No. 1207—HIGH COURT OF JUSTICE (KING'S BENCH DIVISION, DIVISIONAL COURT)—18TH, 19TH APRIL AND 10TH MAY, 1940

COURT OF APPEAL—8TH AND 9TH JULY AND 2ND AUGUST, 1940

HOUSE OF LORDS—1ST, 4TH, 5TH AND 8TH DECEMBER, 1941 AND 20TH FEBRUARY, 1942

REX *v.* GENERAL COMMISSIONERS OF INCOME TAX FOR THE CITY OF LONDON (*ex parte* GIBBS AND OTHERS)[1]

Income Tax—Change in partnership—Apportionment of assessment—Order of Prohibition to prevent apportionment—Income Tax Act, 1918 (8 & 9 *Geo.* V, *c.* 40), *Schedule D, Cases* I *and* II, *Rules* 9 *and* 11; *Finance Act,* 1926 (16 & 17 *Geo.* V. *c.* 22), *Section* 32.

A new partner was admitted to a firm of stockbrokers on 7th February, 1938. *No notice was given under the proviso to Rule* 11 (1), *Cases* I *and* II, *Schedule D* (*contained in Section* 32, *Finance Act,* 1926), *requiring the tax payable to be recomputed as if the business had been discontinued at that date and a new business set up. In July,* 1938, *H.M. Inspector of Taxes concerned sent a certificate to the General Commissioners for the City of London as required by Rule* 9 (1) *of Cases* I *and* II, *Schedule D, informing them of the admission of the new partner. The Commissioners proposed to consider the apportionment of the assessment for* 1937–38 *under Rule* 9 (2) *but the firm, claiming that the Commissioners had no jurisdiction to act under Rule* 9, *on the ground that there was no cessation or succession on 7th February,* 1938, *within the meaning of that Rule, applied for an Order of Prohibition to prevent the Commissioners considering and adjusting the assessment.*

Held (*Lord Russell of Killowen dissenting*), *that Rule* 9 *applied and that the Commissioners had power to adjust the assessment thereunder.*

The case was argued before the King's Bench Divisional Court (Hawke, Charles and Hilbery, JJ.) on 18th and 19th April, 1940, when judgment was reserved. On 10th May, 1940, judgment was given unanimously against the Applicant firm, discharging the Rule *nisi.*

Mr. Cyril L. King, K.C., and Mr. Frederick Grant appeared as Counsel for the Applicant firm; the Attorney-General (Sir Donald Somervell, K.C.) and Mr. Reginald P. Hills for the Crown, and Mr. J. S. Scrimgeour for the General Commissioners.

JUDGMENT

Charles, J.—Before Hilbery, J., went on Circuit, the three of us had an opportunity for extended consultation, and he agrees with the judgment of the Court which I am about to read.

This is an application by Arthur Gibbs, Bryan Northam Gibbs, Frank Leslie John Rogerson, John Moffat and Donald Ernest West, partners in a firm known as Sir R. W. Carden & Co., carrying on business as stock and share

[1] Reported (K.B.) [1940] 2 K.B. 242; (C.A.) [1940] 2 K.B. 615; (H.L.) [1942] A.C. 402.

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brokers and money dealers in the City of London, for an Order of Prohibition to prohibit the Commissioners for the General Purposes of the Income Tax for the City of London from adjusting under Rule 9 of the Rules applicable to Cases I and II of Schedule D of the Income Tax Act, 1918, an assessment to Income Tax for the year 1937–38 made on the said firm under Case I of Schedule D.

The grounds on which the Court was asked for the Order of Prohibition were that Rule 9 (1) had no application to the particular circumstances of this case inasmuch as, on the admission of Donald Ernest West to be a partner in the firm of Sir R. W. Carden & Co. on 7th February, 1938, no person charged under Schedule D ceased to carry on the trade in respect of which the assessment was made or was succeeded therein by another person, and therefore the Inspector of Taxes had no power or authority to certify to the said Commissioners under the said Rule 9 and the said Commissioners had no jurisdiction to adjust the said assessment under the said Rule.

The essential facts are that an assessment was made upon the said firm for the year 1937–38 under Case I of Schedule D dated 5th November, 1937; at the date of the said assessment and until 7th February, 1938, the partners in the said firm were the said A. Gibbs, B. N. Gibbs, F. L. J. Rogerson and J. Moffat; on 7th February, 1938, the four aforesaid partners took into partnership with them the said D. E. West as from 7th February, 1938; no notice requiring a fresh computation under the proviso to Rule 11 (1) of the Rules applicable was then given.

The short point for determination is whether, when the said D. E. West was taken into the partnership, the persons charged under the Schedule ceased within the year of assessment to carry on the trade, profession or vocation in respect of which the assessment was made, and were succeeded therein by another " person " within the meaning of Rule 9 (1). If there was no cessation and succession within Rule 9 (1) then the certificate of the Surveyor, upon which the Commissioners proposed to hear and determine the appropriate adjustment of the assessment in question, was not lawfully given and the Commissioners would have no power to act thereon as they proposed to do under Rule 9 (2).

It was argued that Rule 9 (1) had no application to the circumstances because the trade carried on after the admission of Mr. West as a new partner was the same trade, and the firm carrying on that trade was not succeeded by another " person ", since a partnership under the Rules is not treated as " a person ". We are of opinion that Rule 9 (1) is applicable in the circumstances of the case. It must be read alongside and in conjunction with Rules 10 and 11; but an examination of Rules 10 and 11 leads one to the conclusion that those Rules are devised to deal with the computation or the quantum of the assessment on a partnership business and not with its apportionment as between persons who carry on the business in partnership.

If the old Rule for which the present Rule 11 was substituted is examined, it will be observed that in the case where a succession occurred the quantum of assessment remained the same unless the successor proved a diminution of profits. The new Rule 11 (2), specifically dealing with the case where a succession occurs, provides that in such a case the assessment shall be made as if at the date of the succession the old trade was discontinued and a new trade was set up. But when one turns to the proviso to Rule 11 (1), where one would expect to find provision made for apportionment in the case of a partnership admitting a new partner (one of the cases specifically mentioned

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in Rule 11 (1)) no provision or machinery for apportionment is to be found. The proviso in such circumstances only gives a right to all the persons who were engaged in the trade both immediately before and immediately after the change, by notice signed by all of them, to require a fresh computation as if the trade had been discontinued at the date of the change and a new trade had been set up. If Rule 9 (1) already provides for apportionment in such a case there is good reason for making that which is now to be found under Rule 11 (1) in form a proviso and a proviso to Rule 11 (1). Unless, however, Rule 9 (1) is applicable in such circumstances, one would hardly expect this proviso and no machinery to ensure an apportionment in such circumstances as those in the present case.

Such a case as the present becomes *casus omissus* unless Rule 9 provides the necessary machinery. Now in the first place Rule 9 is the Rule which deals with the persons who have to pay and the adjustment of the assessment among the persons who have to pay, and not with the computation or quantum of the assessment. It assumes an assessment and purports to provide the machinery for apportioning it as between a successor and a person succeeded. Unless, therefore, this Rule cannot be applicable, as a matter of construction, to a partnership firm, and the circumstance of a partnership firm taking a new partner during the year of assessment, it is the Rule to be applied.

Now if, as the Interpretation Act, 1889, provides, and it is conceded, the singular in Rule 9 includes the plural, the difficulty in applying the Rule where a partnership takes in a new partner in the year of assessment does not seem to present any insuperable difficulty. The Rule might then be read in reference to the circumstances of the present case as follows: " If " four persons charged under this Schedule cease within the year of assess- " ment to carry on the trade in respect of which the assessment is made and " are succeeded therein by five persons ", etc. The Rule read thus would immediately become applicable, provided it is right to say that when the new partner was taken in the four who carried on the trade or business previously ceased to carry on the trade or business which was the subject of the assessment. Now that which was the subject of the assessment was the profit which resulted from the trading together of those four partners as a firm, but the profit which is made after the new partner is taken in is the profit made by the five partners trading as a firm composed of five.

It was conceded on behalf of the Applicants that where a new partnership is constituted by the taking in of a new partner the law regards the identity of the old firm as destroyed. The body of four partners whose trading together would have produced the quantum which was the subject of the assessment has ceased to trade as a trading body and a new body of five has become the body trading to produce the cumulo of profit the subject of the assessment.

There would seem, therefore, in such circumstances, to be a cessation of that trade which was carried on by the old firm and which was the subject of the assessment, at the date when the new partner is taken in, and also a succession by five to that which was previously the product of the trading by four. If this is so, Rule 9 (1) is applicable.

One other matter is worthy of observation. Rule 1 of Schedule D provides that the tax under this Schedule shall be charged in respect of (*a*) the annual profits or gains arising or accruing (ii) to " any person " residing in the United Kingdom from any trade, etc. The expression " any person "

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there must be used to include persons carrying on business in partnership, for there are no other words under which partnership trading profits are taxed under Schedule D.

For these reasons we think that this application should be dismissed.

Mr. Hills.—My Lord, I have to apply for the costs of the Inspector of Taxes, for whom I appear, who was served with the Notice as the person affected.

Mr. King.—On the question of costs of my learned friend's client, the law on the matter, as I understand it, is that the Crown do not receive costs in matters like this or pay them.

(*Mr. Hills conferred with his clients.*)

Hawke, J.—Are you going to withdraw your application, Mr. Hills?

Mr. Hills.—No, my Lord.

Hawke, J.—It occurs to me that one might naturally think that there should be no costs in this case. This apparently will be, if it stands, a very useful decision for the Revenue, a matter in which the whole nation is interested. It seems to me that it is a case in which the Inland Revenue might graciously say: " We are not going to ask for costs ", but if you ask for them we must hear about it—we must listen to you.

Mr. Hills.—Costs are always applied for in these prohibition cases. This is a wealthy firm of stockbrokers, I understand, my Lord.

Hawke, J.—That is a very compendious statement. Surely all these prohibition cases vary very much in their importance and facts. We had a hint during the course of this case that the course now taken by your side in this matter is in fact the course that has been taken for years, but the point has never been decided. Two cases were cited to us, but everybody agreed that they did not decide anything very much. Now, Mr. Hills, would you like to do the gracious thing, or do you want us to decide it?

Mr. Hills.—My Lord, I am in a little difficulty in this matter, because this kind of appeal has not been made before in a case of this kind. I think my clients would find themselves in very great difficulty if, whenever an unbroken practice is challenged by a person of perfectly good means—because there is no suggestion that this firm of stockbrokers are not people of perfectly good means—that we should be told we are not to have our costs.

Hawke, J.—You are not going to be told that in any other case but this. That is what you have to apply your mind to. This is a decision which is going to be a useful decision for everybody taxed in partnership cases.

Charles, J.—I understood the Attorney-General to say that it was a matter in which you desired a decision quite as much as they did.

Mr. Hills.—I think he did.

Hawke, J.—I had myself forgotten that, but it is saying what I have already said.

Charles, J.—You have been going on with a certain practice, never knowing, as I understood—and I took a note—what the true law applicable to the matter was, but now that the matter was challenged you welcomed the challenge in order that you might get a decision. I understood.

Hawke, J.—Some years ago, Mr. Hills, there was a dispute about the wear and tear of a Recorder's wig, and I think that until persistent people insisted on going as far as the House of Lords nobody asked for any costs; equally so on the question of receipt stamps on payment of Counsel's fees. I think you had better drop it, Mr. Hills. If you say: "No, I will not", my brother Charles and I will then decide what we think is the right thing to do. It is our discretion.

Mr. Hills.—My Lord, I had not appreciated anything would be said about this matter at all. Your Lordship puts me in very great difficulty.

Hawke, J.—You wish us to decide it, Mr. Hills?

Mr. Hills.—I just want to explain the position of my clients.

Hawke, J.—Do you wish us to decide the point, whether in our discretion we are going to give you costs or not?

Mr. Hills.—My Lord, I do not think in the circumstances of this case I can say, having no instructions in the matter, that the costs will be waived.

Hawke, J.—Then your answer is Yes, you wish us to decide it?

Mr. Hills.—If your Lordship pleases.

Hawke, J.—That is clear enough.

Mr. Hills.—I do not know whether your Lordship wants me to say anything about the right to have costs. My learned friend Mr. King was saying this is a case where the Crown neither pays nor takes costs. It certainly is not so. It has never been the practice.

Hawke, J.—I have not heard anybody yet say that we are going to say what our view about this is until we have heard everything anybody wants to say about it.

Mr. Scrimgeour.—I was about to ask for the costs of the City Commissioners, my Lord. I am afraid I interrupted your Lordship.

Hawke, J.—No.

Mr. Scrimgeour.—My Lord, in these cases they are, of course, necessary parties. They are made parties to the application, and in all recent cases their costs have been provided for.

Hawke, J.—Yes. Mr. King, our impression at the present moment is that, having regard to the particular facts and circumstances of this particular case, we shall not grant costs to the Inland Revenue in our discretion; but there is a difference, I think, in the case of the City Commissioners.

Mr. King.—Yes, my Lord. I think, if I may respectfully say so, my learned friend Mr. Scrimgeour is entitled to his costs.

Hawke, J.—Very well.

Mr. King.—Might I ask your Lordships whether I might have some sort of stay in this case so that my clients may consider their position—it is hardly a stay?

Hawke, J.—Mr. Hills will make some concession to you about that, I am sure.

Mr. Hills.—If my learned friend wants to consider the right to appeal, certainly.

Mr. King.—I ask for fourteen days.

Charles, J.—He has the right to appeal without leave.

Mr. King.—Yes.

Hawke, J.—Certainly you have a right.

Mr. Hills.—It is a question of time.

Hawke, J.—I understand that Mr. King has the right to appeal without leave if he wishes to.

Mr. Hills.—Yes, my Lord.

Hawke, J.—But if we should be wrong about that we think this is a case in which he ought to have leave. Now it is only a question of how long.

Mr. King.—I can let my learned friend know in fourteen days, if in the meantime the City Commissioners will not proceed.

Hawke, J.—No, they will not proceed.

Charles, J.—Fourteen days, and the City Commissioners will not proceed in the meantime.

Mr. King.—No.

Mr. Scrimgeour.—No my Lord; we are quite willing not to.

Mr. Hills.—We will consider my learned friend with regard to time. There will not be any difficulty.

Hawke, J.—Is that all you want, Mr. King—fourteen days?

Mr. King.—My Lord, that is time enough for me.

Hawke, J.—Very well, fourteen days' stay.

An appeal having been entered against the decision in the King's Bench Divisional Court, the case came before the Court of Appeal (Scott, Clauson and Goddard, L.JJ.) on 8th and 9th July, 1940, when judgment was reserved. On 2nd August, 1940, judgment was given unanimously allowing the appeal, reversing the decision of the Court below.

Mr. Cyril L. King, K.C., and Mr. Frederick Grant appeared as Counsel for the Appellant firm; the Attorney-General (Sir Donald Somervell, K.C.) and Mr. Reginald P. Hills for the Crown, and Mr. J. S. Scrimgeour for the General Commissioners.

JUDGMENT

Scott, L.J.—This appeal from an Order of the Divisional Court refusing a prohibition raises an Income Tax question between the Revenue and a firm of London stockbrokers. During the year of assessment there had been a change in the firm through its taking in a new partner on 7th February, 1938, and also a falling off of its profits far below its current assessment under Schedule D. The Revenue claimed to act upon a power conferred by Rule 9 of the Rules applicable to Cases I and II of Schedule D to apportion the existing assessment between the periods of the year before and after the

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change, on the footing that one firm had " ceased to carry on the business " and had been " succeeded " by a new firm. The procedure laid down by the Rule had been strictly followed, and, if the Rule was applicable, the result claimed by the Revenue, namely, that the existing assessment as apportioned became unalterably binding, would *prima facie* seem to follow. For reasons which I will state presently, I do not think we need decide whether it would have followed to the extent of excluding all possibility of escape from the existing assessment. The firm contended that the Rule had no application to such a change in the constitution of a partnership and that it was limited to a case of one person really ceasing to carry on a business and another person succeeding to it; and they pointed out that Rules 10 and 11 are addressed to the rights and obligations of partnerships and that under the proviso to Rule 11 (1) all the partners, both before and after a change, are given the express right by a notice signed by all of them to require the tax to be computed as if the trade had been discontinued at the date of the change and a new trade then commenced. This option was clearly granted by Parliament for the purpose of conferring an absolute right to require the Revenue to reduce the assessment based on the income of the previous period (then a three years' average) to the lower level of the actual income in the year of assessment. The interpretation of Rule 9 claimed by the Revenue and adopted by the Divisional Court, if correct, would be wholly inconsistent with the taxpayer's right of reduction under Rule 11; for the procedure of Rule 9 is mandatory. Under Sub-rule (1) the Inspector of Taxes gives a certificate to the General Commissioners of the Division (in this case the City of London) that one person has ceased to carry on the trade and another succeeded, of the date, and of the apportionment by time. Thereupon under Sub-rule (2) those Commissioners are required to make a fair adjustment, charging the successor and relieving the person originally charged accordingly. By Sub-rule (3) that determination is final and binding.

In the present case (but not till 27th July, 1938) the Inspector of Taxes (who by amending legislation has taken the place of the Surveyor under Rule 9) issued his certificate, purporting to act under the Rule, certifying the assessed profits of the firm of Sir R. W. Carden & Co. at £69,355, the date of change as 7th February, 1938, the name of the " successor " as Sir R. W. Carden & Co., and the apportioned amount of the assessment to be charged to the " successor " as £11,078. He gave four names of partners before the change, whom I shall call *A*, *B*, *C* and *D*, with a fifth, *E*, after the change.

There is an earlier event, necessary to complete the story. On 22nd March, 1938, the firm of five agreed to take in a sixth partner as from the 25th of that month; I call him *F*. There was also a " Stock Exchange partner ", a Mr. Heathcoat-Amory, both before 7th February and after 25th March, but he had no share in the firm's profits, and does not play any part in the story (except in the notice next to be mentioned) and I ignore him. On 1st April in accordance with the proviso to Rule 11 (1) all the partners (including *F*) sent a written notice to the Surveyor of Taxes requiring computation of the tax payable " as if the said trade, profession or vocation had been dis- " continued at the date of the change, and a new trade, profession or " vocation had been then set up or commenced ". It will be observed that the firm contented itself with a requisition in respect of the change of 25th March and did not make any requisition in respect of the change on 7th February. The business was carried on after each of those dates as before; it was continued and not discontinued. The procedure of Rule 9 was duly

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followed by the Revenue. On 22nd November, 1939, the Clerk to the City Commissioners notified the firm that on 6th February, 1940, the Commissioners would meet to consider the Inspector's certificate of 27th July, 1938. The firm considering that Rule 9 did not apply to a mere change in a partnership where the business continued, but doubtless supposing that if the Commissioners acted upon the certificate their " adjustment " might bind the firm finally to the old assessment, apportioned between the old and new firms, decided to move in the King's Bench Division for a prohibition to prevent the Commissioners so acting. The necessary " statement " under the new procedure was filed in the King's Bench Division, with an affidavit sworn the 3rd January, 1940, by the senior partner. It contains all the facts. The King's Bench Division dismissed the motion. The appeal is from that decision.

In my opinion the motion should have been allowed. If the conditions precedent to the jurisdiction of the Inspector to certify, and of the Commissioners to adjust, imposed by Rule 9 had not been fulfilled, neither authority had jurisdiction to act; and in view of the mandatory language of the Rule and the express provision of Sub-rule (3), I think the present Appellants were entitled to pray in aid the disciplinary control of the King's Bench, and were not driven to rely only on a possible but problematical defence to a subsequent claim of the Revenue to enforce tax liability on the basis of the old assessment. Prohibition lies as of right for any excess of jurisdiction by even a quasi-judicial tribunal, *Rex* v. *Electricity Commissioners,* [1924] 1 K.B. 171, at pages 204/5, per Atkin, L.J.; and the fact, if it were a fact, that some other provision of Income Tax legislation might possibly afford a defence, would not give the Divisional Court a discretion to refuse the Order.

Our decision depends directly on the interpretation of Rule 9, but if there be an ambiguity in that Rule, then indirectly upon Rules 10 and 11—with possible assistance from other provisions, past and present, which may throw light on Rule 9. That Rule was first introduced as Section 62 of the Taxes Management Act, 1880. It appeared in Part IV of that Act, the title of which was " Assessment ". Section 61 was entitled " Books of Assessments ", Section 62 "Changes", and Section 63 "Omissions from First Assessments". It would appear, therefore, that Section 62 was a machinery provision, and not a Section either charging or releasing from charge; its purpose was collection. A discretionary kind of release from liability on discontinuance of a trade, and on a falling off of profits by deprivation of a source from a specific cause, was already allowed by Section 134 of the Act of 1842. A successor to a business was by that Section required to pay on the existing assessment, but if he could prove a falling off of its profits from a specific cause, he could get similar relief. These immunities and reliefs were made more definite, in favour of the taxpayer, by Section 24 (2) and (3) of the Finance Act, 1907; and in the 1918 Act those provisions became Rule 8 (1) and (2) of the Rules applicable to Cases I and II—the Rule next preceding the crucial Rule in this appeal. The next following Rule, Rule 10, provides for a statement by the senior partner of the profits of the business, and for a joint assessment in the partnership name. The use of the word " person ", characteristic of Rule 9, is dropped, and the new subject-matter is " partner- " ship ". Ordinarily the subject-matter of Rule 9 is the case of one proprietor of a business giving it up and another acquiring it as a going concern—for example, on a sale. Section 19 of the Interpretation Act, 1889, of course applies to the word " person " in Rule 9 " so far as the context " permits ". The context would obviously permit of its including the plural in case of one firm selling the business as a going concern to an individual

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or company, or to a wholly different firm. But I do not think that it is a natural use of language to say that a firm ceases to carry on its business and that another firm succeeds to the business when all that happens is, for instance, that a young managing clerk has become a very junior partner with a tiny percentage of the firm's profits added to his salary. And it is necessary to test the argument of the Attorney-General by such an extreme case; for his contention is necessarily one of law and not of fact; he says that such a change connotes a cesser and succession within the meaning of the Rule. I cannot agree. If it be a question of fact, and the substance of that event is to be regarded, again I cannot agree; and the Commissioners have found against him, and it cannot be said that there was no evidence to support that finding.

The natural construction of Rules 9, 10 and 11, read together, is that Rule 9 operates only where there is in a business sense a real " ceasing " and " succeeding "; it deals primarily with one person (natural and juridicial) as either " cessor " or " successor "; and it only extends to a plurality of such persons acting jointly where there is a complete transfer from the one group to the other, or from a group to an individual, or *vice versa*. In such a case a whole partnership ceasing or succeeding might come within Rule 9, but otherwise Rule 9 has nothing to do with partnerships. It is Rules 10 and 11 which deal with partnerships, the function of Rule 10 being only to introduce the machinery for assessing them. So viewed, those two Rules naturally follow Rule 9, and Rules 8 to 11 form a small self-contained group. Rule 8 deals with the complete discontinuance of an old business, and the setting up of a new. Rule 9 deals with a continuing business but a total change of the person chargeable. Rule 11 also deals with a continuing business, but not with a total change in the personnel carrying it on (which has been disposed of by Rule 9), but with the special case of a partnership where alone a partial change in the personnel chargeable can and very frequently does take place; and confers on the persons chargeable a substantial benefit where the actual income has fallen below the assessed income, by deeming the change to be a discontinuance of the business within Rule 8. Rule 11 in its present form was enacted by Section 32 of the Finance Act, 1926, in place of the old Rule as enacted in the Income Tax Act, 1918, which in its turn had in large measure re-enacted the fourth Rule applicable to Cases I and II under Section 100 of the Act of 1842 (Dowell, 7th edition, page 296). The plain distinction between a change in a partnership on the one hand, and a succession on the other, appears perhaps even more clearly in the wording of 1842 and 1918, than in 1926, although in the wording of 1926 it is also clear enough. As an aid to the interpretation of Rule 9 in the 1918 Act, the more relevant version of Rule 11 to consider is that which was enacted by Parliament in the same Act. The chief materiality of the 1926 version is that it seems to me tacitly to assume that the contrasted interpretations of Rules 9 and 11 in the 1918 Act which I have expressed are correct; and the 1926 Finance Act provides that its Income Tax part is to be read as one with the 1918 Act. The old antithesis between an internal change in a partnership and an external succession to its business is maintained and emphasised in two ways; the separate and contrasted ideas are put into separate Sub-sections; and the changing and changed partnership is given a new relief from tax in the shape of an option to all the partners, old and new together, to require that the Revenue shall apply the provisions of Rule 8 *as if* there had been a discontinuance of the old business and a setting up of a new, the language of the option necessarily implying that there has in fact been no discontinuance. This right is obviously of great

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value to the taxpayer, in case the actual profits have fallen below the assessment; it is the very opposite of the provision of Rule 9 which forbids any escape by the taxpayer from the existing assessment, and commands a mere apportionment of it. The old Rule 11 was similar in its effect, though rather less beneficial to the taxpayer. The antithesis between taking a new partner into the partnership and ceasing to carry on the business and giving place to a successor is obviously fundamental, and appears to me of itself to show that the idea of succession is intended not to include a mere internal change in the personnel of a partnership.

The case of *Michael Faraday, Rodgers and Eller* v. *Carter,* 11 T.C. 565, was cited to us on behalf of the Revenue, as a decision by Rowlatt, J., or at least an expression of opinion by him, that a change in a partnership constitutes a " succession " within Rule 9. It cannot in my view be so regarded, and if it can I disagree with it. In that case *A* and *B* dissolved partnership in November, 1922. *A* continued the old partnership business. In December, *A* took *C* into partnership. Those are the main facts of the case. But one other question arose. *B* carried on a very small part of the old business in his private house for a short time—till after *C*'s entry into the business. The General Commissioners treated this continuation by *B* as negligible and disregarded it—but held that *A* and *C* together had " succeeded " to *A* and *B* within the meaning of the old Rule 11 of the Act of 1918—and the learned Judge used the same word. The question at issue in the present appeal was never raised by the Stated Case, nor was it argued before the learned Judge; and whether the event was a change in the partnership or a succession was wholly immaterial to the application of the old Rule. The use of the word " succession " was in my opinion simply a slip.

The appeal must be allowed and the Order for a prohibition made.

Clauson, L.J.—The judgment I am about to read is the judgment of **Goddard, L.J.,** and myself. We do not propose to re-state the facts which give rise to the present appeal. They are fully stated in the judgment of the King's Bench Division. The sole point for the decision of this Court may be formulated as follows. During the course of the year of assessment a partnership of four persons carrying on the trade in respect of which the assessment is made takes in a fifth partner. It is suggested on behalf of the Revenue authorities that this circumstance makes it the right, and indeed the duty, of the appropriate officer to set in motion the machinery detailed in Rule 9 of the Rules governing Schedule D, Cases I and II, in the Income Tax Act, 1918, and makes it the right and indeed the duty of the appropriate General Commissioners to deal with the assessment by apportioning liability in respect of it between the original four partners on the one hand and the new partnership of five partners on the other.

On a perusal of Rule 9 it becomes clear that the machinery for apportionment provided by the Rule is to operate only if a person carrying on the trade in respect of which the assessment is made ceases within the year of assessment to carry it on and is succeeded therein by another person. The language seems to be wholly inappropriate to the present case. The four original partners do not cease to carry on the trade: they continue to carry it on with the co-operation of a fifth person. That person in no sense succeeds to the trade: he joins in carrying on the trade. On the language of the Rule it appears to be wholly inapt to cover the case. The Rule seems obviously framed to meet the wholly different case where the business passes, whether on sale or devolution on death, from one owner to another owner

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and to be aimed at adjusting the claims of the Revenue against the two successive owners so as to throw the appropriate burden and liability on each.

Rule 9 is a re-enactment in 1918 of Section 62 of the Taxes Management Act, 1880. In the year 1880 the computation of duty arising in respect of a trade in the case where there was a duality or plurality of ownership in the course of the year, was regulated by certain provisions which appear in the Income Tax Act, 1842, Section 100, as Rules 3 and 4 applying to Schedule D, 1st and 2nd Cases. Rule 3 dealt with the method of assessing partners jointly upon a return made by one of them: Rule 4, supplemented by Section 134 of the Act of 1842, dealt with the case of a change in a partnership carrying on a trade within the period covered by the assessment of the trade so carried on, and also with the case of one person succeeding within that period to the business in respect of which the assessment was made: the change or succession was not to affect the assessment, except on proof of a diminution of profits due to a specific alleged cause: but on proof that the person charged had ceased during the period to carry on the trade, he might apply to the General Commissioners for an amendment of the assessment so as to give him such relief as should be just: but if a person succeeded to the business of the party charged the successor was to be liable to the full duties as assessed without any new assessment, except on proof of a diminution of profits due to a specific cause. This statutory position was altered by Section 62 of the Taxes Management Act, 1880, which is for all practical purposes in the same form as the present Rule 9. It seems reasonably clear that Section 62 relates and relates only to the case where the person assessed ceases to carry on the concern (which is the word used in Section 62) in respect of which the assessment is made and is succeeded therein by another person. In other words the provision made by Section 62 for setting up the machinery for apportioning the assessment as between the person ceasing to carry on the business and the person succeeding him therein deals with the cases of succession dealt with in the latter part of the then Rule 4 and has no concern with the cases of change in a partnership dealt with in the earlier part of Rule 4.

The only method of construing either the present Rule 9 or its predecessor, Section 62 of the Act of 1880, so as to apply to such a case as the present is to treat the partnership consisting of the four original partners as one person and the partnership consisting of five partners as another person and then treating the four original partners (contrary to the obvious fact) as ceasing to carry on the business, and the new partnership consisting of the four original partners and the new partner (contrary to the obvious fact) as succeeding to the business. This, as we understand it, is the method of dealing with the matter adopted by the King's Bench Division in the judgment now under appeal, and is their justification for holding that Rule 9 applies to the circumstances of the present case. We cannot see any reason for adopting such a highly artificial view; and indeed, had the case been one to which the legislation as it stood immediately after Section 62 of the Act of 1880 had come into force applied, we can scarcely think that any mind, however ingenious, would have made any such suggestion. The legislation as it stood after the Act of 1880 came into force was re-enacted with alterations of form in the Income Tax Act, 1918. Section 62 of the Act of 1880 was reproduced in Rule 9, and the substance of Rules 3 and 4 of Schedule D, Cases I and II, in Section 100, reproduced in Rules 10 and 11, and had Rule 11 remained as it appeared in the Act of 1918, the same

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observations would apply, and we venture to think that the suggestion which the King's Bench Division adopted could hardly have been made. A radical alteration in the law was, however, made by the Finance Act, 1926, the purpose of which, as is well known, was to get rid of the old method of assessing business profits on an average of the preceding three years' profits, and to substitute an assessment by reference to the last preceding year's profits. As part of the change Rule 11, as it had stood up to that time, was repealed and a new Rule 11 was substituted: and it is from the terms of the new Rule 11 that the suggestion derives any claims to plausibility which it possesses. We do not propose to recite the new Rule at length: we can summarise its effect with sufficient accuracy for the present purpose as follows. The first Sub-section deals with a case where a change occurs in a partnership but one of the partners at least continues in the partnership: such a change is not to affect the assessment, but if all the persons concerned choose to ask for a reassessment to be made as if at the moment of the change in the partnership the trade had been discontinued and a new trade had been set up, such a reassessment is to be made. The second paragraph deals with the case where a person succeeds to a business which until that time was carried on by another, and the case is not one to which paragraph (1) applies, and it is enacted that the tax payable is to be computed as if the successor had set up a new business at the moment of succession and as if the business theretofore carried on had been discontinued at the same moment. The paragraph goes on to provide that references in this paragraph (2) to a person include references to a partnership.

The argument which found favour with the King's Bench Division was, as we understand it, as follows. It is said that the language of paragraph (2) necessarily implies that a case to which paragraph (1) applies (that is, a case of change in the personnel of a partnership where one partner continues) is a case where one person succeeds to a business previously carried on by another person, and therefore necessarily implies that a change in the constitution of a partnership is regarded by the Legislature as a case where there is a succession in regard to the trade between one person or group of persons (for the singular includes the plural), consisting of the original four partners, on the one hand, and another person or group of persons, consisting of the four original partners *plus* the new partner on the other, and accordingly Rule 9 applies to this succession and the condition is fulfilled which brings Rule 9 into operation.

We doubt whether it is legitimate to use the new Rule 11 as altering the meaning of Rule 9, for that is really what the argument involves. However, waiving this point, we are quite unable to read the words in paragraph (2) " and the case is not one to which paragraph (1) of this Rule " applies " as amounting to a positive enactment that, although a change in a partnership which carries on a business where one partner continues after the change is not in fact and has never been treated in Income Tax legislation as being a discontinuance of a business by the old partners and a succession to that business by the old partners and the new partner, such a change is hereafter to be deemed to be such a discontinuance and succession. The words are, in our view, merely inserted *ex majore cautela* to make it clear that paragraph (2) has nothing to do with the cases to which paragraph (1) applies.

Some reliance seems also to have been placed upon the words which enact that in paragraph (2) references to a person include references to a partnership: but that is, in our view, obviously directed to making it clear that

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where one partnership transfers business to another person, either an individual or a partnership which consists of persons entirely different from those which constituted the transferring partnership, this paragraph will operate. In other words, it is a reminder that as the singular includes the plural, the word " person " includes several persons in partnership. The paragraph has already made it clear that the case where the business is carried on by a firm in which there is one partner who was also in the firm which theretofore carried it on is wholly outside this paragraph.

We must mention a further argument which found favour with the King's Bench Division which we find ourselves unable to accept. It was said that unless Rule 9 is construed so as to enable the assessment to be apportioned under its provisions in such a case as the present, where the parties do not avail themselves of their power to get a reassessment under the proviso to paragraph (1), there is a *casus omissus*. We do not follow this argument. It is to be borne in mind that until 1880 there was no such provision as Rule 9 in existence, and those concerned, whether in the case of a change of partners, or in the case of a transfer of the business from one owner to another, had to do without any such provision. In 1880 it was found desirable to set up this machinery so as to adjust the rights between the Revenue and the successive owners of a transferred business. No machinery was, as we read the Act, set up to deal with the case of a change of partners, for the continuing partners would remain liable to the Revenue (as indeed, we imagine, would the retiring partners in respect of the current year), and the adjustment of the burden as between continuing and incoming partners would obviously in practice be a matter to be dealt with by the partners themselves in accordance with their mutual partnership obligations. We are not impressed by the argument of *casus omissus* when the need to deal with the case was not apparent either from 1842 to 1880 or from 1880 until Rule 11 was altered in 1926, or indeed, so far as we are aware, until this present litigation was started.

One final argument was that, unless Rule 9 is construed as the Revenue contend, there seems now to be no case to which Rule 9 applies, and why, it is asked, was not Rule 9 then repealed? That seems to us a very poor ground for giving an entirely unnatural meaning to reasonably plain words. It may be that the uselessness of Rule 9 after the legislation of 1926 was overlooked: or it may be that the draftsman of the Act (as indeed the words already mentioned which refer in paragraph (2) of Rule 11 to paragraph (1) suggest) may have misapprehended the meaning of Rule 9. But in any case the fact that a provision which has become inoperative in practice is left unrepealed does not appear to us to assist in the construction of it.

For these reasons we find ourselves unable to agree with the judgment of the King's Bench Division. In our judgment the condition precedent to the operation of Rule 9, namely, that a person has ceased to carry on a business and has been succeeded therein by another person, is not fulfilled by the circumstances of the case. It follows that the officer of the Revenue had no duty or right to give the certificate under Rule 9 (1) and the General Commissioners have no duty or right to adjust the assessment under Rule 9 (2). The appeal should in our judgment be allowed, and the Order of Prohibition asked for in the notice of motion should be made.

Mr. King.—I have to ask for costs.

Scott, L.J.—What was the Order in the Court below?

Mr. King.—The Order of the Court below as to costs was that my clients were ordered to pay costs of the City Commissioners, represented by my learned friend Mr. Scrimgeour, and that the Crown should not get their costs. The Divisional Court, I think your Lordship may have noticed from the transcript, took the view that in exercise of their discretion the Crown should not have their costs below.

Scott, L.J.—What do you ask for?

Mr. King.—I ask for the costs of this appeal and that the Order of the Divisional Court, giving my learned friend Mr. Scrimgeour his costs, should be reversed. Of course, I can only get one set of costs here; I cannot get two; and the costs below, I submit, will be payable—

Scott, L.J.—Of the Court below.

Mr. King.—I want the costs of the Court below.

The Attorney-General.—That is right. My learned friend has won here. As your Lordships know, I was precluded in fact from criticising what was done in the Court below as to costs, because I have not appealed on it and it is now academic. My learned friend has won the appeal, and so he gets his costs here and below in the ordinary way.

Clauson, L.J.—Against whom?

The Attorney-General.—I do not think he minds.

Mr. King.—I think both the Inland Revenue and the City Commissioners are equally responsible.

Clauson, L.J.—Against whom do you ask us to make an Order? We cannot make an Order in the air.

Mr. King.—I think the only party against whom it can be made are the Respondents to this appeal.

The Attorney-General.—The Order is usually made against the Inland Revenue.

Mr. Hills.—Against the Inspector.

Scott, L.J.—Is it not against the Commissioners of Inland Revenue?

Clauson, L.J.—Or the Board of Inland Revenue?

Mr. Hills.—No, against the Inspector of Taxes.

The Attorney-General.—It is against the Inspector.

Mr. King.—The Inspector of Taxes.

Scott, L.J.—It is against the Inspector.

Mr. King.—Yes.

Clauson, L.J.—But we have not got the Inspector here.

The Attorney-General.—I was wondering who I was appearing for.

Goddard, L.J.—It was the Inspector against whom the Rule was moved.

The Attorney-General.—I am instructed on behalf of His Majesty's Inspector of Taxes. The notice is always served on him and I think he always appears.

Scott, L.J.—Then in form the Order will be against the Inspector as Respondent.

Mr. King.—Actually the Commissioners of Inland Revenue are only here as parties. The Respondents in the case on the original motion were the City Commissioners. The practice is to give the Commissioners of Inland Revenue, who are of course representing the Inspector, notice of the proceedings, and they are treated as parties afterwards.

Scott, L.J.—It is obviously a purely technical point.

The Attorney-General.—It is purely technical, and no difficulty will arise.

Scott, L.J.—Then the Commissioners of Inland Revenue were Respondents and are Respondents in this Court.

Mr. King.—No, my Lord.

Scott, L.J.—Only the Inspector?

Mr. King.—If I may respectfully say so, unless my friend says it is Commissioners.

Scott, L.J.—Then the Order will be against them in form. I think it must be so.

The Attorney-General.—Yes. I had not appreciated the position, but I think it must be against them.

Mr. King.—If I may respectfully say so, unless my friend says it is wrong, I should have thought the Respondents were the parties against whom the Order should be made—the City Commissioners—but I really do not mind; I can only get one set of costs.

The Attorney-General.—Perhaps some enquiry might be made as to what has been done in past cases of this kind. No trouble will in fact arise in whatever form the Order is made, but it does seem that the proper person against whom it should be made is the Respondent.

Scott, L.J.—The City Commissioners are technically the Respondents, and I think that the Order of the Court must be against the Respondents.

The Attorney-General.—Yes, I think probably that is so.

Scott, L.J.—The Order must be against the City Commissioners.

Mr. King.—The Order is against the City Commissioners for the costs below as well as the costs of this appeal.

Scott, L.J.—Yes.

Mr. King.—If your Lordship pleases.

The Attorney-General.—I ask for leave to appeal to the House of Lords.

Scott, L.J.—Yes.

Mr. King.—Your Lordships will not think it right to impose any terms upon my learned friend's clients as to the appeal to the House of Lords. It is a point of principle, I understand. I am not arguing it, if your Lordship thinks it right—

Goddard, L.J.—That is why the Divisional Court did not give costs, because they thought it raised a question of principle.

Mr. King.—If we are going to the House of Lords, I merely ask whether your Lordships think it right to place some terms on the Inland Revenue for the payment of costs.

The Attorney-General.—I should not resist that if the Court felt it proper —I quite agree it is, because this case does in effect raise a matter of principle as to how partnerships can be dealt with. There are difficult points that the Inland Revenue are interested in with regard to apportionment for Sur-tax purposes, and so on, which do arise if this Rule 9 does not apply. I quite agree those are wider matters than those which only affect my learned friend if your Lordships grant it.

Scott, L.J.—Perhaps you will be good enough to express the form of indulgence for which you ask, Mr. King.

Mr. King.—I think if your Lordships would order that my clients' costs be met by my learned friend's clients in any event, I do not know whether your Lordships would think it right to say that more than party and party costs should be dealt with in that way. I think—I am not sure—that such an Order has been made.

(*The Court conferred.*)

Scott, L.J.—The Court thinks that the proper Order here will be that the Crown should undertake not to ask that costs below the House of Lords should be disturbed.

Mr. King.—If your Lordship pleases.

Scott, L.J.—The Order now made by this Court will remain.

Mr. King.—Your Lordship makes no Order as to costs in the House of Lords.

Scott, L.J.—We leave that to the discretion of their Lordships' House.

Mr. King.—If your Lordship pleases.

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., Lord Russell of Killowen, and Lords Macmillan, Wright and Porter) on 1st, 4th, 5th and 8th December, 1941, when judgment was reserved. On 20th February, 1942, judgment was given allowing the appeal (Lord Russell of Killowen dissenting), thus restoring the decision of the King's Bench Divisional Court.

The Attorney-General (Sir Donald Somervell, K.C.), Mr. Reginald P. Hills and Mr. J. S. Scrimgeour appeared as Counsel for the Crown, and Mr. Cyril L. King, K.C., and Mr. Frederick Grant for the firm.

JUDGMENT

Viscount Simon, L.C. (read by Lord Russell of Killowen).—My Lords, by a document dated 5th November, 1937, the Commissioners for the General Purposes of the Income Tax for the City of London gave notice to the stock-broking firm of Sir R. W. Carden & Co. of an assessment under Schedule D for the year ending 5th April, 1938. The assessment was in respect of the profits of the partnership, and by Rule 10 of the Rules applicable to Cases I and II under that Schedule, the assessment was a joint assessment made in the partnership name, and the tax was " computed and stated jointly and in one " sum ". The total figure upon which tax was to be charged was fixed in the ordinary way upon the profits made in the previous year, 1936-37, and after adjustment was agreed at £69,355.

The firm of Sir R. W. Carden & Co., at the time when the assessment was made, consisted of four partners who for the present purpose may be

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designated *A*, *B*, *C* and *D*, and this continued to be the composition of the firm on 1st January, 1938, when the first half of the Income Tax resulting from the assessment became due. On 7th February, 1938, however, the composition of the firm changed owing to the taking in of a fifth partner, who may be called *E*. On 27th July, 1938, the Inspector of Taxes, purporting to act in accordance with Rule 9 (1) of Cases I and II of Schedule D, certified to the General Commissioners particulars of the change which had taken place, and the Commissioners thereupon purported to adjust the assessment by charging to the firm of five persons, out of the total assessment of £69,355, the apportioned amount of £11,078 with the result that the firm of four persons would be relieved of liability for tax on this latter figure, but would be left answerable for tax on the balance of £58,277. As a matter of mathematical calculation there is no dispute that these figures are correct; they represent the fair apportionment of the total between that part of the year of assessment which lies before 7th February, 1938, and that portion which remains from that date.

But though the apportionment is correctly worked out, the Respondents have throughout insisted that no such apportionment under Rule 9 could lawfully be made, since, according to them, the change during the year of assessment in the composition of the firm does not constitute a cesser in carrying on the trade by *A*, *B*, *C* and *D*, and the succession " by another " person ", viz., *A*, *B*, *C*, *D* and *E*, in that trade. It is as to the validity of this contention, and as to the proper construction and application of Rule 9, that the House has now to pronounce.

The Respondents applied on 17th January, 1940, to a Divisional Court of the King's Bench Division for an Order to prohibit the Commissioners from adjusting under Rule 9 the assessment made upon them. On 10th May, 1940, a Divisional Court, consisting of the late Hawke, J., Charles, J. and Hilbery, J., dismissed the application; but the Court of Appeal (Scott, L.J., Clauson, L.J. and Goddard, L.J.), on 2nd August, 1940, reversed this decision and directed that the Order of Prohibition should be made, taking the view, as Clauson, L.J., expressed it, that " the condition precedent to the operation " of Rule 9, namely, that a person has ceased to carry on a business and has " been succeeded therein by another person, is not fulfilled by the circum- " stances of the case."(1)

It may contribute to a just appreciation of the reality involved in this highly technical question if I add at this point what is the practical reason why the Respondents challenge the Crown's right to proceed under Rule 9. This was frankly stated to the Divisional Court by Mr. Grant when he applied for the Rule(2) and was further explained to this House by Mr. King. The

(1) *See* page 233 *ante*.

(2) Mr. Grant said " . . . . The reason why the matter becomes important, if I may " say so in one sentence, is that the effect of that notice "—this refers to the firm's application under the proviso to the new Rule 11 (1) on admission of the sixth partner on 25th March, 1938; no application under this proviso was made on the admission of the fifth partner on 7th February, 1938—" is that the assessment to be made on the firm, " calling it so for the moment, for the period down to the 25th March falls to be altered " from the basis of the preceding year, which is the normal basis, and made upon the " actual profits of the period. In this case the profits of the actual period were sub- " stantially less than the amount of this assessment. What it really comes to is this: " if the Inland Revenue are right in saying that this apportionment can be made under " Rule 9 then probably the only thing which will be brought to reduce to the actual " will be the assessment for the six weeks from February to March, whereas in my " submission it will be the whole of the period. That, in my submission, explains the " reason for the application, but the point of the application is that in my submission " the admission of a partner is not the cessation of any person to carry on any business."

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actual profits of this stockbroking business made in the year 1937–38 were less than its profits in the preceding year by reference to which the total assessment was made. Just before the end of the fiscal year 1937–38, viz., on 25th March, 1938, a sixth partner, who may be called *F*, was taken into the firm, and on 1st April all the partners joined, under the proviso to Rule 11 (1)—which was first enacted by Section 32 of the Finance Act, 1926—in sending to the Surveyor of Taxes a signed notice claiming that, in consequence of this change in the partnership, Income Tax should be computed as if the trade had been discontinued on 25th March and a new trade had then been set up. The result of this would be that the old trade would be treated as coming to an end in the course of the fiscal year and the assessment in respect of this broken period would be based not on the greater profits of the year before, but on the actual profits of the final period. There would, however, also be a revision of the figure for the previous year. Similarly, if a new trade is to be deemed to be set up on 25th March, 1938, Income Tax in respect of the opening period could not be ascertained by reference to past profits.

Apart from these considerations, which may explain the action taken by the Respondents, the Crown naturally wishes to secure a final and authoritative interpretation of Rule 9, especially in view of the difficulties which now arise from comparing it with Rule 11.

Rule 9 of the Rules applicable to Cases I and II of Schedule D of the Income Tax Act, 1918, runs as follows:—" 9.–(1) If a person charged under " this Schedule ceases within the year of assessment to carry on the trade, " profession, or vocation in respect of which the assessment is made, and " is succeeded therein by another person, the surveyor shall, within four " months from the fifth day of April next after any such change, certify to " the general commissioners for the division in which the assessment is made " the particulars thereof, and the full name and residence of the person " charged and of his successor and the date of the change, if the same be " known to the surveyor. (2) On receipt of the certificate the commissioners " shall cause notice to be given to the respective persons of a meeting of the " commissioners to consider it, and after examination of the said persons, " if they attend, or on other satisfactory proof of the facts, the commissioners " shall adjust the assessment by charging the successor with a fair proportion " thereof from the time of his succeeding to the trade, profession, or vocation, " and relieving the person originally charged from a like amount. (3) The " determination of the commissioners on any such certificate shall be final, and " the sum apportioned to each such person shall be recoverable from him in like " manner as if he had been charged under the original assessment. (4) If " either of the said persons has paid in respect of an assessment so certified " more than the proportion which appears by the determination of the commissioners to be chargeable on him, the amount overpaid shall, when " recovered from the person liable, be paid to the person by whom the over-" payment was made."

The word " assessment " is used in our Income Tax code in more than one sense. Sometimes by " assessment " is meant the fixing of the sum taken to represent the actual profit for the purpose of charging tax upon it. But in another context the " assessment " may mean the actual sum in tax which the taxpayer is liable to pay on his profits. These two things are, of course, not the same, or at any rate will not become the same unless and until Income Tax is charged at the rate of 20*s.* in the £. It is remarkable that these two separate meanings of the word " assessment " may occasionally be found within the bounds of a single Section: for example, in Rule 9, Sub-sections (1) and (2) appear to contemplate the splitting of the assessment

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in the first sense (and this is the practice that was followed when an assessment of £69,355, being the amount of profits assessed, was apportioned as above stated), whereas in Sub-section (3) the words " the sum apportioned " to each such person shall be recoverable from him " obviously mean the amount of tax due in respect of the apportioned fraction of profits.

Rule 9 deals with the persistence of a trade, profession or vocation notwithstanding a change in the persons carrying it on. Such a situation cannot arise in the case of some professions or vocations, e.g., in that of a barrister or of a portrait painter. There are other branches of activity where the persistence of the same enterprise, notwithstanding a change of personnel, may be to some extent possible, e.g., on the sale of a country doctor's practice; and then there is the large and important class of an established business capable of transfer as a going concern. It may be worth observing, in passing, that the preservation of the identity and continuity of a business, notwithstanding a change in those who carry it on, is probably most completely illustrated by changes which may occur from time to time in a partnership firm.

The question in the present case is whether, if a stockbroker's business is carried on for part of the year by *A, B, C* and *D,* in partnership and for the next part of the year by *A, B, C, D* and *E,* this change can be described, within the meaning of Rule 9, as a case in which a person charged " ceases " to carry on the trade and " is succeeded therein by another person ". It cannot be disputed that the language of the Rule would apply if an individual *A* ceases to trade and is succeeded in the business by an individual *B,* and the same result follows if a corporation, limited or unlimited, is substituted for *A* or *B,* or both. There would also be no difficulty in treating the Rule as applying to the transfer of a business from a partnership consisting of *A, B, C* and *D* to another partnership consisting of *W, X, Y* and *Z,* for " person " includes " persons ". The difficulty is to construe and apply the Rule if the new partnership contains a member, or members, of the old. In the present case none of the former partners has retired, and the new combination is the result of an addition. But it seems to me—and indeed this is admitted by Counsel for the Respondents—that no distinction, in principle, can be drawn between this case and the case in which all the previous partners, except one, have retired and a large number of new partners are added. The crucial case always is one in which there is one individual at least who is a partner throughout.

If we were concerned with nothing more than the strict legal construction of Rule 9 without regard to its setting in the Income Tax code, I should have no difficulty in agreeing with the view of the Court of Appeal. That view is crystallised in the closely reasoned judgment of Clauson, L.J., insisting that it is not a partnership firm which carries on trade but its individual members who carry it on in partnership, and that the old partnership is not to be regarded as ceasing to carry on trade, and the new partnership is not to be regarded as succeeding, when members of the old partnership are also some of the members of the new, and thus do not individually cease to carry on the trade at all. It seems to me, however, that regarded in its historical setting this interpretation of Rule 9 involves difficulties which must be examined.

The scheme of Income Tax imposed under Schedule D in respect of annual profits or gains arising in respect of any trade, etc., provides that the figure taken to represent profits in the year of assessment shall be arrived at by reference to the results of former trading—originally the average of profits of the three previous years, and now, under the Finance Act, 1926, the

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previous year's profits. It is obvious that this feature of the system, if not modified, might operate with special hardship in the event of a change in the composition of a partnership in the course of the year of assessment, and indeed in the case of any change in the personnel of those carrying on the business in the year for which the tax is being collected. In the case of a partnership, the tax is to be computed and stated jointly and in one sum, separately from any other Income Tax chargeable on any of the partners, and the joint assessment is to be made in the partnership name (Rule 10 of Cases I and II of Schedule D of the Income Tax Act of 1918). The liability, therefore, is joint and, unless the Income Tax code provides some mitigation, the Crown would be entitled (though we are told this is not what in fact is ordinarily done) to demand the whole amount of tax from a new partner who has only joined towards the end of the year. Moreover, the very fact that there has been a change in the composition of the partnership during the year may, owing, for example, to the dropping out of a partner who has been chiefly instrumental in making the business a success, cause a fall in profits. Again, the same result might follow where the carrying on of a trade passes from a single individual to another individual, and this remains true if a corporation, limited or unlimited, is substituted for the individual in either or both cases.

In the Act of 1842, Parliament dealt with this situation in the 4th Rule of the 1st and 2nd Cases of Schedule D, contained in Section 100 of the Income Tax Act of that year. The Rule is as follows:—" Fourth.—If amongst any " persons engaged in any trade, manufacture, adventure, or concern, or in " any profession, in partnership together, any change shall take place in " any such partnership, either by death, or dissolution of partnership as to " all or any of the partners, or by admitting any other partner therein, " before the time of making the assessment, or within the period for which " the assessment ought to be made under this Act, or if any person shall have " succeeded to any trade, manufacture, adventure, or concern, or any " profession, within such respective periods as aforesaid, the duty payable " in respect of such partnership, or any of such partners, or any person " succeeding to such profession, trade, manufacture, adventure, or concern, " shall be computed and ascertained according to the profits and gains of " such business derived during the respective periods herein mentioned, " notwithstanding such change therein or succession to such business as " aforesaid, unless such partners, or such person succeeding to such business " as aforesaid, shall prove, to the satisfaction of the respective commissioners, " that the profits and gains of such business have fallen short or will fall short " from some specific cause, to be alleged to them, since such change or " succession took place, or by reason thereof."

It will be observed that in this Rule a " change " is regarded as taking place not only if some one or more members of a partnership drop out but also if there is a dissolution of partnership as to all the partners. Yet if the partnership is completely dissolved and the trade goes on in new hands, this seems to involve a change which amounts to a succession. On the other hand, the Rule goes on to speak of the case in which any person shall have " succeeded " to the trade, etc., and it is not easy to give a confident application to the phrase " such partners " which follows the word " unless ", for there is no expressed antecedent to the word " such ". Yet the reason of the thing strongly suggests that the partners who can secure relief by alleging a falling short of profits from a specific cause would be the partners who are left after the change has taken place. These obscurities would be more important if the Act of 1842 had not been repealed in 1918 and if the existing provisions on the subject were not differently expressed.

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In 1880, a new and more effective method was adopted for providing against the hardship which might otherwise be suffered from a change in the carrying on of a concern during the year of assessment. The Taxes Management Act of that year is described in its full title and in its preamble as a consolidating Act, but in fact the provision under the head of " Changes " in Section 62 was new. The provision was in almost the same terms as the present Rule 9, and provided that if a " person " ceases within the year of assessment to carry on the concern in respect of which the assessment is made and is succeeded therein by another " person ", there shall be a splitting of the assessment by the Commissioners so that the predecessor and the successor shall each be liable for a fair proportion of the resulting tax. The proof, therefore, that as the result of the change some specific cause had operated to reduce the profits was no longer necessary in the cases to which Section 62 applied for the purpose of getting an adjustment. Section 62 manifestly applied, and its substitute Rule 9 now manifestly applies, to every case where a business during the year of assessment passes from the hand of one person or set of persons to another person or another completely different set of persons. The question is whether it applies in a case where the new set of persons is not completely different, because though there is a change in the composition of the partnership, there is a common element of one or more partners in each combination.

I now turn to the Income Tax Act, 1918, where Rule 9 is immediately followed by Rules 10 and 11. Rule 10 merely carries forward the provision for making a joint assessment in the partnership name in the case of a concern carried on by two or more persons jointly, and making it separately from any other assessment on the individuals who are partners.

Rule 11 reproduced in substance the 4th Rule above set out as it was contained in the Act of 1842. The Finance Act of 1926, however, by Section 32, Sub-section (1), substituted in place of the former Rule 11, the following language:—" 11.–(1) If at any time after the fifth day of April, " nineteen hundred and twenty-eight, a change occurs in a partnership of " persons engaged in any trade, profession or vocation, by reason of re- " tirement or death, or the dissolution of the partnership as to one or more " of the partners, or the admission of a new partner, in such circumstances " that one or more of the persons who until that time were engaged in the " trade, profession or vocation continue to be engaged therein, or a person " who until that time was engaged in any trade, profession or vocation on his " own account continues to be engaged in it, but as a partner in a partnership, " the tax payable by the person or persons who carry on the trade, profession " or vocation after that time shall, notwithstanding the change, be computed " according to the profits or gains of the trade, profession or vocation during " the period prescribed by the Income Tax Acts: Provided that, where all " the persons who were engaged in the trade, profession or vocation both " immediately before and immediately after the change require, by notice " signed by all of them or, in the case of a deceased person by his legal " representatives, and sent to the surveyor within three months after the " change took place, that the tax payable for all years of assessment shall " be computed as if the trade, profession or vocation had been discontinued " at the date of the change, and a new trade, profession or vocation had " been then set up or commenced and that the tax so computed for any year " shall be charged on and paid by such of them as would have been charged " if such discontinuance and setting up or commencement had actually taken " place, the tax shall be computed, charged, collected and paid accordingly.

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" (2) If at any time after the said fifth day of April any person succeeds " to any trade, profession or vocation which until that time was carried " on by another person and the case is not one to which paragraph (1) " of this Rule applies, the tax payable for all years of assessment by the " person succeeding as aforesaid shall be computed as if he had set up or " commenced the trade, profession or vocation at that time, and the tax payable " for all years of assessment by the person who until that time carried on the " trade, profession or vocation shall be computed as if it had then been " discontinued. In this paragraph references to a person include references " to a partnership. (3) In the case of the death of a person who, if he had " not died, would, under the provisions of this Rule, have become chargeable " to income tax for any year, the tax which would have been so chargeable " shall be assessed and charged upon his executors or administrators, and " shall be a debt due from and payable out of his estate."

Reading Rule 9, Rule 10 and the amended Rule 11 together, a puzzle is disclosed to which, as it seems to me, no entirely satisfactory solution can be found. One effect of Sub-section (2) of Rule 11 is that if there is a complete change in the persons or person carrying on the trade during the year of assessment, the tax in respect of the trade carried on down to the change shall be computed as if the trade had then been discontinued, i.e., the actual profit in the broken period is the basis of tax, with the possibility of consequential adjustments in respect of the previous completed year; and the trade as from the date of the change shall be treated as the setting up of a new trade from that date. Consequently, Rule 9 is no longer needed and can have no operation in such cases. To what then can Rule 9 have any application, unless it be when there is a change in the composition of the partnership during the year of assessment, such that there is not a complete substitution of new partners for old, but some partner or partners remain in the partnership throughout?

It was pointed out during the argument that the amended Rule 11 though enacted in 1926, did not operate until two years later, and therefore, there was a field in which Rule 9 could apply to complete changes in personnel during the intervening two years. That is true; but this only amounts to saying that the difficulty in finding any usefulness in Rule 9 did not arise till two years later. Certainly we cannot attribute to the Legislature the mistake, as Clauson, L.J., was inclined to do, of overlooking the fact that Rule 9 was useless, for Section 35 of the Finance Act, 1926, contains a reference to the power of the Commissioners to adjust the assessment under that very Rule. In the case of a provision in the Finance Act, in connection with which there is an annual review for purposes of amendment in every session of the House of Commons, I find it very difficult to suppose that the existence of Rule 9 as part of the existing code has been forgotten, or that it would be deliberately left, year after year, as a piece of dead wood without any possible usefulness or effect in the ramifications of the ever-spreading Income Tax tree.

There is indeed another indication that Parliament regards the transfer of a business from one partnership to another as a " succession ", even though some of the partners remain in the firm throughout. Sub-section (2) of Rule 11, in which it is expressly stated that references to a person include references to a partnership, provides that if after 5th April, 1928, any person succeeds to any trade which until that time was carried on by another person, and the case is not one to which paragraph (1) of this Rule applies, tax shall be calculated as though there had been the discontinuance of one trade and the commencement of another. But what is the case to which paragraph (1) of the Rule applies? It is the very case under discussion, where there is a

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persistence of certain partners while other partners have changed. This then assumes that such a change in partnership amounts, in the language of the Income Tax code, to a succession.

Moreover, if Rule 9 is not left to operate in the only case conceivably remaining for its operation, this curious result follows. If there is a change in a partnership such as is described in the first paragraph of Rule 11, and if all the partners old and new combine to give the notice therein referred to, then there will follow a division of responsibility for the tax, the old partners being liable on the basis that the trade was discontinued at the date of the change, and the new combination being liable for a new trade thenceforward. But what happens if the whole body of partners does not make this unanimous application, perhaps because one of them objects to do so, or because it is not in their interest to do so? If Rule 9 has no application in such a case, then as above pointed out, the Crown could call upon a single partner, even one who had only joined the firm at the time of the change, to pay the whole tax. This, to say the least of it, appears to be quite contrary to the trend of the efforts which the Legislature has made for a century past to limit the rights of the Crown in this respect. It would be very extraordinary if the Legislature, while enacting in Rule 11, Sub-section (1), what would happen on the hypothesis that all the partners agreed to act together, has never asked itself what would happen if all the partners did not so agree. Construing this bundle of Rules as a whole, I feel forced to the conclusion that it was the intention of the Legislature to leave Rule 9 to apply in such a case. It was suggested by Mr. King, in his persuasive argument for the Respondents, that Rule 9 and Rule 11 could not live together. But I do not think that this is so. If we imagine a case in which the profits of the trade actually made in the year of assessment greatly exceed the assessed profits derived from the past, it might not at all suit the partners to make use of Sub-section (1) of Rule 11, for they would thereby bring upon themselves much heavier claims for tax at once. In such a case the partners would much prefer to have the smaller total divided by the machinery of Rule 9.

I concede without any doubt or qualification the proposition relating to the English law of partnership upon which the judgment of the Court of Appeal is largely based. Strictly speaking, it is certainly true that an old partnership cannot be regarded as " ceasing " to carry on the trade, and the new partnership cannot be regarded as " succeeding " to it when some members of the old partnership are also members of the new, and thus do not individually cease to carry on the trade at all. *A, B, C* and *D* are carrying on the trade throughout the year; how then can it be said that they, or any of them, have in the course of the year ceased to carry it on? If language is accurately used, a partnership firm does not carry on a trade at all: it is the individuals in the firm who carry on the trade in partnership. It is not the firm which is liable to Income Tax. The individuals composing the firm are so liable, though by Rule 10 when a trade is carried on by two or more persons jointly the tax is computed and stated jointly and in one sum and is separate and distinct from any other tax chargeable to those persons or any of them, and a joint assessment shall be made in the partnership name. If, therefore (it is argued), Rule 9 is applied to a partnership, it applies not because a partnership is " a person charged under this Schedule ", but because the singular includes the plural, and instead of a single person the case is one of a number of persons who are jointly so charged.

So far as Engish law is concerned, it is indisputable that a partnership firm is not a single *persona,* though a different view obtains in Scotland, and

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in construing a taxing Statute which applies to England and Scotland alike, it is desirable to adopt a construction of statutory words which avoids differences of interpretation of a technical character such as are calculated to produce inequalities in taxation as between citizens of the two countries. Lord Halsbury, L.C., affirmed this principle in *Commissioners for Special Purposes of the Income Tax* v. *Pemsel*(1), [1891] A.C. 531, at page 548, when he adopted the canon of construction laid down by the Court of Session in *Baird's Trustees* v. *Lord Advocate* (1888), 15 R. 682, and quoted the general principle of common sense which Grose, J., laid down in a rating case (*Rex* v. *Hogg*, 1 Term Rep., 728) " a universal law cannot receive different " constructions in different towns ". Lord Watson in *Pemsel's* case, at page 557(2), deduces from the Scotch decision of *Lord Saltoun* v. *Lord Advocate*, 3 Macq. 659, the principle, which he there applies, that the Income Tax Act, 1842, must, if possible, be so interpreted as to make the incidence of its taxation the same in both countries.

It is these considerations which have made it necessary for me to look further into the statutory history and possible application of Rule 9, not because I have any doubt as to the correctness of the proposition of English law as to the nature of a partnership firm, but because our duty in construing a Statute such as this is to find out what the Legislature must be taken to have really meant by the expressions which it has used, without necessarily attributing to the Legislature a precise appreciation of the technical appropriateness of its language. " The more literal construction ought not to prevail ", said Lord Selborne, L.C., in *Caledonian Railway Co.* v. *North British Railway Co.*, 6 App. Cas. 114, at page 122, " if . . . it is opposed to the intentions " of the Legislature, as apparent by the statute, and if the words are sufficiently " flexible to admit of some other construction by which that intention will be " better effectuated." As a strict proposition of English law, there is no doubt at all that a partnership is not, as such, a single juristic person. As Farwell, L.J., said in *Sadler* v. *Whiteman*, [1910] 1 K.B. 868, at page 889, " In English law a firm as such has no existence; partners carry on business " both as principals and as agents for each other within the scope of the " partnership business; the firm name is a mere expression, not a legal entity, " although for convenience under Order XLVIII.A it may be used for the " sake of suing and being sued." And again, " It is not correct to say that " a firm carries on business; the members of a firm carry on business in " partnership under the name or style of the firm."

In the end, the House has to choose between two views, neither of which is entirely satisfactory. But, for the reasons I have given, I think that we must in this case be prepared to construe the Rule under discussion in a popular rather than in a technical sense, and I am not greatly shocked to find that when dealing with a joint assessment of trade carried on by a partnership, the Legislature has proceeded on the view that when the trade was first carried on by *A*, *B*, *C* and *D* in partnership and was subsequently carried on by *A*, *X*, *Y* and *Z* in partnership, this is to be regarded as though the first partnership ceased and the second partnership succeeded to the first.

At the same time, this result, though in my opinion preferable to treating Rule 9 as obsolete lumber, is only reached by giving to the Rule an application which is difficult to reconcile with the aptest use of legal terminology, and it is to be hoped that Parliament, in a future Finance Act, may by the use of amending language think fit to illuminate the obscurity in which the Judiciary for the time being has to grope.

(1) 3 T.C. 53, at p. 71. (2) *Ibid.*, at pp. 77/8.

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In my view, therefore, this appeal should be allowed. I must point out, however, that, in substance, the Respondents do not appear to lose anything by this reversal. The claim made on 1st April, 1938, under the proviso to Rule 11 (1), remains valid, with the consequences that the business carried on down to 25th March must be regarded as discontinued at that date and a new trade must be regarded as having been set up thenceforward. In the circumstances, I think that there should be no costs in this House; the decision of the Court of Appeal except as to costs should be reversed, but its Order as to costs must stand, as this was the agreement when leave to appeal to this House was given.

Lord Russell of Killowen.—My Lords, one question only arises on this appeal, viz., the true meaning and construction of the language employed in Rule 9 of the Rules of Cases I and II of Schedule D of the Income Tax Act, 1918. The particular question is, does that Rule apply where the change is of this nature, viz., where a partnership consisting of four individuals takes in, during the year of assessment, a fifth partner, with the result that during one part of the year a business is carried on by four individuals in partnership and is carried on during the remaining part of the year by those four individuals and a fifth person in partnership. That is the precise question which arises in regard to the facts of the present case; but in the argument on construction the broader question is involved, whether the Rule applies to any case in which after such a change, one or more of the members of the old partnership continue to carry on the business as members of the new partnership. I am using the word " business " so as conveniently to cover " trade, profession or vocation ".

In my opinion the language of the Rule, interpreted according to the ordinary meaning of the words used, admits of no doubt. It does not apply to such a case.

Rule 9 does not, in terms, refer to partnerships as such at all. Partnerships as such are dealt with by Rules 10, 11 and 12. The word " person " in the singular in Rule 9 could not, of its own force, include a partnership of two or more persons. Businesses carried on in partnership can only come within the purview of Rule 9 by reason of the Interpretation Act, 1889, which enables the singular word " person " to be read as including the plural " persons "; for businesses carried on in partnership are carried on by the individuals who are in partnership, and not by the partnership firm as a separate conception. The firm's name is a mere expression to denote the individuals. Read in the light of the Interpretation Act, the Rule comes into operation upon, but only upon, the following hypothesis—I omit words immaterial for this purpose—" If a person or persons . . . ceases or cease " within the year of assessment to carry on the trade . . . in respect of which " the assessment is made, and is or are succeeded therein by another person " or other persons ".

As I read it, that hypothesis, according to its plain meaning, postulates that there shall be at a point of time a ceasing to carry on by a person or persons, and a commencement to carry on by other, i.e., different, person or persons. In other words, the language used contemplates only the case of an owner or owners of a business ceasing to carry it on, and a different owner or owners commencing to carry it on within the year of assessment.

In coming to this conclusion I rely simply upon the language of paragraph (1) of Rule 9, without any reference to its pedigree, or to the history of Income

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Tax legislation. If however reference is made to this history it becomes abundantly clear that two conceptions have always, since 1842, been distinguished and dealt with separately, viz: (1) changes in partnerships and (2) successions to businesses. I do not think it necessary to explore this history in detail. It has been done by Clauson, L.J., in his judgment, and, as he pointed out, had this case arisen before the new Rule 11 had come into operation, it must have been dealt with under the old Rule 11 and could not have been dealt with under Rule 9. If this view be right, and it is in my opinion obviously right, the case cannot, after the alteration of Rule 11, fall under Rule 9, unless, notwithstanding that the language of Rule 9 remains unaltered, the meaning of the words used in it has undergone some change. I feel unable myself to assent to the suggestion that the Legislature has in this way not merely enacted a new Rule 11, but has also in some way, I suppose by necessary implication, enacted that a new meaning shall attach to the language of Rule 9.

Nor do I rely on the difficulty of fitting in the mandatory provisions of paragraphs (2) and (3) of Rule 9 with the provisions of the new Rule 11. These matters, however, help to corroborate what I take to be the plain meaning of the language used in Rule 9.

My Lords, I heard arguments on behalf of the Appellants which purported to show that the construction for which they contended was a useful one from the point of view of the tax authorities or a beneficial one to the taxpayer, or was one which was in accordance with the view which had prevailed in official circles. But I heard no argument on construction which did not appear to me irreconcilable with the plain meaning of the words under consideration. Rule 9 became in my opinion a spent force when the new Rule 11 came into operation. There is no longer any case to which it can apply.

I have stated in my own words my views upon this question of construction, but I am not conscious of having added anything to the judgment of Clauson, L.J., which, in my opinion, is unanswerable.

Lord Macmillan.—My Lords, on 5th November, 1937, the Commissioners of Income Tax issued to Sir R. W. Carden & Co., a firm of London stockbrokers, a notice of assessment to Income Tax under Schedule D for the year ending 5th April, 1938. In the annexed particulars the assessed amount of the profits of the firm's business for the year 1937–38 was stated at £70,000, based on the profits of the preceding year. The amount was subsequently adjusted at £69,355, and is not in dispute.

When the notice of assessment was issued the firm consisted of four partners. On 7th February, 1938, the four partners assumed a fifth. Thus for approximately five-sixths of the year of charge the business was carried on by four partners and for approximately one-sixth of the year by five partners. The name of the firm remained the same throughout.

The question for decision is whether Rule 9 of the Rules applicable to Cases I and II of Schedule D of the Income Tax Act, 1918, applies to the circumstances which I have stated. That Rule provides that if " a person " charged " under Schedule D " ceases within the year of assessment to carry " on the trade, profession or vocation in respect of which the assessment is " made, and is succeeded therein by another person " then certain procedure shall be set in motion " within four months from the fifth day of April next " after any such change ", having for its object and effect an adjustment by the General Commissioners of the assessment " by charging the successor " with a fair proportion thereof from the time of his succeeding to the trade,

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" profession or vocation, and relieving the person originally charged from a " like amount." The determination of the General Commissioners is to be final and " the sum apportioned to each such person shall be recoverable " from him in like manner as if he had been charged under the original " assessment."

It was common ground that if Rule 9 does not apply to the circumstances of the present case there is no other provision in the Income Tax Statutes for the apportionment of liability for the total tax payable under the assessment for the year 1937–38, and the new partner in a question with the Crown must remain under liability for the whole amount of the tax jointly with the original partners, although he participated for less than two months in the year 1937–38 in the carrying on of the business. It was also common ground that if Rule 9 does not apply to such a case as the present it has no application to any case and is entirely inoperative.

These considerations are argumentatively impressive and ought not to be left out of account; but the real question is whether the present case falls within the language of Rule 9 when soundly construed. I propose, therefore, to begin by examining the terms of Rule 9 as it stands by itself, apart from its history.

In order that the Rule may be applicable there must first of all be " a " person charged ". The word " person " is in the singular but it includes the plural and also any body of persons corporate or unincorporate (Interpretation Act, 1889, Section 1 (1) (*b*) and Section 19). In considering whether a partnership or a group of persons associated in partnership constitutes " a person charged " within the meaning of the Rule, I think it right to lay aside any preconceptions derived either from the law of England or from the law of Scotland as to the technical legal nature of a partnership. In Scotland a firm is " a legal person distinct from the partners of whom it is composed " (Partnership Act, 1890, Section 4 (2)), but this is not so under English law. For the present purpose this distinction should, in my opinion, be disregarded. The Income Tax Acts are Imperial Statutes equally applicable on both sides of the border and the language which they employ ought to be construed so as to have, as far as possible, uniform effect in England and in Scotland alike (*Commissioners for Special Purposes of the Income Tax* v. *Pemsel*[1], [1891] A.C. 531, per Lord Halsbury, L.C., at page 548). The important thing to ascertain is the meaning of the word " person " in the vocabulary of the Income Tax Acts. The word constantly occurs throughout the Acts, and I think that it is most generally used to denote what may be termed an entity of assessment, i.e., the possessor or recipient of an income which the Acts require to be separately assessed for tax purposes. Now Rule 10 provides that " Where a trade or profession is carried on by two or more persons jointly, " the tax in respect thereof shall be computed and stated jointly and in one " sum, and shall be separate and distinct from any other tax chargeable " on those persons or any of them, and a joint assessment shall be made " in the partnership name." The profits of a business carried on by a partnership are thus treated as a separate subject of assessment and the assessment is made in the partnership name. The personification of partnerships is even more manifest in Rule 12, by which in certain circumstances a " partnership shall be deemed to reside outside the United Kingdom, " notwithstanding the fact that some of the members of the said partnership " are resident in the United Kingdom ". That Rule uses the expressions

(1) 3 T.C. 53, at p. 71.

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" the trade or business of a partnership firm "; " the said firm shall be " chargeable "; " an assessment may be made on the said firm in respect of " the said profits in the name of any partner resident in the United Kingdom ". Justification is thus not wanting for the view expressed by Romer, L.J., that for taxing purposes "a partnership firm is treated as an entity distinct from " the persons who constitute the firm " (*Watson & Everitt* v. *Blunden*, 18 T.C. 402, at page 409). Having regard to the special vocabulary of the Income Tax legislation, I find no difficulty in interpreting the words " a person " charged " in Rule 9 to include the case of several persons associated together in partnership for the purpose of carrying on a trade in common, whose profits are by the Acts made the subject of separate assessment and separate charge.

But in order that Rule 9 may apply it is necessary next that there should be a " change " in the year of charge in consequence of which one person " ceases " to carry on the trade and is " succeeded " by another person. Both Scott, L.J., and Clauson, L.J., find it unnatural to describe in these terms what has happened in the present instance. Scott, L.J., says(1): " I " do not think that it is a natural use of language to say that a firm ceases " to carry on its business and that another firm succeeds to the business when " all that happens is, for instance, that a young managing clerk has become " a very junior partner with a tiny percentage of the firm's profits added " to his salary." Clauson, L.J., puts it thus(2): " The four original partners " do not cease to carry on the trade: they continue to carry it on with the " co-operation of a fifth person. That person in no sense succeeds to the " trade: he joins in carrying on the trade." With all respect, I am not convinced of the soundness of this reasoning. It is not a question whether the four original partners cease individually to be engaged in the business or the new partner as an individual succeeds to the business. There has undoubtedly been a change in the person charged, as I construe this expression. The trade has ceased to be carried on by four persons in partnership and has become a trade carried on by five persons in partnership. Whereas four persons were jointly chargeable, there are now five persons jointly chargeable by reason of the change in the " person charged ". It does not seem forced to say of this change that four persons jointly have ceased to carry on the trade and that five persons jointly have succeeded to it.

I agree with Scott, L.J., that, the Attorney-General's contention being one of law, it is fair to test it by an extreme case. Let it then be supposed, to take a case at the opposite extreme, that what has happened is that in the case of a business carried on originally by four partners, *A*, *B*, *C* and *D*, three new partners *E*, *F* and *G* are assumed and *A*, *B* and *C* resign. It seems quite natural in such a case to say that *A*, *B*, *C* and *D* have ceased to carry on the business and have been succeeded by *D*, *E*, *F* and *G*, although *D* has throughout had a share, possibly different shares, in carrying on the business. In ordinary parlance one firm would be said to have succeeded to another. *A*, *B* and *C* have certainly ceased to share in carrying it on; *E*, *F* and *G* have certainly succeeded to shares in it.

That the terminology of Rule 9 is not inapt to describe what happens when a change in the persons constituting a partnership takes place is illustrated in the case of *Brace* v. *Calder*, [1895] 2 Q.B. 253. That was the case of a firm composed originally of four partners. Two of them retired and the business was continued by the two remaining partners. An employee of the original firm declined to serve the two continuing partners and was held entitled to nominal damages for wrongful dismissal. I am concerned not

(1) *See* page 229 *ante*. (2) *See* page 230 *ante*.

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with the soundness of the decision but with the language judicially employed. Lord Esher, M.R., at page 258, thus described what had happened: " What " they did was to alter the constitution of the firm. The old firm ceased " to carry on its business, and the business became that of the new firm. " For the present purpose it is just the same as if the firm had simply ceased " to carry on business." Lord Esher was a dissentient from the decision, but that does not affect the passage which I have quoted, for his colleagues in the majority said much the same. Thus Rigby, L.J., at page 262, said that " the partnership between the four defendants was put an end to and " the business transferred to two of them, who continued to carry on a " business under the same firm name "; and Lopes, L.J., used similar language. So if the draftsman of Rule 9 intended to include the case of a change in the composition of a firm, but used language inapt for the purpose, he at least erred in good company. I should add that it was agreed on all hands that the language of Rule 9 would cover a case in which a firm composed of one set of partners transferred its business to another firm composed of entirely different partners.

Taking Rule 9 then as it stands, I should be of opinion that the present case falls within it. But I must turn now to the history and the context of the Rule, which the learned Lords Justices have closely examined and on which their contrary conclusion is largely based.

The tax under Schedule D extends to " every trade carried on in the " United Kingdom or elsewhere ", with one specific exception. The Rules prescribe how the profits or gains of the trade are to be computed. But a trade does not pay taxes; persons do. Therefore the tax is charged on and levied from the persons carrying on the trade in respect of the profits or gains arising or accruing to them therefrom, computed in the manner directed. In the case of a trade carried on continuously by the same person or persons from year to year no difficulty as regards either computation or charge arises. But there are various special cases to be considered. Thus (*a*) a trade may be begun or set up for the first time within the year or years forming the basis of assessment or within the year of assessment itself; (*b*) a trade may entirely come to an end in the course of the year of assessment; (*c*) a trade may be carried on continuously, but there may be changes in the persons conducting it. Such cases present difficulties both of computation and of charge. Special provision was made for (*a*), new trades, in the 1842 Act, Schedule D, First Case, Rule 1; in the 1918 Act, Schedule D, Rules 1 (2) and 8 (1) applicable to Cases I and II; and in the 1926 Act, Section 29 (1). For (*b*), discontinued trades, provision was made in the 1842 Act, Section 134; in the 1918 Act, Schedule D, Rule 8 (2) applicable to Cases I and II; and in the 1926 Act, Section 31 (1). It is not necessary to say anything more about these special provisions relating to the commencement and the discontinuance of a trade, for they do not apply directly to the case in hand, which is an example of my class (*c*), that is, where a trade has been continuous, but there have been alterations in the persons carrying it on.

A survey of the legislation applicable to continuing businesses discloses two main features. First, as regards computation, a consistent disregard, down at least to 1926, of changes of personnel, the object being to secure that the whole profits of the trade, by whomsoever carried on, shall be duly taxed. Second, as regards charge, inasmuch as the tax once computed has to be recovered from " persons ", a progressive recognition of the propriety of apportioning liability where different persons have been concerned in the making of the profits brought into charge. The Act of 1842 showed little

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compunction in the matter. Rule Fourth of the Rules applicable to Cases I and II of Schedule D provided that if amongst any persons engaged in any trade in partnership together, any change shall take place " either by death, " or dissolution of partnership as to all or any of the partners, or by admitting " any other partner ", or " if any person shall have succeeded to any trade ", within the relevant periods, the duty payable in respect of such partnership or any person succeeding shall be computed irrespective of such changes therein or succession to such business, unless such partners or such person succeeding are able to prove that since such change or succession took place or by reason thereof there was a falling off in profits or gains from some specific cause. Section 134 also dealt with the case where a person " succeeded " to the trade or business of another person and imposed on such person " so succeeding " liability for the full duties without any new assessment unless he could show a falling off of profits due to some specific cause.

It is noteworthy that in 1842 the Fourth Rule, which I have above summarised, makes provision for the computation of the duty in two cases, (*a*) the case of a change among the persons carrying on a trade in partnership, including a change as to " all " the partners, and (*b*) the case of a person succeeding to a trade. The classification is not very logical, for where there has been a change in all the partners there would seem clearly to be a succession. Then in Section 134, which is concerned with liability to charge, the Act deals with persons ceasing to carry on a trade and being succeeded by other persons but says nothing expressly about partnership changes. Perhaps this may have been because Rule Third had already made provision for all partners being charged jointly, though it would seem that if an assessment made on four partners jointly was to affect five partners jointly, an enactment providing that this should be so without any new assessment would have been appropriate, if Section 134 did not cover such a case.

In 1880, the Taxes Management Act of that year, in Section 62, made provision for the first time, in terms almost identical with those of the present Rule 9, for the apportionment of the charge of tax in the case of a person ceasing to carry on a trade and being succeeded therein by another person. The Section is comprehensively headed with the word " Changes " and refers to such a case as a " change in the carrying on of the concern ".

Now it is said, and fairly said, that in endeavouring to ascertain the true import of the present Rule 9 it is relevant to consider how the case now before the House would have stood after the coming into force of the 1880 Act, containing as it did the progenitor of Rule 9, but without the present Rule 11. The draftsman of Section 62 of the Act of 1880, it is suggested, with the provisions of the Fourth Rule of the Act of 1842 before him, deliberately elected to deal with one only of the two cases covered by that Rule, viz., the case of a person ceasing to carry on a business and being succeeded in it by another person, and deliberately refrained from dealing with the other case also covered by that Rule, viz., the case of a change among the persons engaged in a trade in partnership. The conclusion is sought to be drawn that Section 62 of the 1880 Act, and so the present Rule 9, cannot have been intended to apply to a change in the personnel of a partnership. This is a formidable logical argument, but it is not in my opinion conclusive. The scheme of legislation in the matter in hand has been far from logical. It has been a case of makeshift patches by different hands, and verbal consistency is the last virtue that can be attributed to a code which uses so vital a term as " assessment " in no less than eight differing senses (Report of Committee on Income Tax Codification, 1936, Cmd. 5131, paragraph 31). Indeed, Lord Wrenbury, in the

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case of *Kensington Income Tax Commissioners* v. *Aramayo*(1), [1916] 1 A.C. 215, at page 228, went so far as to say that " no reliance can be placed upon " an assumption of accuracy in the use of language in these Acts." Section 62 of the Act of 1880 does not profess to be an amendment of the previous law; it is a new departure, and I have offered reasons to show that its language, repeated in Rule 9, may fairly be held to cover the case of changes in the persons carrying on a partnership concern. The draftsman of Section 62 may have taken that view and have regarded a change in partnership personnel as a ceasing by one set of persons to carry it on and a succeeding to it of another set of persons, notwithstanding, or perhaps without due regard to, the distinction drawn in the Fourth Rule of the Act of 1842.

The next stage is reached in 1918 when the consolidation Act was passed. With minor alterations, it reproduced as Rule 9 applicable to Cases I and II of Schedule D, the provisions of Section 62 of the 1880 Act, and it reproduced as Rule 11 the provisions of the Fourth Rule in the Act of 1842. Being a consolidation Statute it made no attempt to reconcile Rules 9 and 11 or to bridge the gap (if there was one) which, according to the Respondents, left partnership changes with no machinery for apportionment. The 1842 distinction between partnership changes and successions may have been brought into more prominence by the new juxtaposition of Rules 9 and 11, but the law remained as it was after 1880, and if Section 62 of the Act of 1880 was intended to cover changes in partnership personnel, the Act of 1918 did not alter the position.

Finally, in the progressive development of the law, came Section 32 of the Finance Act of 1926, which substituted for the previous Rule 11 an entirely new Rule. It introduced a new refinement by recognising explicitly in paragraph (1) for the first time that, in the case of a continuing trade, changes in the persons carrying it on in partnership might occur which left one or more of the persons who previously carried it on still engaged in it though in a new association. In such a case the Rule reasserts the principle of the 1842 Act that the computation of the profits of the trade shall remain unaffected by the change in personnel. Nothing is said about apportionment. There is a proviso, however, to the effect that all concerned may by notice within three months (subsequently altered to twelve months) after the change require the surveyor to treat the case as one of a discontinuance of one trade and the commencement of another and to charge the tax on the several parties as if there had been an actual discontinuance and commencement. The proviso has quite a different effect from what is directed to be done under Rule 9. That Rule apportions the assessment computed for the whole year among the different persons who carried on the trade during the year. The proviso to Rule 11 requires two separate computations, one applicable to the notionally discontinued trade, the other applicable to the trade notionally commenced. Then in paragraph (2) the new Rule goes on to deal with the case where a person " succeeds " to a trade previously carried on by another person, " and " the case is not one to which paragraph (1) of this Rule applies ". In such a case the tax payable is to be computed as if at the time of the change the predecessor had discontinued the trade and the successor had commenced it. It is expressly provided that in this paragraph references to a person include references to a partnership. Section 35 (1) of the Act of 1926 provides, *inter alia*, that where in the case of any profits or gains chargeable under Cases I and II of Schedule D it is necessary to effect an apportionment thereof to specific periods, it shall be lawful to make such an apportionment: " Provided

(1) 6 T.C. 613, at p. 623.

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" that nothing in this section shall be construed as limiting the power of the " general commissioners with respect to the adjustment of an assessment " under Rule 9 of the Rules applicable to Cases I and II of Schedule D." The provisions of Part IV of the Act of 1926 (which includes Sections 32 and 35) are by Section 37 to come into operation on 6th April, 1927, till which time the existing enactments are to continue to have effect; thereafter any provisions inconsistent with Part IV are to cease to have effect.

Having examined the history of Rule 9 and set out its context, I now return to the question of the interpretation of the Rule with such light as my investigation has afforded. I cannot say that it has afforded much. But one thing is clear, namely, that the existence of Rule 9 was not overlooked when the new Rule 11 was introduced and that there was no inadvertent omission to repeal it, as suggested by Clauson, L.J., whose attention was apparently not drawn to Section 35 of the 1926 Act. The operation of Rule 9 was not safeguarded merely for the time intervening till the 1926 Act came into effect: that would have been secured by the general saving in Section 37. Accordingly, in the view of the draftsman of the new Rule 11, Rule 9 had still a part to play. It may be that he misconstrued the effect of Rule 9, as Clauson, L.J., alternatively suggests, but that does not afford an escape from the fact that Parliament has re-affirmed Rule 9 as part of the existing code and must be presumed to have intended that it should have some effect. In view of Rule 11, the only case left in which it can operate is the case where there has been a change in the personnel of a partnership with a common element continuing and where no notice has been given to the Surveyor under the proviso to paragraph (1) of Rule 11. I agree with Clauson, L.J., that that by itself would be " a very poor ground for giving an entirely unnatural " meaning to reasonably plain words "(1), but it is not a circumstance to be disregarded if the words may be reasonably read in a sense which would not only render Rule 9 an effective part of the code but also supply means of apportionment of tax in a case otherwise not covered.

It will have been observed that paragraph (2) of the new Rule 11, which deals with succession to a trade, is to be applicable only if " the case is not one " to which paragraph (1) of this Rule applies ", and paragraph (1) deals with changes in partnership personnel. If in the Income Tax vocabulary a partnership change is never regarded as a succession, it was superfluous to except from the operation of paragraph (2) cases falling within paragraph (1). This time logic tells in favour of the Attorney-General's interpretation of Rule 9. If the excepting words were introduced *ob majorem cautelam*, it was surely an excessive precaution to except a case which could only on an entirely unnatural reading of paragraph (1) be thought to be included.

After this long and tedious marshalling of all the relevant considerations I have now to come to a decision, and my decision is that the arguments in favour of the applicability of Rule 9 to the case in hand ought to prevail. I cannot, however, take leave of the case without expressing my regret that so much time and money has had to be spent in unravelling a tangle which could easily have been straightened out by the Revenue authorities in one of their annual applications to the Legislature and I hope that an early opportunity will be taken of doing so. My vote is in favour of allowing the appeal and restoring the Order of the Divisional Court.

Lord Wright.—My Lords, I have had the advantage of reading in print the opinion just delivered of my noble and learned friend, the Lord Chancellor. I agree with it and only add a few words of my own to explain my position

(1) *See* page 233 *ante*.

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out of respect to the distinguished lawyers in the Court of Appeal and in this House who take a different view.

The difficulties in deciding this case result from the extreme parsimony in language practised by the Legislature in formulating Rule 9 of the Rules applicable to Cases I and II of Schedule D in the Act of 1918. I confess that for some time I was impressed by the close logic of Clauson, L.J., who, agreeing with Scott, L.J., has proceeded on the narrow interpretation of the words of the Rule. The material words of Rule 9 are: " If a person charged " under this Schedule ceases within the year of assessment to carry on the " trade, profession or vocation in respect of which the assessment is made, " and is succeeded therein by another person ". That is the condition upon which the machinery provided by the Rule in order to secure a fair apportionment of the tax between the former person and the successor is to operate. This certainly seems simple enough. It appears to contemplate merely a transfer of the undertaking from one person to another. Before this provision was introduced by Section 62 of the Taxes Management Act of 1880, which was headed " Changes ", and was substantially identical with the present Rule 9, there was nothing to mitigate the effect of the provision now embodied in Rule 11, which replaced the corresponding provision of Section 100 of the Act of 1842. Notwithstanding the change it was there enacted that there was to be only one assessment for the year, and only a limited right to claim a reduction of the assessment was given to the successor in the event of there being a reduction of profits consequent on the change. But the position is not quite so simple. It is a familiar rule of construction that the singular includes the plural. Hence Rule 9 is to be read in law as signifying " if a person or persons ceases or cease " and " is or are " succeeded by another person or other persons ", etc. But if persons carry on a business they do so jointly, and thus the idea of partnership is introduced. Where several persons jointly carry on business some may retire and others take their place, or a new partner may be admitted by the old partners without any other change in the firm. These and similar questions were, it is clear, present to the minds of the framers of the Act, because Rule 11 provides for a change in a partnership " by reason of death, or of dissolution " of the partnership as to all or any of the partners, or by the admission of a " new partner ". It also provides for a case where a person succeeds to a trade or profession which, on ordinary principles of interpretation, includes a case where several persons succeed. Rule 11 provides that in all these cases the tax is to be computed as if there had been no change or succession " notwithstanding the change or succession ". Under Rule 10 where there is a partnership the tax is to be computed jointly and in one sum and a joint assessment is to be made in the partnership name, which means that any partner can be called upon to pay the whole. This Rule shows that while the Revenue Acts do not deal specifically with partnerships, save exceptionally as in Section 32 (2) of the Finance Act, 1926, they do in some respects treat them in a sense as special entities for taxation, though it is still true that the partners, not the firm as an entity, are taxed.

The result is that where a new partner is admitted under Rule 11, say at whatever period of the year, he is liable *in solido* to Income Tax for the whole assessment, which is a single assessment on the profits of the entire year, before the new partner joined the firm, though no doubt the old and new partners may provide for some adjustment of the burden *inter se*. That this seemed to the Legislature to be an unjust burden to place upon the new partner is shown by the terms of Rule 9, particularly when it is realised that the Rule refers to persons trading in partnership. It is in Rule 9 that the

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provision, if any, is to be found in the Act of 1918 for a more equitable adjustment of the direct liability for the year's tax, apart, that is, from the limited relief possible under Rule 11. But on the literal construction of the word " ceases "adopted by the Court of Appeal there is nothing directed to the case at least where the existing partners remain but a new partner is admitted. Clauson, L.J., can only say that there is a *casus omissus* which the partners new and old can deal with by the agreement under which the new partner is admitted, though clearly their domestic agreement could not affect the statutory incidence of the tax liability. But the principles of construction abhor, if it can be avoided, a *casus omissus,* especially one so obvious as this. I do not find the words " cease to carry on the trade " etc., so precise and unambiguous as to be incapable of the meaning for which the Appellants contend, when read in their surroundings. Construction *ex vi termini* involves a fitting together of words with their context. Words in most cases take their colour from their environment. We must indeed exclude certain words which are so precise and distinctive as to admit of only one meaning . Such words are generally technical or scientific. Other words are so various in their connotation that without the context they cannot be understood, as for instance " quarter ". But the majority of words and phrases depend on the context. Hence the familiar phrase that they must be construed *secundum subjectam materiam.*

Rule 9, like Section 62 of the Act of 1880, is a slip-shod piece of draftsmanship. It must, it seems, have been intended to cover the types of case mentioned in Rule 11 of the Act of 1918. The framers of Rule 9 may fairly be held to have taken the view that if four partners admit a new partner and continue the business as a partnership of five, there is a change. The four old partners do not carry on the business on the same footing as before even if the actual business operations are unchanged. There is on any view a cessation of the old partnership business and the starting of a new partnership business. Even if the business remains the same and the name remains the same as before the change, still the five who carry it on succeed to the four who did so before the change, and the five can only succeed to the four if the four cease to carry it on, which is the fact because five partners carrying on a business jointly are different from four. Thus a change in the persons jointly carrying on a business by the admission of a new partner may fairly be held to come within the very general words of Rule 9, even though in one sense the previous partners may not cease to carry on the business. But the business is not the old business. The old business is superseded by a new business, with a different division of property ownership, of powers of agency and representative capacity, of rights on dissolution and of all the incidents of partnership, including joint liability. The draftsman may have had in mind that by English law the admission of a new partner involves a dissolution of the partnership and the starting of a new partnership which succeeds to the old firm. In that sense, the old partners may be said to cease to carry on the business. It is a joint business. A joint business carried on by four is different from a joint business carried on by five, even if the five include the original four. The addition of the new partner changes the constitution of the firm.

As the Lord Chancellor has pointed out in his speech, this view brings the English way of looking at a partnership into line with the Scotch way, for practical purposes of the Revenue Acts, which apply both to England and Scotland, and prevents a difference between the effect of the Acts in England as compared with their effect in Scotland, which would otherwise result from the fact that by the English law a firm is not, whereas by Scots law a firm is, a legal *persona.*

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I have so far ignored the Finance Act, 1926, Section 32, because I do not see how the Act of 1918 can be construed in the light of the later Act of 1926. Section 32 of that Act did indeed give a new machinery to effect an equitable adjustment of tax where a change has taken place in a firm during the year of charge, but there was no complete change of identity in the partners because at least one partner remained throughout. But that machinery is optional, and where the option is not exercised, because, for instance, all the partners before and all the partners after the change would not agree to avail themselves of the machinery, Rule 9 is as necessary as it ever was, and indeed is the only machinery to effect the readjustment. It was clearly not repealed by the Act of 1926, which indeed in Section 35 expressly refers to it.

I am conscious, like the Lord Chancellor, that the question raised in this case does not admit of an entirely satisfactory solution, whichever view is taken. It can never be satisfactory to a Court of construction to have to deal with words such as these. But I agree with him in thinking that on the whole it is more correct to give the wider meaning to Rule 9 than to leave so obvious an anomaly, even though in practice the Revenue authorities may not exercise their powers inequitably. The language of Rule 9 is vague and obscure, and though in ordinary parlance it would not at first sight be natural to describe the four partners in a case like the present as ceasing to carry on the business merely because they take in a new partner, yet in my opinion when the words are read in their immediate context, in their general setting in the Revenue system and in the light of partnership law, the meaning which I adopt is the true construction. That meaning achieves a practical and reasonable result, which is what the Rule must, as it seems to me, have intended.

I concur in the motion proposed.

Lord Porter.—My Lords, the question at issue in this case is a short but by no means easy one. Unfortunately the Income Tax Acts are not a coherent whole but a congeries of provisions often enacted to deal with specific problems without any sufficient care to see how they fit into the general framework amidst which they are inserted. Some of your Lordships in this House have set out the vital Rule, Rule 9 of the Rules applicable to Cases I and II of Schedule D of the Act of 1918, which requires elucidation, and in the course of the speeches delivered have traced the history of that Rule itself and of the Rules following it which deal with partnership businesses.

The argument on behalf of the subject, as I understand it, is that, in the case of a partnership, so long as one partner continues in the business it cannot be said that the partnership has " ceased to carry on a trade " or has been " succeeded by another person ". Partnerships, it is said, do not carry on a trade, the several partners do. An individual may cease to carry on a business and be succeeded by another person, and so may the individuals forming a partnership provided all the original partners are replaced by another person or other persons, but unless all are changed there is no cessation and no succession by a person carrying on the business. The argument is strengthened by pointing out that in the 4th Rule of the 1st and 2nd Cases of Schedule D contained in Section 100 of the Act of 1842, a distinction is made between a change of partners on the one hand and a succession to a trade on the other; that this distinction was continued in Rule 11 of the Act of 1918, which substantially reproduces Rule 4 of the Act of 1842; and, it is said, again continued, though perhaps not quite so definitely, in the new Rule 11 embodied in the Act of 1926. Rule 9, it is added, deals with cessation and succession and not with a change of partners. In spite of this forcible

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argument, if I were faced only with the Rules as they now stand, I think that in common with my noble and learned friend, Lord Macmillan, I should without undue difficulty consider Rule 9 at least capable of bearing the interpretation which the Appellants put upon it, more particularly in view of the circumstance, which he has pointed out, that Rule 10 treats the entity of assessment as being the partnership and not the individuals composing it.

It is true that Rule 9 speaks of a person ceasing to carry on a trade and being succeeded by another, but for my own part I can conceive of the Legislature, when dealing with a partnership consisting of *A*, *B*, *C* and *D*, describing them as ceasing to carry on a trade when those four individuals cease to carry it on as a group and of their being succeeded by other persons when a different group of four carry it on (e.g., *A*, *B*, *C* and *F*), albeit three out of the four are persons who previously constituted the partnership. Some of the individuals indeed remain, but *A*, *B*, *C* and *D* have ceased to carry on the business and are succeeded by *A*, *B*, *C* and *F*. The phraseology may be loose inasmuch as strict accuracy compels one to acknowledge that in England, though not in Scotland, the business is carried on by the individual partners jointly and not by the partnership. Nevertheless, it is not unimportant to recall that one partner alone does not carry it on. The totality of members form a joint body of management and responsibility.

It is interesting to observe in this connection that Rule 9 speaks of cessation and succession as a change—as indeed it is—and thereby makes less marked the difference between the language used in Rule 4 and the earlier Rule 11 when referring to a change of partners and that used in a case where persons who are not partners cease to carry on a business and are succeeded by others. Moreover those Rules treat the death or dissolution of partnership as to all partners exactly on the same footing as the death or dissolution of some only. Further, as the Lord Chancellor has pointed out, it is at least possible to read the phrase " unless such partners or such person succeeding " as if " partners " as well as " persons " were qualified by the word " succeeding ".

Nevertheless, if I were dealing with a case where Rule 4 of the Act of 1842, or the old Rule 11 embodied in the Act of 1918, applied, I should be less willing to disturb the judgment of the Court of Appeal, not only because the construction of the Act is itself a matter of some doubt, but also because I feel the force of the reasoning of the Court of Appeal, and in a case of doubt recognise that your Lordships would affirm their decision.

But this House is not directly concerned with the Act of 1842 or with Rule 11 of the Act of 1918 as it originally stood. In the language of the present Rule 11 and elsewhere in the Act of 1926 there are, I think, some expressions sufficient to weight the scale in favour of the construction contended for by the Appellants. I may tabulate them as follows.

(i) The present paragraph (2) of Rule 11 speaks of a case of cessation and succession to which paragraph (1) of the Rule does not apply, and paragraph (1) deals with changes of partnership. This phraseology gives some indication that in the Act changes of partnership are treated as involving a cessation of, and a succession in, the carrying on of the business. In this connection it is also, I think, not unimportant to observe that in the new Rule, as in the old, no distinction is made between those cases where all the partners are changed and those where there is a change of some only or even nothing except an addition to or subtraction from the existent partners without further change. This, in my view, suggests that no difference was intended to be made between a complete and a partial change in the ownership of a business.

(ii) Rule 11 (2) expressly provides that in that paragraph references to a person include references to a partnership. The conclusion I should draw is

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that the first paragraph was intended to deal primarily with a partial change of partners and the second as including a complete change, and in each case the change is treated as a succession.

(iii) It was conceded by the Respondents in argument that except for the two years before the Act of 1926 came into force, Rule 9 would find no set of circumstances upon which to operate. It seems unlikely that Parliament would leave that Section unrepealed for all time, if this were the result of the new Rule 11. At best this particular argument is only of slight weight, but I have some doubt as to whether the admission should properly have been made by the Respondents if their argument is sound. If the business is carried on not by the partnership but by the individual partners, I see no reason why a new partner should not buy out an old one with the consent of the others. In such a case I should have thought it might be contended that the outgoing partner had ceased to carry on the business and the incoming one had succeeded him, and that as between those two an apportionment under Rule 9 should be made. This argument, however, does, to my mind, accentuate certain difficulties in the Respondents' contentions. In the first place, the outgoing partner does not cease to carry on the business, he only ceases to help in doing so; and in the second place it would be an odd thing if apportionment were possible where partner succeeded partner, but none where the only change was that a new partner was taken in or an old one retired, and odder still if no apportionment were possible unless a new partner took exactly or substantially the old partner's share and place so that it could be said he had succeeded him.

(iv) Finally, Section 35 (1) of the Act of 1926 contains the words " Provided that nothing in this section shall be construed as limiting the " power of the general commissioners with respect to the adjustment of an " assessment under Rule 9 of the Rules applicable to Cases I and II of " Schedule D "—a provision which seems to indicate that that Rule was intended to retain its effect in addition to the powers granted and obligations imposed by Rule 11 of that Act.

The general effect of this summary is to induce me to believe that in this difficult matter of construction, Rule 9 of the Act of 1918 continues to be effective and does apply to a partnership where a change of partners occurs though the old members are not superseded by entirely new persons. I cannot say that this result is achieved by that clarity of expression which one would desire in a taxing or indeed in any Act of Parliament, but of the two views I think it is the better.

Accordingly I find myself in agreement with the opinions expressed by the Lord Chancellor, Lord Macmillan and Lord Wright in proposing that the appeal should be allowed.

Questions put:

That the Order appealed from be reversed except as to costs.

The Contents have it.

That the Order of the Divisional Court be restored except as to costs; and that no costs be allowed to either side in respect of the appeal to this House.

The Contents have it.

[Solicitors:—Janson, Cobb, Pearson & Co.; Solicitor of Inland Revenue.]

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