

NO. 1414—HIGH COURT OF JUSTICE, NORTHERN IRELAND (KING'S BENCH DIVISION)—26TH JUNE, 1946

COURT OF APPEAL, NORTHERN IRELAND—25TH AND 26TH NOVEMBER, 1946,  
AND 15TH JANUARY, 1947

HOUSE OF LORDS—7TH, 8TH, 9TH, 13TH AND 14TH APRIL AND  
13TH MAY, 1948

**Scott v. Russell (H.M. Inspector of Taxes) (1)**

*Income Tax—Receipts from sale of sand by owner of sandpit—Income Tax Act, 1918 (8 & 9 Geo. V, c. 40), Schedule A, No. III; Finance Act, 1926 (16 & 17 Geo. V, c. 22), Section 28 and Third Schedule.*

A farm of about 25 acres owned and occupied by S included a field containing a deposit of sand about 1 acre in extent. In 1940 M, a building contractor, obtained S's permission to open up a sandpit in the field in question, M to construct a road into the field and pay S 1s. per ton for all sand taken. After the sandpit was opened up in January, 1941, other contractors also obtained S's permission to take sand, at rates of 6d., 9d. and 1s. per ton according to quality. S did not take the initiative in opening up the pit or disposing of the sand, and purchasers had to make their own arrangements for digging the sand and carrying it away. In May, 1941, S arranged with H, an employee of M, to check the quantities of sand taken by the various contractors, and paid him ½d. per ton for his services. H, on behalf of S, supervised the pit generally, and when he left the pit his duties were taken over by his wife. The pit was worked regularly and continuously until 1944, when the sand was practically exhausted.

No assessments under No. I of Schedule A or under Schedule B had been made in respect of the farm because the personal allowances due to S cancelled any liability to tax in respect of the farm, considered apart from the sandpit.

S was assessed to Income Tax under Schedule D in respect of the sums received from the disposal of the sand for the years 1940-41, 1941-42 and 1942-43\*, and appealed to the Special Commissioners. The Crown contended that the sandpit was a "concern of the like nature" with those enumerated in Rule 3 of No. III of Schedule A. The Special Commissioners on the rehearing of the appeal decided that the sandpit was a "concern" carried on by S, and that it was a concern "of the like nature", and confirmed the assessments.

Held, that the sandpit was not a "concern of the like nature" with those enumerated in Rule 3 of No. III of Schedule A.

Mosley v. George Wimpey & Co., Ltd., 27 T.C. 315, overruled.

\* For previous proceedings in respect of these same assessments see page 375 ante.

(1) Reported (C.A. (N.I.) and H.L.) [1948] N.I. 119.

## CASE

Stated under Section 149 of the Income Tax Act, 1918, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice in Northern Ireland.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held in Belfast, on 23rd March, 1945, Mr. David Scott (hereinafter called "the Appellant") appealed against assessments made upon him to Income Tax under Schedule D for the years 1940-41, 1941-42 and 1942-43 in estimated sums of £4,000, £10,000 and £10,000, respectively.

These assessments were made in respect of sums received by the Appellant from the disposal (in the manner hereinafter described) of sand, from a sandpit on his lands of Glebe in the County of Londonderry, on the footing that such sandpit fell within the lands, tenements, hereditaments or heritages mentioned in Rules 1, 2 or 3 of No. III of Schedule A, the property in which is now chargeable to tax under Case I of Schedule D by virtue of Section 28 of the Finance Act, 1926.

2. On 20th November, 1942, an appeal by the Appellant against these same assessments had been heard by the Commissioners for the Special Purposes of the Income Tax Acts, who had discharged the assessments. On appeal by way of Case Stated to the King's Bench Division of the High Court of Justice in Northern Ireland, and thence to the Court of Appeal in Northern Ireland, the decision of the Special Commissioners discharging the assessments had been affirmed (on different grounds), but on a further appeal to the House of Lords it was ordered by an Order dated 7th February, 1945, that the assessments be restored and the appeal against them be remitted to the Special Commissioners for them to rehear and, if so requested, to state a fresh Case for the opinion of the High Court in Northern Ireland. A copy of the Order of the High Court in Northern Ireland, setting forth the said Order of the House of Lords and making the same an Order of the High Court, is hereto annexed and forms part of this Case<sup>(1)</sup>.

3. At the rehearing of the appeal on 25th March, 1945, evidence was given by the Appellant, Mr. Stewart Harvey, Mr. William Moore, Mr. James McKinney and the three witnesses mentioned respectively in paragraphs 14, 15 and 16 below.

The facts found by us on the evidence are as hereinafter set forth.

4. The sandpit, which is the subject of the appeal, is situate on a small portion of a farm at Glebe in the County of Londonderry, consisting of 25 acres and 30 perches. The area of the pit (which is now practically worked out) is about one acre and its depth varies from 30 to 40 feet. Eight photographs of the pit (as it now exists) accompany this Case, in a separate bundle, and may be treated as forming part of this Case<sup>(1)</sup>.

5. Some time before the beginning of the year 1939, Mr. Moore, who is a building contractor and was then engaged in building cottages, had, by the permission of the then owner of the farm, got sand from a field on the farm, being the field which was subsequently opened up and excavated as a sandpit as hereinafter described. This field was

(1) Not included in the present print.

rough ground unsuitable for cultivation. At that time there was simply a hole in the field from which Mr. Moore got the sand, the hole subsequently being filled up by him with earth.

6. The Appellant is a farmer. He purchased the farm on 8th February, 1939. He lives about a mile from the farm. At the time he bought the farm he did not know that sand existed in any large quantity under the field in question, and he himself did not take the initiative in opening up the sandpit or disposing of sand. Neither before nor after the pit was opened did the Appellant ever publish any advertisement in any newspaper about the pit or ever invite anybody to buy sand from him. Nor did he get any printed billheads or note headings or keep books of account.

7. Towards the latter part of 1940 a demand for sand arose in connection with the construction of aerodromes in Northern Ireland. In December, 1940, Mr. Moore came to see the Appellant and asked for permission to open up a sandpit in the field from which he (Mr. Moore) had previously dug sand, and asked the Appellant what his terms would be. At that time there was no road into the field in question. It was verbally agreed between the Appellant and Mr. Moore that Mr. Moore should have permission to open up a sandpit in the field, on the terms that he should pay the Appellant 1s. per ton for all sand gotten, and should also at his (Mr. Moore's) own expense make a road from the county road to the brae face in the field.

Mr. Moore accordingly made a substantial road to the brae face, laying the road with stones, opened up the sandpit and commenced excavation operations in January, 1941.

8. Later in the same year other contractors began to come to the Appellant and asked for permission to take sand. The sand was of different qualities or grades, in particular, a finer quality, namely, building sand, and a coarser quality, namely, concrete sand. The Appellant granted permission to other contractors to take sand, at rates varying between 6d., 9d. and 1s. per ton, according to the quality of sand gotten. Five of these other contractors were James McKinney, Peter McKinney, John O'Hara, John Morrow and J. McWilliams. In addition to the "regular" contractors there were a number of "casual" ones, who (not having previously made any arrangement with the Appellant) came to the pit to get sand and there arranged terms with Mr. Stewart Harvey (on behalf of the Appellant), as stated in paragraph 12 below.

9. The sandpit was regularly and continuously worked, and sand excavated and taken by the various contractors, from January, 1941, until about October, 1944, by which time the pit was practically worked out. The excavation was done by shovelling. The hours of working at the pit were from 8 a.m. to 6 p.m. daily. Save as stated in paragraph 13 below, each contractor made his own arrangements for providing lorries to convey the sand from the pit to the particular aerodrome at which he delivered it.

The two largest contractors concerned were Mr. Moore and Mr. McKinney. Mr. Moore had from 7 to 12 men working for him at a time, and Mr. McKinney an average of 8 or 9 men. Between January, 1941, and October, 1944, Mr. Moore paid the Appellant (in monthly payments) sums aggregating £3,915, which, at 1s. per ton (the rate at which he was paying) represents an aggregate of 78,300 tons of sand dug and taken by him. Mr. McKinney dug and took an aggregate of 22,220 tons, for which he paid

£1,111 (his rate also being 1s. per ton). These two tonnages aggregate 100,520 tons, dug and taken between January, 1941, and October, 1944, in addition to which there were the tonnages dug and taken by the other contractors (regular and casual), the details of which were not in evidence before us. All payments by all contractors were made in full without deduction of Income Tax.

The profits made by the Appellant from the disposal of sand as aforesaid (after deduction of expenses) up to 5th April, 1943 (the end of the last of the three years of assessment before us), as agreed between the parties subsequently to the rehearing, were £5,150, namely, £150 in 1940-41, £1,250 in 1941-42 and £3,750 in 1942-43.

10. Some time after Mr. Moore had begun to dig and take away sand (namely, in January, 1941) he (Mr. Moore), in his own words, "saw the job was going to be fairly large" and offered to buy the field from the Appellant for £700. The Appellant, however, declined to sell it.

Up to May, 1941, the Appellant kept no check on the tonnage excavated and taken by Mr. Moore, but accepted his figures. It was about this time that the other contractors hereinbefore mentioned began to come in. There was a house on the farm, situate just beside the sandpit, the occupiers of which house were Mr. Stewart Harvey and Mrs. Harvey, who were tenants of the Appellant. At that time (May, 1941) Mr. Harvey was in the employ of Mr. Moore at the pit, having been so employed since January, 1941. In November, 1941, Mr. Harvey left Mr. Moore's employment and entered that of the Appellant as a lorry driver.

In May, 1941, notwithstanding that Harvey was then in the employ of Mr. Moore, the Appellant entered into an arrangement with Harvey that he (Harvey) should, on behalf of the Appellant, check the tonnage of sand excavated and taken by Mr. Moore, and that the Appellant should pay Harvey  $\frac{1}{2}d.$  per ton for so doing. Mr. Moore was unaware of the arrangement at the time, but discovered it later and raised no objection thereto. Harvey did this until he left Mr. Moore's employment at the pit in November, 1941. Thenceforth this work of checking was taken by Mrs. Harvey (his wife).

11. The procedure for checking the sand taken by Mr. Moore was that Harvey (and later Mrs. Harvey) kept monthly sheets recording the tonnage taken, entered the particulars in note-books, and once a month handed the sheets to the Appellant. The Appellant took these sheets to a solicitor's office, where there were prepared for him typed "dockets" or accounts for the amounts due. The Appellant then furnished these dockets to Mr. Moore, who paid the Appellant monthly by cheque, after he himself had checked the figures. Mr. Moore did not make independent records of his own, but all the sand excavated and taken by him was delivered by him to an aerodrome; the aerodrome authorities checked the tonnage delivered, entering the particulars in a docket book, in triplicate, a copy of the docket being handed by them to Mr. Moore, from which he checked the accounts furnished to him by the Appellant.

Mr. (and later Mrs.) Harvey similarly checked, on behalf of the Appellant, the tonnages of sand taken by all the other contractors and delivered the records to the Appellant, and either the Appellant, or Mr. or Mrs. Harvey on his behalf, then furnished the particulars to the contractors concerned.



12. Harvey, on behalf of the Appellant and by his instructions, also supervised the pit generally. He directed the various contractors as to which particular part of the face of the pit each should work. Whenever a "casual" contractor whom he did not know came with a lorry and wanted to buy sand, Harvey arranged with him what he was to pay, and then allowed him to go and get the sand and directed him where to get it. Sometimes, also, the regular contractors paid Harvey. In particular, James McKinney never paid the Appellant personally but always paid Mr. or Mrs. Harvey. Moore, on the other hand, always paid the Appellant himself by cheque, and the Appellant made out the receipts.

The Appellant (who personally farmed the adjoining land) did not himself (or by his own workmen) dig for sand. He occasionally visited the pit, but he left the general supervision thereof to Harvey. The remuneration of  $\frac{1}{2}d.$  per ton which the Appellant paid Harvey for checking (whether done by Harvey or his wife) covered Harvey's remuneration for supervising the pit as aforesaid.

13. For a good many months Harvey also used the Appellant's lorry to convey sand for different contractors from the pit to the aerodrome concerned. The contractors, however, did not pay the Appellant anything extra (in addition to the price of sand) for the use of the lorry, the Appellant being paid by the Transport Board, on whose behalf he was then using the lorry.

14. Mr. Stephen Alexander Orr, Bachelor of Engineering, and an architect practising in Belfast, gave evidence (which we accepted) as follows.

He inspected the pit on March 3rd, 1945. The area of the pit was about one acre and the height varied between 30 feet to 40 feet. He estimated that the contents of the pit would have been approximately 100,000 tons. When he inspected the pit the deposits left round the face were more in the nature of clay than sand. There was a little fine soft sand left of inferior quality not suitable for concrete. In his opinion sand originated from rock in that it is formed of the granulars of minerals which at one time were constituents of a rock. Sand has an entity of its own and a well-known meaning. Stones in the building line have also an entity of their own and a well-known meaning. According to the dictionary a quarry is a place where stones are squared and dressed for building purposes.

15. Mr. John J. Hartley, a Master of Science, a Master of Engineering and an Associate Member of the Institute of Civil Engineers, a Fellow of the Geological Society and a lecturer in geology at Queen's University, Belfast, gave evidence (which we accepted) as follows.

He also had examined the pit on March 3rd, 1945, and found a certain amount of sand and clay and some seams of sandy gravel and rock pebbles. The sand had probably not been of good quality. In his opinion sand consisted mainly of silica, although it might contain other substances. Sand consists essentially of certain of the elements, or it may contain all the elements of rock in some cases. Different rocks gave different varieties of sand. Sand was disintegrated stone. In his opinion a quarry was an artificial excavation from which material is obtained either by cutting or blasting. Stone and sand could not be regarded as synonymous. It would be far-fetched to suggest that this sandpit was in the nature of a mine.

16. Mr. H. M. Russell (the Respondent), H.M. Inspector of Taxes for the Londonderry District in which the farm owned by the Appellant was situate, gave evidence (which we accepted) as follows.

The assessments made upon the Appellant, the subject of this appeal, were intended only to cover the profits earned from the sandpit, and to relate only to that part of the Appellant's land occupied by the sandpit. The farm (including the field on which the sandpit was opened) appears in the valuation list in the relevant period under the description, "Land—area, 24 acres, 1 rood, 30 perches—valuation £14 15s. 0d.", the Appellant being shown as the owner and occupier. No assessments under No. I of Schedule A nor under Schedule B, were made in respect of the farm for the years 1940-41, 1941-42 and 1942-43 for the reason that, before it was known that the sandpit was being worked, the Appellant's personal allowances cancelled any liability to tax in respect of the farm.

Under Section 23(2) of the Finance Act, 1936, if the assessments under appeal were upheld by the Court, an application would be made by the Revenue to the Commissioner of Valuation of the lands, so that the assessment which would be subsequently made under No. I of Schedule A and under Schedule B would be confined to the land exclusive of the sandpit.

17. It was contended on behalf of the Appellant:—

- (a) that the sandpit was not within the words of Rules 1, 2 or 3 of No. III of Schedule A and was not a "concern" at all, but that the Appellant merely granted a single licence to each contractor to enter on his land and remove sand;
- (b) that stone and sand were not synonymous and the sandpit was neither a quarry nor a mine;
- (c) that the disposal of the sand by the Appellant by granting the licences aforesaid was a realisation of a capital asset and the sums received by him were not income at all;
- (d) that the assessments should be discharged.

18. It was contended on behalf of the Respondent that the Appellant carried on in respect of the sandpit a concern of a like nature with those enumerated in Rule 3 of No. III of Schedule A and, in the alternative, that the said sandpit was a quarry of stone within the meaning of Rule 1 of No. III of Schedule A, or a mine within the meaning of Rule 2 of No. III of that Schedule; that the assessments were rightly made and should be confirmed in principle, subject only to agreement of figures.

19. We, the Commissioners who heard the appeal, gave our decision on 8th June, 1945 as follows.

On the additional evidence adduced before us at the rehearing of this case we find that the sales of sand by the Appellant, which amounted to more than 100,000 tons and extended over three years, were by way of trade, that they were not merely casual and occasional but constituted a series of transactions carried out in pursuance of a regular method, and we arrive at the conclusion that the sandpit was a concern carried on by the Appellant. Further, following the decision in the Court of Appeal in *Mosley v. George Wimpey & Co., Ltd.*, [1945] 1 All E.R. 674; 27 T.C. 315, we hold that it was a concern of a like nature with those enumerated in Rule 3 of No. III of Schedule A. We accordingly confirm the assessments appealed against in principle and leave the figures to be agreed between the parties.

20. The parties having subsequently agreed the figures we reduced the assessments to £150 for the year 1940-41, £1,250 for the year 1941-42 and £3,750 for the year 1942-43.

21. The Appellant immediately after the determination of the appeal declared to us his dissatisfaction therewith as being erroneous in point of law and in due course required us to state a Case for the opinion of the High Court of Justice in Northern Ireland pursuant to Section 149 of the Income Tax Act, 1918, which Case is stated and signed accordingly.

Commissioner for the Special  
Purposes of the Income Tax  
Acts.

F. N. D. PRESTON,

[Mr. F. England, the other Commissioner who heard and determined the appeal, has since retired from the public service.]

Turnstile House,  
94/99 High Holborn,  
London, W.C.1.

26th April, 1946.

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The case came before the King's Bench Division, Northern Ireland, on 26th June, 1946, when Black, J., held that he was bound by the decision of the Court of Appeal, Northern Ireland, in *Russell v. Scott*, page 379 *ante*, and allowed the appeal, with costs.

The Crown having appealed against the decision in the King's Bench Division, Northern Ireland, the case came before the Court of Appeal, Northern Ireland, (Andrews, L.C.J., and Babington and Porter, L.JJ.) on 25th and 26th November, 1946, when judgment was reserved. On 15th January, 1947, judgment was given against the Crown, with costs.

Mr. L. E. Curran, K.C., Mr. W. W. B. Topping, K.C., and Mr. F. A. L. Harrison appeared as Counsel for the Crown, and Mr. W. F. McCoy, K.C., and Mr. H. A. McVeigh for Mr. Scott.

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#### JUDGMENT

**Andrews, L.C.J.**—This is an appeal from an Order of Black, J., dated 26th June, 1946. The notice of appeal asks that the said Order may be set aside, and that in lieu thereof an Order may be made allowing the said appeal and adjudging that the Respondent, David Scott, the owner of a sandpit, was and is assessable to Income Tax under Schedule D of the Income Tax Act, 1918, for the years 1940-41, 1941-42 and 1942-43 in respect of income received from sales of sand.

The matter came before Black, J., on a Case stated under Section 149 of the Income Tax Act, 1918, by the Commissioners for the Special Purposes of the Income Tax Acts. It was the second Case stated by the Commissioners raising the issue as to the Respondent's liability to such assessment, the main contention on behalf of the Appellant, Russell, one of His Majesty's Inspectors of Taxes, being in each case that the said sandpit was a "concern of the like nature" with those enumerated in Rule 3 of No. III of Schedule A to the Income Tax Act, 1918, and assessable as such. When the matter came before this Court on the first Case Stated the decision of the Special Commissioners discharging the assessments was affirmed, but on wholly different grounds to those relied upon by

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the said Commissioners. We were unanimously of opinion that the Respondent's sandpit was not a "concern of the like nature" within Rule 3 of No. III of Schedule A. On the question of whether or not it was a "concern", all the members of the Court referred to the meagre character of the particulars set out in the Case. I myself stated at page 60 of the report of the case, [1944] N.I. 57, that I did not find in the Case sufficient material to enable me to form a definite opinion as to whether or not this particular sandpit would be aptly designated a "concern", and at page 61 I called attention to the absence of any express finding of fact on the subject by the Special Commissioners, as also did Murphy, L.J., at page 73<sup>(1)</sup>.

When the matter reached the House of Lords on appeal from our decision, an even stronger view was taken by the House, Lord Simon, L.C., stating, with the full concurrence of all the other learned law Lords, that it was quite impossible for the House to decide whether the sandpit was a "concern of the like nature" within Rule 3 on "the scanty materials 'before it.'" "The House", he said, "ought to be furnished with adequate 'information.'" Accordingly, the Order of this Court (and of the High Court), except as to costs, was discharged "without pronouncing on the 'correctness or otherwise of the opinions therein appearing.'" The assessments, he said, would be restored, but the appeal against the assessments would be remitted to the Special Commissioners for them to rehear and, if so requested, to state a fresh Case for the opinion of the High Court. The Lord Chancellor then stated with considerable particularity the matters which a properly drawn Case would include, amongst them being "the 'conclusions of fact drawn from the evidence'". So far, he continued, as the conclusion arrived at by the Commissioners was a conclusion of law it would be subject to appeal. "The question whether it was a concern 'of 'the like nature' involves the construction of the Rule which we are not 'at present called upon to undertake to pronounce.'"<sup>(2)</sup>

The fresh Case so authorised was duly stated and is before us. No one has seriously criticized its form, and no one can fail to recognise the additional wealth of detail which it contains. I think it right to say at once that the contentions put forward on behalf of the Inspector (alternatively to the main contention) that the sandpit was a quarry of stone within the meaning of Rule 1 of No. III of Schedule A, or a mine within the meaning of Rule 2 of No. III of that Schedule, were not ruled upon by the Commissioners when giving their decision, and they were expressly abandoned by Mr. Curran during his argument in this Court. Accordingly, the sole issue which now calls for determination is as to whether the Respondent's sandpit is a "concern of the like nature" within Rule 3.

The first point which naturally arises is whether the sandpit is a "concern". Upon this question I refrained, as above-stated, from expressing any opinion on the hearing of the former Case Stated having regard to the insufficiency of the facts then before us. As I read the learned Lord Chancellor's judgment I think he obviously regarded this as a question largely, if not indeed entirely, of fact, upon which the Commissioners were invited to state their conclusion on the evidence. They have done so, holding in clear and unmistakable terms that "the sandpit was a concern". In my opinion there was ample evidence before the Commissioners to justify this finding, and it is one which cannot and should not be disturbed by us. Accordingly, I accept it without reserve or qualification.

(1) Pages 381 and 388 *ante*.

(2) Page 392 *ante*.



(Andrews, L.C.J.)

There only remains to be considered the question whether it is a "concern of the like nature" with those enumerated in Rule 3. Here it appears to me that neither has the Court nor have I personally the same freedom as upon the question of a "concern", as both Murphy, L.J., and I, after giving the matter the best consideration that we could, expressed the conclusion that this sandpit was not "of the like nature" within the Rule. The third member of the Court, Babington, L.J., found it unnecessary to express any opinion upon this issue having arrived at the definite conclusion that the sandpit, on such evidence as was then forthcoming, was not a "concern". I expressed my inability to find a genus common to all the enumerated concerns, and consequently none which could also be shared by a sandpit; whilst Murphy, L.J., was equally unsuccessful in finding any individual concern of those specially enumerated with which a sandpit could be said to have a common genus. "It has not", he said, [1944] N.I., at page 74<sup>(1)</sup>, "been very strenuously argued on behalf of the 'appellant that the words 'other concerns of the like nature' should be 'related not to a preceding genus but to the several enumerated 'concerns', 'but, even if such a construction could be adopted, I do not think that 'this sandpit is 'of the like nature' with any of the enumerated 'concerns'."

Since these judgments were delivered only one new circumstance of importance has arisen which calls for consideration. This is the decision of the Court of Appeal in England in *Mosley v. George Wimpey & Co., Ltd.*<sup>(2)</sup>, [1945] 1 All E.R. 674, in which, reversing the decision of Macnaghten, J., [1944] 2 All E.R. 135, the extraction by the appellants, a firm of contractors, of gravel from the respondent's land was held to be a "concern" within the meaning of Schedule A, No. III, Rules 1, 2 and 3. Tax was accordingly held to have been rightly deducted from the rent which the appellants had paid to the respondent. The Crown were not parties to the action, but the then Attorney-General (Sir Donald Somervell, K.C.) and Mr. Reginald P. Hills appeared as *amici curiæ*. The conclusion arrived at by the Court was unanimous, but all three members of the Court, Scott and du Parcq, L.JJ., and Uthwatt, J., adopted different lines of reasoning. Scott, L.J., considered that the intention of Parliament was plain—that every form of real property should be included in its tax on annual value, and that the generic words in Rule 3 of No. III should, accordingly, be interpreted widely, and not restricted to a meaning generally similar to one or other of the specific concerns enumerated. The main function or purpose of No. III was, he considered, to throw a wide net around a variety of properties, the nature of which made rackrent an impracticable measure of annual value. The common characteristic of them, he considered, is that a "concern" is extracting profits from particular land by some special form of user—a user other than what may be regarded as the normal user of land, such as agriculture, forestry, housing or other constructional development. Another generic conception which the learned Lord Justice also found in the "concerns" listed in No. III was their common feature of a variable economic yield, for that makes the rackrent an untrue or impracticable measure of annual value. These "generic characteristics", he held, applied to the gravel pit from which the appellants had made their extractions; and he also considered that it fell "within the heterogeneous list of more specific concerns contained in

(1) Page 389 *ante*.

(2) 27 T.C. 315.

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"Rule 3."<sup>(1)</sup> The Lord Justice did not, however, name which one or more of the enumerated concerns was in its physical or other features "of the like nature" with a gravel pit. My respectful comment on the views so expressed by the learned Lord Justice is that if the extracting of profits from land by "some special form of user" is the common feature of all "concerns" specified in Rule 3 of No. III and so constitutes a concern a "concern of the like nature", I am unable to understand the necessity for Rules 1 and 2, for the quarries and mines referred to in these Rules are, of course, also "special forms of user" of land, and methods of "extracting profits" from land, and so, according to the Lord Justice's interpretation, would have been included in Rule 3 without special mention, and taxable as such on a profits basis. Next, *du Parcq, L.J.*, sought for the "nature" common to this heterogeneous list. He could not agree with *Scott, L.J.*, that it was to be found in the quality of bringing profit to the landowner. Neither could he accept the view that the genus to all the named concerns is a user of the land abnormal in the sense that it was outside the normal use of land for the erection of buildings, or for agriculture, or for pleasure or amenities. He rejected *Scott, L.J.*'s principle of the construction of a taxing Act. Likewise, he said that he was not completely satisfied with his own "final solution of the puzzle", namely, that each of the concerns mentioned in the Rule must be supposed to have been intended to be typical of a class, for he could not see any way of fitting all the concerns into one class. "On this view", he concluded, "I find an indication in the inclusion of salt mines and alum mines in the Rule that profits made by commercially dealing with mineral deposits on or under the land are brought within it, and I am prepared to agree that this gravel pit is within Rule 3."<sup>(2)</sup> Finally, there is the judgment of *Uthwatt, J.*, who expresses the opinion that "to be a concern there must be in some real sense an undertaking carried on with a view to profit"—"a business enterprise"—"a commercial undertaking"; and who also asserts that the gravel pit of the company, which in his opinion satisfied these requirements, was one of the concerns specified in Rules 1, 2 and 3 of No. III of Schedule A<sup>(3)</sup>. The learned Judge, as I read his judgment, simply views the matter from the commercial standpoint; he does not in terms discuss the true meaning of the words "concerns of the like nature"; nor does he, indeed, state whether the gravel pit fell, in his opinion, within Rule 1, Rule 2 or Rule 3. As it is only in the event of its falling within Rule 3 that the construction of the words "concerns of the like nature" would have arisen, it would rather appear as if he must have inclined to the view that it fell within either Rule 1 or Rule 2 as a "quarry" or "mine".

It has been necessary for me to examine the judgments in *Mosley's* case in a somewhat critical spirit in order to justify expression of the view which I have formed that they are not convincing. All the members of the Court appear to have experienced difficulty and to have entertained much doubt. *Du Parcq, L.J.*, indeed, refers to "the melancholy obscurity" of the Rule. Moreover, all the judgments proceed on different grounds, and this is not wholly surprising when we bear in mind the various judicial interpretations of the words "concerns of the like nature" to be found in earlier authorities, to several of which I referred in my judgment

(1) 27 T.C., at p. 325.

(2) *Ibid.*, at p. 327.

(3) *Ibid.*, at pp. 328-9.

**(Andrews, L.C.J.)**

upon the previous Case stated in this matter ([1944] N.I., at pages 62-7<sup>(1)</sup>). Thus, the views have been variously expressed that to fall within Rule 3, (a) the concern must be a company; (b) that the land on which the concern is situate must be used in connection with trade or for purposes of trade, but that it is also very difficult to separate the income of the proprietor into rental and commercial profits; (c) that the concern must have some connection with land; (d) that it must have profits in some way arising out of land or interests in land, and (e) that it must be of a public utility character. Again I would point out that Lord Buckmaster's opinion that Rule 3 has a "narrow foundation"<sup>(2)</sup> appears to me to support Lord McLaren's view that one must be careful not to give too wide an extension to the general words of Rule 3<sup>(3)</sup>; but at the same time it seems to me to be in direct conflict with the view of Scott, L.J., that "the generic words "should... be interpreted widely, and as disclosing an express intention "of Parliament to sweep into the net every concern of the general character I have endeavoured to describe above."<sup>(4)</sup> With such conflict of opinion it is not altogether surprising that it has been held that a brickfield does not come within Rule 3 (*Edmonds v. Eastwood*, 2 H. & N. 811) whilst a public cemetery does (*Edinburgh Southern Cemetery Co. v. Kinmont*, 2 T.C. 516).

Such is the unsatisfactory state of the law more than a century after the words were enacted in practically their present form in the Income Tax Act of 1842. I can only say that, in seeking to impose this charge upon the subject, the Crown have failed to satisfy me that it is imposed by "the clear and unambiguous language" required by Bayley, J., in *Denn & Manifold v. Diamond* (1825), 4 B. & C. 243, at page 245, or in "the plain terms" which Lord Buckmaster regarded as essential for the imposition of a tax, *Ormond Investment Co., Ltd. v. Betts*, [1928] A.C. 143, at page 151 (13 T.C. 400, at page 425).

In these circumstances I hold that the appeal must be dismissed with costs.

**Babington, L.J.**—This matter comes before the Court for the second time having been already decided by us on a Case stated by the Special Commissioners between the same parties, [1944] N.I. 57<sup>(5)</sup>. An appeal was taken from our decision to the House of Lords who discharged the Case Stated together with the Orders of the Divisional Court and of this Court, and remitted the assessments challenged to the Special Commissioners for them to rehear and, if so requested, to state a fresh Case for the opinion of the High Court. The judgment of the House of Lords was pronounced by Viscount Simon, L.C., who called the attention of the Commissioners to the facts relevant to the question to be decided which they should find and to the form in which the Case Stated should be drawn. The case was reheard by the Commissioners who decided in favour of the Revenue, and the taxpayer thereupon asked for the present Case to be stated. It came before Black, J., who found against the assessments, and from this the Appellant, one of His Majesty's Inspectors of Taxes, has appealed. No objection to the Case as stated was taken by either side

(1) Pages 382-5 *ante*.

(2) *Commissioners of Inland Revenue v. Forth Conservancy Board*, 14 T.C. 709, at p. 720.

(3) *Edinburgh Southern Cemetery Co. v. Kinmont* 2 T.C. 516, at p. 530.

(4) 27 T.C., at p. 323.

(5) Page 379 *ante*.



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during the argument, and we may therefore assume that all the facts are now before the Court.

The appeal relates to assessments made by the Special Commissioners on the Respondent, Scott, in respect of the profits derived by him from the sale of sand obtained from a portion of his holding under circumstances which the Special Commissioners say make the pit and its use by the Respondent a "concern of the like nature" within the meaning of Schedule A, No. III, Rule 3, of the Income Tax Act, 1918. The issues are the same as those raised by the former Case Stated, but the evidence contained in the present Case is fuller and more specific, and we have to consider it again.

First, is this sandpit, as used by the Respondent, a "concern", and secondly, if it is a concern is it a "concern of the like nature" within Schedule A, No. III, Rule 3? In the former case *Andrews, L.C.J.*, did not decide the question as to whether the sandpit, as used, was a "concern" but held that it was not a "concern of the like nature". *Murphy, L.J.*, appears to have been of the opinion that on the evidence then before the Court it was neither a "concern" nor a "concern of the like nature", while I was of the opinion that it was not a "concern" on the facts then stated and came to no conclusion as to whether it was a "concern of the like nature".

The Special Commissioners have now set out certain additional facts, and have found that the sandpit was a concern and a concern of the like nature with those enumerated in Rule 3.

I summarise the facts found by the Special Commissioners. David Scott, the Respondent, is the owner of a farm of 25 acres, 30 perches, which he purchased on 8th February, 1939, and on which there was a deposit of sand covering about an acre with a depth of from 30 to 40 feet. Early in 1939 a contractor named Moore, who was engaged in building cottages, opened a pit on this farm and excavated sand with the former owner's consent, subsequently filling up the hole with earth. Towards the end of 1940 there was a demand for sand in connection with the construction of aerodromes and Moore obtained permission from Scott to open a sandpit on the farm, Moore to pay 1s. per ton for all sand taken out and to make a roadway from the county road to the pit at his own expense. This was done, and excavation commenced in January, 1941. Later in that year Scott gave permission to other contractors to take sand at rates varying from 6d. to 1s. a ton according to quality. Five of these are named in the Case and there were also others.

The pit was regularly and continuously worked until about October, 1944, when it became worked out. The excavation was done by shovelling, and the hours of work were from 8 a.m. to 6 p.m. daily. Each contractor made his own arrangements for conveying the sand from the pit. Moore had from 7 to 12 men working for him at that time and another contractor, called McKinney, an average of 8 or 9.

Scott kept no check on the sand excavated by Moore but accepted his figures. Moore had a man named Harvey in his employment and when other contractors began to come in about May, 1941, Scott entered into an arrangement by which Harvey was to check the tonnage of sand taken by Moore and generally supervise the pit, Scott to pay him  $\frac{1}{2}$ d. a ton for so doing, and Harvey did this until he left Moore's employment in November,



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1941, when Mrs. Harvey, his wife, took over this work. Monthly sheets were kept by Harvey and Mrs. Harvey recording the tonnage taken, and these were handed to Scott who took them to his solicitor's office where typed dockets or accounts were made out upon which Moore paid Scott. Moore kept no accounts but all sand taken by him was delivered to an aerodrome where the tonnage was again checked.

Harvey and Mrs. Harvey similarly checked the tonnage taken by all the other contractors. Harvey gave directions as to the place from which the sand was to be taken, arranged the price and sometimes took the money. Scott did not dig for sand himself. He occasionally visited the pit but left its supervision to Harvey. For a good many months Harvey also used Scott's lorry to convey sand for different contractors, and Scott was paid by the Transport Board on whose behalf he was using the lorry.

More than 100,000 tons of sand was extracted from this pit, and the profits made by Scott from its sale after deduction of expenses up to 5th April, 1943, which was the end of the three years of assessment the Special Commissioners were dealing with, was agreed at £5,150, namely, £150 in 1940-41, £1,250 in 1941-42, and £3,750 in 1942-43.

On these facts the Commissioners found that the sales were by way of trade; that they were not merely casual and occasional, but constituted a series of transactions carried out in pursuance of a regular method, and arrived at the conclusion that the sandpit was a concern carried on by Scott, and on the authority of *Mosley v. George Wimpey & Co., Ltd.*<sup>(1)</sup>, [1945] 1 All E.R. 674, that it was a concern of the like nature with those enumerated in Rule 3 of No. III of Schedule A.

No assessments were in fact made in respect of the farm for the three years 1940-43 under Schedules A or B, as Scott's personal allowances cancelled any liability he would otherwise have been under as owner and occupier, and in law the farm must be treated as assessed under Schedule A, No. 1. If the Commissioners were right in holding that Scott was carrying on a concern of the like nature with those enumerated in Schedule A, No. III, Rule 3, he is, under Rule 8, liable to tax calculated according to the Rules applicable to Schedule D, the actual amounts being as set out above.

The first question to be decided is whether Scott was carrying on a "concern". On the facts stated in the former Case I was of the opinion that there was no evidence that he was carrying on a concern, but am now compelled to reconsider this question upon the new facts and the express finding of the Special Commissioners that the sandpit was a concern.

Speaking generally, the term "concern" can be applied to a great number of activities, but to constitute a concern I think there must always be an entity of some kind, and what must be looked for is a concern with an entity approximating to those enumerated in Rule 3. What is the entity constituting this alleged concern? The Special Commissioners say in paragraph 19 of the Case: "We arrive at the conclusion that the sandpit was "a concern carried on by the Appellant" (Scott), but as a sandpit cannot of itself be a concern, being merely land the nature of which is sand, it can only become a concern by some action of the owner, his lessees or licensees. The Special Commissioners in paragraph 19 accordingly rely on (1) the sale of sand by Scott; (2) the amount of these sales, i.e., more than

(1) 27 T.C. 315.

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100,000 tons in three years; (3) that they were not merely casual and occasional but constituted a series of transactions carried out in pursuance of a regular method.

The facts stated in this Case are fuller but, in my opinion, they do not put the matter any further than the former Case. The sale of sand is not, in my opinion, sufficient to constitute a concern: all sales are by way of trade, no sale is casual: if there are many sales they are not occasional and must constitute a series of transactions, and be carried out in pursuance of a regular method, namely, selling to anyone willing to buy. Ringing the changes on the sales of sand will not make the pit a concern unless the law says that making a profit in this way constitutes a concern.

As I see the facts set out in the Case they all relate to sale, and sale alone. Scott was compelled to collect his charges, but would have had to do this if he had been selling potatoes or some other agricultural produce, and the fact is neutral. He had to point out where the sand was to be taken. If he had sold a cow he would have had to point her out in the field or byre either personally or by an employee, and this fact is also neutral. The issue therefore narrows itself down to a determination as to whether the sale of sand in large quantities producing profits constitutes not only this pit, but any pit from which sand is sold, a concern, and, in my opinion, the answer must be in the negative. I cannot find any material distinction between the facts in this case and those in *Roberts v. Lord Belhaven's Executors*, 1925 S.C. 635 (9 T.C. 501), in which the Revenue attempted to assess the respondents under Schedule D and not under No. III of the Rules applicable to Schedule A, which the Lord President (Clyde) held did not apply to the lands and heritages there in question.

If sale does not of itself constitute a concern, must a large number of sales and a considerable return do so? In order to answer this it is necessary to examine the Income Tax Acts generally, as Lord Greene, M.R., says in *Croft v. Sywell Aerodrome, Ltd.*, [1942] 1 K.B. 317, at page 325 (24 T.C. 126, at page 135)—Schedule A as a whole contemplates profit and an "owner of lands is deemed to obtain income from his mere ownership, and the occupier of lands is deemed to obtain income from his mere occupation." The Master of the Rolls was dealing with a case in which the issue was whether the landowner was to be taxed under Schedule A or under Schedule D in respect of profits derived therefrom, and he rejected the principle that even "a very large excess of actual income over the assessed value" can determine the liability to tax, [1942] 1 K.B., at page 326 (24 T.C., at page 136). Similarly in this case the amount of the sales cannot determine whether this sandpit was a concern, and if this factor be ruled out I cannot find any other evidence to sustain the finding of the Special Commissioners. These sales were, therefore, the exercise and exploitation of the owner's rights of property, and the price obtained was the result of the sale of a capital asset and not profits within No. III, Rule 3, of Schedule A. They were not the proceeds of an organised commercial operation, for Scott had no organisation of his own, and if there was any concern operating this pit it belonged to Moore, the contractor.

*Salisbury House Estate, Ltd. v. Fry*, [1930] A.C. 432 (15 T.C. 266), was applied in *Croft's* case. In that case the company, who were the owners of a block of buildings, let out rooms unfurnished and provided a

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staff to operate the lifts and act as porters to watch and protect the buildings. They also provided certain services, such as heating and cleaning, at an additional charge. The Crown claimed that the company was carrying on a trade within the meaning of Case I, Schedule D. Schedule A, No. III, was not relied on but the premises were already assessed under Schedule A. The company admitted liability under Schedule D in respect of the profits derived from cleaning and other services, but contended that, so far as the proceeds of the property were concerned, they had already been taxed under Schedule A and could not be taxed again under Schedule D. Lord Atkin says, [1930] A.C., at page 454 (15 T.C., at page 318): "Annual income derived from the ownership of lands, tenements and hereditaments can only be assessed under Schedule A and in accordance with the rules of that Schedule." These cases show that an owner may make profits and still be assessable only under Schedule A if they are derived from his property rights or his occupation of the land, and if the price obtained here was not the result of the sale of a capital asset but represented profits, such profits were as certainly derived from Scott's property and occupation as the profits in the *Sywell Aerodrome*<sup>(1)</sup> and *Salisbury House* cases, and not from an independent concern.

Under Schedule A an owner is assessed on the rackrent, or if the lands are not let at a rackrent, then the rackrent at which they are worth to be let by the year, i.e., the annual value. This tax is charged in respect of the property in all lands in the United Kingdom for every twenty shillings of the annual value thereof. And this measure applies unless the lands can be brought within Schedule A, No. III, as not to be charged according to the General Rule but, by No. III, Rule 8, according to the Rules applicable to Schedule D.

I rule out the evidence set out in paragraph 13 of the Case, which only amounts to this, that the Transport Board hired the lorry from Scott and in turn hired it to Moore, and Harvey, an employee of Moore's, drove it either for Moore or the Board. This transaction was an independent one and has no bearing on the question as to whether or not the sandpit was a concern, and for the reasons I have given I hold that there was no evidence to justify the finding of the Special Commissioners that the sandpit was a concern.

It may well be that Moore carried on a concern which depended on his user of this sandpit, but I can find no evidence to justify the finding of the Commissioners that Scott carried on any concern or did anything more than convert his sand into money, and therefore the hereditament must be assessed under the General Rule and No. III has no application.

I now come to the second point. Assuming that the sandpit was a concern, was it a concern of the like nature with those enumerated in Rule 3?

Reading Schedule A as a whole, it would seem that the only concerns which the Legislature intended to take out of the General Rule No. I, Schedule A, are those of the like nature with the concerns enumerated in No. III, Rule 3, and which produce profits, and such concerns must satisfy both conditions.

As I have said, the profit element is not of itself sufficient to constitute a concern so as to bring the case within Rule 3. If it were, every

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(1) 24 T.C. 126.

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operation upon lands which produces profits would be a concern within the Rule, and it is impossible to come to this conclusion because the whole of No. III, Rules 1, 2 and 3, would have been unnecessary if this were so and would never have been cast in their present form. The entities dealt with in Rules 1, 2 and 3 are, therefore, limited entities and must be so construed. Those included in 1 and 2 are named and present no difficulty. Similarly those in Rule 3 present no difficulty until the words "other concerns of the like nature" are reached, and these words must be construed with limitations to be gathered from what precedes them.

What is the nature of the preceding entities which the other concerns must share? As I have pointed out it cannot be that they make profits, though when found they must fulfil this condition. It must, therefore, be something special in their physical nature which the "other concerns" also exhibit, either directly or by very strict analogy.

This, in my opinion, is what the statute says, and the difficulty of construing it becomes comparatively simple if one does not attempt to read more into the Rule than can be gathered from the plain meaning of the words used, bearing in mind that Rule 3 contains exceptions to the General Rule that land must be assessed according to the annual value and that, if the hereditaments being assessed cannot be brought within the exception, they will nevertheless be assessed under the General Rule.

The case of *Mosley v. George Wimpey & Co., Ltd.*<sup>(1)</sup>, 61 T.L.R. 411, was decided after the decision of this Court on the case which has now been discharged. The facts were very similar to those in the present case, and the contractors, George Wimpey & Co., Ltd., who extracted gravel from a pit belonging to Mrs. Mosley, the plaintiff, on payment of tonnage rents deducted Income Tax from the amount due by them to Mrs. Mosley under Section 21 of the Finance Act, 1934, alleging that the licence to extract the gravel was an easement, and was used, occupied and enjoyed in connection with some of the concerns specified in Rules 1, 2 and 3 of No. III, Schedule A, so as to make the rent chargeable with tax under Schedule D. The case was tried by Macnaghten, J., [1944] 2 All E.R. 135<sup>(1)</sup>, who held (1) that the payments made were "rent" payable in respect of an easement, and this was affirmed by the Court of Appeal; (2) that on the true construction of Schedule A, No. III, Rules 1, 2 and 3, the easement was not a "concern", and (3) that the easement was not occupied or enjoyed in connection with the "concern"; and gave judgment for the plaintiff. On appeal the case turned on these three findings, Scott, L.J., at page 412<sup>(2)</sup> saying that the real dispute turned on two issues, (a) and (b), namely, "(a) whether there was any 'concern' carried on by the appellants" (George Wimpey & Co., Ltd.) "within the meaning of No. III, and (b) whether 'their enjoyment of the easement was 'in connection with it.'"

The issues were, therefore, the same as in the present case except that, it being held that there was an easement, the liability to tax was under Section 21 of the Finance Act, 1934, and not under Schedule A of the Income Tax Act, 1918. Here there is no easement. This was conceded in argument before us, and is negatived by the judgment of the House of Lords. The "concern" must, therefore, be itself a concern of the like nature with those enumerated in Rule 3.

(1) 27 T.C. 315.

(2) *Ibid.*, at p. 321.



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In *Mosley v. George Wimpey & Co., Ltd.*<sup>(1)</sup> the easement was held to be used in connection with the concern carried on by the defendants, who were the purchasers of the sand, and the liability to tax which was upheld in that case did not turn on anything done by the owner of the land, but on whether her grantee was carrying on a concern unconnected with the gravel pit.

Section 21 appears to have been inserted in the Finance Act, 1934, to capture certain profits derived from land which theretofore had escaped taxation as being the result of the owner's exploitation of his rights of property, as in *Croft v. Sywell Aerodrome, Ltd.*, [1942] 1 K.B. 317 (24 T.C. 126); *Salisbury House Estate, Ltd. v. Fry*, [1930] A.C. 432 (15 T.C. 266), and the present case, provided such profits arise from any land or easement used, occupied or enjoyed with any of the concerns mentioned in Schedule A, No. III. It is very obscure, but the Revenue apparently thought that it covered cases such as this one, for they originally made the case that Moore had an easement over Scott's lands, and the suggestion that Scott was himself carrying on a concern was an afterthought which arose when it transpired that the case could not be brought within Section 21 of the Act of 1934. Here once more it is to be observed that if the Legislature intended to bring all revenue producing concerns within Rule 3 this Section would have been very differently worded. The Revenue authorities must have known all the relevant facts before they assessed Scott, and the fact that they did not proceed directly under Rule 3 in the first instance suggests that they were by no means confident that sandpits were either concerns or concerns of the like nature within Rule 3 so as to be taxable on the profits derived from them. Now, assessment under Schedule D having been ruled out by the decision in *Roberts v. Lord Belhaven's Executors*<sup>(2)</sup>, and having failed in the attempt to prove the existence of an easement, they have fallen back on Schedule A, No. III.

As I have said, this legislation is very obscure in its application, but we cannot strain it against the taxpayer and must require the Revenue authorities to satisfy us as to his liability by reference to some statutory enactment which imposes it in terms which are clear and certain.

This sandpit clearly does not fall within Rule 1 or 2. It is neither a quarry nor a mine, and the fact that it is not mentioned in either of these Rules suggests that it was not intended to be included in Rule 3, for it is more nearly like in nature to the quarries and mines referred to in Rules 1 and 2 than to the concerns named in Rule 3 which it is said to be like and under which it is taxable only if it is a concern. I expressed no opinion on this branch of the case when it was first before us, and feel bound by the decision of the other members of the Court upon it unless the facts now found have changed the issue. I do not think they have, but having considered the question again and assuming that it has been established that Scott was carrying on a concern, I am not persuaded that it was a concern of the like nature with those concerns enumerated in Rule 3. These concerns do not constitute a genus. They are exceptions, and it was not necessary to make a comprehensive genus since any concerns omitted fall under the General Rule.

In *Mosley v. George Wimpey & Co., Ltd.*<sup>(3)</sup>, 61 T.L.R. 411, at page 412, Scott, L.J., however, says: "The generic words should, for the

(1) 27 T.C. 315.

(2) 9 T.C. 501.

(3) 27 T.C., at p. 323.

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“reasons which I have already stated, be interpreted widely, and as disclosing an express intention of Parliament to sweep into the net any concern of the general character which I have endeavoured to describe above.” I agree that Parliament intended to impose a charge in respect of the property in all lands by Schedule A, but when it becomes necessary to determine whether certain lands are to be charged under the General Rule, or not to be so charged because they fall within No. III, I think it is impossible to say that an express intention is disclosed to sweep into the net every concern of the general character indicated without making an assumption for which there is no foundation and which is negatived by the form of the Schedule A, No. III. That assumption is, in the words of Scott, L.J., at page 412<sup>(3)</sup>, that the intention was “to throw a wide net around a variety of properties the nature of which made rackrent an impracticable measure of annual value.” It may fairly be asked: What is the net which holds these various properties together and constitutes them a genus embracing all properties the nature of which made rackrent an impracticable measure of annual value?

It appears to be that they are all cases in which (1) profits are extracted from the land, (2) by some special form of user. This was strongly pressed on us on behalf of the Appellant, but the short answer is that the Legislature has not so enacted. If Parliament had so intended it would have been a simple matter to say that all profits derived from land by some special form of user shall be taxed on the value of the produce thereof, and the fact that this was not done shows that the concerns named in No. III, Rule 3, are exceptions from the General Rule to be read distributively and not a generic class embracing all concerns which may be regarded as having profits from abnormal user of the lands. The latter conclusion cannot be arrived at without straining the words of the Rule and making an assumption in favour of the Revenue which, in my opinion, is not warranted.

Moreover it is impossible to define generally the normal user of land, and what acts are an exercise or exploitation of the owner's or occupier's rights of property, and what is special or abnormal. Clearly the mere making of profits is not the test even if these are largely in excess of the annual value—*Croft v. Sywell Aerodrome, Ltd.*, [1942] 1 K.B. 317 (24 T.C. 126).

In *Mosley v. George Wimpey & Co., Ltd.*<sup>(2)</sup>, [1945] 1 All E.R. 674, the Court of Appeal held that the gravel pit was a concern within Schedule A, No. III, but I have read the judgments in that case with respectful attention and I cannot find that there was any evidence that Mrs. Mosley, the owner of the gravel pit, who occupied the same relative position as Scott in this case, was carrying on a concern of the nature alleged. The Court of Appeal held that George Wimpey & Co., Ltd., the contractors, were carrying on a concern, which negatives the existence of another concern being carried on by the owner in connection with the same pit. The Special Commissioners have relied on that decision as an authority for this very proposition, but when it is examined it would appear to support a finding that George Wimpey & Co., Ltd. were carrying on a concern and that Mrs. Mosley was not and was, therefore, wrongly assessed on her profits, there being no easement within Section 21 of the Finance Act, 1934. The basis of the finding that the concern was

(1) 27 T.C., at p. 323.

(2) 27 T.C. 315.

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of the like nature with those enumerated in No. III was, therefore, that it made profits, and in my opinion this is not sufficient to bring it within Rule 3, it not being in any other respect like in nature to any of the concerns there enumerated.

In *Mosley v. Wimpey & Co., Ltd.*, 61 T.L.R. 411, at page 414<sup>(1)</sup>, du Parcq, L.J., dealing with the words "and other concerns of the 'like nature having profits'", says: "What, then, is the common 'nature'? Certainly not merely the quality of bringing profit to the landowner, since to bring a profit-making concern within the rule it must be shown that it is 'of the like nature' with the named profit-making concerns", and, apparently with some hesitation, came to the conclusion that each of the concerns mentioned in the Rule must be typical of a class. He says<sup>(2)</sup>: "This is the only way in which I can give a meaning to the words 'of a like nature', for I cannot see any way of fitting all the concerns into one class." He therefore rejects the test of "having profits" and reads the concerns mentioned distributively, but, holding that each represents a class, brings in the gravel pit as being of the same nature as salt works and alum mines.

I think this construction is to some extent based on the assumption that the onus is on the taxpayer, who admits having made profits, to show that he is not liable to tax, and strains the words of the Rule in favour of the Revenue. The Revenue must satisfy us that by clear words or necessary implication the Legislature has imposed liability, and the whole course of this case, and the authorities cited, show that they are not in a position to discharge this onus.

This view is supported by the case of the *Duke of Fife's Trustees v. George Wimpey & Co., Ltd.*, 1944 S.L.T. 41, a decision of the Scottish First Division. This case was decided on Section 21 of the Finance Act, 1934, and the issue arose in the same way as in *Mosley v. Wimpey & Co., Ltd.*, namely, on the right of the defendants to deduct Income Tax under that Section. Its importance lies in the fact that no one suggested at any stage that the Duke of Fife's Trustees were carrying on a concern, but it was assumed that, if there was a concern, it was carried on by the contractors.

The user of land is infinitely varied and cannot be said to be normal only when used for agriculture, forestry or building, so that all other user which produces profits must fall within No. III, Rule 3.

*Edinburgh Southern Cemetery Co. v. Kinmont*<sup>(3)</sup>, 17 Sess. Cas (4th series) 154, appears to be a decision to the contrary. There a cemetery company, which derived profits from selling the use of grave plots in perpetuity, was held to be assessable under Rule 3 as being a concern of the like nature within the Rule. Lord Shand says, at page 163<sup>(4)</sup>: "At first sight the notion that a Cemetery Company is a concern of the like nature with any of the others is a little startling but the essential point of similarity is this, that all of these different concerns are companies which, having purchased or acquired land, remain in the occupation of that land themselves and are using it for the purpose of some trade or business whereby they acquire profits." In that case Lord McLaren

(1) 27 T.C., at p. 326.

(2) *Ibid.*, at p. 327.

(3) 2 T.C. 516.

(4) *Ibid.*, at p. 528.

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points out, at page 166<sup>(1)</sup>, that the question as to whether the company should be assessed under Rule 3 or under Schedule D was of no pecuniary consequence, the assessable income being the same in either case, and the substantial issue was whether it was to be allowed to deduct part of the proceeds of the sale of plots as a realization or conversion of capital. The question as to whether the company was liable to be assessed under Schedule A, No. III, Rule 3, was not, therefore, argued, and though by the decision of the Scottish Courts the case was brought within that Rule, I do not think we are bound to follow it in the present case in which the question is a substantial issue. I respectfully agree with *du Parcq, L.J.*, when he says: "I am by no means satisfied that the case of *Edinburgh Southern Cemetery Co. v. Kinmont* was rightly decided.<sup>(2)</sup>"

In my opinion the attempt made by the Revenue to establish that Rule 3 constitutes a genus or a net which covers all profits made out of lands which are, as Counsel maintained, derived from some special form of user fails, and to bring the case within the Rule it must be shown that, not only is there a concern having profits from or arising out of lands, but that the concern must be of the like nature with some one or more of those enumerated in some respect other than that it produces profits by some form of special user.

Counsel for the Revenue argued that the fact that the House of Lords remitted the case to the Special Commissioners for rehearing involves a finding that, if there be a concern, it is a concern of the like nature, because if it is not a concern of the like nature there would have been judgment for the Respondent. This appears to me to be an untenable suggestion. The Lord Chancellor, in moving the House, refrained from deciding any of the questions to be raised and expressly left them all open. Further, the division of the issue into the two questions argued is perhaps convenient when considering whether there is a concern of any nature or not, but having found a concern, this division cannot be maintained when considering whether it is of the like nature since the concern and its nature must be examined together.

I cannot find any concern among the heterogeneous concerns mentioned in Rule 3 which can be said to be of the like nature with the sandpit in this case. It is more like some of the entities named in Rules 1 and 2, under which, if named, it would have been taxable whether it be a concern or not. As it is not mentioned in these Rules it can only be taxable if it be a concern of the like nature with those mentioned in Rule 3, and, in my opinion, the Revenue have failed to establish this. I agree that the assessments must be discharged.

**Porter, L.J.**—The farm of land of which the Respondent is the owner and occupier is situate at Glebe in the County of Londonderry, and appears in the valuation list under the description "Land—area, 24 acres, 1 rood, 30 perches—valuation £14 15s. 0d." Included in this area is a field which had extensive deposits of sand thirty to forty feet in depth. The sandpit, which is the subject of this appeal, was opened up by a building contractor called Moore some time before the year 1939. After the outbreak of war there was an urgent and extensive demand for sand in connection with the construction of aerodromes, and by arrangement with the Respondent the sandpit was worked continuously by various

(1) 2 T.C., at p. 531.

(2) 27 T.C., at p. 327.



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contractors between January, 1941, and October, 1944. Very large quantities of sand were taken by these contractors, who were charged 6*d.*, 9*d.* or 1*s.* per ton according to the grade or quality of the sand. The Respondent had an agent who supervised the sandpit, checked the amount of sand taken, and kept monthly sheets of account which he handed to the Respondent. Payments were sometimes made to the Respondent, sometimes to the agent, but the general supervision of the pit was left to the agent. The Respondent farmed the adjoining land, but no sand was excavated or used or carried away from the pit by him or his workmen.

Assessments were made upon the Respondent under Schedule D as follows: for the year 1940-41, £4,000; for the year 1941-42, £10,000; for the year 1942-43, £10,000. An appeal was lodged against these assessments, and after prolonged litigation, which at one stage reached the House of Lords, the matter now comes before this Court for the second time on appeal from a decision of Black, J., in a Case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

The Commissioners have found that the sales of sand, amounting to more than 100,000 tons and extending over a period of three years, were by way of trade; that these sales were not merely casual or occasional, but constituted a series of transactions carried out in pursuance of a regular method, and they accordingly held that the sandpit was not only a concern carried on by the Respondent but also a concern of the like nature with the concerns enumerated in Schedule A, No. III, Rule 3. They therefore confirmed the assessments, leaving the figures to be settled between the parties, and as the figures were subsequently agreed, the Commissioners accordingly reduced the assessments to £150 for the year 1940-41, £1,250 for the year 1941-42 and £3,750 for the year 1942-43.

The Commissioners who heard the original appeal had decided that the tonnage payments received by the Respondent were rent payable in respect of an easement within the meaning of Section 21 of the Finance Act, 1934, but, on the hearing before Brown, J., it was admitted by the Crown that this decision was unsustainable, and the case then made was that the sandpit was either a quarry of stone within the meaning of Schedule A, No. III, Rule 1, or, in the alternative, a "concern of the like nature" with the other concerns mentioned in Rule 3. The contention that the sandpit was a quarry of stone has also been abandoned, and in this appeal the Crown relies solely upon the general words of Rule 3.

The question therefore is: Was the sandpit of the Respondent a concern of the like nature with the other concerns mentioned in Rule 3 having profits arising out of lands? In order to determine the answer it is necessary to refer to the relevant parts of Schedule A.

Tax under Schedule A is chargeable in respect of the property in all lands, tenements, hereditaments and heritages in the United Kingdom, for every twenty shillings of the annual value thereof, and the annual value is determined in accordance with the Rules laid down in the Schedule. No. I is the General Rule for estimating the annual value of all lands, tenements, hereditaments or heritages capable of actual occupation, of whatever nature, and for whatever purpose occupied or enjoyed (except the properties mentioned in No. II and No. III of the Schedule), and it is provided that the annual value in such cases shall be under-

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stood to be the rackrent, if the premises are let at a rackrent, and if they are not let at a rackrent, then the rackrent at which they are worth to be let by the year.

In view of the construction which Counsel for the Crown asked us to place upon the somewhat restricted general words of No. III, Rule 3, it should be observed that, excepting the properties specially mentioned, the language used in No. I is intended to cover the widest possible range of lands, tenements, hereditaments or heritages, whatever be their nature or the purpose for which they are occupied or enjoyed.

Under Section 187 of the Income Tax Act, 1918, in Ireland the poor law valuation instead of the rackrent is to be taken as the annual value for the purposes of Schedules A and B; but if the judicial rent, or the annual interest payable in lieu of rent, or the purchase annuity, is less than the poor law valuation, then for the purposes of Schedule B the judicial rent, or the annual interest in lieu of rent, or the purchase annuity, shall be taken to be the annual value.

No. II of the Schedule contains a number of Rules for estimating the annual value of tithes, dues and money payments in right of the church or by endowment, and other rights of property, which are not relevant to the present case.

No. III is as follows: "*Rules for estimating the annual value of certain other lands, Tenements, Hereditaments, or Heritages which are not to be charged according to the preceding General Rule.* 1. In the case of quarries of stone, slate, limestone, or chalk, the annual value shall be understood to be the profits of the preceding year. 2. In the case of mines of coal, tin, lead, copper, mundic, iron, and other mines, the annual value shall be understood to be the average amount for one year of the profits of the five preceding years: Provided that . . . 3. In the case of ironworks, gasworks, salt springs or works, alum mines or works, waterworks, streams of water, canals, inland navigations, docks, drains or levels, fishings, rights of markets and fairs, tolls, railways and other ways, bridges, ferries, and other concerns of the like nature having profits from or arising out of any lands, tenements, hereditaments or heritages, the annual value shall be understood to be the profits of the preceding year. 4. Tax under the above rules shall be assessed and charged on the person or body of persons carrying on the concern, or on the agents or other officers who have the direction or management of the concern or receive the profits thereof."

By Section 28 of the Finance Act, 1926, all the above-mentioned concerns ceased to be chargeable under Schedule A, and it was provided that they should become chargeable under Schedule D, Case I, and that Rules 4, 5 and 7 of Schedule A, No. III, should apply, and be deemed to be Rules of Schedule D, Case I, for the purpose of charging those concerns.

Rules 1, 2 and 3 reproduce, with slight alterations, similar Rules of the Income Tax Act, 1842, Section 60, Schedule A, No. III, one of these alterations being the introduction of the words "having profits" into Rule 3. The attribute of "having profits from or arising out of any lands, tenements, hereditaments or heritages", is common to the quarries and the mines mentioned in Rules 1 and 2 as well as to the concerns mentioned in Rule 3 and I can see no reason why these words should have been

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used in Rule 3 any more than in Rules 1 and 2. Nor can I see any reason why the quarries in Rule 1 should be mentioned separately from the concerns in Rule 3, since the annual value of the quarries and the concerns is declared to be the profits of the preceding year. The explanation of these and other anomalies appears to be that the Income Tax Act of 1918 was merely a consolidation Act. In *Great Western Railway Co. v. Bater*, [1922] 2 A.C. 1, at page 31 (8 T.C. 231, at page 255), Lord Wrenbury, who was a member of the Joint Committee in charge of the Bill, said: "The Committee had only to consolidate, and "could not substitute plain words to express a plain meaning without "going beyond the limits of consolidation. The Act of 1918 therefore "reproduces the old language with all its faults, and has done little more "than improve matters a little by some rearrangement. If Parliament had "the time, which it has not, the law of income tax, which now so vitally "affects the subjects of the realm, ought as speedily as possible to be "expressed in a new statute which should bear and express an intelligible "meaning."

Counsel for the Crown sought to lay particular stress on the words in Rule 3, "having profits from or arising out of lands", which he said indicated an abnormal and non-natural user of the land, a user not for agriculture or forestry or a site for buildings.

In my opinion the words in this Rule have exactly the same meaning as elsewhere in the Income Tax Acts. The Act of 1803, in which Schedules A to E appear for the first time, after the imposition of a duty upon lands, manors and messuages, goes on to mention the various properties subject to the duty, adding the general words, "and all other "profits arising out of lands or tenements".

The argument for the Crown on this branch of the case was based on an alleged distinction between the charge imposed under the General Rule, Schedule A, upon lands, tenements, hereditaments or heritages, and the charge imposed upon profits from or arising out of lands, tenements, hereditaments or heritages under Schedule A, No. III. The same argument was rejected by the House of Lords in *Attorney-General v. London County Council*, [1901] A.C. 26 (4 T.C. 265). It was there laid down that there was no difference in kind between the duties assessed under Schedule D and those assessed under Schedule A, or any of the other Schedules of charge. "In every case", Lord Macnaghten said, [1901] A.C., at page 36 (4 T.C., at page 294), "the tax is a tax on "income, whatever may be the standard by which the income is "measured. It is a tax on 'profits or gains' in the case of duties "chargeable under Schedule A and everything coming under that "schedule . . . just as much as it is in the case of the other schedules "of charge." So, also, Lord Davey, [1901] A.C., at page 45 (4 T.C., at page 301): "I am, therefore, of opinion that the words 'profits or gains' "are apt words, and the words chosen by the Legislature for describing "not only the taxable subjects under Schedule D, but also those comprised "in Schedules A and B and the other schedules".

I come now to the question whether this sandpit is a "concern of the "like nature" with the other concerns mentioned in Rule 3. The difficulty of applying these words to the heterogeneous catalogue of concerns mentioned in the Rule has been discussed at length in the judgments already delivered in this Court, and also by the English Court

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of Appeal in *Mosley v. George Wimpey & Co., Ltd.*<sup>(1)</sup>, 61 T.L.R. 411. The catalogue comprises three entirely different classes of "concerns", viz., industrial works, public undertakings, and franchises such as tolls, markets, fairs, bridges and ferries. It seems rather fantastic to suggest that this sandpit, in which sand was merely excavated and removed, is of a like nature with salt springs or works, or alum mines or works, both of which are clearly industrial works involving the intensive use of power and machinery in mining, pumping and manufacturing operations. That the sand which constitutes a portion of the agricultural holding of the Respondent is not a mineral is clearly shown by the decision of the Irish Court of Appeal in *Staples v. Young*, [1908] 1 I.R. 135. Nor is the sandpit in itself a concern, though it might perhaps, if worked as an industrial undertaking, be deemed to be a "concern" in the hands of the person or persons who worked it. By No. III, Rule 4, the assessment is to be made upon the person or persons who carry on the concern, that is to say, upon the person or persons who are engaged in the actual working of the concern, and not upon the person who receives payment for the privilege of permitting a lessee or a licensee to work the concern; so that even if this sandpit were deemed to be a concern within the meaning of Rule 3, an assessment could not be made, at any rate, under Rule 4, upon the Respondent, who, as the Commissioners have found, neither excavated nor removed any sand.

In *Mosley's* case the English Court of Appeal held that the gravel pit undertaking carried on by the defendant company under a licence from the plaintiff was a concern of the like nature with the concerns mentioned in Rule 3. The Crown relied very strongly upon this decision, and particularly upon the opinion of Scott, L.J., that the generic words of the Rule ought to receive a wide interpretation, as disclosing an express intention of Parliament to sweep into the net every concern of a general character of which the rackrent was an impracticable measure of annual value<sup>(2)</sup>. Such a sweeping interpretation of the words of a taxing Act found little favour with du Parcq, L.J., who described the Rule as amorphous and perplexing, but thought, with some doubt, that the gravel pit might be of a like nature with salt works or alum mines<sup>(3)</sup>. The decision in the case and the construction placed upon the words of the Rule "other concerns of the like nature" are alike unsatisfactory, and the true construction of these words must remain in doubt until finally settled by a decision of the House of Lords or by further legislation.

Counsel for the Respondent relied upon *Edmonds v. Eastwood*, 2 H. & N. 811, which was tried by a very strong Court (consisting of Pollock, C. B., Martin, Watson and Channell, BB.). The brick-field in that case was held on lease subject to a surface rent of £17 per annum and certain royalties or brick rents, and the lessee, having discharged the Income Tax on the royalties and brick rents, paid the balance to the lessor, who claimed that he was entitled to the entire amount of the royalties and brick rents on the ground that the brick-field was a concern of the like nature with the other concerns mentioned in Rule 3, and that he was liable only for tax on the surface rent of £17. The lessor failed in his claim. The judgments contain some interesting criticism of the Rule, each member of the Court expressing doubt whether the brick-field

(1) 27 T.C. 315.

(2) *Ibid.*, at p. 323.

(3) *Ibid.*, at pp. 326-7.



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was within the general words. Pollock, C.B., and Martin, B., had considerable doubt, while Watson, B., referring to ironworks, gasworks, and the other concerns, said that digging clay and making it into bricks was a very different matter. Such being their opinion about a brick-field, which was unquestionably a manufacturing concern, I think that the case was rightly relied on by the Respondent as showing that a sandpit, where the digging and removal of sand were the only operations, and where those operations were not carried on by the person whom the Crown seeks to assess and charge, is not a concern of the like nature with the concerns enumerated in Rule 3.

*Edinburgh Southern Cemetery Co. v. Kinmont*, 2 T.C. 516, was the case of a commercial company which was formed for the purpose of selling grave plots in a cemetery. The judgments in this case have been so fully discussed by my colleagues that it is unnecessary for me to add anything, except that it is a "startling proposition"—to use the words of the late Murphy, L.J.—that this Edinburgh cemetery is a concern of the like nature with the other concerns enumerated in Rule 3<sup>(1)</sup>. In *Salisbury House Estate, Ltd. v. Fry*, [1930] A.C. 432 (15 T.C. 266), both Viscount Dunedin and Lord Macmillan refer to this cemetery case, but the only portion of the judgments which they quote is that portion of Lord McLaren's judgment which opens with words, which are peculiarly applicable to the Respondent's case, as follows: "It is certainly not sufficient to bring a particular use of land within the scope of Rule 3 that the proprietor of the land is using it in connexion with his trade or for purposes of trade"<sup>(2)</sup>.

The Special Commissioners, in finding that there were sales of sand by the Respondent and that these sales were by way of trade, appear to have overlooked the legal effect of the agreements made with the various contractors. What was granted to each contractor was a *profit à prendre*, a right to dig and carry away sand from the sandpit in consideration of a payment at the rate of 6d., 9d. or 1s. a ton according to the quality of the sand.

A similar question arose in *Stratford v. Mole & Lea*, 24 T.C. 20. A firm of sand and gravel merchants had purchased all the sand and gravel upon a certain parcel of land, paying therefor a fixed sum per ton for all sand and gravel removed. The contention of the firm was that the agreement was a sale of goods, but the Special Commissioners found that the payments made by the firm were a rent within the meaning of Section 21 of the Finance Act, 1934, and Lawrence, J., following the decisions in *Morgan v. Russell & Sons*, [1909] 1 K.B. 357, and *Lavery v. Pursell*, 39 Ch. D. 508, held that the agreement was not an agreement for the sale of goods, but that it created a *profit à prendre* and an interest in land. It is true that the firm in that case had an agreement in writing for the removal of sand and gravel for a period of three years, but, with regard to the manner in which the proprietor dealt with his land, there is no essential difference between that case and the present one.

In *Ormond Investment Co., Ltd. v. Betts*, [1928] A.C. 143, at page 162 (13 T.C. 400, at page 434), Lord Atkinson clearly stated the principles which should guide us in the interpretation of Acts which impose a tax upon the subject. "It is well established", he says, "that one is bound,

(1) Page 390 *ante*.

(2) 2 T.C., at p. 530.

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“in construing Revenue Acts, to give a fair and reasonable construction to their language without leaning to one side or the other, that no tax can be imposed on a subject by an Act of Parliament without words in it clearly showing an intention to lay the burden upon him, that the words of the statute must be adhered to, and that so-called equitable constructions of them are not permissible”.

Applying these principles to the present case, I hold that the Crown has not proved that the Respondent was carrying on a concern of the like nature with the concerns enumerated in Rule 3, and if the sandpit is not covered by the Rule, when fairly construed according to the natural meaning of the words, that can only be remedied by legislation and not by an attempt to construe the Rule benevolently in favour of the Crown (*Attorney-General v. Earl of Selborne*, [1902] 1 K.B. 388, per Collins, M.R., at page 396).

I agree that this appeal should be dismissed with costs.

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The Crown having appealed against the decision in the Court of Appeal, Northern Ireland, the case came before the House of Lords (Viscount Simon and Lords Porter, Simonds, Normand and Oaksey) on 7th, 8th, 9th, 13th and 14th April, 1948, when judgment was reserved. On 13th May, 1948, judgment was given unanimously against the Crown, with costs, confirming the decision of the Court below.

The Attorney-General, Northern Ireland (Mr. L. E. Curran, K.C.), Mr. W. W. B. Topping, K.C., Mr. Reginald P. Hills and Mr. F. A. L. Harrison appeared as Counsel for the Crown, and Mr. Cyril L. King, K.C., Mr. W. F. McCoy, K.C., and Mr. H. A. McVeigh for Mr. Scott.

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#### JUDGMENT

**Viscount Simon.**—My Lords, the question in this appeal is raised by a Case stated by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice in Northern Ireland.

The Respondent is the owner in fee simple of a farm of some twenty-five acres in the County of Londonderry. It was discovered that, under a portion of the surface of this farm extending to about one acre, sand existed in considerable depth, and the Respondent allowed various persons to come on his land, dig sand, and take it away, with the result that a sandpit was formed which was regularly and continuously worked from January, 1941, until about October, 1944, by which time the pit was practically exhausted. The sand was of different qualities and the Respondent's charges varied from between 6*d.* to 1*s.* per ton according to the quality of the sand gotten. The hours of working at the pit were from 8 a.m. to 6 p.m. daily. A road to the sandpit from the county road was, with the Respondent's approval, made by a Mr. Moore, who was the earliest and biggest contractor. The demand for this sand principally arose in connection with the construction of aerodromes in Northern Ireland. The sand was excavated by the various contractors' men by shovelling and was loaded into lorries for removal. The Respondent employed a man to record the tonnage of sand taken in each case, and this employee supervised the pit generally and directed the various contractors to the particular

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part of the face of the pit where each should work. There was a regular system for rendering accounts, for checking them and for receiving payments.

The profits made by the Respondent from the disposal of sand from this sandpit amounted to £150 in 1940-41, £1,250 in 1941-42 and £3,750 in 1942-43.

The Revenue contends that the Respondent, in connection with this sandpit, was carrying on a "concern of the like nature" within the meaning of those words in No. III, Rule 3, of the Rules applicable to Schedule A. If so, Income Tax would be separately charged by reference to the profits made by him in the preceding year. The Respondent, on the other hand, argues that what he was doing in connection with this sandpit did not amount to the carrying on of a "concern" at all, and that even if it did, it was not a "concern of the like nature" within the meaning of Rule 3. If this contention prevails, Income Tax would be charged on the annual value of the farm as a whole, calculated as directed for Ireland by Section 187 of the Income Tax Act, 1918.

The Commissioners decided against the Respondent on both points, but stated a Case which admirably sets out the facts found by them, and formulates their decision thus: "We find that the sales of sand by the Appellant (the present Respondent), which amounted to more than 100,000 tons and extended over three years, were by way of trade, that they were not merely casual and occasional but constituted a series of transactions carried out in pursuance of a regular method, and we arrive at the conclusion that the sandpit was a concern carried on by the Appellant. Further, following the decision in the Court of Appeal in *Mosley v. George Wimpey & Co., Ltd.*<sup>(1)</sup>, [1945] 1 All E.R. 674, we hold that it was a concern of a like nature with those enumerated in Rule 3 of No. III of Schedule A. We accordingly confirm the assessments appealed against in principle and leave the figures to be agreed between the parties."

When the matter came on appeal before Black, J., that learned Judge considered himself to be bound by the views expressed in an earlier stage of the same controversy by the Court of Appeal in Northern Ireland<sup>(2)</sup>, and consequently reversed the view of the Commissioners.

In the Court of Appeal<sup>(3)</sup> Andrews, L.C.J., confirmed the Commissioners' view that the Respondent was conducting a "concern", but rejected the Commissioners' other conclusion that it was a "concern of the like nature". Babington, L.J., considered the Revenue's contention to be wrong on both points, saying as regards the first that he could find no evidence to justify the finding of the Commissioners that the Respondent carried on any "concern" or did anything more than convert his sand into money. Porter, L.J., agreed with the view that there was no "concern of the like nature" being carried on by the Respondent, and thus the Court of Appeal was unanimous in holding that the Revenue's claim failed. From this decision an appeal is now brought to this House.

In order to reach a correct conclusion in this difficult matter it is necessary to examine the language of parts of Schedule A with much care. It is first to be observed that No. I is the General Rule to which No. III, like No. II, is an exception. There is nothing therefore in the

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(1) 27 T.C. 315.

(2) Page 379 ante.

(3) Page 400 ante.

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scheme of the Schedule to require that No. III should be given a wider interpretation than its terms on their natural construction require. All that will happen when tax under Schedule A is charged "in respect of the property in all lands, tenements, hereditaments, and heritages in the United Kingdom" is that, if the case does not fall within either of the Rules which constitute exceptions, it will fall under the General Rule, No. I, and the tax will be calculated on annual value as therein defined.

No. III is headed: "*Rules for estimating the annual value of certain other Lands, Tenements, Hereditaments, or Heritages which are not to be charged according to the preceding General Rule*", and provides as follows:

"1. In the case of quarries of stone, slate, limestone, or chalk, the annual value shall be understood to be the profits of the preceding year.

"2. In the case of mines of coal, tin, lead, copper, mundic, iron, and other mines, the annual value shall be understood to be the average amount for one year of the profits of the five preceding years . . .

"3. In the case of ironworks, gasworks, salt springs or works, alum mines or works, waterworks, streams of water, canals, inland navigations, docks, drains or levels, fishings, rights of markets and fairs, tolls, railways and other ways, bridges, ferries, and other concerns of the like nature having profits from or arising out of any lands, tenements, hereditaments or heritages, the annual value shall be understood to be the profits of the preceding year.

"4. Tax under the above rules shall be assessed and charged on the person or body of persons carrying on the concern, or on the agents or other officers who have the direction or management of the concern or receive the profits thereof."

Section 28 of the Finance Act, 1926, transferred the calculation of tax in respect of properties included in No. III to Case I of Schedule D, and consequently the measure is now the profits of the preceding year in Rule 2 as well as in Rules 1 and 3.

I agree with Andrews, L.C.J., that what the Respondent was doing in connection with his sandpit amounted to the carrying on of a "concern". The question is not, of course (as the language of the Commissioners, if strictly read, might seem to imply), whether the sandpit was itself a "concern", but whether the Respondent's activities in connection with it amounted to the carrying on of a "concern", and this, I think, is what the Commissioners really meant by their finding. "Concern" is a very wide word, and appears to imply an adequate degree of business organisation for the purpose of carrying on the undertaking. But the amount of organisation needed must depend upon the character of the "concern" itself. It will be noted from the language of Rule 4 that all the various enterprises in Rules 1, 2 and 3 are spoken of as "concerns", and it is obvious that the amount of organisation needed for a toll or for streams of water would be vastly less than for a mine of coal or for gasworks. The language of Rule 4 implies that, in order to amount to a "concern", there must be direction or management as well as the receipt of profits. Here the facts found by the Commissioners show that there was a regular system of direction and management sufficient for the exploiting of the sandpit by



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its owner, and the Commissioners had material before them on which they could properly arrive at the conclusion of fact that the Respondent was carrying on a "concern". Such a conclusion must be accepted unless there were no facts to support it, and in my opinion the conclusion can be supported by the material in the Case. I should myself draw the same conclusion.

All this, however, will not assist the Appellant unless the conclusion is also reached that the "concern" was a "concern of the like nature" within the meaning of Rule 3. In view of the heterogeneous list of specific undertakings which precedes this phrase, it is a matter of the greatest difficulty to determine whether the phrase can properly include a sandpit. Indeed, if a collection of items is heterogeneous, it almost seems a conflict in words to say that they belong to the same genus. But there the words are in the statute, and, if possible, the phrase must be given some meaning.

The arguments before the House have sought an interpretation by pursuing two alternative methods. One method is to search for some common feature in the specific items regarded as a single collection. The other method is to treat the phrase as though it ran "other concerns of the like nature to any one of the above".

The two contrasted methods are illustrated in the judgments of Scott and du Parcq, L.JJ., in *Mosley v. George Wimpey & Co., Ltd.*<sup>(1)</sup>, [1945] 1 All E.R. 674, where the Court of Appeal held that the undertaking of working a gravel-pit by a company which had acquired the exclusive right to do so fell within the words now under examination. In that case Scott, L.J., took the view that the list of specific undertakings in Rule 3 constituted a single genus because they all involved a special or intensive use of the land with a view to its exploitation for commercial profit as distinguished from what he regarded as the ordinary use of land for agricultural purposes (including forestry) or for the site of buildings and the like. Du Parcq, L.J., on the other hand was prepared to hold that a gravel-pit could be regarded as analogous to certain items in the list, viz., "salt works" or "alum works", as these are instances in which profits are made by commercially dealing with mineral deposits on or under the land.

The phrase "other concerns of the like nature" following a whole list of concerns which, with some more recent additions, constituted the specific subject matter of what is now Rule 3 of No. III first appears in the Income Tax Act of 1806 (46 Geo. III, c. 65), Section 74. "Gasworks" and "railways" were added to the list by the Act of 1842. Mr. Cyril King, in resisting the contention that a sandpit could be included as *eiusdem generis* with what went before, pointed out that in nearly all of the specific cases in Rule 3, the ground itself is substantially preserved while the concern is being carried on, and there is no abstraction of the land but only a special use of it, whereas in Rules 1 and 2 the profit was made by abstraction of a wasting asset. Hence, he argued, a concern which involves the abstraction and ultimate exhaustion of sand or gravel could not be within Rule 3. Moreover, as such concerns as these were neither any of the quarries specified in Rule 1 nor mines dealt with in Rule 2, it followed that the tax under Schedule A of the concern of carrying on a sandpit did not depend on profits, but fell within the General Rule No. I.

(1) 27 T.C. 315.

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One difficulty in the way of this argument is that an alum mine would apparently involve substantial extraction. Moreover, this view of the matter would not only involve dissent from the Court of Appeal's decision in *Mosley v. George Wimpey & Co., Ltd.*<sup>(1)</sup> above referred to, but also would be inconsistent with views expressed as to the scope of Rule 3 in *Edinburgh Southern Cemetery Co. v. Kinmont* (1889), 17 Sess. Cas. (4th series) 154; 2 T.C. 516.

This last case deserves careful consideration in connection with the present matter, but it is not necessary in this appeal to reach a conclusion as to whether it is correctly decided or not.

The Crown's contention in the present case involves the drawing of a distinction between the "ordinary" and the "extraordinary" use of land, and by the latter is meant some intensive exploitation of the surface or subsoil by means of which a profit is derived which is likely to vary from year to year, as distinguished from the "normal" user of land, of which its use for agriculture or forestry or for the site of buildings are regarded as examples. In the latter case the assessment is by reference to annual value as defined in Rule I and such annual value is not likely to vary each year. On this view of the matter No. III applies where the land is specially exploited as distinguished from being normally used. It is suggested that such a contrast, though difficult to work out exactly, corresponds with the common sense of the matter and with the general scheme of Income Tax, for although the owner of land thus specially exploited was originally dealt with under Schedule A because his income was primarily derived from his property either in or under the land, it was still desirable to draw a distinction between the proprietor who made a valuable profit by extraordinary use and the proprietor in whose case the use to which the land was put was "normal".

Whatever view may be taken of this contention, it does not, to my mind, decide the present issue in favour of the Revenue. The difficulty of classifying the exploitation of sandpits, or gravel-pits, as extraordinary or abnormal uses of land still persists. The digging and carrying away of sand or gravel have been, I apprehend, one of the normal uses of suitable areas of land from the earliest times. The very fact that a concern depending on a sandpit requires so little organisation makes me doubt whether an enterprise of this sort can properly be thrown into the "extraordinary" class. If, in the contemplation of the Legislature, the exploitation of sandpits or gravel-pits was an example of the special cases included in Rule 3 of No. III, it is difficult to imagine why the Rule did not specifically mention so obvious and so common an example. The same consideration applies to clay for making bricks, and in *Edmonds v. Eastwood* (1858), 2 H. & N. 811, a very strong Court of Exchequer held that a brickfield was not within No. III. Pollock, C.B., and Watson, Channell and Martin, BB. (see bottom of page 818), all took the view that the getting of such material from land would not bring into play the special Rule. It does not appear that this decision was brought to the attention of the Court of Appeal in *Mosley v. George Wimpey & Co. Ltd.*, nor is there any reference to it in the judgments delivered in that case. It is possible that it may have been overlooked because

(1) 27 T.C. 315.

**(Viscount Simon.)**

*Edmonds v. Eastwood* is not a Revenue case, but the importance of what the Court of Exchequer then laid down cannot be minimised.

My conclusion therefore is that the concern of working a sand-pit, such as is found to exist in this case, does not fall within the concerns covered by Rule 3 of No. III, and that the whole farm ought, as the Court of Appeal in Ireland held, to be assessed under the General Rule. This conclusion involves the overruling of the *ratio decidendi* of *Mosley v. George Wimpey & Co., Ltd.*<sup>(1)</sup>. We were informed that concerns for working china clay have been customarily assessed under Rule 3 of No. III and, in view of the much greater elaboration of that process which involves operations akin to mining (see the account given in *Hext v. Gill*, 7 Ch. App., at page 703), the present decision does not necessarily affect that practice.

I must add that the language of the Rule is so obscure and so difficult to expound with confidence that — without seeking to apply any different principle of construction to a Revenue Act than would be proper in the case of legislation of a different kind — I feel that the taxpayer is entitled to demand that his liability to a higher charge should be made out with reasonable clearness before he is adversely affected. In the present instance, this reasonable clearness is wanting.

I move that this appeal be dismissed with costs.

**Lord Porter.**—My Lords, I concur.

**Lord Simonds.**—My Lords, the relevant facts of this case have been so fully stated that I need not repeat them, nor should I think it necessary to add anything upon the general questions of law that arise but for the importance of the case and the fact that it is necessary to consider and in effect overrule the decision of the Court of Appeal in England in *Mosley v. George Wimpey & Co., Ltd.*, 27 T.C. 315.

The two questions of law, which are in truth two branches of one question, are (1) whether that which the Respondent did in relation to a sandpit forming part of his farm at Glebe in the County of Londonderry was the carrying on of a “concern”, and (2) if so, whether it was a “concern of the like nature having profits from or “arising out of any lands” within the meaning of Rule 3 of No. III of Schedule A to the Income Tax Act, 1918.

Upon the first question I will add nothing to what has been said by my noble and learned friend on the Woolsack. It is upon the second question that I wish to make some observations.

My Lords, there is a maxim of Income Tax law which, though it may sometimes be over-stressed, yet ought not to be forgotten. It is that the subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax upon him. It is necessary that this maxim should on occasion be reasserted and this is such an occasion. Here it is sought to tax the owner and occupier of land in respect of the profits made by him from the sale of sand upon the footing that in effecting those sales he is carrying on a concern which is of the like nature to “ironworks, gasworks, salt springs or works, “alum mines or works, waterworks, streams of water, canals, inland “ navigations, docks, drains or levels, fishings, rights of markets and “fairs, tolls, railways and other ways, bridges, ferries”. I need go

(1) 27 T.C. 315

**(Lord Simonds.)**

no further into the history of this catalogue than to say that with some additions it goes back for nearly 150 years. During the whole of that time there can have been no more familiar feature of the landscape than pits of sand or gravel or clay, and I cannot doubt that during that time and before it the owners of such pits have been accustomed in greater or less degree to exploit them not only for their own use but by profitable sales. Yet it is suggested that the Legislature, while expressly including in the catalogue such comparatively rare concerns as alum mines or works and salt springs or works, yet left to the precarious embrace of the expression "other concerns of the like nature" the commonplace operations which it is now sought to tax. Nor does the matter rest there. For the catalogue which I have recited follows immediately after Rule 1, which deals with quarries of stone, slate, limestone, or chalk, and Rule 2, which deals with mines of coal, tin, lead, copper, mundic, iron, and other mines.

Here surely would be the appropriate setting in which, had the Legislature so intended, pits of sand or gravel or clay should *eo nomine* have been placed or included by words of general description. I cannot bring myself to suppose that the Legislature either overlooked what almost obtrudes itself on the eye of any observer, or, observing it, deliberately refrained either from mentioning it or from putting it in its proper place.

I am brought back then to the maxim that I have mentioned. For it appears to me that here is a case in which the subject is entitled to say that the words of the Rule under which it is sought to tax him do not do so with the clarity which the subject matter demands.

What I have said applies equally to gravel-pits and to sandpits and it follows that in my view *Mosley's case*<sup>(1)</sup> was wrongly decided. The argument of the learned Attorney-General was properly founded on that decision. I must therefore observe on it that, while Scott, L.J., rested his judgment on the view that "the generic words should . . . be interpreted widely, and as disclosing an express intention of Parliament to sweep into the net every concern of the general character I have endeavoured to describe above<sup>(2)</sup>", *du Parcq, L.J.*, disclaimed this view and found in a sandpit a concern of a like nature to two of the particular concerns included in the catalogue, viz., salt works and alum mines<sup>(3)</sup>. Your Lordships have not the advantage of knowing the opinion of *Uthwatt, J.*, on this point.

My Lords, I agree with *du Parcq, L.J.*, in thinking that the general proposition of *Scott, L.J.*, cannot be sustained. In the first place I think, with great respect, that he ignores that No. III in Schedule A comprises exceptions to the General Rule which is to be found in No. 1. What is not covered by the language of No. III falls within No. I if it is within Schedule A at all and does not fall within the other exceptions, and there is no need to give to No. III a wider meaning than, construed as a taxing statute, it strictly requires. Secondly, I cannot accept what I understand to be the view of *Scott, L.J.*, as to the generic conception of the specified concerns, viz., that they have the common feature of a variable economic yield which

(1) 27 T.C. 315.

(2) *Ibid.*, at p. 323.

(3) *Ibid.*, at p. 327.



**(Lord Simonds.)**

makes the rackrent an untrue or impracticable measure of annual value and a dissimilarity to the "normal" use of land. It is not, I think, open to the House after the decision in *Fry v. Salisbury House Estate, Ltd.*<sup>(1)</sup>, [1930] A.C. 432, to say that if a "concern" satisfies these two conditions it must necessarily fall within Rule 3 of No. III. Nor, apart from that decision, should I be prepared to accept such a proposition. For, if these two conditions constituted the difference between the cases falling within No. I and No. III, I see no necessity for segregating the items in Rule 1 from those in Rule 3 nor indeed for any catalogue at all.

Nor, my Lords, can I accept the view expressed by du Parcq, L.J., that a gravel pit is a concern of like nature to alum mines or salt springs and therefore within Rule 3. I would doubt whether, where a list is followed by such general words as "concerns of the like "nature", it is proper to regard as covered by those words concerns which have a likeness to one or two of the items but do not exhibit a characteristic common to them all. But, however this may be, I cannot find a sufficient likeness to the items chosen by du Parcq, L.J., to justify the inclusion of concerns which, if they had been intended to be included, would surely themselves have been selected as examples. In this connection I refer to my earlier observations and reinforce them by reference to the case of *Edmonds v. Eastwood*, 2 H. & N. 811, which appears not to have been called to the attention of the Court of Appeal in *Mosley's case*<sup>(2)</sup>. In that case, which was decided 90 years ago and has never so far as I am aware been criticised, Pollock, C.B. (at page 818), used these words: "I entertain considerable doubt—indeed more than a doubt—whether brick fields are to be treated as coal mines or salt works, or any of those matters specifically mentioned in the Rules to Schedule (A.), No. III . . . . With the public notoriety that property of that description exists to a great extent, especially in the neighbourhood of London, it seems almost impossible, if it was intended to include it, that it should not have been inserted by name in the same category as coal mines or "salt works"; and again: "My opinion is that the case of a brick field was not intended to be included within No. III". In this view Watson, B., expressly concurred. Martin, B., observed that he concurred with the Lord Chief Baron that there was considerable doubt whether this was so — i.e., whether a brick field fell within the 3rd Rule of No. III: he appears to have underestimated the force of the Lord Chief Baron's conviction. Channell, B., doubted whether the case fell within No. I or No. III.

My Lords, I do not think that your Lordships would be justified in disregarding these expressions which have gone so long unchallenged upon the meaning and effect of a taxing statute, even if they did not wholly commend themselves. But for myself there is in them not only the force of almost venerable authority but also compelling reason. I would dismiss this appeal accordingly.

I must finally say a few words about the so-called cemetery cases which begin with the *Edinburgh Southern Cemetery Co. v. Kinmont*, 2 T.C. 516. Your Lordships are not, I think, called on to review the correctness of these decisions. In the cited case Lord President

<sup>(1)</sup> 15 T.C. 266.

<sup>(2)</sup> 27 T.C. 315.

**(Lord Simonds.)**

Inglis, without giving any further reason, said (at page 528) that it appeared to him that the cemetery company there under consideration fell "very fairly within the words, 'other concerns of the like nature,' as occurring in that rule". Lord Shand said (at pages 528-9) that the true solution of the question was to be found in the fact that "all of these different concerns relate to companies which, having purchased or acquired land, remain in the occupation and use of that land themselves, and are using it for the purpose of some trade or business whereby they acquire profits." I do not think that the learned Judge is here laying any stress on companies as distinguished from natural persons, but I would respectfully suggest that, if he meant that all companies or persons which satisfy the test that he indicates at once come within Rule 3 of No. III, the proposition is far too wide. It may well be that, if the matter came to be argued before your Lordships, there would be found some common characteristic which would justify the inclusion of cemetery companies in the Rule. Remembering the high authority of Lord President Inglis I am not disposed without argument to decide the contrary. But in this case I do not feel called upon either to attempt a definition of the class which Rule 3 embraces or to do more than reject the contention of the Inland Revenue that they have established that a sandpit is a "concern of the like nature" to the concerns enumerated in Rule 3 of No. III or to any one or more of them.

**Lord Normand.**—My Lords, I concur in the two speeches which have been delivered by my noble and learned friends.

**Lord Oaksey.**—My Lords, I agree that the judgment of the Court of Appeal in Northern Ireland is right and should be affirmed.

The question is whether the Respondent in the way in which he dealt with a sandpit on his farm was carrying on a concern of the like nature with the concerns referred to in Rule 3 of No. III of Schedule A.

I agree with your Lordships that there was evidence upon which the Commissioners could find that the Respondent was carrying on a concern. The question remains whether it was a concern of a like nature to the other concerns mentioned in Rule 3. On this question I agree with the observations of my noble friend Lord Simonds on the maxim of Income Tax law that the subject is not taxed unless the words of the taxing statute unambiguously impose the tax upon him.

It has been argued by the Attorney-General for Northern Ireland that No. III of Schedule A should be construed to include all concerns connected with land which are in their nature commercial, and which produce varying profits, that the characteristic suggested by the Respondent's Counsel, namely, extraction of part of the soil, is inconsistent with the inclusion of salt springs and alum mines in Rule 3 and further is unconnected with any reason for treating such concerns differently from any other concern connected with the land. It was also suggested that No. I dealt with the agricultural uses of land and No. III with all other uses.

I am unable to accept these arguments. I do not think the interpretation of such provisions as Schedule A, Nos. I and III, can be

(Lord Oaksey.)

approached in this general way. It may be that it would have been perfectly reasonable to tax every profit arising from land, other than agricultural profit, in a different way from agricultural profit, but it is necessary to consider the words used and the frame of the Schedule.

Schedule A provides by No. I: "*General Rule for estimating the annual value of Lands, Tenements, Hereditaments or Heritages.* In the case of all lands, tenements, hereditaments or heritages capable of actual occupation, of whatever nature, and for whatever purpose occupied or enjoyed, and of whatever value (except the properties mentioned in No. II and No. III of this Schedule), the annual value shall be understood to be: (1) The amount of the rent", etc.

No. III is one of the exceptions, and everything not dealt with in the exceptions must fall within the general provisions of No. I. No. I is not confined to agricultural uses of land, but refers to all uses except those in Nos. II and III.

No. III, Rule 1, I think, deals with quarries and Rule 2 with mines exhaustively, with the single exception of alum mines, and it is conceded that sandpits are not included in Rules 1 or 2. Now the digging of sand, gravel, clay or peat are and have been from time immemorial ordinary and well-known uses of land, and it is in my view impossible to construe Rule 3, which deals expressly with a variety of subjects none of which bears anything like such a close resemblance to digging for sand as do the subjects dealt with expressly in Rule 1, as including sandpits merely because alum mines are included in Rule 3.

The reason why such subjects as sandpits were omitted from the list in No. III (though it is not for the Courts to find a reason) was, I imagine, because the concern of using a sandpit or the like was considered to be an ordinary use of land. In any event sandpits were not expressly referred to in No. III, and to bring them in under such words as "other concerns of the like nature" in Rule 3 appears to me to be an unjustifiable extension of general words in an exception. For my own part, I am not at present prepared to hold that it is necessary to find a category to which all the subjects enumerated in Rule 3 belong, and that concerns of a like nature must fall within that category, but in my opinion digging sand is not of a like nature to any of the enumerated subjects, having regard to the context of Rules 1 and 2 in which Rule 3 occurs.

Apart from these reasons of construction, I think it is not unimportant that as long ago as 1858, in the case of *Edmonds v. Eastwood*, 2 H. & N. 811, Pollock, C.B., and Martin and Watson, BB., all expressed the view that No. III did not include digging for clay.

This case does not appear to have been cited to the Court of Appeal in England in the case of *Mosley v. George Wimpey & Co., Ltd.*, 27 T.C. 315, where it was held that the extraction of gravel for commercial purposes was a concern within No. III. For the reasons which I have given, that case must in my opinion be overruled. I cannot agree with the view of Scott, L.J., that the widest possible interpretation ought to be given to the exceptions contained in No. III, nor can I agree with du Parc, L.J., as he then was, in holding that digging of gravel is a concern of a like nature with alum mines.

*Questions put:*

That the Order appealed from be reversed.

*The Not Contents have it.*

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

*The Contents have it.*

[Solicitors:—Rising & Ravenscroft; W. J. G. Seeds, Belfast; Solicitor of Inland Revenue; Solicitor to the Ministry of Finance (Northern Ireland).]

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