HIGH COURT OF JUSTICE (CHANCERY DIVISION)—1ST AND 2ND MARCH, 1956

COURT OF APPEAL—11TH AND 12TH JUNE, AND 24TH JULY, 1956

HOUSE OF LORDS—8TH AND 9TH APRIL, AND 29TH MAY, 1957

Commissioners of Inland Revenue

v.

National Coal Board[1]

Profits Tax—Capital allowances—Industrial building or structure—Miners' dwelling-houses—"likely to have little or no value to the person carrying on the trade when the mine . . . is no longer worked"—Income Tax Act, 1945 (8 & 9 *Geo.* VI, *c.* 32), *Section* 8 (3); *Finance Act,* 1947 (10 & 11 *Geo.* VI, *c.* 35), *Eighth Schedule, Part* I, *Paragraph* 1.

The National Coal Board owned dwelling-houses which were built for, and occupied at the relevant times by, persons employed at a colliery. It was agreed that the houses would have a substantial value to the Board if mining operations at the colliery ceased in the near future but that they would have little or no value some fifty years before the year 2141, *when the seams were expected to be exhausted.*

On appeal against an assessment to Profits Tax for the chargeable accounting period ended 31*st December,* 1951, *the Board claimed annual allowances in respect of these houses as being industrial buildings within the proviso to Section* 8 (3), *Income Tax Act,* 1945, *on the ground that they were likely to have little or no value when the mine was no longer worked. The Crown contended that the eligibility of a house for allowance depended on its being valueless upon the supposition of a cessation of mining operations. The Special Commissioners allowed the appeal, holding that the eligibility for allowance depended on the likely value of the houses at the time when mining was expected to cease.*

Held, *that the Board was not entitled to the allowances claimed.*

CASE

Stated under the Finance Act, 1937, Fifth Schedule, Part II, Paragraph 4, and the Income Tax Act, 1952, Section 64, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the High Court of Justice.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 21st March, 1955, the National Coal Board (hereinafter called "the Board") appealed against an assessment made upon it to Profits Tax for the chargeable accounting period beginning on

[1] Reported (H.L.) [1957] 3 W.L.R. 61; 101 S.J. 502; [1957] All E.R. 461; 223 L.T. 312.

1st January, 1951, and ending on 31st December, 1951, in the sum of £1,150,000.

2.—(1) The only question which we were asked to determine was whether or not the Board was entitled to annual allowances under Part I of the Income Tax Act, 1945 (which relates to industrial buildings and structures), and consequently under Paragraph 1 of Part I of the Eighth Schedule to the Finance Act, 1947 (which applies those allowances for the purposes of the Profits Tax), in respect of certain dwelling-houses at Edwinstowe, Nottinghamshire, owned by the Board and occupied by persons employed by the Board at Thoresby Colliery.

(2) It was common ground between the parties (*a*) that the said dwelling-houses would qualify for the annual allowances claimed unless they were buildings to which Sub-section (3) of Section 8 of the Income Tax Act, 1945, applied, and (*b*) that the said Sub-section (3) would apply to the said buildings unless its application were excluded by the terms of the proviso thereto, which reads as follows:

> "Provided that this subsection shall not apply to, or to part of, a building or structure which was constructed for occupation by, or for the welfare of, persons employed at, or in connection with the working of, a mine, oil well or other source of mineral deposits, or for occupation by, or for the welfare of, persons employed on, or in connection with the growing and harvesting of the crops on, a foreign plantation, if the building or structure is likely to have little or no value to the person carrying on the trade when the mine, oil well or other source or the plantation is no longer worked, or will cease to belong to such person on the coming to an end of a foreign concession under which the mine, oil well or other source, or the plantation, is worked."

3.—(1) The houses to which the appeal relates are 124 houses in

ERRATUM SLIP

Tax Cases, Volume 37, Part 4, page 264, footnote:

insert 2 *after* [1957] *and before* All E.R. 461.

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(3) The houses were constructed between 1926 and 1928.

(4) It was agreed between the parties—

(*a*) that if mining operations had ceased or should cease at Thoresby Colliery during 1951 or 1952 or in any of a number of years following the houses would have a substantial value and would not have "little or no value" within the meaning of Section 8 (3) of the Income Tax Act, 1945, and

(*b*) that some 50 years before 2141, at which time it was estimated that the coal seams at Thoresby Colliery would be exhausted, the houses would have "little or no value" within the meaning of the said Section 8 (3).

(5) The agreement recorded in the immediately preceding sub-paragraph was subject to the following reservation made by the Solicitor of Inland Revenue in a letter dated 16th March, 1955, to the Board's Solicitor:

> "The Revenue agree that if working continues at the colliery in the manner expected it will probably be exhausted in 188 years. But mining operations may, in the meanwhile, cease for other reasons and the Revenue do not agree that it is possible to forecast the reason for which, or the time at which, they will cease."

(1) Not included in the present print

4.—(1) A statement of facts agreed between the parties concerning Edwinstowe village and houses therein was produced to us, and is annexed hereto, marked "A", and forms part of this Case(1).

(2) A statement of facts agreed between the parties concerning the coal seams at Thoresby Colliery and the estimated life thereof was produced to us, and is annexed hereto, marked "B", and forms part of this Case(1).

(3) A bundle of correspondence agreed between the parties concerning the appeal was produced to us; it is not annexed hereto, but is held available for the use of the Court if required.

5. It was contended on behalf of the Board:

(1) that the said houses were not buildings to which Section 8 (3) of the Income Tax Act, 1945, applies, being excluded from the application thereof by the proviso thereto;

(2) that the said houses were industrial buildings qualifying for annual allowances under Part I of the Income Tax Act, 1945;

(3) that the assessment under appeal should be reduced accordingly.

6. It was contended on behalf of the Commissioners of Inland Revenue:

(1) that on the true construction of the proviso to Section 8 (3) of the Income Tax Act, 1945, the houses in question were not buildings to which the said proviso applies;

(2) that the said houses were buildings to which the said Sub-section (3) applies and were not industrial buildings qualifying for annual allowances under Part I of the Income Tax Act, 1945;

(3) that the assessments should, in principle, be upheld.

7. We, the Commissioners who heard the appeal, gave our decision as follows:

(1) We find that, on the suppositions (i) that coal continues to be extracted from the mine at the present rate of extraction and (ii) that nothing happens to result in a premature closing of the mine before the seams are exhausted, the mine will cease to be worked in or about the year 2141. In our view these two suppositions are reasonable and no evidence of any sort was produced to contradict or throw doubt upon them; for these reasons we find that the mine is likely to be no longer worked in or about the year 2141 and not earlier. In so far as it may be necessary for the purpose of the present appeal to decide when the mine will in fact be no longer worked, we find that it will be no longer worked in or about the year 2141, for the same reasons. We find that until the year 2091 the houses in question are likely to have some substantial value, and that after the year 2091 they are likely to have little or no value.

(2) The question for our decision is whether the houses are eligible for annual allowances under Part I of the Income Tax Act, 1945; this depends upon whether they fall within the proviso to Section 8 (3) of that Act, and in particular whether they are

> "likely to have little or no value to the person carrying on the trade when the mine, oil well or other source or the plantation is no longer worked".

(3) It was contended on behalf of the Crown that on the true construction of the phrase quoted above the eligibility of a house for the allowance depends upon its being valueless upon the supposition of a cessation of working. We are unable to agree with this. We do not

(1) Not included in the present print.

think that the language of the phrase indicates that we are to suppose that the mine is no longer worked and to consider the value of the houses on that supposition. The words "is likely to" and the use (in two places) of the indicative "is" suggests to our minds that we are to address ourselves to a real situation which may be expected to arise in the future and not to a supposed situation which could be supposed to exist now or at any other time. We have borne in mind that there may be a practical difficulty in determining, as a question of fact, when any particular mine or plantation will cease to be worked, and in this connection we have considered carefully whether the words "is likely to" govern the whole of the phrase or not—in other words, whether we have to determine the *likely* time or the *exact* time of cessation. Upon the whole, we think that it is the *likely* time of cessation which is referred to but even if we are wrong as to this we do not think that the difficulty of making a finding as to the exact time provides a compelling reason for departing from what we think is the natural meaning of the language of the proviso. In the course of argument reference was made to cases where no cessation of working could be foreseen at all (as might be the case with some plantations); it seems to us that such cases would present no real difficulty, as we would expect it to be self-evident that the plantation would outlive the buildings on it.

(4) It was also urged upon us on behalf of the Crown that the context in which the phrase we are construing is found affords a strong indication that the Crown's construction should be preferred; the intention, it was said, was to provide an allowance for dwelling-houses in very remote places. We do not find this argument very convincing. It may be that mines and plantations were grouped together and afforded special treatment in the proviso because they are sometimes found in unpopulated districts where dwelling-houses would command no value; it may be that they were dealt with in this way simply because they are all undertakings which can rarely, if ever, be sited with an eye to the availability of local labour, whether they are found in a populated area or in a desert. We do not feel that considerations of this sort help us in any way in arriving at our decision.

(5) For the reasons given above, we hold that the appeal succeeds in principle, and we leave the figures to be agreed.

8. Immediately upon the giving of our decision the Commissioners of Inland Revenue expressed their dissatisfaction therewith as being erroneous in point of law and required us to state a Case for the opinion of the High Court pursuant to the Finance Act, 1937, Fifth Schedule, Part II, Paragraph 4, and the Income Tax Act, 1952, Section 64. Having been informed that a considerable time must elapse before figures can be agreed and we shall be able finally to determine the amount of the assessment in accordance with our decision, and both parties desiring that the Case should be stated in principle without waiting for our final determination, we have stated and do sign this Case accordingly.

R. A. Furtado } Commissioners for the Special Purposes
H. G. Watson } of the Income Tax Acts.

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

4th October, 1955.

The case came before Roxburgh, J., in the Chancery Division on 1st and 2nd March, 1956, when judgment was given against the Crown, with costs.

Mr. J. E. S. Simon, Q.C., and Sir Reginald Hills appeared as Counsel for the Crown, and Sir James Millard Tucker, Q.C., and Mr. Desmond Miller for the National Coal Board.

Roxburgh, J.—The question in this case is whether or not the National Coal Board was entitled to any allowances under Part I of the Income Tax Act, 1945, which relates to industrial buildings and structures, and consequently under Paragraph 1 of Part I of the Eighth Schedule to the Finance Act, 1947, which applies these allowances for the purposes of the Profits Tax, in respect of certain dwelling-houses at Edwinstowe, Nottinghamshire, owned by the Board and occupied by persons employed by the Board at Thoresby Colliery.

It is common ground that these buildings qualify for the annual allowances claimed if they fall within the proviso to Sub-section (3) of Section 8 of that Act. I will put it in the singular, because each one ought, theoretically, to be dealt with separately.

> " . . . if the building or structure is likely to have little or no value to the person carrying on the trade when the mine "

—that is to say, the Thoresby mine—

> " . . . is no longer worked ".

The Commissioners have held that these houses are likely to have some substantial value until the year 2091, and that after that year they are likely to have little or no value, and that finding has not been questioned. Mr. Simon has said—I think I am quoting him accurately—I tried to write it down correctly—that, wherever the onus lies, the Crown did not call any evidence, and could not do so; but in the nature of things this mine, like others, is subject to premature closing, and, in so far as one can make an estimate, it must follow that the best estimate one can make today, for what it is worth, is that the mine will close in the year 2141. Therefore, the case depends entirely upon the construction of those very few words in the Sub-section.

If the Special Commissioners have rightly construed the Sub-section, on the facts and admissions which I have mentioned they have obviously reached the right conclusion, because they have found that the houses will have little or no value at a date anterior to the date at which they estimated that the mine would no longer be worked. If, on the other hand, they ought to have taken a date now already past, these houses would have had a substantial value if the mine had closed then, and the Crown would be right, and this appeal would succeed. It all turns really on the meaning of the word " when " in its context.

The particular assessment related to the year 1950–51, and the date on which the question whether the Coal Board was entitled to these allowances fell to be decided was 31st December, 1949, though the assessment would be made at some later date. The question is: What were the Special Commissioners called upon to do, and what am I now called upon to do?

For my own part, in spite of the able arguments which have been addressed to me, I am unable to see any ambiguity. But I know that, on a matter of construction, something may seem obvious to one person and yet to another person that construction may appear obviously wrong. That often happens in matters of construction. Therefore, though I have not

been able to see any ambiguity, I should be the last person to assert that there may not be one. So I propose to try to analyse the matter a little further.

The word "when" is sometimes used to indicate a definite point of time, albeit at the time of speaking it is incapable of precise ascertainment, and it is sometimes used to indicate indefinite points of time. I regard that distinction in this case as fundamental. Which use is intended by the speaker or writer depends upon the context. If I say: Value this chair when I die, there is only one point of time at which the chair falls to be valued, notwithstanding that the actual valuation may be directed to be made either before the happening of the event, when *ex hypothesi* the precise date is uncertain, or after the event, when *ex hypothesi* the actual date is known. But where the direction involves a valuation before I die, such a valuation cannot possibly be made without first of all making some estimate as to when I am to be expected to die. On the other hand, if I say: When I look upon the tombs of the great, every emotion of envy dies within me, the word "when" does not there indicate a precise point of time at all. It contemplates that I may pay several visits to the tombs of the great, and on every occasion of such visits I express my certainty that every emotion of envy will die within me. That is a different use of the word "when", because I can die but once, whereas I can go to Westminster Abbey and contemplate the tombs of the great many times.

To start with, there can be no doubt that the word "when" must be used in the first of those two senses, because, just as I can only die once, so this mine can "no longer be worked" only once. It is not a repetitive process and cannot be. So the direction is to ascertain whether the building is likely to have little or no value on the happening of an event which must happen, but can happen only once, though at the moment no one can specify the date on which it will happen. There is only one way in which to do that, in my view. You cannot estimate the value until you have estimated by some method or another the date when the event is likely to happen, because you have to ascertain the value of the building at a specified future time. You have to arrive at some sort of certainty as to the date before you can carry out the process at all.

The argument for the Crown is this, or at least this was how I first understood it. The Crown said that the Commissioners were to ascertain if the building or structure would have been likely to have little or no value to the person concerned if the mine had been closed even on the day after the matter came under consideration. That was the way in which I first understood the argument. I think it is to that contention that Sir James addressed his argument. So far as that is concerned, it does not seem to me that there is any ambiguity at all about the direction, and there is no difficulty whatever in carrying it out except one to which I will refer later. It would be quite impossible for me to read into the sentence the large number of words which would be required to give it that meaning which simply are not there.

But in reply Mr. Simon put it differently. His argument in reply was one of great subtlety, and I am not certain that I have got it quite straight, but I think I have. At any rate, I wrote down what he said, and what he said was this, that "when" equals "whenever that might be". He said that includes the whole of the future from the point of view of ascertainment, and the task of the Commissioners was to find out whether, if the mine is no longer worked at any time during the future, it is likely to have

(Roxburgh, J.)

little or no value. With all deference, I think there is a logical failure in that reasoning. In one sense, of course, if you are speaking of a future event, though it is one event and can only happen once, you can say that it might happen at any time in the future—in other words, that the whole of the future is open for its ascertainment. In one sense that is true, but not in the sense which will carry the final proposition. It is open only in this sense: if you are told to value something in relation to an event which must happen but has not yet happened, there are only two courses open to you. You can wait until it happens, in which case it would be a pure question of fact when did it happen; or, if that is what you are told to do—and only, I agree, if that is what you are told to do—you can make an estimate of when it may be expected in the ordinary course of events to happen. That estimate may well involve a large margin of error. If you have to estimate something by reference to a future event which must happen, but you do not know when it is going to happen, there is, so far as I know, no other possible method of proceeding. In some contexts it is often done, but it is certainly very difficult to do in some contexts, and it is difficult in this case. But when Counsel goes on to say that the task is to discover whether, if the mine is no longer worked at any time during the future, it is likely to have little or no value, in my judgment, that is a *non sequitur*. The question when you have ascertained the happening of the event by estimate or otherwise (that is to say, either because you have waited and seen it happen, or because you have estimated, in accordance with some direction, when it may be expected to happen) is not "if the mine is no longer worked at any time during the future", but whether, if the mine ceased to be worked on that particular date, the buildings were likely to have little or no value. Therefore, it seems to me that the last argument of Counsel is not really more persuasive than the first, though it breaks down for a different reason. The last argument appears to me, with all respect to Mr. Simon, to involve a manipulation of words which produces self-deception, whereas his former argument would be absolutely sound if only the words were there. On that point I cannot conceive why, if Parliament did mean to say that you were to value the houses at the date most suitable to the Crown, which in this case no doubt would have been the day after 31st December, 1949, upon the hypothesis that the mines might have ceased to be worked by then, it did not say so, because Parliament well knows how to direct a valuation on that sort of basis with or without the assistance of the word "deem".

There is one other point that I should mention. It was said by Mr. Simon against this construction of this Section that Parliament could never have intended the Special Commissioners to be confronted with such a difficult problem. If that be thought to be an argument which should receive consideration, I should like to refer to Section 27 (2) of this Act. It has no relevance to the present case except to show the sort of task which Parliament does think fit to impose upon the Special Commissioners and others in these days in connection with Income Tax allowances:

> "The amount of the said allowance shall be the amount which results from applying to the residue of the expenditure the fraction of which—(*a*) the numerator represents the output from the source in question in the basis period for the year in question; and (*b*) the denominator represents the sum of that output and the total potential future output of the source, estimated as at the end of that period, or the fraction one-twentieth, whichever is the greater."

Fortunately, I have not been called upon to try to understand that; but if I could make that calculation, I am quite certain that I could make the

calculation which I should have to make if I were the Special Commissioners, and if their construction, which I affirm, of this Section is correct.

What happens to the costs?

Sir James Millard Tucker.—I would ask your Lordship to dismiss the appeal with costs.

Roxburgh, J.—There has been no actual assessment?

Sir James Millard Tucker.—No, my Lord, because this is an interim decision, and the case will go back, without any Order by your Lordship at all, for further action.

Roxburgh, J.—Very well.

The Crown having appealed against the above decision, the case came before the Court of Appeal (Singleton, Morris and Romer, L.JJ.) on 11th and 12th June, 1956, when judgment was reserved. On 24th July, 1956, judgment was given in favour of the Crown, with costs (Romer, L.J., dissenting).

Mr. J. E. S. Simon, Q.C., and Sir Reginald Hills appeared as Counsel for the Crown, and Sir James Millard Tucker, Q.C., and Mr. Desmond Miller for the National Coal Board.

Singleton, L.J.—The National Coal Board owns a number of houses at Edwinstowe in Nottinghamshire. They are occupied by persons employed by the Board at Thoresby Colliery. Sinking operations at the colliery were commenced in the year 1925 and production began in 1928. The houses were built between the years 1926 and 1928 for the occupation of persons employed at the colliery, and they are still so occupied.

The question before the Court is whether the Board is entitled to certain allowances against Profits Tax for the chargeable accounting period 1st January, 1951, to 31st December, 1951. By virtue of the provisions contained in Paragraph 1 of Part I of the Eighth Schedule to the Finance Act, 1947, the answer depends upon whether the Board was entitled to annual allowances in respect of the houses under Part I of the Income Tax Act, 1945. Section 1 of the 1945 Act provides that a person who incurs capital expenditure on an industrial building or structure occupied for the purposes of trade shall be entitled to an initial allowance against Income Tax equal to one-tenth of his expenditure thereon. Section 2 provides for an annual allowance equal to one-fiftieth of the capital expenditure to a person entitled to an interest in a building or structure (as the Coal Board was at the material time) if at the end of the basis period the building or structure is an industrial building or structure. It is under this Section that the Board claimed to be entitled to annual allowances in respect of their colliery houses. The problem falls to be considered under the definition of " industrial building or structure " in Section 8 of the Income Tax Act, 1945, which is the one directly relevant to the question before the Court. I have thought it right to refer to earlier Sections in order to emphasise that the Act is one which is intended to give relief to the taxpayer.

The definition in Section 8 (1), in so far as is material, reads :

> " Subject to the provisions of this section, in this Part of this Act the expression ' industrial building or structure ' means a building or structure

(Singleton, L.J.)

> in use—(*a*) for the purposes of a trade carried on in a mill, factory or other similar premises; or (*b*) for the purposes of a transport, dock, inland navigation, water, electricity or hydraulic power undertaking; or (*c*) for the purposes of a trade which consists in the manufacture of goods or materials or the subjection of goods or materials to any process; or . . . (*e*) for the purposes of a trade which consists in the working of any mine, oil well or other source of mineral deposits, or of a foreign plantation . . . and, in particular, the said expression includes any building or structure provided by the person carrying on such a trade or undertaking for the welfare of workers employed in that trade or undertaking and in use for that purpose."

It is to be observed that dwelling-houses are not mentioned in Sub-section (1). It may be that they can come in under the words in paragraph (*e*) as used for the purposes of a trade which consists in the working of any mine, or, possibly, under the words "for the welfare of workers employed" in the concluding words of the Sub-section. If dwelling-houses are not within Sub-section (1) they are not within the definition, for Sub-section (3) does not add to it. This question was not argued before us; no doubt that was because of paragraph 2 (2) of the Case from which it appears that the only question the Special Commissioners were asked to consider was whether the proviso to Sub-section (3) applied to the dwelling-houses in question. It is important to notice that it is in Sub-section (3) that dwelling-houses are first mentioned and that in the proviso the words "for occupation by" persons employed appear in addition to the words "for the welfare of" at the end of Sub-section (1). I do not pretend to understand the reason for this. Sub-section (3) provides:

> "Notwithstanding anything in subsection (1) or subsection (2) of this section, but subject to the provisions of subsection (4) of this section, the expression 'industrial building or structure' does not include any building or structure in use as, or as part of, a dwelling-house, retail shop, showroom, hotel or office or for any purpose ancillary to the purposes of a dwelling-house, retail shop, showroom, hotel or office".

Thus, if dwelling-houses are within Sub-section (1), they are expressly excluded by Sub-section (3) unless they are within the proviso, which reads:

> "Provided that this subsection shall not apply to, or to part of, a building or structure which was constructed for occupation by, or for the welfare of, persons employed at, or in connection with the working of, a mine, oil well or other source of mineral deposits, or for occupation by, or for the welfare of, persons employed on, or in connection with the growing and harvesting of the crops on, a foreign plantation, if the building or structure is likely to have little or no value to the person carrying on the trade when the mine, oil well or other source or the plantation is no longer worked, or will cease to belong to such person on the coming to an end of a foreign concession under which the mine, oil well or other source, or the plantation, is worked."

Thus one has a definition of "industrial building or structure" which is far from clear, an express exclusion of a dwelling-house generally from the definition followed by a proviso upon the exclusion. This is most unfortunate drafting; it leads to endless waste of time in the Courts. And the last part, the proviso, is worse than that which has gone before. No one can with any confidence state what it means. The position as it is put to us is that these colliery dwellings fall within the definition of industrial buildings "if the building . . . is likely to have little or no value to the person carrying on the trade *when* the mine . . . is no longer worked." The word used is "when", not "if". And no one knows when the mine will fall within the words "is no longer worked".

Mr. Simon, on behalf of the Crown, submitted that the position must be considered in each year of assessment and, as the mine might, for one reason or another, cease working during any year it could not be said

in this case that the building (i.e., the house) had little or no value at the material time. The condition of the house might be of importance, but the condition of the mine was of no importance, said he ; or, to put it in another way, the test is : if the mine ceased to be worked during the year of assessment. The adoption of such an interpretation would be to make the relief given wholly illusory in a case such as this, where the mine is in a locality in which there is a demand for houses apart from workers at the mine. It may be that the draftsman had in mind the giving of allowances in respect of houses in an isolated area which would be worth little or nothing if the mine closed down. It is the wording of the proviso which is of importance. Sir Reginald Hills, following, said that the only question to ask oneself each year is: Has the house any value today? and that it was not justifiable to ask, as the Special Commissioners had done: When would the pit cease to be worked by reason of its being exhausted or worked out?

On behalf of the National Coal Board Sir James Millard Tucker pointed out that this Part of the Act was to give relief of a kind that had not been given to the taxpayer before, and that there was nothing in the proviso to show an intention to limit its application to houses built in isolated places. He referred to the definition of " basis period " in Section 57 of the Act of 1945 to show that in one sense you are always looking at a past period and asking what was the state of affairs at that date, and he submitted that the decision of the Special Commissioners was right.

The finding of the Special Commissioners is:

> " (1) We find that, on the suppositions (i) that coal continues to be extracted from the mine at the present rate of extraction and (ii) that nothing happens to result in a premature closing of the mine before the seams are exhausted, the mine will cease to be worked in or about the year 2141. In our view these two suppositions are reasonable, and no evidence of any sort was produced to contradict or throw doubt upon them ; for these reasons we find that the mine is likely to be no longer worked in or about the year 2141 and not earlier. In so far as it may be necessary for the purpose of the present appeal to decide when the mine will in fact be no longer worked, we find that it will be no longer worked in or about the year 2141, for the same reasons. We find that until the year 2091 the houses in question are likely to have some substantial value, and that after the year 2091 they are likely to have little or no value."

There is much to be said for the way the Commissioners approached the problem ; still there are difficulties. One has to consider " if the building or structure is likely to have little or no value ", but one is not called upon by the words of the proviso to consider when the mine is *likely* to be no longer worked: in the latter connection the words are simply " when the mine . . . is no longer worked ". Now, the decision of the Special Commissioners, which is supported by the judgment of Roxburgh, J., proceeds upon an estimate as to the probable life of a house in contradistinction to the probable working life of the mine. That is closely akin to introducing the word " likely " into the proviso a second time. Again, it seems to be clear that the provisions as to annual allowances are intended to cease after fifty years, or perhaps after forty years if an initial allowance has been given : see Section 2 (1) and (2) (*b*) of the 1945 Act. If that is the correct view it seems to be out of line to consider an imaginary position which might exist 135 years hence. And the submission for the Crown receives support from the proviso to Section 14 (1) of the Act. The word " when " which there appears must be used in the sense " whenever ". If it is read in the like sense in the proviso to Section 8 (3) the words " whenever the mine . . . is no longer worked " would be equivalent to " on the mine being no longer worked, whenever that may happen ". I feel the force of Sir Reginald

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Hills' submission that the question is one for consideration each year, for there might be a change of one kind or another. At the present time there is considerable value in these houses apart from the mine and it is not likely that that position will change. In other cases there might well be a change over the years.

There can be no doubt, I think, that one object of Part I of the Act is to give allowances over a limited period in respect of houses built for, and occupied by, miners if there is no value in the houses to the one carrying on the trade apart from the working of the mine. Effect is given to that if the words are read in the way I have suggested. I do not remember encountering a more difficult question of construction. It may be said that the word " when " in the proviso to Section 8 (3) can be read in more ways than one. This has encouraged me to look at the purpose of the proviso. It is only dwelling-houses of a particular kind which come within it. I am not satisfied that the National Coal Board's houses at Edwinstowe fall within it. Unless it is shown that they are within the proviso it cannot be said that those who carry on the trade are entitled to the allowances claimed. Among the meanings of the word " when " I find " at the (or a), or at any time at which ", " on any occasion that ", and " sometimes merely if ". Thus I would read the sentence in the proviso as " if the building or structure is likely to have little or no value to the person carrying on the trade at a time at which the mine . . . is no longer worked ".

I am in favour of allowing the appeal.

Morris, L.J.—The question which is raised in the Case Stated turns upon the construction of certain words in the Income Tax Act, 1945. In Section 8 of that Act there is a definition of the expression " industrial building or structure ". It is a definition for the purposes of Part I of the Act. It is under that Part of the Act that the question of qualification for an annual allowance arises in this case. If the dwelling-houses at Edwinstowe are to be regarded as industrial buildings or structures then it is agreed that the Board is entitled to annual allowances in respect of them. Paragraph 1 of Part I of the Eighth Schedule to the Finance Act, 1947, applies those allowances for the purposes of Profits Tax.

The Case Stated records that it was common ground between the parties that the dwelling-houses would qualify for annual allowances unless they were buildings to which Section 8 (3) of the Income Tax Act, 1945, applied. This means that the parties have been content to agree that the dwelling-houses are within Section 8 (1). This in turn means that the parties have agreed that the dwelling-houses are in use for the purposes of a trade which consists in the working of Thoresby Colliery. The Court is not called upon to consider Section 8 (1) or to be concerned with what was agreed. In ordinary parlance no one would look upon a dwelling-house as being an industrial building or structure, but it is to the statutory definitions that regard must be paid. The provisions of Sub-section (3) proceed to exclude certain buildings or structures: there is an exclusion of

> " any building or structure in use as, or as part of, a dwelling-house, retail shop, showroom, hotel or office or for any purpose ancillary to the purposes of a dwelling-house, retail shop, showroom, hotel or office ".

The Case Stated records that the parties agreed that the dwelling-houses come within the words I have quoted, but Sub-section (3) has an elaborate proviso ; its effect is to provide exemptions from the exclusions.

It is to be noted that the exclusions relate to buildings or structures in use as, or as part of, (*a*) a dwelling-house or (*b*) a retail shop or (*c*) a

showroom or (*d*) an hotel or (*e*) an office or for purposes ancillary to the purposes of such buildings or structures. The exemptions from the exclusions may or may not relate to all of these. The exemptions are stated generically. They cover buildings or structures either (i) constructed for occupation by persons employed at a mine, oil well or source of mineral deposits or (ii) constructed for occupation by persons employed in connection with the working of a mine, oil well or source of mineral deposits or (iii) constructed for the welfare of persons employed at a mine, oil well or source of mineral deposits or (iv) constructed for the welfare of persons employed in connection with the working of a mine, oil well or source of mineral deposits or (v) constructed for occupation by persons employed on a foreign plantation or (vi) constructed for occupation by persons employed in connection with the growing and harvesting of the crops on a foreign plantation or (vii) constructed for the welfare of persons employed on a foreign plantation or (viii) constructed for the welfare of persons employed in connection with the growing and harvesting of the crops on a foreign plantation. The question which has to be decided is whether the dwelling-houses at Edwinstowe come within the words of the proviso. The agreement of the parties first takes the houses within the ambit of Sub-section (1) and then within the exclusion of Sub-section (3) unless the proviso exempts them from such exclusion. It is agreed that the early words of the proviso are satisfied, for the houses were constructed for occupation by persons employed at Thoresby Colliery. The essence of the dispute is, therefore, whether the houses are likely to have little or no value to the Coal Board when Thoresby Colliery is no longer worked.

The crucial words of the proviso which are here relevant are the words " when the mine . . . is no longer worked ". The question arises as to what situation is denoted by these words. A comparable situation is when a foreign plantation is no longer worked. A " foreign plantation " is defined to mean " any land outside the United Kingdom used for the growing and harvesting of crops ". If the growing and harvesting of crops on such land ceases the land will no longer be worked. The cessation of the growing of crops or of the harvesting of them (which by definition includes " the collection thereof, however effected ") may result from an infinite variety of causes. But the land itself will remain and it may be owned by " the person carrying on the trade ". It will continue to exist and to be available for the growing and harvesting of crops. Another situation which may be considered is that which may arise if the owner of a source of minerals who has been extracting such minerals ceases to do so. The source may be thought to be so abundant in quantity as to be capable of being worked for a very long time. If the owner decides for business or economic reasons to cease extracting, the period thereafter will presumably be one " when the source is no longer worked ". An owner (or a lessee or an owner of a concession) of an oil well may decide to cease working it at a time when the continuance of its yield is thought to be assured for very many years. The period after cessation will presumably be one " when the oil well is no longer worked ".

The problem of construction which is presented by the words of the proviso is one which in this case relates to possible annual allowances in respect of dwelling-houses constructed between 1926 and 1928. An annual allowance is of an amount representing one-fiftieth of the capital expenditure incurred on the construction of the building or structure. It would seem that no allowance is made for a building or structure that has existed for 50 years. In the present case the basis period for the purposes of Section 2 of the Act is the year ending 31st December, 1949. An annual allowance

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can be claimed if the houses were at that date industrial buildings or structures. They are within that definition if they are likely to have little or no value to the Coal Board when the Thoresby mine is no longer worked.

It is I think in the first place to be observed that the words of the Section are " when the mine . . . is no longer worked " and not " when the mine . . . is no longer likely to be worked ". In the second place it is to be observed that the phrase is " when the mine . . . is no longer worked " and not " when the mine . . . is worked out ". The situation referred to in the proviso is that which will exist when a mine or an oil well or a source of mineral deposits or a foreign plantation " is no longer worked ". There may at such time be abundant coal or oil or minerals or crops. Another situation referred to is that which may arise if a foreign concession ends and the building or structure ceases to belong to the person carrying on the trade of working a mine or oil well or source of minerals or plantation under such concession.

On behalf of the Coal Board it is submitted that the enquiry which the proviso requires to be raised is as follows: Are the houses likely to have little or no value when Thoresby Colliery is no longer worked? It is submitted that this enquiry cannot be answered until the date is ascertained when Thoresby Colliery is likely to be or will in fact be no longer worked; it is further submitted that this date must be estimated in as reasonable and rational a way as seems possible and that an appraisement of the future value, at such estimated or calculated time, must then be made in respect of the houses.

On behalf of the Crown it is submitted that on such approach there is involved a most formidable if not an impossible task. It is submitted that the words of the proviso merely require assessing whether the houses are likely to have little or no value on the mine being no longer worked upon the supposition of a cessation of working or on the hypothesis that the mine is no longer worked, the assessment being in this case made by reference to 31st December, 1949. Stated otherwise it is submitted that what has to be considered is whether the houses are likely to have little or no value at any time when the mine ceases to be worked, i.e., whenever that may be and for whatever cause it may be.

It seems to me that the wording employed in the Section is such that argument may be submitted against whatever construction is preferred. The concluding words of the proviso refer to " the coming to an end of a foreign concession ". There is finality about that. In many cases it will be known in advance when a foreign concession will end, but in some cases this date will not be known in advance. The element of certainty, however, is that when the event happens, whenever that may be, certain buildings or structures will cease to belong to " the person carrying on the trade ". This suggests that the underlying conception or notion of the proviso is of buildings or structures having no independent value to the person carrying on the trade if and when he ceases to carry on the trade.

The construction adopted by the Special Commissioners leads, and has in this case led, to the undertaking of the burden of making decisions of somewhat startling boldness. Three suppositions are in this case made: (1) that coal will be extracted in the future at present rates of extraction, (2) that there is enough coal in the seams so that at such present rates extraction can continue until about the year 2141, (3) that nothing will happen to result in the premature closing of the mine before the year 2141. As to the second

of these, I see no reason why expert evidence should not be satisfactory in proof of it. As to the other two the Commissioners state that they regard the suppositions as reasonable and they say that " no evidence of any sort was produced to contradict or throw doubt upon them ". They therefore found (*a*) that the mine " is likely " to be no longer worked in or about the year 2141 and not earlier and (*b*) that the mine *will* be no longer worked in or about the year 2141 (i.e., at a date 186 years later than the hearing before the Special Commissioners).

With every respect, it seems to me to be expecting too much if it were thought that evidence could be adduced to prove that nothing will happen in the next 186 years to bring about the closing of the Thoresby Colliery. I doubt if the most enlightened and imaginative scientist would venture to prophesy the shape of things to come so far ahead; and the estimates of scientists could not alone be taken into account; there would be needed the opinions of those who may be qualified to assess the future courses of human behaviour. I cannot think that in the year 1769 (i.e., 186 years past) there could have been accurate forecast of the structure and pattern of the industrial political and social life of today. But furthermore the reasons which might bring about the cessation of the working of a mine are multiform and manifold. They may be economic or they may be political; they may depend upon local events or upon world events. A construction of the Act that involves making prophecies or guesses as to the future which must be highly speculative and conjectural is in my judgment only to be adopted if it is clearly denoted.

If the question is posed, Are the houses likely to have little or no value at the time when the Thoresby Colliery is likely to cease working? then it would have to be decided when that would be and whether at such time the houses would be likely to have value. The Section does not however use the phrase " when the mine is no longer likely to be worked ". If the question is posed, Are the houses likely to have little or no value at such time as Thoresby Colliery ceases to be worked? then a rational answer might well be: It all depends. The answer might be: If the colliery ceases to be worked at such and such a date, yes; if at another date, also yes; if at a different date, no. To that answer additions and qualifications would have to be made as to various possibilities in reference to various dates. It would have to be stated that in reference to any particular chosen date there will have to be assessment as to the size of the population in the locality and its disposition and the nature of the industry and of the occupations of the people. But, furthermore, if the future value of dwelling-houses is being assessed much will depend upon the manner in which they have been looked after and kept in repair. In the present case there has been agreement that by the year 2091 the houses at Edwinstowe will have little or no value. But in a case where there is no agreement as to such a matter the question as to the value of a house some 136 years hence must depend upon an infinite variety of circumstances amongst which will be whether they will have had much or little money spent on them and whether they will have been kept in constant repair and will have been properly maintained. But it seems to me that to whatever question is posed some definite answer is to be expected. By reference to the end of the basis period it has to be decided affirmatively or negatively whether there can be an annual allowance. There cannot be a vacillating answer or one hedged about by numerous qualifications. It may well be that the question must be answered annually and it may be (though it is not necessary to decide this) that there may be different answers for different years.

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The considerations to which I have referred tend in my judgment to show that the construction favoured by the Special Commissioners is not the one to be adopted. It seems to me that the purpose of the proviso is to exempt from exclusion certain buildings or structures which are really only of value during the continuance of the trading for the purpose of which they are used. Thus on a foreign plantation a retail shop might be constructed for the welfare of workers employed. It would be covered by Section 8 (1). But, being a retail shop, it is by Sub-section (3) taken out of the definition of " industrial building or structure " unless by the proviso it is retained within that definition. Would it be likely to have little or no value when the plantation is no longer worked? The answer might well be that, as it is located on a plantation which will be deserted and vacated by everyone when the plantation is no longer worked, the shop is likely to be of little or no value when the plantation is no longer worked. The cessation of the working of the plantation might come about for various reasons but not at any predictable time. The plantation would still be capable of producing crops if it were worked but if it were not worked there would be no need for the shop. The value of the shop would have gone because its use and value were so closely linked with the working of the plantation. Similar considerations would apply to dwelling-houses erected on the plantation for the housing of workers who would only be there so long as the plantation was worked.

There must be many contexts in which the word " when " is not used in a purely temporal sense. It may be used to denote the possible occurrence of an event and it may simultaneously denote the period of duration of such event if it occurs. The word may be used to mean " in the event of " or " in the case of ". When it is so used it is probably the consequence of some event which is of importance and not the time when it may happen. In In re *Stead,* [1913] 1 Ch. 240, a question arose as to the meaning of the phrase " when the property is not sold " as it occurred in Schedules of the General Order to the Solicitors Remuneration Act, 1881. Neville, J., held that the reference was to cases where property was not sold in the first instance but was sold afterwards perhaps by private treaty after abortive attempts to sell by auction. In effect the reference appears to have meant, in the event or in the case of property not being sold in the first instance. In *Lower* v. *Porter,* [1956] 1 Q.B. 325, a phrase which came under consideration was " such that when the dwelling-house is let under the tenancy it is a dwelling-house to which the principal Acts apply." The phrase permitted of different interpretations. In expressing his opinion Hodson, L.J., at page 331, said:

> " The word ' when ' should not, it seems to me, be construed, in its context, in a temporal sense; it is merely used to make the phrase equivalent to ' in the case of a dwelling-house if let under the tenancy,' so as to identify the particular dwelling-house ".

I cite these cases merely to illustrate some diverse uses of the word " when ".

If the phrase " when the mine, oil well or other source or the plantation is no longer worked " is read in the sense or with the meaning of " in the event (or in the case) of the mine, oil well or other source or the plantation being no longer worked " it may be said that in order to resolve the question as to the value of certain buildings or structures on the happening of such event some particular time for its happening must be taken. It seems to me that what has to be done is to decide, by reference to the end of a basis period, whether under conditions existing at such time certain buildings or structures would be likely to have value if the assumption or supposition were made that the mine or oil well or source of minerals or plantation for

the purposes of which the buildings or structures were constructed was then no longer being worked. The purpose of the proviso as I see it is to preserve certain buildings or structures from disqualification if their value is really dependent upon the continuance of the working of a mine or an oil well or a source of mineral deposits or a foreign plantation; or, in other words, if they are likely to have little or no value when the mine, oil well, source of mineral deposits or foreign plantation is no longer worked.

It is of interest to see the provisions of Section 14 (1) of the Income Tax Act, 1945. They are as follows:

> "References in this Part of this Act to expenditure incurred on the construction of a building or structure do not include—(*a*) any expenditure incurred on the acquisition of, or of rights in or over, any land; or (*b*) any expenditure incurred on preparing, cutting, tunnelling or levelling any land: Provided that paragraph (*b*) of this subsection shall not apply to expenditure on work done on the land to be covered by a building or structure for the purposes of preparing the land to receive the foundations of the building or structure, being work which may be expected to be valueless when the building or structure is demolished and not being work which consists of cutting or tunnelling."

Thus the result will be that expenditure on work done on the land to be covered by a building or structure for the purposes of preparing the land to receive the foundations of the building or structure can be counted or included if it is work "which may be expected to be valueless when the building or structure is demolished". It would appear that the word "when" refers to such time when the building or structure is demolished irrespective of the precise date when that will be. It is whenever that will be.

Though I am much impressed by the difficulties which beset each view in turn, I have for these reasons come to the conclusion that the construction submitted by the Crown is correct. The dwelling-houses had abundant independent value whether the Thoresby Colliery was worked or not. It is agreed that

> "if mining operations had ceased or should cease at Thoresby Colliery during 1951 or 1952 or in any of a number of years following the houses would have a substantial value and would not have 'little or no value' within the meaning of Section 8 (3) of the Income Tax Act, 1945".

In my judgment, the Board was not entitled to the annual allowances claimed. I would allow the appeal.

Romer, L.J.—It is with both regret and hesitation that I find myself at variance with the judgments which my brethren have delivered, but for myself I am not persuaded that the conclusion at which the Special Commissioners and Roxburgh, J., arrived in this very difficult case was wrong.

The case depends upon the true meaning and effect of Section 8 of the Income Tax Act, 1945, and, in particular, of the proviso to Sub-section (3). The Crown proceeds to what it contends is the true construction of the proviso by a process of reasoning which may be shortly summarised as follows. After observing, by way of preliminary comment, that there is no intelligible or logical reason why Parliament should have intended to confer the special privileges which result from the decision of the Commissioners and of Roxburgh, J., in the present case, the Crown submits that the first thing to do, in order to construe Section 8, is to ascertain what is the common characteristic of mines, oil wells or other sources of mineral deposits and foreign plantations. This characteristic, says the Crown, is that they are in general situated in remote and isolated places. It follows from this that houses which are constructed for occupation by or for the

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welfare of persons employed on or in connection with mines, oil wells, etc., would usually be of no use for occupation by anyone else; for no one else would want to live in them. It is a legitimate assumption, therefore, (so runs the argument) that the proviso to Sub-section (3) is directed in its application solely to buildings which are essential to the owners of the mines, etc., for the purpose of housing or providing amenities for their workers but which would be of little or no use to them if they had no workers to house or provide for. In the light then of these considerations it is contended that the proviso should be construed as meaning that the authorised annual allowance should extend only to houses which would have little or no value if divorced from the mines, etc., in connection with which they are used; and that this result can and should be achieved by reading the words "when the mine . . . is no longer worked" in some such sense as "on the mine . . . being no longer worked, whenever that may be".

I am not altogether sure that the premise upon which it is sought to base this reasoning is necessarily well founded. Whilst it is true that some coal mines, to take one of the specified forms of industrial activity, are to be found in lonely and far away places, this cannot by any means be said of all of them; for it is well known that many coal mines in Great Britain are situated quite close to large towns, whose inhabitants would gladly occupy the miners' dwellings if the mines themselves closed down; and indeed it is contended by the Crown in the present case that the Thoresby Colliery itself fails to conform to the requisite degree of isolation. It seems to me more probable that the common characteristic of the industries referred to in Section 8 (1) (*e*) is that they constitute assets of a wasting nature, a fact which the Legislature recognises (except as to foreign plantations) in Part III of the Act, which deals with "the working of a mine, oil well or other source of mineral deposits of a wasting nature". However that may be, I am unable on the whole to accept the construction which the Crown seek to place upon the Sub-section though I confess that I can find no solution to the problem which is to my mind in conformity both with the relevant statutory language and with common sense and probability.

We were referred by Mr. Simon to other provisions of the 1945 Act which, so he submitted, lend support to the construction of the proviso for which the Crown contends. I am unable, for myself, to derive much assistance from these provisions in the elucidation of a problem which, as it seems to me, depends ultimately for its solution on the language of Section 8 itself. It is quite true, of course, that the word "when" can be used in an indefinite future sense as well as in a definite future sense; an example of the former use is: I shall retire from business when my uncle dies; whilst an example of the latter is: when I travel to France next week. The Crown seeks to attach the former meaning to the word "when" in the proviso, but there appear to me to be reasons of some cogency for rejecting this construction.

In the first place it seems to me that the phrase "if the building or structure is likely to have little or no value to the person carrying on the trade when the mine is no longer worked" is projecting the mind forward to the happening of a definite event which will occur at some point of time in the future which cannot immediately be ascertained with precision. It may be postulated with reasonable certainty of any mine that it will cease to be worked sooner or later and the question to which the proviso gives rise is whether a building which is used in connection with the mine is *likely*

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(and I stress the element of surmise which is inherent in that word) to have value to the person who is carrying on the trade when that time arrives. The construction which the Crown urges, however, seems to be quite inconsistent with this composite conception of futurity and surmise because the question which the proviso poses can, on that construction, invariably be answered by reference only to a position which is already known and to immediately existing possibilities, however unlikely the latter might be. All that the Commissioners need ask themselves, according to the Crown, is whether a building would have value to the owner of a mine if the mine ceased to be worked during the following week or at any time during the year of assessment. Indeed, in strictness, the question would have to be asked retrospectively; for example, in preparing the assessment for the year 1950–51 the relevant inquiry would be: would the building have had little or no value on 31st December, 1949, on the mine ceasing to be worked whenever that might be?—and a question in a corresponding form would have to be asked at some time subsequent to 5th April in each year. It appears to me that this result of applying the Crown's contention tends to show that it is not the correct one, for it involves the application of hypothetical possibilities, however unlikely they may be, to an existing state of affairs; whereas the proviso, in my judgment, is solely concerned with the probable factual position at a future time.

The second objection to the Crown's submission, as it seems to me, is that if the intention of the Legislature was that for which Mr. Simon and Sir Reginald Hills contend, it would have been so very easy and natural to have expressed it by appropriate language. So far as I can see, the substitution of "if" for "when" would have been sufficient for the purpose; and the very fact that the word "if" appears in the preceding line of the proviso is some indication that the draftsman's "when" was intended to bear a different meaning. Alternatively, Parliament's alleged intention could well have been expressed by some such language as: "if the use of the building or structure is so closely connected with the working of the mine . . . that it is likely to have little or no value to the person carrying on the trade whenever the mine . . . is no longer worked". That is what the Crown says the proviso means; it is not, however, what the proviso says, and I can find no sufficient warrant for introducing language which is not there.

It seems to me that the Special Commissioners and the learned Judge attributed a correct interpretation to the proviso in its application to the facts of the present case. They thought that the question whether the buildings and structures which are now in question are likely to have little or no value to the National Coal Board when the Thoresby Colliery is no longer worked cannot be answered without reference to the probable future life of the colliery. In this I agree with them; for every appraisement of values on the happening of a future event must necessarily depend to a large extent upon when that event is likely to occur. No doubt the calculation which the Commissioners are required to make, if my view of the Section is right, may in some cases be a difficult one; it appears, however, to be of much the same quality as that envisaged by Section 27 (2) of the Act so I doubt whether much weight can be attached to that objection. It may very well be that the intention of the Legislature was in accordance with the interpretation for which the Crown contends; as, however, I do not myself think that such intention emerges from the language used I would myself dismiss the appeal. But as my brethren take a different view the appeal will be allowed.

Sir Reginald Hills.—The appeal will be allowed with costs?

Singleton, L.J.—Yes, in this Court and in the Court below.

Sir Reginald Hills.—Yes, my Lord.

Singleton, L.J.—I saw from the Order appealed against that the other side had the costs below, and I suppose you want them in both Courts?

Sir Reginald Hills.—Yes, my Lord.

Mr. Patrick Jenkin.—I am instructed to ask for leave to appeal to the House of Lords.

Singleton, L.J.—Would you tell me what is the purpose of it all? There are very involved matters here which have taken a long time already. It appears to me to be a dispute between two Government Departments at great cost and at great length to everyone. What is it all about? If it is a case of a coal mine, now the Government has got them all.

Mr. Jenkin.—Most mines are within the control of the Board.

Singleton, L.J.—There is something between you and the Statute is not quite clear. Why not get the Statute made quite clear rather than incur all these costs? It occupies the time of the Court too and not only in Court hours.

Mr. Jenkin.—Yes. My clients have not quite the control that they would wish over the activities of Parliament.

Singleton, L.J.—I do not like all this waste of time which is involved. I am told the same language is repeated in a later Act. Is that right?

Mr. Jenkin.—Yes, it appears in the 1949 and 1952 Acts.

Romer, L.J.—Do other cases depend on this case?

Mr. Jenkin.—Yes, a large number of them.

Romer, L.J.—With regard to other collieries—all the collieries in England?

Mr. Jenkin.—Yes, I think so, but perhaps I may take instructions? (*Mr. Jenkin consulted with his clients.*) I am instructed that there is a large number of houses involved. On the matter of construction, it is not only the Coal Board who are interested in the construction of this Section.

Singleton, L.J.—It is only the Coal Board which is interested in the mines now, is it not?

Mr. Jenkin.—They have the working of most of the mines in Britain.

Singleton, L.J.—I recommend them to leave any other part to somebody else. I do not see the point of a contest on a question of this kind going on year after year between two Government Departments. They ought to be able to resolve it.

Mr. Jenkin.—The Coal Board is not a Government Department.

Singleton, L.J.—You are quite right. I apologise for saying it was. But it is a bit like it, though.

Mr. Jenkin.—They are in a very different position.

Singleton, L.J.—I know. If it be necessary, I think we should say that the point is of sufficient difficulty and if you want leave to appeal on that ground we think you ought to have it. How far it can help anyone in the long run I wonder.

Mr. Jenkin.—The Coal Board has certain statutory duties.

Singleton, L.J.—I cannot see why they do not get somebody to consider amending this part of the legislation. It could be made quite clear, you know. This particular provision could be made clear; there is no doubt about that.

Mr. Jenkin.—It is very doubtful whether Parliament would amend it retrospectively going back to 1949.

Singleton, L.J.—You could adjust your differences in the past. Have you anything to say, Sir Reginald?

Sir Reginald Hills.—I am only instructed to deal with the general point. On what your Lordship is talking about I am certainly under the impression that it is no part of the policy of Parliament that the various nationalised industries should not pay tax. If they be taxed, they should pay the tax.

Singleton, L.J.—I do not think anyone suggested that.

Sir Reginald Hills.—It is not only the mines of a particular colliery owner but there are the general mineral deposits and others who carry on pits in the United Kingdom who may be affected by this. I do not know of any other mining case, but it is fairly far-reaching. I am saying that in support of my friend. I do not think that it is possible to alter the work of the appeal Commissioners and the Courts because tax is to be paid by a nationalised trade.

Singleton, L.J.—You may be right.

Sir Reginald Hills.—It has got to pay tax.

Singleton, L.J.—If it is not possible to do anything it ought to be. You may have leave.

The National Coal Board having appealed against the above decision, the case came before the House of Lords (Lords Morton of Henryton, Reid, Radcliffe, Cohen and Keith of Avonholm) on 8th and 9th April, 1957, when judgment was reserved. On 29th May, 1957, judgment was given unanimously in favour of the Crown, with costs.

Mr. John Pennycuick, Q.C., and Mr. Desmond Miller appeared as Counsel for the Board, and Mr. Geoffrey Cross, Q.C., and Sir Reginald Hills for the Crown.

Lord Morton of Henryton.—My Lords, I have had the privilege of reading in print the opinion which is about to be delivered by my noble and learned friend, Lord Radcliffe, and I agree with it, but I shall add a few words in view of the striking difference of judicial opinion which has arisen in this case.

(Lord Morton of Henryton.)

Your Lordships have to construe the proviso to Section 8 (3) of the Income Tax Act, 1945, and, in particular, the words

> "if the building or structure is likely to have little or no value to the person carrying on the trade when the mine, oil well or other source or the plantation is no longer worked".

Counsel for the Appellant Board claimed throughout his argument that the meaning which the Board seeks to apply to the words in question is their "natural meaning" and that any other construction of the words involves either giving to them a strained or unnatural meaning or inserting into the Section words which are not there.

My Lords, I reject this claim. To my mind the most natural meaning of the words used is the meaning attributed to them by the majority of the Court of Appeal, and it is the meaning which the words at once conveyed to my mind when they were first read by Counsel for the Board. I think it would be a natural and correct use of language if a valuer expressed himself as follows, after viewing a row of miners' cottages beside a mine in a lonely and desolate spot: In my opinion these cottages will have little or no value to the owners when the mine is no longer worked; when that time comes it will be impossible for the owners to sell or let these cottages, because they are so far from any town or village. A case of this kind would be, in my opinion, an example of the situation which the Legislature had in mind when the proviso to Section 8 (3) of the 1945 Act was enacted. I do not see any necessity for inserting any words into the proviso, but if I sought to expand the phrase "when the mine is no longer worked" so as to make its meaning clear beyond any possibility of doubt, I should insert after the word "when" the words with a scriptural flavour "it comes to pass that".

Having regard to the course which this case has so far taken, I realise that the words in question cannot be as clear as they seem to me. In my opinion, however, any doubt is removed when one considers the context in which these words appear, and the general scheme of allowance to industrial buildings which is revealed in the Income Tax Act, 1945. On this part of the matter I can add nothing to the opinion of Lord Radcliffe.

I would dismiss the appeal.

Lord Reid.—My Lords, I agree.

Lord Radcliffe.—My Lords, the question raised by this appeal is whether the National Coal Board is entitled to claim the annual tax allowance for industrial buildings and structures in respect of a number of dwelling-houses at Edwinstowe in Nottinghamshire which belong to the Board and are occupied by some of its employees who work at Thoresby Colliery in the same county.

The tax against which the allowance is sought is Profits Tax assessed upon the Board's profits for the chargeable accounting period represented by the calendar year 1951. Nothing, however, turns upon the details or the machinery of the assessment. It is common ground that the validity of the claim depends upon the true construction of Section 8 of the Income Tax Act, 1945, in particular Sub-section (3) of that Section, as applied to the circumstances of this case; and that the allowances given by that Section, if admissible in the assessment of profits under Schedule D of the Income Tax Act, would also be admissible in a Profits Tax assessment for the comparable period or periods.

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The point was presented to us as a very short one. Do these houses come within the description which is found in the proviso to Section 8 (3),

> "a building or structure . . . likely to have little or no value to the person carrying on the trade when the mine, oil well or other source or the plantation is no longer worked"?

It was even said that the whole point at issue turns upon the meaning to be assigned to the word "when" in that sentence. My Lords, I agree that the point is indeed a short one; and, perhaps, in one sense it may be said that the issue comes down to one of deciding what the word "when" means in the context of the proviso which I have just quoted. Nevertheless, the solution has produced a diversity of judicial opinion. The Special Commissioners held that the houses did qualify for allowance. On appeal to the High Court, Roxburgh, J., agreed with them. The Court of Appeal by a majority reversed this decision, Singleton and Morris, L.JJ., holding that the allowance was not claimable, Romer, L.J., in a dissenting judgment holding that it was. I think myself that the true meaning and effect of the proviso are better ascertained by setting it in the context of the general scheme of industrial building allowances introduced by the Income Tax Act, 1945, than by concentrating any close attention upon the rich variety of permissible uses which the English language allows to the word "when".

As is well known, the 1945 Act introduced into our tax code the first general scheme for the allowance of depreciation in tax assessments. Even then, though general, the scheme was by no means comprehensive. The first six Parts of the Act, extending from Section 1 to Section 47, classified allowable expenditure under separate heads, industrial buildings and structures, machinery and plant, mines and oil wells, agricultural land and buildings, patents, scientific research. No place was found for expenditure on dwelling-houses in this scheme except so far as it ranked as expenditure on an industrial building under the special provisions of Part I with which we are now concerned, or as expenditure on a farm-house or cottage under Section 33, which appears in Part IV.

The effect of the allowances given by Part I was to provide an initial allowance of one-tenth and an annual allowance of one-fiftieth of his capital expenditure to every person who incurred such expenditure on an industrial building or structure occupied for purposes of trade. Thus, by the end of forty-five years, ignoring complications, the whole of the original capital expenditure would have been written off as an allowance against assessable profits. The definition of what was meant by "industrial building or structure" for this purpose was supplied by Section 8. The scheme of that Section is that by Sub-section (1) the expression "industrial building or structure" is defined as meaning a building or structure in use for any one of a number of industrial purposes which are there listed, including, in sub-head (*e*),

> ". . . the purposes of a trade which consists in the working of any mine, oil well or other source of mineral deposits, or of a foreign plantation".

By Sub-section (2), provision, not now material, is made for applying the Section to a part of a trade or undertaking where it cannot be applied to the whole; and Sub-section (3) is in the following terms:

> "Notwithstanding anything in subsection (1) or subsection (2) of this section, but subject to the provisions of subsection (4) of this section, the expression 'industrial building or structure' does not include any building or structure in use as, or as part of, a dwelling-house, retail shop, showroom, hotel or office or for any purpose ancillary to the purposes of a dwelling-house, retail shop, showroom, hotel or office: Provided that this subsection shall not apply to, or to part of, a building or structure which was constructed for

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> occupation by, or for the welfare of, persons employed at, or in connection with the working of, a mine, oil well or other source of mineral deposits, or for occupation by, or for the welfare of, persons employed on, or in connection with the growing and harvesting of the crops on, a foreign plantation, if the building or structure is likely to have little or no value to the person carrying on the trade when the mine, oil well or other source or the plantation is no longer worked, or will cease to belong to such person on the coming to an end of a foreign concession under which the mine, oil well or other source, or the plantation, is worked."

It seems to me fairly plain what these rather complicated provisions were intended to secure. The general rule was to be that capital expenditure on dwelling-houses, retail shops, showrooms, hotels or offices was not to rank as industrial expenditure or, accordingly, to rank for depreciation allowance, even though it was made or they were occupied for purposes of trade. But a special exception was to be made in taxing the profits arising from the working of mines, oil wells and foreign plantations. Capital expenditure on dwelling-houses, etc. put up by those conducting such enterprises could be treated as industrial expenditure and allowed accordingly if the assets created by the expenditure were so intimately connected with the enterprise, either by character, situation or the terms of working imposed by a foreign concession, that they could not be expected to have any value apart from their contribution to the conduct of the enterprise. In the special circumstances thus envisaged expenditure upon the construction of such dwelling-houses was in truth expenditure on an industrial building and nothing else, and, unlike expenditure on other dwelling-houses, its useful life must necessarily expire with the expiry of the working of the mine, oil well or plantation or, alternatively, its value to the trader disappear with the end of the concession.

It is common knowledge that many mines, oil wells and plantations worked abroad by traders taxable in this country are in isolated places. Townships, large or small, have to be created, with dwelling-houses, shops, and offices, for the occupation of those serving the enterprise in these remote spots. So far as this country is concerned, the mining camp has never been one of its features; and the mining village which was wholly dependent upon the continued working of the local mine is, I dare say, becoming a thing of the past. But that means only that there will be less occasion for conceding the allowance in respect of dwelling-houses in this country than in respect of dwelling-houses, differently situated, overseas.

Now, the houses which are the subject of the present appeal have, in my opinion, very little to do with the kind of scheme that I have outlined above. It is true that they were built between 1926 and 1928, and were built for and have always been occupied by men employed at Thoresby Colliery. But there is no suggestion that their value as houses is confined to their use for housing Thoresby miners. On the contrary, it is agreed that, if mining operations had stopped there in 1951 or 1952 or in any of a number of years following, the houses would still have had or have a substantial value. In other words, they are dwelling-houses in their own right: the expenditure on them cannot be described as expenditure that was exclusively devoted to the mining enterprise at Thoresby or as having little or no value apart from the continuance of the enterprise. *Prima facie*, therefore, they do not come within the scope of the proviso.

The Board's claim to allowance rests, however, on a different consideration. In effect it depends on a comparison of the expected physical life of the houses with the expected working life of the colliery. There is an agreement between the parties that the life of the colliery will probably end in the year 2141, if working there continues in the manner now expected.

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It is also agreed that about the year 2091 the houses would have become of little or no value, having by that time exhausted their useful life as subjects of occupation. From the comparison of these figures, which have not, of course, the precision of astronomical calculations, it is deduced that the houses can be described as likely to have little or no value at the time when the mine is no longer worked and therefore that the expenditure on them is within the proviso to Section 8 (3).

The majority members of the Court of Appeal found themselves somewhat startled at the idea that the Income Tax Act should have produced a scheme under which tax allowances are conceded or withheld in accordance with estimates of this kind. And, indeed, it is not easy to take the figures too seriously. The Special Commissioners supported their decision in favour of the Board by accepting as reasonable two suppositions: (1) that coal will continue to be extracted from the mine at the present rate of extraction, and (2) that nothing will happen to result in a premature closing of the mine before the seams are exhausted. I dare say that these may be reasonable suppositions about a period of some 180 years of the future. But I could not infer from that that they are the only reasonable suppositions about such a matter. I can think of two others: (1) that coal will not continue to be extracted from the mine over the period of its working at the same average rate as prevails to-day, and (2) that something will happen which will result in a premature closing of the mine before the seams are exhausted. Could anyone say to-day which suppositions are the more reasonable? In the nature of things there can be no great validity about any of them.

Nevertheless, in my opinion, the Board's argument does not fail by reason of any special vagueness in the calculations it invites. We can accept its general premise that Thoresby Colliery is a coal-mine with a very long expected life and that the life of the mine is likely to be substantially longer than the physical life of the houses. Where I think that the Board's argument fails is that this consideration is not relevant to the proviso which confers the allowance. The value to be taken account of for that purpose is value as affected by the circumstance of the closing of the mine: it is not value as affected by the normal physical decay of the building itself. All that is proved by the comparison which the Board invites between the expected life of the mine and the expected life of the houses is that the owner is never likely to be threatened with any loss of the value of his expenditure on housing by reason of the close of the industrial enterprise, because the enterprise is likely to be longer lived even than an ordinary dwelling-house. That comparison takes the case away from the special cases for which the proviso is designed. It contributes nothing to bring it within the proviso.

The argument for the Board has been rested throughout on the proposition that the " natural meaning " of the words of the proviso necessarily covers its claim and that is all that matters. And this argument has received much support in the judgments that have been given in the earlier Courts. I do not think that it is all that matters, anyway ; but, that apart, I do not agree that the construction contended for does represent any natural meaning of the relevant words. Such a construction involves treating the words " when the mine . . . is no longer worked " as if they were the equivalent of the words " when the mine . . . is likely to be no longer worked ", and they are not the equivalent. The date when an event occurs is not the same thing as the date when, as seen at any one moment, it is thought likely to occur. What is being referred to is the circumstance of the mine ceasing to work, whenever that may be, not the date, necessarily unknown, when that circumstance will occur. Secondly, if the figures put forward by the Board are to

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be our guide, it is not a natural use of words to say of these houses that they are likely to be of little or no value when the mine stops working. What would be accurate would be to say of them that they cannot possibly be of any value on that event because they will not exist to have value attributed to them. They will have ceased to exist for any purpose some two generations of human life before.

These considerations help to show, I think, what it is that the proviso is confined to allowing. The wording may not be very happy and there may be other difficulties in applying it which have not yet appeared. But the general range of circumstances to be covered by the exemption is reasonably clear. The assumption which underlies the exemption is that the building in question is in existence at a date, whatever it may be, when the industrial enterprise itself comes to an end or, in the case of a concession, comes to an end for its owner by the expiry of the concession. The question to be asked, in order to see whether it qualifies for allowance now, is whether it is of such a character or so situated, or, in the case of a concession, whether the terms of the concession are such that, in the event postulated, the capital expenditure incurred in respect of the building would be likely to have any appreciable residual value for the owner. If the answer is " Yes ", then the expenditure does not qualify for industrial building allowance : if the answer is " No ", it does.

I would dismiss the appeal. The houses are shown to have a likely alternative use as ordinary dwellings and they are not, therefore, within the proviso.

Lord Cohen.—My Lords, I agree with the speech delivered by my noble and learned friend, Lord Radcliffe, and have nothing to add.

Lord Keith of Avonholm.—My Lords, I also agree.

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:—Solicitor of Inland Revenue ; Solicitor, National Coal Board.]

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