellants admitted that, if the use of land for "growing vegetables such as these for sale for human consumption "can be regarded as a use of the land as a garden for the sale of "the produce within the meaning of Rule 8, he would have found "it difficult to maintain that these lands, if they had been the "only lands cultivated by the Appellants, had not been properly "assessed under Rule 8", and Lord Fleming at page 606 states that the first reason advanced against the assessment of the lands as garden was "that the produce grown on them was used for human "consumption". On this point I can well understand that the appeal failed, for it would seem a curious reason for declining to call a garden by that name to say that it was growing vegetables for human consumption, instead of flowers and fruit. The reports in "Tax Cases", useful as they are, do not as a rule give even the briefest outline of the contentions of Counsel and it is, therefore, sometimes difficult to make sure what is the meaning of the reference which Judges make to Counsel's argument. But in any case it is, in my opinion, clear that the decision in *Lowe's* case on this point does not embarrass the present Appellant.

There remains to be examined the decision in *Monro & Cobley* v. *Bailey*, 17 T.C. 607, which is the only previous decision on Rule 8 pronounced by the House of Lords. That was a very special case. The holding was devoted to the growing of bulbs for sale and, as a secondary matter, to the growing and selling of flowers produced by the bulbs while so growing. The cost of the labour employed on the bulbs amounted to more than three times per acre of the price of ordinary farming. There was evidence upon which the Commissioners could find, and did find, that the part of the area not actually occupied with the growing of bulbs was none the less part of one entire holding in which the purpose of producing bulbs predominated. Lord Buckmaster pointed out, at page 623, that the taxpayers limited their bulb growing to sixty acres "because it is necessary, "for change of soil and other reasons, that they should use no more".

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I find no difficulty in distinguishing *Monro & Cobley's* case (1) from the present, and I accordingly move your Lordships that the present appeal should be allowed with costs here and below.

Viscount Maugham.—My Lords, in this case there has been some judicial difference of opinion. The trial Judge, Lawrence, J., was in favour of the taxpayer, the present Appellant, but thought he was bound by authority to decide in favour of the Crown. In the Court of Appeal, Clauson and Goddard, L.JJ., took the view that the General Commissioners were justified in deciding against the Appellant; but Scott, L.J., in a very careful and elaborate judgment, was for deciding in the Appellant's favour. The appeal seems to me to raise a question of considerable importance to a large number of farmers in this country, and I should like to say that Counsel on both sides, by their able arguments, have rendered great assistance to the House.

The matter comes before your Lordships on a Case stated under Section 149 of the Income Tax Act, 1918, by the Commissioners for the General Purposes of the Income Tax for the Division of Pershore West, in the County of Worcester. The Lord Chancellor has fully set out the material paragraphs of the Case. The question is whether the Appellant was rightly assessed to Income Tax for the year ended 5th April, 1937, in respect of a single mixed farm of some 550 acres by two separate assessments. The whole of the arable land (229 acres) was assessed by reference to the profits of the preceding year as being "lands occupied as nurseries or gardens for the sale of the "produce" within the meaning of Rule 8 of Schedule B of the Income Tax Act. The remaining land, consisting mostly of mowing grass, grazing and hops, in all some 307 acres, was taxed by an assessment on the annual value in accordance with the General Rules of Schedule B. This is clearly an unusual, if not an unprecedented, method of assessing a mixed farm which *prima facie* appears to be a single assessable unit; and in my opinion strong reasons must exist to justify such a course. The Stated Case should state facts which are at least sufficient to justify the General Commissioners in separating or splitting the farm into two areas and in treating one of the areas as a "garden for the sale of the produce". I need not add anything to what the Lord Chancellor has said on this aspect of the case. The question which emerges is whether there are any facts stated in the Case which justify the course which the Commissioners took.

That the whole farm is occupied and worked as a single unit appears clear from the following findings in the Stated Case:— "(*c*) The whole acreage occupied by the Appellant was worked as "a single mixed farm in one unit. The Appellant employed ordinary "farm labourers who were not highly skilled. (*d*) The Appellant "used very up-to-date appliances and practised mechanized farming "over the whole farm. The minimum amount of hand labour

(1) 17 T.C. 607.

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" was used in producing crops upon the arable land, much of it " being machine planted and machine hoed. . . . (*f*) Wheat was " grown upon 16 acres of the arable land, partly to obtain the " subsidy payable under the Wheat Act, and partly to provide " straw litter for the pigs. The mangolds, parsnips and lucerne were " grown to provide feed for the stock and horses. . . . (*h*) During " the winter the poultry had access to the arable land. . . . " (*j*) . . . The numbers of regular employees were 80 men and " 29 women. These workers worked indiscriminately upon the whole " farm, whether upon the sheep, pigs, cattle and poultry or upon " the pasture and/or the arable land, often being engaged upon " different parts of the farm at different times in the same day. . . . " (*o*) The methods of cultivation were the ordinary accepted " agricultural methods."

The Case shows that the Appellant carries on farming operations of various kinds. He keeps over a thousand pigs and over eight thousand poultry, as well as considerable numbers of sheep, cattle and horses. He buys and sells live-stock. He grows and sells small fruit and a considerable quantity of vegetable produce not of the cereal kind. It is correctly described as a " mixed " farm. The occupation of each part derives benefit from the occupation of the other parts. For example, the manure produced by the pigs is used on the arable and no doubt is responsible for its fertility, and the parsnips, mangold and lucerne were grown to provide feed for the stock, and it may be added were therefore not within Rule 8.

I should mention here that I propose for the sake of brevity to use the word " farm " as a synonym for " lands occupied for the " purposes of husbandry ", which is the old-fashioned phrase still used in the Income Tax Acts. " Husbandry ", in fact, means the business of a farmer. I shall make some remarks later as to the words " lands occupied as nurseries or gardens for the sale of the " produce " in Rule 8 ; but I wish to observe here that that Rule is obligatory. It seems to be clear that the nurseries or gardens for the sale of the produce must have boundaries capable of being definitely ascertained. Moreover, it is plain from Rule 5 of Schedule B that a farm cultivated according to the usual custom and methods of farmers for the purpose of growing crops and other produce in the open as food for human beings and beasts cannot be a garden within Rule 8. That follows from the fact that a man occupying lands for the purposes of husbandry only—that is, an ordinary farmer—has an option under Rule 5 to be assessed and charged under Schedule D instead of under Rule 1 of Schedule B. In contrast to this, Rule 8 provides that the profits of the nurseries or gardens must in every case be assessed and charged under Schedule B as profits arising from the occupation of lands. The farm lands *may* thus be assessed and charged under Schedule D : the nurseries and gardens *must* be assessed and charged under

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Schedule B. The conclusion is inevitable that the two kinds of lands are quite distinct. Either a certain area is land "occupied as "nurseries or gardens for the sale of the produce", and is therefore to be taxed in relation to profits, or it is not. There must therefore be ascertained facts which lead the Commissioners to class a particular area as "nurseries or gardens". *A fortiori* must this be so when the area in question is admittedly a portion of a single mixed farm worked in one unit. The Commissioners have no discretion in the matter. I emphasize this because the decision in the Court of Appeal seems to be based on the view that what the Commissioners say is "garden" must be "garden". Clauson, L.J., says that the test is whether the locus in question is occupied as nurseries or gardens for the sale of the produce (1). With the greatest respect, this does not seem to me to be a test at all. It is the problem to be solved. The test, if it can be found, should determine whether the area is land occupied by a farmer taxable according to Rule 1 or whether it is land "occupied as nurseries "or gardens for the sale of the produce" within Rule 8. To say that the Commissioners have applied the right test, in the absence of any statement by them, or by the Court, as to what the test is, seems to me not to solve but to avoid the whole question. I find myself compelled to prefer the judgment of Scott, L.J., who has, if I may respectfully say so, attacked the problem with equal care and erudition, and has given, if not a rigid test, at least one which is capable of being applied to the particular case which comes before us. I shall now state my reasons for agreeing with his conclusions.

The only fact, so far as I can see, which is alleged to justify the splitting of the farm into two separate units for the purposes of taxation is that considerable parts of the arable land were in the year of assessment used for growing crops of vegetables, predominantly of a non-cereal character, and some 57 acres for growing small fruit. I will take the vegetable area first. There are here found to be 16 acres of wheat, 7 acres of potatoes, 3 acres of mangolds, ½ acre of lucerne, 26½ acres of peas, 18½ acres of beans, 44½ acres of brussels sprouts, 3½ acres of leeks, 4 acres of carrots and 6 acres of parsnips. These, it will be remembered, are grown in the open by ordinary accepted agricultural methods, by ordinary farm labourers, who were not highly skilled and who worked indiscriminately on the whole farm. I have mentioned these crops because it is common general knowledge that crops of this nature are and have for years past commonly been grown on ordinary farms in different parts of Britain where the soil is suitable for raising them A reference to the Government Paper (1927, Cmd. 2815) giving a return of the Agricultural Output of England and Wales, 1925, is sufficient to support this statement. It is, for instance, impossible to suggest

(1) *See* page 674 *ante*.

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that potatoes, peas and beans are not now just as commonly grown on farms as cereal crops, or for that matter as turnips, cabbage, rape, mustard and other cruciferous and leguminous crops. The crops I have mentioned occupy in this case 129½ acres out of 160 acres of arable land (apart from the land used for fruit and the fallow), which the Commissioners have treated as "garden" within the meaning of Rule 8.

There are some vegetables grown on the arable land as to which I do not think it can be asserted as common general knowledge that they are commonly grown by farmers as ordinary farm crops, though for all I know it is so. There are 4 acres of savoys, 18½ acres of cauliflower, 2 acres of asparagus, 1 acre of rhubarb, and in addition 5 acres of "plants" of which the nature is not stated. It seems to be impossible to regard this small proportion (some 30 acres) of a farm of 550 acres and an arable area of 229 acres as justifying the finding of the Commissioners in a case where these crops are grown on a farm by ordinary farm labourers and in the open by ordinary agricultural methods. It is in my opinion quite wrong to suppose that crops like these, or newly introduced crops, raised for the purposes of food for man or beast, coming into vogue and capable of being, and in fact being, grown in the way described afford any ground for asserting that the area on which they are grown can be singled out as a garden within Rule 8. As for the 57½ acres of small fruit, it is well known that all these fruits, with the possible exception of the 2 acres of loganberries, are ordinary farm produce grown in the open in Kent, and in various other counties where the conditions are favourable. In many counties there is hardly a farm to be found without its orchard, and it has become very common to grow small fruit for market in various counties, particularly in Kent and in Worcestershire. In my opinion it is erroneous to think that crops which have been described as "greengrocers' stuff" and ordinary small fruits are not quite properly grown on an ordinary farm where ordinary agricultural methods are employed. Farming is an industry which changes with the times, with modern knowledge of soil cultivation, and with the needs of changing markets and new methods of distribution. It must be progressive or it will have little future prosperity. The mere fact that a farmer undertakes the raising of a new crop, such, for example, as sugar-beet was a few years ago, by ordinary methods, affords in my opinion no ground for the conclusion that the farm or the portion of it so employed is in any true sense a garden for the sale of produce.

In this connection it also has to be remembered that a farmer's business does not consist simply of raising crops in a single year of assessment. It is his duty—to his landlord if he is a tenant, and I think also to the State itself—to do his best by his farming operations to preserve the fertility of the soil. I suppose most educated persons know something of various systems of rotation of crops, and of

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the advantages to the soil which may be obtained by the growing of certain non-cereal crops in certain soils, for example, by the growing of nitrogen-accumulating plants or of deep-rooting plants such as currants. It would be singular and very unfortunate if it could be held that the existence of such a crop in the year of assessment would justify the Commissioners in treating the farm or a selected part of it as a garden within the Rule. To avoid misconception I will state here that many of the crops I have referred to can be and are grown in market gardens. My point is that they are to a much greater extent grown on farms, and the mere fact that you find such crops on a piece of land does not prove that it is a garden rather than a farm. The matter, however, does not rest there. As Scott, L.J., pointed out (1), the Commissioners did not suggest that there was any physical separation which had enabled them to split the holding geographically into two self-contained units, and to decide that the whole of the arable land was not part of the farm, but was a garden for the sale of produce. Indeed, the Lord Justice states that it was admitted in argument that arable fields were in fact interspersed with mowing grass or pasture fields. There are, however, two findings stated in the Case to be findings of fact which are apparently supposed to justify the separation or splitting of the farm. The first is that the farming operations on the arable land (apart from that used for the growth of hops) are "ancillary" (which means "subservient") to the market garden operations. The second is that the whole of the arable land (apart from that occupied for the growth of hops) is occupied as gardens for the sale of produce. I am at a loss to understand either of these so-called findings of fact. If the second were true there would be no need for the first. It is a finding that a certain large area is a garden. But it cannot in my opinion be reconciled with the findings in paragraph 2 which I have set out, unless we are to suppose that Commissioners can at their pleasure pick out fields of wheat, potatoes, mangolds, peas, beans and so forth grown by ordinary agricultural methods on an ordinary farm, and describe those fields collectively as "a garden "for the sale of the produce". That depends on the true meaning of "garden" in Rule 8. The first finding is even more puzzling. How can operations on a garden for the sale of produce be "ancillary" to those same operations? For the words "market garden opera-"tions" obviously mean operations carried on in "a garden for the "sale of the produce".

I have carefully read the Stated Case more than once and I am satisfied that the Commissioners have decided that the arable land is "garden" merely because of the nature of the produce. They could not, I think, have attached any importance to the cost of labour without some further finding as to the usual cost of labour on a highly mechanized farm using very up-to-date appliances,

(1) *See* pages 653/4 *ante*.

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and growing vegetable crops and fruit. Clauson, L.J., uses the words " garden crops " as a description of the crops raised (1). This for the reasons I have already given seems to me with all respect to be misleading, for most of them are common farm crops ; but the Lord Justice indicates clearly that if the only reason for deciding that an area is a " garden " is that it is concerned with " garden " crops ", that would not be sufficient. With that I entirely agree. He, however, comes to the conclusion that the Commissioners must have had some other reason because they included in the so-called garden the 16 acres of wheat. As I have already said, a piece of land cannot be occupied, from the point of view of Income Tax, both as a farm and as a garden for the sale of produce at the discretion of the Commissioners. It must be either one or the other. No facts are stated or suggested in the Stated Case which go to show that the 16-acre field on which wheat was grown was part of a garden, or " ancillary " to a garden, within the meaning of Rule 8. The fact that the Commissioners thought that they could so describe that area seems to me a further reason for thinking that they were acting on a wrong view of the meaning of the words " nurseries or gardens ".

In my opinion it is impossible to define in precise language the meaning of the word " garden " as used in the Rule, and I have no intention of attempting the impossible. It is however possible to state the general nature of the various characteristics which go to make up such a garden.

I have already pointed out the remarkable contrast between the effect of Rule 5 and Rule 8 in relation to the scheme of taxation. Next, I think some weight should be given to the fact that a garden is *prima facie* an area which is enclosed, and it is a little surprising that nothing in the Case Stated suggests such a separation, except that the whole arable area, including a wheat-field and all the fallow, is regarded as a garden. Then it is to be noted that Rule 8 applies only to two kinds of lands—namely, " lands occupied as nurseries " or gardens for the sale of the produce (other than lands used for " the growth of hops) ". Nurseries obviously require a very special kind of cultivation ; and it is I think a probable conjecture that the Legislature, when it in effect took nurseries and gardens for the sale of produce out of the general words of Schedule B and Rule 1, did so because in both cases the method of cultivation was not that ordinarily used on a farm.

I attribute weight also to the historical considerations which have been mentioned in the judgment of Scott, L.J., which reinforce his view as to the meaning which should still be attached to the words now in Rule 8. Further, I agree with him that the various Income Tax Acts must have been framed in the belief that nurseries and gardens would, normally at least, have some permanency of character, since the profits of such lands had formerly to be estimated

(1) *See* page 674 *ante*.

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on a three-years' average, and now, under the Finance Act, 1926, have to be estimated on the yield of the preceding year. Peas, beans, and so forth grown on a farm may occupy lands which were occupied during the preceding year by cereals, or for grazing. It will be understood that I am only dealing with characteristics of a garden and am not suggesting that any one of the matters I have mentioned is conclusive.

My Lords, in my opinion far the most important distinctive quality which differentiates a garden within the Rule from a farm taxable under Rule 1 is the mode of cultivation employed. It is the character and nature of the operations on the land which mainly determines whether or not it is a garden for the sale of produce. I agree with Scott, L.J., that the distinction between "farm" and "garden" may be expressed in general words as the difference between lands cultivated by agricultural methods and lands on which horticultural methods are employed. Produce which requires the attention of skilled men would generally be found grown in a garden. The use of the plough in such a place would be something of a rarity. The soil in the garden would usually be prepared by the employment of the homely spade and the tiresome operation of trenching and digging in manure. At any rate I am confident that that was the case when the words "gardens for the sale of the "produce" were employed in the early Acts relating to Income Tax. Certainly, hand labour would usually be employed, and it would be very unusual to find that (as in this case) the land was for the most part both machine-planted and machine-hoed. It is not altogether irrelevant to note that in the Census returns gardeners and nurserymen and "gardeners' labourers" are enumerated separately from "agricultural labourers". The greater care employed in raising vegetables in a market-garden generally results in better shape and quality in the produce. Peas and beans, as I have pointed out, may be grown both on farms and gardens, but they will not usually have quite the same taste and quality.

My Lords, the occupier of a farm carried on as a single unit must *prima facie* be entitled to be taxed as if it were a unit. It is, in fact, a unit of occupation. As pointed out above, he is entitled if he pleases to be assessed and charged under Schedule D, and this must *prima facie* be on the whole of his profits and gains. I think this follows from Schedule D, Cases I and II, Rule 16, which provides that his statement of profits must include every source of income, and that he shall be chargeable in respect of the whole of the tax so chargeable in one and the same Division. The proviso relates to a person engaged in different trades in different places, which of course is not the case here. I am not doubting that there might be in a proper case a separation of lands occupied as a garden for the sale of produce from the farm lands; but I am of opinion that the necessity for the separation should be clearly established.

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It is desirable to make a few remarks on two of the authorities which have been cited. *Monro & Cobley* v. *Bailey*, 17 T.C. 607, was decided by this House. It related to a holding of some 200 acres occupied mainly for the purpose of growing bulbs. It seems to me widely different from the present case. Bulb-growing, like flower-growing, is a very special use of land. The method of cultivation is a special one. The main question in the case was whether an area not used for growing bulbs was properly held to be used for a purpose ancillary to the bulb-growing, and it was held that there was sufficient evidence to justify the Commissioners in taking that view. I do not think that case throws light on the present appeal.

The other case is *Dennis* v. *Hick*, 19 T.C. 219. The crops grown were vegetable crops as opposed to cereals, and a small amount of stock was raised. But most of the work on the crops was done by hand—for example, sowing in seed-beds, grading, washing and packing—and the manuring was much heavier than on ordinary farm-lands. Moreover the taxpayer frankly admitted that he carried on the business of a market gardener. Finlay, J. (as he then was), not without some doubt, held that there was evidence to justify the Commissioners in finding that the whole area was occupied as a garden for the sale of produce within Rule 8. I will only add with respect that with the same modicum of doubt I should have come to the same conclusion. That case can certainly be distinguished from the one before us.

My Lords, I do not wish to be understood as saying that a farmer cannot carry on ordinary farming and at the same time carry on the business of a garden for the sale of produce on a distinct area adjacent to or situate within his holding, so that as regards the latter he would be taxable under Rule 8. I do however express the opinion that it is wholly erroneous to select from the area of a farm occupied and worked in one unit, which is used for raising crops and small fruits predominantly of kinds grown by farmers all over the country, the land being cultivated by ordinary agricultural methods and by ordinary agricultural labourers working indiscriminately on the whole farm, and to give to the selected portion the name of a "garden for the sale of the produce". To my mind there is no finding of fact in the Case Stated which justifies such a conclusion. On the contrary, I think that the findings of fact to which I have more than once referred lead only to the conclusion that the arable land is part of a mixed farm used for the purposes of husbandry and cannot be brought within Rule 8.

For the above reasons I think this appeal should be allowed, and I agree with the motion proposed by the Lord Chancellor.

My Lords, I have been asked by my noble and learned friend **Lord Russell of Killowen** to state that he concurs in the opinion which I have just delivered.

Lord Wright.—My Lords, this appeal comes to your Lordships upon a Case Stated by the Commissioners of Taxes under Section 149 of the Income Tax Act, 1918, for the opinion of the High Court. The Appellant, who was assessed for the tax, declared his dissatisfaction with the decision of the Commissioners as being erroneous in point of law.

The question of law involved is whether the Appellant was correctly assessed as occupying lands as gardens for the sale of produce under Rule 8 of Schedule B of the Act. His claim is that he ought to be assessed under the general Rules of Schedule B as to the whole of the land occupied by him, on the footing that he occupies the whole acreage of about 536 acres for purposes of husbandry, that is, as a farmer, whereas in regard to about 229 acres of these lands, called throughout in the Case the arable lands, he has been assessed under Rule 8. The remainder, about 307 acres, was made up of 40 arable acres under hops, 82 acres of mowing grass, 178½ acres of grazing and 7 acres of osiers. On these lands the Appellant kept live-stock, namely, 16 horses, 90 cattle, 232 sheep, 1,012 pigs and 8,045 poultry. He was assessed upon them under the general Rules of Schedule B. On the 229 acres the Appellant grew various crops or produce. Of these wheat occupied 16 acres, grown partly to obtain the subsidy payable under the Wheat Act, partly to provide straw litter for the pigs. Mangolds (3 acres), parsnips (6 acres) and lucerne (½ acre) were grown to provide feed for the stock and horses. As these were not grown for sale they were, on that ground, in addition to the fact that their growing was an ordinary farming operation, outside Rule 8, because the produce was not for sale. The Commissioners held, however, that they were assessable under Rule 8 on the ground that the farming operations were ancillary to what they described as "the market "garden operations", carried on upon the remainder of the 229 acres. These, apart from 11½ acres of fallow, were used for growing (as set out in the Case) 16 different kinds of crops or produce—potatoes (7 acres), peas (26½ acres), beans (18½ acres), brussels sprouts (44½ acres), savoys (4 acres), cauliflower (18½ acres), leeks (3½ acres), carrots (4 acres), asparagus (2 acres), "plants" (5 acres), rhubarb (1 acre), plums (17 acres), blackcurrants (1½ acres), strawberries (32 acres), raspberries (5 acres) and loganberries (2 acres). The conclusions of the Commissioners were that the whole of the 229 acres was occupied as gardens for the sale of produce and assessable under Rule 8 and that the remainder of the land occupied by the Appellant was devoted to farming operations assessable under the ordinary Rules applicable to Schedule B. Lawrence, J., held that the acres under wheat, parsnips, mangolds and lucerne were, on the face of the case, outside Rule 8, but as to the remainder he decided that the decision of the Commissioners should be upheld.

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His own view was that the finding in the Stated Case that the whole acreage was worked as a single mixed farm was inconsistent with the decision to uphold an assessment on one part as gardens and on another part as farm lands, because the land to be assessable as gardens must be distinct and separable from the farm. He thought, however, that there was some evidence to support the Commissioners' finding on the authority of *Lowe* v. *Commissioners of Inland Revenue*, 21 T.C. 597, where it was held by the Court of Session that the Commissioners could apportion the assessment even where lands were held and worked as one unit. In the Court of Appeal, by a majority, Scott, L.J., dissenting, the decision of Lawrence, J., was upheld, except that the Court restored the finding of the Commissioners as regards the lands which the Commissioners found were ancillary to the gardens. Clauson and Goddard, L.JJ., who formed the majority of the Court, did indeed discuss to some extent the legal effect of Rule 8, but in the main, as I read their judgments, they treated the question as one of " fact and degree " on which the finding of the Commissioners is final, if, as they thought, there was some evidence to support it. Scott, L.J., in an admirable and exhaustive judgment, with which in substance I agree, held that on the findings of the Commissioners and on the true construction of Rule 8 their conclusions could not be supported, and that the Appellant should be assessed as to the whole of the lands under the ordinary Rules of Schedule B as being a single mixed farm.

The justification for stating an award in the form of a Stated Case for the opinion of the Court is that it raises questions of law by which the correctness of the conclusions are to be decided. I think that such questions are involved in the present case. It has been strenuously contended as a main argument on behalf of the Crown that the questions here to be discussed are questions of " fact and degree ". But in my opinion the true effect of the facts found cannot be ascertained until the true construction of Rule 8 has been examined and its true application to the facts ascertained. There are, in addition to incidental questions, two main questions of law, namely, what is the meaning of " gardens for the sale of the " produce " and how is that meaning to be applied to an acreage which is worked as a single mixed farm in one unit. This latter point is that on which Lawrence, J., would have (if he had felt free to do so) decided for the Appellant, on the footing, as I follow it, that, according to the findings in the Case, the whole area of 536 acres is not capable of being split or divided into two separate undertakings, one gardens, the other a farm, but there is one single agricultural undertaking, and that the parts which might otherwise be regarded as gardens are nothing more than parts of a single farming unit.

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What, however, is the test by which it may be ascertained what are gardens within Rule 8 as contrasted with a farm generally? It cannot be merely that the land is managed for the sale of the produce, that is, to make profits. All that a husbandman grows is for sale, subject of course to deducting such produce as is grown for use in connection with other parts of the undertaking (as, for example, in this case the parsnips and lucerne) or for the use of himself and his family. The farmer is a trader so far as he sells, though apart from election under Rule 5 he is assessed under Schedule B. The specific reference to sale as the object of growing the produce is to distinguish a garden within Rule 8 from a private, non-commercial garden, ranging from the cottage garden to the garden of a great mansion, in which the fruit or flowers or vegetables are grown for home consumption or for the pleasure or the pride or the benevolence of the occupier. To distinguish gardening operations in this connection from other agricultural operations to raise produce from the land, there must be some other criterion. Scott, L.J., in his judgment has thrown light on this question by tracing back Rule 8 to its first appearance in the Act of 1806, then, when that Act lapsed, to its re-enactment in 1842. (I disregard the special treatment of hoplands.) "Nurseries" then as now are coupled with "gardens". Scott, L.J., quotes from an interesting work, Middleton's "Agricultural Survey of Middlesex", published in 1798. This shows the circumstances which in 1806 obviously were in the mind of the Legislature. Middleton distinguished "kitchen-gardeners" (obviously what we should call "market "gardeners") from "farming gardeners". The former occupied smaller holdings, intensively cultivated "by the spade", engaged in supplying London from the outlying villages with fruit and vegetables. The latter had larger tracts of land, worked their soil principally by the plough, and were more distant from London. My noble and learned friend Lord Maugham has supplemented this information by referring to a Report (1927, Cmd. 2815) issued by the Ministry of Agriculture of the Agricultural Output of England and Wales in 1925. In Table 4 on page 128 the Report gives the average annual production of the principal farm crops and includes, along with wheat, barley and oats, beans, peas, potatoes, turnips and swedes. Tables 7 and 8 give the enormous quantities of vegetables and fruit produced in that year in England and Wales, for instance, cabbage for human consumption 410,000 tons, strawberries 705,000 cwts. This Report shows clearly the enormous scale on which vegetables and fruit are produced. It seems to me to indicate a departure from the intensive or horticultural method prevalent according to Middleton in the smaller holdings about the end of the eighteenth century, and an adoption of the methods of cultivation found in the Case to have been adopted by the Appellant, that is, ordinary agricultural methods (finding *o*) which the Appellant used. The growth of the population, now mainly urban, and the great

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facilities for transmission, must tend to the use, even in lands occupied as gardens within Rule 8, of agricultural methods. I therefore do not think that the use of such methods as contrasted with horticultural methods in the stricter sense can serve as a general criterion to distinguish gardening within Rule 8 from farming, although that factor may be taken into account in considering whether particular lands are garden lands as contrasted with farm lands.

The nature of the produce raised is no doubt also an important factor. But there again the line cannot be drawn with precision. Garden produce as meant by Rule 8 has been described as what is sold in greengrocers' shops. But modern methods and demands have in many cases led to specialised production on a large scale. Potatoes are clearly an ordinary and important part of a greengrocer's stock. But it seems to me impossible to treat a case of cultivation like that illustrated in *Back* v. *Daniels*, [1925] 1 K.B. 526, and 9 T.C. 183, as gardening in contradistinction from farming. There a large area, about 187 acres, was devoted to potato growing for sale. The question in the case was who was occupier, but throughout, as a matter of course, the operation is referred to as farming or husbandry and the assessment was under the ordinary Rules of Schedule B. This view seems to me to be right. The same must be true, I think, of the raising on a large scale of crops of a particular produce such as cabbages. It does not follow that because certain produce is grown in gardens any land on which it is grown is necessarily a garden. The word "gardens" is not used in Rule 8 in a technical sense. It is an ordinary word, to be understood as in ordinary popular usage. But whatever else may be included in the word "gardens" in the Rule, I think it cannot be wholly divorced from its root idea of a substantially homogeneous area, substantially devoted to the growth of fruits, flowers and vegetables. The dictionary definitions of "garden" include the idea of its being an enclosed space. Thus, for instance, in the Oxford English Dictionary, "garden" is defined as "An enclosed piece of ground "devoted to the cultivation of flowers, fruit, or vegetables; often "preceded by some defining word, as *flower*, *fruit*, *kitchen*, *market*, "*strawberry-garden*, etc." I do not say that in modern times gardening operations falling within Rule 8 may not be carried on in open fields. But the essential characteristic of the statutory "garden" and the idea material to this case is that it should be within reasonable limits a defined unit of cultivation in relation to space. That is not inconsistent with the inclusion in the unit of some lands used at some particular time for other purposes. This is necessary for rotation of crops. But it must be possible to predicate a substantial and relatively permanent unity of character and purpose. This was so in *Monro & Cobley* v. *Bailey*, 17 T.C. 607, where this House upheld an assessment as a garden within Rule 8, of 200 acres, on

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60 acres of which bulbs were grown. But it was necessary to have the remaining 140 acres in order to carry on the bulb growing, partly because of the operations necessary in shifting the bulbs from one area to another and partly for purposes of rotation. Bulbs are clearly a garden crop and the whole area was necessary to enable 60 acres of bulbs to be grown even though the remaining acreage was at times used for other crops. That may be described as an easy case, but it is no authority to govern this case. Indeed, it is in sharp contrast and illustrates the absence from this case of the factors necessary to constitute a garden. There was there a defined unit of occupation as a garden. Here there is no defined unit of occupation as a garden. On the contrary, the only defined unit of occupation is, according to the Commissioners' finding, a mixed farm. The main area was called Springhill, which covered 508 acres. Within that area the great bulk of the mixed farming operations were carried on. The accuracy of the statement made by Scott, L.J., in his judgment was accepted in argument in this House. He said: "There is nothing in their" (the Commissioners') "findings of fact to indicate that the fields they added together" (to constitute the 229 acres which they held to be gardens) "were "not scattered over the whole holding, so as to be interspersed with "mowing grass or pasture fields, and indeed, it was common ground, "as we were informed, that the arable fields were in fact so inter-"spersed."(1) In my opinion, this state of things is inconsistent with the conception of "gardens". "Gardens" within the meaning of Rule 8 cannot be notionally constituted by picking out from the total area about 16 scattered fields, used in the year of assessment for producing fruit and vegetables. It would logically be just as easy to say that if there were in the middle of the farm lands, in a large farm, a single field of cabbages, that single field was a garden within Rule 8. I do not doubt that in a large holding there might be two distinct portions spatially severable, one devoted to farming operations, the other to the growing of fruit and vegetables. Each of these separate areas might properly be separately assessed, the one area as a farm under the ordinary Rules of Schedule B, the other as gardens under Rule 8. But that is a different matter. There is in that case no intermingling of garden and farm.

The Commissioners' conclusion would also involve serious administrative difficulties. There is here no continuity or fixity in the user of any particular field. The particular field used in the year of assessment for growing fruit and vegetables may have been, owing to the ordinary system of rotation of crops, used in the preceding year for ordinary farm purposes. Rule 8 requires the application to the lands coming within it of the Rules of Schedule D which make the tax payable on the basis of the previous years' income. But it would be impossible, in the case supposed, to

(1) *See* page 654 *ante*.

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ascertain the gardening profits of the particular field or indeed of the aggregate of the particular fields in accordance with the proper methods of computation. This was even more obvious before the profits of the preceding year were substituted for the average profits of the three preceding years. It is no answer that in each year the business might be treated as a new business commenced in that year. That would not be in accordance with the fact, and would necessitate complex book-keeping and accounting such as could not be exacted from the agricultural community.

The difficulty was solved in the *Monro & Cobley* case[1] by treating the whole area as a single unit of cultivation for gardening purposes. But the facts there justified the finding that the whole unit was a garden. Here, for reasons which I have explained, no such finding is justifiable. It is not legitimate to constitute a notional garden by claiming to aggregate the *disjecta membra*, the scattered and islanded fields, in which fruit or vegetables are grown.

But apart from all these difficulties the matter is concluded, as I think, by the first finding of the Commissioners: "The whole "acreage occupied by the Appellant was worked as a single mixed "farm in one unit. The Appellant employed ordinary farm "labourers who were not highly skilled." The Case adds that the "workers worked indiscriminately upon the whole farm, whether "upon the sheep, pigs, cattle and poultry or upon the pasture and/or "the arable land", and "the methods of cultivation were the "ordinary accepted agricultural methods". In my opinion these findings mean that there was one unit of cultivation, and that it was a farm. They exclude the idea that the farm was partly "gardens", or that there was any division into component or separate parts. I picture the farmer facing the problem of what would be the best use to make of his farm of 500-odd acres from year to year, deciding what different kinds of produce or stock would pay best, what rotation of crops is required, and deciding how best to apportion his land among the different purposes. Another year he would have the same problem and presumably settle it in a different way. Lawrence, J., was of opinion, as I have already observed, that the first finding was inconsistent with a decision to uphold an assessment on one part as gardens and on another part as farm lands. I agree with him, and I also agree with him in taking as an essential criterion of "gardens" in Rule 8 that the lands to be characterised as gardens must be distinct and separate from the farm. This was also the view of Scott, L.J.

Lawrence, J., was diverted from his own view because he felt bound to follow the Scots decision, *Lowe* v. *Commissioners of Inland Revenue*, 21 T.C. 597. But in that case the taxpayer admitted the possibility of picking out individual separate fields and aggregating

(1) 17 T.C. 607.

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them to form notional "gardens". I think the case cannot be supported in principle. The other cases cited do not appear to me to help, and I do not discuss them.

I ought to add, though it is not material in view of my general conclusion, that I should agree with Lawrence, J., with reference to that part of the arable lands which the Commissioners held to be ancillary to the gardens. Lawrence, J., shrewdly observes [1] that he cannot see how these lands were ancillary to the gardens any more than the other lands used for feeding stock, which indeed was exactly what these lands were used for. I ought also to add that the cases of woodlands and hoplands stand on a different footing, as also does glass-house cultivation.

In my opinion the appeal should be allowed.

Lord Porter.—My Lords, the short question in this appeal is whether a portion of the Appellant's land can rightfully be severed from the rest and classed as land occupied as a garden for the sale of the produce. If it can, under Rule 8 of Schedule B of the Income Tax Act, 1918, its profits are to be assessed and charged under that Schedule as profits arising from the occupation of land but they are to be estimated according to the provisions and Rules applicable to Schedule D, that is, not upon the annual value of the land, but upon the profits derived from it. If it cannot, then the charge is normally made in respect of the occupation of the land for every twenty shillings of the assessable value, that is, in the case of land used for husbandry, upon the annual value of the land without regard to the profits made, save in so far as they affect its assessable value.

The reason for the differentiation is agreed by both parties to be due to the much greater amount of profit expected to be earned proportionate to the acreage occupied in the case of lands occupied as gardens compared with that expected when they are used for husbandry or other purposes. The distinction goes back to the period at which Income Tax was re-imposed in 1806, when not dissimilar language was used, and to the renewal of the tax in 1842, when the language was almost identical with that now in use. Under Rule 8 hop gardens are now, after some changes in the law, left to be dealt with under the ordinary provisions of Schedule B, and under Rules 5 and 7 lands occupied for the purpose of husbandry, and woodlands managed on a commercial basis and with a view to the realisation of profits, may at the option of the occupier be assessed under Schedule D instead of under Schedule B.

In the present case the lands the subject matter of the dispute form part only of the Appellant's holding. The Crown maintains that they are properly severable from the rest and chargeable under Rule 8 as lands occupied as gardens for the sale of produce; the

[1] *See* pages 648/9 *ante*.

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Appellant that, having regard to the facts of the case, they cannot be disassociated from the rest of the land, and in any case are not such gardens.

The Commissioners to whom the question was referred found that the lands could be divided, and that the whole of the arable land occupied by the Appellant (apart from that occupied for the growth of hops) was occupied as gardens for the sale of produce, but stated a Case for the opinion of the High Court. Lawrence, J., before whom the case was argued, upheld the finding of the Commissioners (subject to a slight modification), but, as I gather, with some reluctance. If he had not felt himself bound by authority, he would have decided that no division was permissible, and though he thought that there was some evidence on which the finding that the arable portion was a garden could be supported, and therefore did not feel justified in differing from the Commissioners, he would, if left to himself, have found the other way. In the Court of Appeal, Scott, L.J., disagreed on both points, but Clauson and Goddard, L.JJ., thought both were questions of fact and degree, and inasmuch as in their view there was some evidence upon which the Commissioners could base their findings, affirmed the decision.

I did not understand the Appellant to seek to establish that in a proper case a holding could not be divided into two portions, one of which was occupied as a " garden " (for brevity's sake I omit the words " for the sale of the produce ") and the other not so occupied. Nor do I think he would be right if he did. Provided it is clearly shown that one part of the land is so occupied and there is a definite separation in the method of working, I see no reason why the two portions should not be separately assessed, and speaking for myself I think this conclusion might be arrived at though the portions separately worked were not divided into two continuous parts, but were made up of broken portions of the area. In the latter case, however, it would, I think, require very clear evidence that the working and method of working of the part classified as a garden differed from that of the other portion of the lands.

The Appellant did, I think, contend that in no case was it permissible to deduce the conclusion that the land was occupied as a garden solely from the type of crop grown, that is, from the fact that it was what the representatives of the Crown described as " garden produce ". Again speaking for myself, I think that if substantially the whole of an undivided holding contained little save such crops as are as a rule grown only in gardens, and in particular if a mixed crop consisting substantially of garden produce was shown to be cultivated on the land, there would be evidence on which the Commissioners could find that the land was occupied as a garden. But the fact that part only of the land was so used would not entitle

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them to split up that portion and call it a garden, nor even if no splitting were required would it be legitimate to rely upon the fact that the produce was such as might be grown on farms or gardens. An inference cannot be drawn from the growth of a crop of doubtful classification.

If I were asked to state the most material matters to be looked at in determining whether a particular portion of land was occupied as a garden or no, I should lay stress on (*a*) the unit to be considered, that is, was the whole land worked by the same methods and the same staff, or was there some clear distinction in its treatment; (*b*) the method of cultivation, that is, was it intensive and under skilled labour or not; (*c*) what crops were grown there; and, I think (though its importance is slight) (*d*) the size of the unit. That the cultivation was effected by mechanical means would not, I think—provided it were proved to be intensive—make it impossible to hold that the land was occupied as a garden. Methods of cultivation change, and what at one time can only be accomplished by the spade may at another be brought about by some mechanical substitute; but, even so, the large-scale operations of a farm are still likely to be distinguishable from the more individual cultivation of a garden crop. Some continuity of treatment is also, I think, predicated. No doubt a garden must be begun at some time, and the fact that it has only just been brought into being will not prevent it from being a garden, but Income Tax under or in accordance with the principles of Schedule D is chargeable upon the profits of the year preceding the year of assessment (and formerly upon the average profits of the three previous years). It is inconsistent with such a provision that land should in one year be regarded as occupied for husbandry and the next as a garden merely because the crops vary from year to year. No doubt if land as a whole is occupied as a garden it is immaterial that it is found advisable in the ordinary rotation of crops to grow farm produce from time to time on a portion, just as, if land as a whole is occupied for husbandry, it, or a portion of it, does not become a garden because garden produce is cultivated from time to time on some part of it. It is the cultivation as a whole that is to be looked at, not its temporary variations.

These principles are, I think, consistent with the decided cases. In both *Munro & Cobley* v. *Bailey*, 17 T.C. 607, and in *Dennis* v. *Hick*, 19 T.C. 219, the whole of the land occupied was found to be occupied as a garden because substantially that was its use, though in the earlier case a much larger acreage was cultivated in order that the room necessary for the replanting of bulbs might be available. In the latter the portion not used for gardening purposes was found to be merely ancillary to the part so used, by which I understand it to be meant that the additional portion was worked with the garden as one unit because it was convenient to do so. In neither

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case was the finding dependent on the crop alone. In the former case the crop was bulbs (which is not a usual crop in ordinary husbandry) sold for replanting; the profit was made largely from them and their flowers. In addition the cost of labour was much in excess of that employed on ordinary farming operations. In the latter the cost of labour per acre far exceeded that of a farm. Much heavier manuring took place and much of the work on the crop, both when growing and after picking, was done by hand.

Lowe v. *Commissioners of Inland Revenue*, 21 T.C. 597, was the only case quoted to us of splitting up of land in the same occupation, and was the case which the learned Judge thought himself obliged to follow in deciding in favour of the Crown. I refrain from expressing an opinion whether or not the Commissioners were in that case rightly held to have had such material before them as entitled them to decide that the divided portion was a garden. The decision seems in part to have turned upon an admission of Counsel, and, as appears from the opinion of Lord Carmont, the question of splitting was not argued. The case therefore affords no authority on that matter.

It only remains to apply these considerations to the present case.

Prima facie the unit was the whole farm. Findings (*c*), (*d*) and (*o*) of the Case are as follows:

"(*c*) The whole acreage occupied by the Appellant was worked "as a single mixed farm in one unit. The Appellant employed "ordinary farm labourers who were not highly skilled. (*d*) The "Appellant used very up-to-date appliances and practised mech- "anized farming over the whole farm. The minimum amount of "hand labour was used in producing crops upon the arable land, "much of it being machine planted and machine hoed." "(*o*) The methods of cultivation were the ordinary accepted "agricultural methods."

They show that it was so worked. That the stock-keeping was no merely ancillary activity is shown by the value and amount of the stock and the magnitude of the sums derived from its sale. Each activity was an important one and each assisted the other. That the labour was not highly skilled and that ordinary agricultural methods were used might, I think, support an argument that the Appellant was a farmer, but afford no reason for dividing up his holding.

Except the nature of the crop and the fact that part was arable and part pasture, the only difference between the two portions appears to be that a heavier expenditure was incurred for labour on the arable than on the other, and that to my mind is not enough, even though I accept as accurate the statement in (*k*) that the cost of labour over the whole farm was £12 per acre and over the land upon which fruit and vegetables were grown, £18 per acre, a statement

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which appears to be inconsistent with the allegation in (*j*) that the wages for the year amounted to £9,684 17*s*. 10*d*., a figure which makes wages over the whole area amount to not £12 but £17 12*s*. per acre. Even if splitting was justified, I should have difficulty in holding that the divided portion was occupied as a garden. The only evidence is derived from the crop, the fact that part was sold through an agent, and that supplies were sometimes obtained from other growers. Many of the crops are such as might be grown either on a farm or in a garden. If there had been a finding that a substantial portion of the crop was such as in the district was grown in gardens only and not on farms the conclusion that the arable land was occupied as a garden might be justified, at any rate, on an undivided farm, but to my mind it is not enough for facts to be set out which do not of themselves (apart from circumstances which may possibly exist and be known to the Commissioners to exist) point to a conclusion either way, and then to have a finding of fact from those inconclusive matters. There may, it is true, be other facts justifying the conclusion, but your Lordships, like any other tribunal to whom the case is referred, are bound to consider only the facts found.

It seems to be not unusual, if my examination of the Cases is accurate, for Commissioners, after stating the facts, to say that they come to a certain conclusion and accordingly find such and such a thing as a fact. I do not think this is justifiable ; the final result is not a fact, it is an inference from facts previously set out. I should prefer the commonplace of the legal arbitrator : " So far as it is a " question of fact I find as a fact, and so far as it is a question of " law I hold." But this is a matter of form rather than substance.

In the present case my view is that the splitting up of the holding for tax purposes was not justified and there was no evidence on which the Commissioners could find that the portion which they so notionally divided from the rest was occupied as a garden for the sale of produce.

I should allow the appeal.

Questions put :

That the Order appealed from be reversed.

The Contents have it.

That the Case be remitted to the Commissioners for the General Purposes of Income Tax with a direction to assess the whole of the arable land under the ordinary Rules applicable to Schedule B ; and that the Respondent do pay to the Appellant his costs here and below.

The Contents have it.

[Solicitors :—Ellis & Fairbairn, for Ryland, Martineau & Co., Birmingham ; Solicitor of Inland Revenue.]

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