No. 746.—HIGH COURT OF JUSTICE (KING'S BENCH DIVISION).—23RD AND 24TH JANUARY, 1929.

COURT OF APPEAL.—10TH, 11TH, 12TH AND 24TH JUNE, 1929.

HOUSE OF LORDS.—24TH AND 25TH FEBRUARY, 1930.

## FRY (H.M. INSPECTOR OF TAXES) v. BURMA CORPORATION, LIMITED.[1]

*Income Tax, Schedule D—Trade "set up and commenced" Income Tax Act*, 1918 (8 & 9 *Geo.* V, *c.* 40) *Schedule D, Cases* I *and* II, *Rule* 1 (2).

*An Indian Company, which had for some years carried on business in circumstances in which it was not liable to United Kingdom Income Tax in respect of its profits, introduced, with effect from the 1st July, 1925, certain changes as regards the control of its business in consequence of which it became liable as from that date to assessment under Case* I *of Schedule D. It was contended on behalf of the Revenue that the Company's assessment for the year* 1925–26 *should be computed in accordance with the provisions of Rule* 1 (2) *of Cases* I *and* II, *the trade in respect of which liability arose being a trade "set up and commenced" on the 1st July,* 1925. *The Special Commissioners on appeal accepted the Company's contentions, viz.—that the trade was not "set up and commenced" on the 1st July,* 1925, *within the meaning of Rule* 1 (2), *there being no material difference in the nature of the trade before and after that date, and that the assessment should properly be made in accordance with the Rule applicable to Case* 1, *with regard to the average profits of the appropriate three preceding years.*

Held, *that the assessment should be made in accordance with the Rule applicable to Case* I *on the average of the three preceding years.*

### CASE

Stated under the Income Tax Act, 1918, Section 149, 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.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 10th February, 1926, for the purpose of hearing appeals the Burma Corporation, Ltd. (hereinafter

[1] Reported (C.A.) [1930] 1 K.B. 249 and (H.L.) [1930] A.C. 321.

called the Company) appealed against an assessment to Income Tax under Case I of Schedule D in respect of the profits of the Company's business in the sum of £1,500,000 for the year ending 5th April, 1926, made upon the Company under the provisions of the Income Tax Acts.

2. The Company was incorporated under the Indian Companies Act, 1913, on 17th December, 1919.

The Registered Office of the Company is situate in Rangoon.

The London Office of the Company is at 1, London Wall Buildings, London, E.C.2.

The issued share capital of the Company consists of 135,416,890 rupees, divided into shares of 10 rupees each.

Nearly all the issued capital is held in the United Kingdom.

3. The principal object of the Company was to acquire and carry on certain lead, silver and zinc mines situate in Burma, which had been carried on previously by an English company, the Burma Mines, Ltd.

A copy of the Memorandum of Association of the Company is attached hereto(1) (marked A) and forms part of this Case.

4. From the incorporation of the Company until July, 1925, the business of the Company was controlled by a Board of Directors (six in number) in Burma.

The directors' meetings and the annual general meetings of the Company were held in Rangoon. The accounts of the Company were prepared and audited in Burma. Of the six directors of the Company, five were resident in Burma.

5. Having regard to the fact that the great majority of the shares in the Company were held in the United Kingdom and to the difficulty of constituting a Board of any permanence in Rangoon it was decided that the control of the Company's business should be transferred to London.

This decision was carried into effect by increasing the number of directors to a maximum of twelve, and by enabling the directors to hold their Board meetings elsewhere than in India.

The necessary alteration of the Articles of Association of the Company were effected by resolutions passed and confirmed on the 18th December, 1924, and 3rd January, 1925, respectively.

Six new directors all of whom were resident in England were appointed, making the total number of directors of the Company eleven, seven of whom were resident in England.

6. By a memorandum in writing dated 1st July, 1925, and signed by a majority of the directors of the Company (as required by the amended Article of Association No. 106) it was determined that the meetings of the Board should henceforth be held in London.

(1) Not included in the present print.

The directors of the Company resident in Rangoon (four in number) constituted a Local Committee of the Board to deal with the Company's affairs in Burma under the general direction of the London Board.

A copy of the Articles of Association of the Company is attached hereto(1) (marked A) and forms part of this Case.

The attention of the Court is directed to Articles 85, 86 and 106.

7. It is agreed that since 1st July, 1925, the Company became resident in the United Kingdom and assessable to Income Tax under Case I of Schedule D of the Income Tax Act, 1918.

8. We were satisfied upon the evidence called before us that the removal of the control of the Company from Burma to London in 1925 did not cause and was not intended to cause any alteration in the carrying on or working of the Company's undertaking.

The Company has continued to work and develop the same mine on similar lines as heretofore winning therefrom similar products (lead, silver and zinc) and disposing of them in the same markets.

The Company is selling silver to the Indian Banks under running contracts which were entered into by the Company before July, 1925.

The following is an extract from a report of the directors to the shareholders on the 30th December, 1925 :—

" The work of bringing the affairs of the Corporation into " their present state of prosperity has been most satisfactorily " accomplished under the supervision of the Board originally " appointed in Rangoon and of the General Manager, " Mr. P. E. Marmion, and the new Board desire to express " their high appreciation of the great service those gentlemen " have rendered.

" But having regard to the fact that the great majority of " the shares are held in Great Britain, and to the difficulty of " constituting a Board of any permanence in Rangoon, it was " decided that the time had come to transfer the supreme " control of the Corporation's affairs to London, and six new " Directors resident in England were accordingly appointed in " accordance with the announcement already made. Those of " the Directors who are resident in Rangoon will constitute a " Local Committee of the Board to deal with the Corporation's " affairs in Burma under the general direction of the London " Board. These changes took effect as from the 1st July last. " In connection therewith it was with great regret that the " Directors received the resignation of Sir T. R. Wynne as " Chairman, which position he occupied for the long period " of ten years. In consideration of the value of his services " to the Corporation an honorarium was voted to him of £3,000.

(1) Not included in the present print.

" In place of Sir T. R. Wynne, Mr. F. A. Govett was elected " Chairman. The Directors regret to record the resignation " from the Board in June last of Mr. G. Lovell to whom also " a sum of £2,500 was voted for his special services during the " period since the formation of the Indian Company.

" The transfer of the Board to London rendered the " continuance of the Advisory Committee in London unneces- " sary and sums of £1,000 each were voted to three members " of that Committee who have not joined the new Board, as an " honorarium by way of compensation for their loss of office. " Mr. W. W. Paine who was also a member of the Advisory " Committee has been appointed Financial Adviser to the " Board."

9. The assessment under appeal was made upon the Company on an estimate of the Company's profits for the period from 1st July, 1925, to 5th April, 1926, and purports to be made in accordance with Rule 1 (2) of the Rules applicable to Cases I and II of Schedule D of the Income Tax Act, 1918. Previous to this assessment no assessment had been made on the Company in respect of the profits of its business.

10. It was contended on behalf of the Company that :—

(*a*) the trade of the Company was not set up or commenced within the year of assessment.

(*b*) the Company during the year of assessment was carrying on the same trade or concern in the nature of a trade as it had carried on since its incorporation in 1919.

(*c*) the Company was assessable under Case I of Schedule D of the Income Tax Act, 1918, and the assessment should be computed in accordance with the Rule applicable to Case I of Schedule D on the full amount of the balance of the profits and gains upon a fair and just average of the three years ending 30th June, 1924.

11. It was contended on behalf of the Appellant (*inter alia*) that :—

(*a*) that the assessment under appeal fell to be made in accordance with Rule 1 (2) of the Rules applicable to Cases I and II of Schedule D.

(*b*) that the assessment having been so made was correct in principle and should be confirmed.

12. Having considered the evidence and arguments adduced before us we decided as follows :—

1. In July, 1925, the control of the Appellant Company was shifted from Burma to the United Kingdom and consequently the Company became assessable to Income Tax under Case I of Schedule D as a Company residing in the United Kingdom, in respect of the whole of the profits arising from the Company's trade.

2. Under these circumstances the Crown contended that the trade of the Company which became assessable under Case I of Schedule D is " a trade which has been set up and com- " menced within the year of assessment " (Rule 1 (2) of Cases I and II).

3. Upon the evidence before us we hold that the trade was not set up and commenced within the year of assessment. The Company carry on the same trade or " concern in the " nature of a trade " as they have carried on since incorporation in 1919.

4. We hold that the assessment on the Company for the year ending 5th April, 1926, must be made in accordance with the Rule applicable to Case I of Schedule D on the full amount of the balance of the profits and gains upon a fair and just average of the three years ending 30th June, 1924.

5. If, however, a part of the profits of the Appellant Company for 1925–26 has been treated as income from foreign or colonial possessions or securities for the purpose of taxation in the hands of its shareholders or debenture holders, the assessment upon the Company under Case I will require to be adjusted proportionately in order to avoid double taxation.

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

14. Having regard to the remarks of Rowlatt *J.* in *Maclaine* v. *Eccott*, 10 T.C. at page 550, we have considered it desirable to state this Case on a question of principle only in order to avoid the delay occasioned by waiting for an agreement of the figures of assessment in accordance with our decision set out in paragraph 12 hereof. When the High Court has decided the question of principle in dispute, the case will require to be remitted to the Special Commissioners in order that the assessment may be adjusted in accordance with the judgment of the Court.

N. ANDERSON,
MARK STURGIS,
P. WILLIAMSON,
} Commissioners for the Special Purposes of the Income Tax Acts.

York House,
23, Kingsway,
London, W.C.2.

25th September, 1928.

The case came before Rowlatt, *J.*, in the King's Bench Division on the 23rd and 24th January, 1929, and on the latter date judgment was given in favour of the Crown, with costs.

The Solicitor-General (Sir F. Boyd Merriman, K.C.) and Mr. R. P. Hills appeared as Counsel for the Crown, and Mr. A. M. Latter, K.C., Mr. R. Needham, K.C., and Mr. I. Bailleu for the Respondents.

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JUDGMENT.

**Rowlatt, J.**—In this case the Burma Corporation are an Indian company and it happens that most of its shareholders, or many of its shareholders, are resident in this country, but that is a circumstance which does not in itself affect the case at all, although it enabled the Solicitor-General to found an argument which he equally well could have founded upon the hypothesis that some of the shareholders might have been in this country. That in itself does not affect this case at all. The Company was an Indian company and up to the 1st July, 1925, it had nothing to do with this country as a company; it carried on business exclusively in Burma. Therefore it was not as a company within the scope of the Income Tax Acts at all; it was a foreign company with a foreign business. As from the 1st July, 1925, it set up the control of its business in Burma in the hands of a London directorate and in point of law that made two changes in its circumstances as regards Income Tax. First of all, they became resident in this country. Very well, being resident in this country they might, like the Egyptian Hotels Company(1), if the control was still holding as regards this business in Burma so that the business was run completely locally—they still might, though resident in this country, have not been liable to be taxed under Case I for the Burma business. But they also started to control a Burma business in this country and therefore not only did they become resident here but they also began to carry on business here, or partly carry on business here, so as to come within Case I and not within Case V, as they would have come if, being resident here, they had still kept their business entirely abroad.

Under those circumstances the question arises whether in respect of the broken year, 1926, for the purpose of taxation since they became taxable they are to be treated as having commenced and set up their trade on the 1st July, 1925, when they first sailed into the ambit of the Income Tax Acts, or whether we ought to look at the trade before that, which was, as is found, precisely the same trade from a commercial point of view, only directed from another place. That is the question. Now Mr. Latter's argument is that this trade must be regarded as set up and commenced where

(1) The Egyptian Hotels, Ltd., *v.* Mitchell, 6 T.C. 152 and 542.

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it was in fact set up and commenced, in Burma, being the same trade, and the strength of it is this. He says, here we are purely upon a figure by which you measure the profits of the trade in a conventional way; it is purely upon a question of figures, and why are not you to look, says he, to the actual figures of these commercial operations which are the same as this trade? And he says you must have done that when the Act was first introduced in 1842, because clearly you had then to look to the history of existing businesses to find out in the first year of tax how much ought to be paid by reference to what had been made in the years immediately previous to the coming into effect of the tax. I do not think, as I pointed out during the Solicitor-General's reply, that much comes of that argument, because it does not seem to me that there is really a parallel between the case of an Act of Parliament coming into operation and dealing with facts and incorporating a reference to facts which existed before the Act came in, and the case where, the Act being in operation, something comes within it for the first time; and the question arises whether you can look at facts existing before the subject matter came within the Act. I think that is what it is. I think they are two different cases and I do not think that arises here. Now that is the very plain and simple argument of Mr. Latter and I feel the force of it.

On the other hand, this is said. First of all, this observation is made upon it. It is said by the Solicitor-General—and I think there is a good deal of force in it—look at Rule 8, to which Mr. Latter himself appealed, where in Sub-rule (1) you get those words " set up and commenced ". If you look at (2), on the other hand, where the trade is discontinued, says the Solicitor-General, it cannot be said that a trade goes out of Income Tax by going away abroad and escaping from Case I altogether; then for the purpose of Case I you are not to treat it as having been discontinued for the purposes of the Sub-section. It is only argument, but I think there is a good deal of force in that. But when one comes down to the main point one has to consider how these cases for this purpose are to be treated in relation to one another; and in the *Bradbury* case[1], which was, of course, a very much more complicated case than this—I need not go into differences in every respect —it was laid down, and laid down very clearly, that the Income Tax Act divides the sources of income into a number of categories and they cannot overlap, and that they cannot overlap for the purposes of estimation; you must not confuse the two systems of estimation so as to have a subject matter passed from one category to another to get the facts of one period brought into the calculation in assessing in respect of the other period. Now that is not, as I understand it—their Lordships came to different conclusions on

(1) Bradbury v. English Sewing Cotton Company, Ltd., 8 T.C. 481.

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the merits—a question of double taxation. That is a mistake. You do not tax the years by which you measure; you tax the year in which you tax and measure by the years to which you refer. But the decision was that you cannot confuse the two categories; that means, confuse the different years for the purpose of measurement.

Now, Mr. Latter says: Well, but of course they had the two categories in the *Bradbury* case because there you had got an English Company which had property first of all taxed under one category, and then it became property in foreign possessions to be taxed under another category. Here, says Mr. Latter, you have not got that, because this Company was not in any category at all until July 1st, 1925, when it first appeared here and became discernable by our Income Tax. Now the Solicitor-General has pointed out that that is not really quite true in substance here because there being English shareholders—or assuming for the moment that there were English shareholders, even if there were no English shareholders—they have been before 1925 owners of foreign possessions, namely their shares in the foreign company with a foreign business; then if when the company came here you are to look back for the purpose of estimating the amount of their profits and gains beyond the year when it came here and treat the trade as set up beforehand, you are confusing the categories in substance because they are the same shareholders and there has been tax in respect of those years under another category. Now I think that is very true, but I think on a broader ground that the Solicitor-General is right. In that case when they talked of the categories not overlapping I do not think it was intended by the learned Lords, who used those expressions or decided to that effect, that each category was kept within itself by the competition of the others so that when that pressure was removed it expanded over to the neighbouring categories, if I may use that figurative language. I think one must take the view that each category is kept to itself by its own intrinsic nature, and the fact that we have only to deal with one category in this case means that you have to deal with it exactly in the same way as if there was a competing category. Looking at it in that way, I feel bound to say that both the setting up and the commencing of the trade here must refer to the beginning of the time when the trade took such a shape as enabled Case I first to see it. I have expressed myself, I am afraid, a little metaphorically, but let it pass at that. I think setting up and commencing means setting up and commencing for the purpose which those words are used for, namely, in Case I.

Therefore I think that in this case the Crown is entitled to succeed with costs.

**Mr. Latter.**—In view of your Lordship's judgment I think this Case has got to go back.

**Rowlatt, J.**—Yes.

**The Solicitor-General.**—To find facts.

**Mr. Latter.**—Yes.

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The Company having appealed against this decision, the case came before the Court of Appeal (Lord Hanworth, *M.R.*, and Lawrence and Russell, *L.JJ.*) on the 10th, 11th and 12th June, 1929, when judgment was reserved. On the 24th June, 1929, judgment was given unanimously against the Crown, with costs, reversing the decision of the Court below.

Mr. A. M. Latter, K.C., Mr. R. Needham, K.C., and Mr. I. Bailleu appeared as Counsel for the Company, and Sir F. Boyd Merriman, K.C., and Mr. R. P. Hills for the Crown.

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JUDGMENT.

**Lord Hanworth, M.R.**—This is an appeal by the Burma Corporation, Limited, from a judgment given by Mr. Justice Rowlatt on the 24th January, 1929, reversing the decision of the Commissioners for the Special Purposes of the Income Tax Acts.

The facts which raise the point to be decided are as follows. The Company was incorporated under the Indian Companies Act, 1913, on the 17th December, 1919, and the registered office of the Company is situate at Rangoon. The Company has a London office, and nearly all the issued share capital is held in the United Kingdom. The principal object of the Company was to acquire and carry on certain lead, silver and zinc mines in Burma, which had previously been carried on by an English Company—the Burma Mines, Limited.

From the incorporation of the Company until July, 1925, the business of the Company was controlled by a Board of Directors, six in number, in Burma; and directors' meetings and the annual general meetings of the Company were held in Rangoon. Of the six directors of the Company, five were resident in Burma.

At the end of 1924 it was decided to transfer the seat and control of the Company's business to London; and by special resolutions passed on the 18th December, 1924, and confirmed on the 3rd January, 1925, effect was given to this decision. New directors were appointed, providing a majority who were resident in England, and by a memorandum in writing dated the

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1st July, 1925, signed by a majority of directors as required by the amended Article 106, it was determined that the meetings of the Board should thenceforth be held in London.

It is not questioned that the effect of these changes was to make the Company assessable to Income Tax under Schedule D, 1 (*a*) (ii), in respect of its annual profits accruing to it, as a company residing in the United Kingdom and carrying on a trade, whether that trade be " carried on in the United Kingdom or elsewhere ", nor that the tax was to be charged under Case I. An assessment was accordingly made upon the Company for the year ending the 5th April, 1926, and the question to be decided is whether the method of assessment adopted for that year is correct or not.

The Commissioners state that they were satisfied that the removal of the control of the Company from Burma to London did not cause, and was not intended to cause, any alteration in the carrying on or working of the Company's undertaking; and upon the evidence before them they hold, as a fact, that the trade was not set up and commenced within the year of assessment—" The " Company carry on the same trade or concern in the nature of " a trade as they have carried on since incorporation in 1919."

No question of figures arises. The question to be determined is one of principle, whether or not the Commissioners are right in their decision that the assessment on the Company must be made in accordance with the Rule applicable to Case I of Schedule D on the full amount of the balance of the profits and gains upon a fair and just average of the three years ending the 30th June, 1924, being the date in the year immediately preceding the year of assessment on which the accounts of the Company were usually made up.

Upon the facts thus stated, it would seem plain that the Commissioners adopted a right method and measure of assessment.

Admittedly the Company is to be charged in respect of its annual profits or gains to Income Tax under Schedule D, for it is within the terms of Schedule D, 1 (*a*) (ii) already quoted.

By Schedule D, 2, tax under that Schedule is to be charged under Case I; for that is the Case which applies in respect of any trade not contained in any other Schedule. This trade is not one, such as are quarries or mines, which do fall to be taxed under another Schedule—Schedule A.

Then by the Rule applicable to Case I " The tax shall extend " to every trade carried on in the United Kingdom or else- " where, . . . . and shall be computed on the full amount of the " balance of the profits or gains upon a fair and just average of " three years " ending at the date already given. It would seem unnecessary to go further, for the above Case and Rules afford guidance which fits the present facts.

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The argument of the Crown, however, is that the Rules so far referred to do not govern this case. It is claimed that the Company came within the liability imposed by the Income Tax Act on the 1st July, 1925, and not earlier, and that for Income Tax purposes it was a new entity with a new trade; that you cannot measure the liability for the purpose of the assessment, by facts and trading which were previous to, and thus not within the cognisance of the Income Tax Acts on, the 1st July, 1925. The result of this would be that it is necessary to go further and apply Rule 1 (2) of the Rules applicable to Cases I and II, which runs: "Where the trade. . . . . has been set up and commenced within "the said period of three years, the computation shall be made on "the average of the profits or gains for one year from the period "of the first setting up of the same, and where it has been set up "and commenced within the year of assessment, the computation "shall be made according to the rules applicable to Case VI."

Emphasis is laid upon the fact that there was no trade in the United Kingdom before the 1st July, 1925, with the result that you cannot use a measure or standard derived from facts which it is said are not relevant to the liability to tax which has supervened since they occurred. Secondly, it is said that the measure of the tax must be derived from matters cognate to the same Case and liability; whereas the facts as to the trade antecedent to the 1st July, 1925, might have been relevant to a liability to tax suffered by the shareholders, who received dividends from Rangoon upon their holding in this Indian Company, but that that liability was in respect of a foreign possession under Case V, and that such facts cannot now be used for a new purpose or have a different value put upon them in relation to a liability which is to be charged under Case I.

The main support for the first contention is derived from the case of *Colquhoun* v. *Brooks*(1), 14 App. Cas. 493. In that case it was held that a resident in the United Kingdom, who was a partner in a business carried on in Australia, and as such partner therefore carried on business "in the United Kingdom or else-"where", was not liable to the extent of the profits of the business but only in respect of so much of the profits as were received by him in the United Kingdom. It was held that Case I "was not intended to apply to a trade carried on exclusively "abroad," per Lord Macnaghten(2), page 516. That, however, did not free the subject from all liability, and he was held chargeable to tax under Case V in respect of his receipts that were remitted over here, as being income from possessions out of the United Kingdom. The ground of the decision on the first point was that there was no machinery for assessing the duty on trade profits arising and remaining abroad, and that the wider meaning of the

(1) 2 T.C. 490. (2) *Ibid.* at p. 508.

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Income Tax Act must be restricted accordingly. Lord Macnaghten at page 516, therefore, holds that(1) "the 'first case', though clearly "applying to a trade carried on partly abroad and partly in Great "Britain, was not intended to apply to a trade carried on exclusively "abroad."

To the First Case, therefore, let the words be added "and not "carried on exclusively abroad."

But how far does this amendment carry the Respondent? The Corporation still remain charged to Income Tax in respect of their profits and gains from their trade which is now directed and controlled from London, for they are not excluded by the words of exception thus supposed to be added to Case I. Under the *San Paulo* case(2), [1895] 1 Q.B. 580; [1896] A.C. 31, the tax falls upon the full amount of the balance of the profits or gains of their business, and not only upon the amount of the actual sums annually received in the United Kingdom.

This liability must be measured as directed by the "Rule "applicable to Case I", that is, upon a three years' average.

It is answered not so, because it is the first institution of the seat and control of the Corporation in London that converted the trade exercised outside the United Kingdom into one equivalent to a trade exercised within the United Kingdom, and that must be the setting up and commencing of the taxable trade.

It is said that mere residence will not do, for in *The Egyptian Hotels, Limited* v. *Mitchell*(3), [1914] 3 K.B. 118, it was admitted that the Company resided in England (*see* page 127), and yet it was held that the Company was not taxable upon the whole of its profits, but only under Case V on such part as was remitted to this country.

The seat and control is the test. Lord Halsbury said in the *San Paulo* case(4): "the person who, in the strictest sense, makes "the profits by his skill or industry, however distant may be the "field of his adventure, is the person who is trading."

Moreover it is the trader—the Corporation—who is taxed in respect of his profits or gains, and Rule 1 (2) of the Rules applicable to Cases I and II in terms refers to the trade and not to the trader. The trader is charged to tax in respect of his profits and gains, and those are to be estimated as the Rules direct.

Did the trader then, the Corporation, set up and commence his trade when on the 1st July, 1925, the seat and control of it passed to London? As to the meaning of those words *simpliciter*—Mr. Justice Grove in a judgment, assented to by Mr. Justice Lindley (as he then was), in *Ryhope Coal Company* v. *Foyer*, 7 Q.B.D. 485, at page 494(5), gives an interpretation of them as

(1) 2 T.C. at p. 508.
(2) San Paulo (Brazilian) Railway Company *v.* Carter, 3 T.C. 344 and 407.
(3) 6 T.C. 152 and 542. (4) 3 T.C., at p. 410. (5) 1 T.C. 343, at p. 350.

**(Lord Hanworth, M.R.)**

being not applicable to a mere change in the individuals constituting the firm or company, but to the setting up of an adventure or concern. " I think that the words ' set up ' and ' commenced ' " apply strictly to that, and it "—the adventure or concern— " cannot be said to be ' set up ', or ' commenced ', because there " is a change in the partnership carrying on identically the same " adventure or concern . . . . . It appears to me that the words " ' trade, manufacture, adventure, or concern ' apply to the under- " taking, and have no reference to the individuals who carry it on."

I venture to agree with this, and in my judgment it is not possible to hold that the trader, now chargeable to Income Tax, has by his becoming so liable set up and commenced anew his business, which has been in existence for years. Upon the interpretation in law to be given to these words, I reject the argument presented, and so far as it is a question of fact, the Commissioners have in terms held that the Corporation carry on the same trade or concern in the nature of trade as they have carried on since incorporation in 1919.

To put a metaphorical meaning upon the plain words appears to disregard the direction of the House of Lords in the case of *Ormond Investment Company* v. *Betts* (1), [1928] A.C. 143. In that case the Court of Appeal had by analogy treated the purchase of foreign securities as the setting up and commencement of a trade for the purposes of the Rule to which it appeared for purposes of assessment the liability had been referred. Lord Sumner, at page 158, rejects such an analogy, and says (2) : " the Crown does not tax " by analogy but by Statute, and there is nothing in the Act which " says what is here contended for." Lord Atkinson, at page 162, equally rejects this suggested adaptation of the words of the Act. Lord Wrenbury, at page 167, points out the difference between trade and an investment; and Lord Warrington says (3) that the employment of the words by the Court of Appeal is " a mere " assumption and not justified by anything in the Act of Parlia- " ment." These speeches recall attention to the words of the Statute; and in accordance with this direction, it seems impossible by analogy or metaphor to treat a trade which has been going on for years as newly set up and commenced, contrary to the facts, and by this device to justify the application of Rule 1 (2) contained in the Income Tax Act, 1918.

Next, I do not find a difficulty in applying a measure derived from facts which, when they took place, lay outside the purview of the Income Tax law. This appears to me to have been decided in *Singer* v. *Williams* (4), [1921] 1 A.C. 41. In considering the effect of the saving clause contained in Section 5 of the Finance Act, 1914—" and nothing in those provisions as to the receipt of

(1) 13 T.C. 400. (2) *Ibid.* at p. 431 (3) *Ibid.* at p. 441.
(4) 7 T.C. 419.

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" sums in the United Kingdom shall be construed so as to render " liable under those rules to income tax for the current or any " subsequent year any sums which represent . . . . (*b*) income " from any such securities, stocks, shares, or rents which was " paid or became due before the sixth day of April, nineteen " hundred and fourteen ", Lord Cave, at pages 52 and 53 (1), expressly refers to the argument that if the tax is computed upon an average of three years preceding the financial year in question, such computation must include income which was paid or became due before the 6th April, 1914, and is an infringement of the saving clause above quoted. He rejects the argument. He says that the exemption has no reference to the computation of income for the purpose of Section 5 of the Act of 1914. Lord Atkinson says there is nothing to prevent the previous years being taken into account in fixing the fair and just average of the income.

In the later case of *Bradbury* v. *English Sewing Cotton Company*, [1923] A.C. 744, at page 752, Lord Cave refers to *Singer* v. *Williams* as the case in which it was pointed out that (2) " the " fact that the income of a previous year is not taxable, does not " prevent it from being brought into computation for the purpose " of assessing the tax payable in a later year, and so being treated " as a measure, though not as a ground, of taxation."

So too, in *Stevens* v. *Boustead*, 7 T.C. 107, the deduction of the cost of premises abroad, where the business was carried on, was allowed, and a limitation of such a deduction to premises that were assessable to Income Tax under Schedule A was not accepted.

In accordance with these cases the argument that unless the material is the subject of taxation it cannot provide a basis for measure must be rejected. It seems right to take the available data from the actual trade during the three relevant years as the foundation of the computation of the profits or gains brought into charge. It is thus unnecessary to go further to the later Rule 1 (2), as it might be necessary to do if the required data were not in existence and available. There is thus no necessity to put an artificial or metaphorical meaning upon the words " set up and " commenced " in that Rule.

There remains the second argument of the Crown, which is based upon the case of *Bradbury* v. *English Sewing Cotton Company* and some observations made in the speeches in the House of Lords. It is said that the trading of the three years antecedent to the year of assessment formed the basis of taxation under Case V upon the shareholders of the Corporation who received their dividends paid out of it, as being income arising from a foreign possession. Thus this trading had received a definite character which cannot be changed.

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(1) 7 T.C. at pp. 432 and 433. (2) 8 T.C. 481, at p. 507.

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This reasoning appears to me not only artificial, but not well founded upon anything in *Bradbury's* case. In that case the American company was taxed first of all in this country upon its whole profits. Later it was sought to refer again to those profits, under a different category, namely, as income from a foreign possession. It was held that the Crown could not do this. The profits of that trading had been stamped as falling within Case I in the most definite manner by charging tax upon them under that Case. The character of these same profits could not be changed, and they could not be made use of in a different capacity as income from foreign possessions in the hands of the same tax-payer.

I note what Lord Shaw says(1), page 755, that the Cases (the Report says Rules) were " made to apply so as to disintegrate " into . . . . categories the cases of liability to taxation in the " Schedule. The separate cases mean the separate instances." Lord Wrenbury says(2), at page 769, that the company " cannot " be foreign for one purpose of the Acts and not for another." But it is to be observed that the subject of those observations is the company, and the profits, the same profits which were irrevocably treated as profits chargeable under Case I. No such change of attitude is attempted in the present case. It may be that some tax-payers over here have paid tax upon their dividends received, as derived from a foreign possession; but I fail to see how that charging can prevent the totality of the profits of the trade being treated in the hands of a different tax-payer—namely, the Company, as the measure of that entity's liability to tax.

We were pressed with Lord Shaw's observations, on page 758, in the *Bradbury* case. But in the present case, the use of the Corporation's profits for the purpose of a measure is not to use profits which have been already defined and taxed under one category and take them into account for another. It is not a re-opening of the past or a reversal of their attitude on the part of the taxing authorities, for the profits that were made in the three years taken for average purposes have not been defined and taxed in any other way in the hands of the Corporation.

For these reasons I am of opinion that the appeal must be allowed with costs here and below, and the decision of the Commissioners restored.

**Lawrence, L.J.**—The question in this case is whether the removal by the Company, on the 1st July, 1925, of the seat of control of its trade from Burma to London constituted the setting up and commencement of a trade on that day within the meaning of Rule 1 (2) of the Rules applicable to Cases I and II of Schedule D of the Income Tax Act, 1918.

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(1) 8 T.C., at p. 509. (2) *Ibid.* at p. 518.

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The Commissioners have found that such removal did not cause, and was not intended to cause, any alteration in the carrying on or working of the Company's undertaking; that the trade carried on by the Company after such removal was the same trade or concern in the nature of a trade as had been carried on by the Company since its incorporation in the year 1919; and that upon the evidence before them the trade of the Company had not been set up and commenced within the year of assessment. The Commissioners accordingly held that the assessment on the Company for the year ending April 5th, 1926, must be made in accordance with the Rule applicable to Case I of Schedule D on the full amount of the balance of profits and gains computed upon a fair and just average of the three years ending 30th June, 1924.

Mr. Justice Rowlatt, on appeal, reversed the determination of the Commissioners, and held that the removal to London of the seat of control of the Company's trade operated as the setting up and commencement of a trade, and accordingly that the assessment upon the Company fell to be made in accordance with Rule 1 (2) of the Rules applicable to Cases I and II.

With the greatest respect for the opinion of the learned Judge, I think that he was wrong in disturbing the finding of the Commissioners. In my opinion the question whether a trade has or has not been set up and commenced within the year of assessment is a pure question of fact. For instance, if a company trading in Liverpool were, for the convenience of the individual members of the board, to resolve that in future its board meetings should be held in London instead of in Liverpool without in any way altering the character of its trade, I do not suppose it would be suggested that the mere change in the seat of control would constitute the setting up and commencement of a new trade. On the other hand, there might be attendant circumstances which would give rise to questions whether or not the company in the case I have supposed had in fact set up and commenced a new trade. For instance, if the trade of the company had in the past been purely local, such as a shop, and in addition to removing the seat of control the company had opened a branch establishment in London or had closed down the Liverpool shop and opened a new shop in London, it might well be that a new trade had been set up and commenced, and in such a case, no doubt the removal of the seat of control would be one of the facts to be taken into consideration in determining this question. Does it, then, make any difference in principle that the removal of the seat of control to London is from a place outside the United Kingdom, and, as in the present case, from such a distant place as Burma? In my judgment it does not. In both cases it is a question of fact to be determined on the evidence whether or not the Company has merely shifted the seat of control of its trade from one

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place to another and still carries on the same trade, or whether it has set up and commenced a new trade.

Sir Boyd Merriman contended that the conclusion of the Commissioners was a mixed finding of fact and law. Whilst admitting that the Company had not in the ordinary commercial sense set up and commenced a new trade on the 1st July, 1925, he contended that the expression " where the trade . . . has been set up and " commenced " in Rule 1 (2) of Rules applicable to Cases I and II, bore a special meaning, which included not only a case where a new trade has in fact been started, but also a case where an established trade had been brought for the first time within Case I of Schedule D. In my judgment this contention is not well founded. The decision of the House of Lords in *Levene* v. *Inland Revenue Commissioners*(1), [1928] A.C. 217, shows that the Court ought not to attach to familiar English words used in the Income Tax Act, 1918, any special or artificial meanings unless the context demands it. Now the expression " to set up and commence a trade " is a familiar English expression meaning " to start or begin a new " trade ", and there is no context in Rule 1 (2) or in any other part of the Income Tax Act, 1918, which demands that any special or artificial meaning should be attached to that expression; consequently it ought to receive its ordinary and natural meaning, with the result that the question which the Commissioners had to determine was not a mixed question of law and fact, but purely a question of fact. The reasons advanced by Sir Boyd Merriman why the expression in question ought to bear a special or technical meaning were that under the Rule applicable to Case I the profits which are to be used to measure the tax must be profits arising from a trade in respect of which the trader has been taxable during the whole or some part of the three years preceding the year of assessment, and that as that Rule (according to the decision in *Colquhoun* v. *Brooks*, 14 App. Cas. 493) does not apply to a trade carried on exclusively abroad, therefore in a case like the present the three years' average does not apply and the trade must be deemed to have been set up and commenced within Rule 1 (2) applicable to Cases I and II, when its owner first became taxable in respect of it under Case I. This reasoning is, in my opinion, fallacious. Even if the contention that in the present case the profits in the three years preceding the year of assessment could not be brought into computation were well founded, it would by no means follow that the Company would be assessable under Rule 1 (2) applicable to Cases I and II as having set up and commenced a trade. In that case the logical result, in view of the finding of the Commissioners, would be that the Company would escape taxation for the first year of assessment, and not that an

(1) 13 T.C. 486.

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artificial meaning should be given to the plain words of Rule 1 (2) in order to avoid such an escape.

The question whether the Company can, in the circumstances, properly be assessed on a three years' average, or whether it can escape taxation, does not arise in the present case, as the Company has accepted the decision of the Commissioners on this point, but I think that the Company and the Commissioners were right in assuming that the fact that the Company did not become taxable in respect of its trade until the 1st July, 1925, does not prevent the profits arising from that trade before that date from being brought into computation for the purpose of assessing the tax payable for the year ending 5th April, 1926, and that therefore the contention of the Crown breaks down *in limine*.

In *Singer* v. *Williams*(1), [1921] 1 A.C. 41, it was held that although by virtue of Section 5 (*b*) of the Finance Act, 1914, income from foreign possessions paid or due before 6th April, 1914, was not taxable, yet it ought to be brought into computation for the purpose of arriving at the amount of tax payable on a three years' average after that date.

In *Bradbury* v. *the English Sewing Cotton Company*, [1923] A.C. 744, which was also a case dealing with the assessment of tax under Case V., Viscount Cave, *L.C.*, said at page 752(2) : " As was " pointed out in *Singer* v. *Williams*, the fact that the income of a " previous year is not taxable, does not prevent it from being " brought into computation for the purpose of assessing the tax " payable in a later year and so being treated as a measure, though " not as a ground, of taxation." Although both *Singer* v. *Williams* and *Bradbury* v. *English Sewing Cotton Company* were cases dealing with tax in respect of income arising from foreign possessions, and therefore governed by provisions other than those with which the present case is concerned, yet I think that the decision in the former case provides a close analogy to the present case and strongly supports the opinion which I have formed, that the fact that the Company is not taxable in respect of its trade before the 1st July, 1925, does not prevent the profits arising from that trade in the three preceding years from being treated as a measure of taxation in the year ending 5th April, 1926.

The cases of *Colquhoun* v. *Brooks* and *Bradbury* v. *English Sewing Cotton Company*, upon which Sir Boyd Merriman chiefly relied, do not in my opinion bear out his contention that this view is wrong. *Colquhoun* v. *Brooks* decided that a person resident in the United Kingdom and engaged in a trade carried on exclusively abroad is not taxable under Case I in respect of that trade, but is taxable under Case V in respect of so much only of the profits of

(1) 7 T.C. 419. (2) 8 T.C. 481, at p. 507.

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that trade as are received by him in the United Kingdom, as being income received from foreign possessions. That case did not purport to decide that, for the purpose of computing the amount of tax payable in the year of assessment in respect of a trade admittedly within Case I, the profits arising from that trade in previous years and before any tax became payable in respect of it could not be taken into account.

In *Bradbury* v. *English Sewing Cotton Company* the tax-paying company was a company registered and carrying on business in the United Kingdom, and was during the whole of the three years preceding the year of assessment the holder of the common stock of the American company. During those three years the Crown had successfully maintained that the American company was resident and trading in England, and it had been taxed under Case I accordingly. As the result of this taxation, the English company had suffered Income Tax by deduction on that footing. On the removal of the American company from England to America the Crown sought to bring the same interest which it had theretofore treated as profits divided by a company resident and trading in England into computation as being income arising from foreign possessions for the purpose of assessing the tax which, after the removal of the American company, became payable by the English company under Case V. The House of Lords, by a majority, decided that in the special circumstances of that case the Crown could not be heard to say that the profits arising during the three previous years from a trade, in respect of which tax had during those years been levied on the footing that it was being carried on in the United Kingdom, was income arising from foreign possessions which ought to be brought into computation in assessing the tax which, after the removal of the American company, had become payable by the English company in respect of income arising from foreign possessions. The facts of that case differ essentially from the facts of the present case, and in my opinion the decision has no application here. In the present case the Company, prior to the 1st July, 1925, resided out of the United Kingdom, and carried on its trade exclusively abroad; it was, therefore, wholly outside the purview of the Revenue laws of this country, and was not taxable, and had not been taxed, either under Case I or under Case V, or at all. The passage which I have cited from the Lord Chancellor's speech in *Bradbury's* case shows that the decision in that case has no application to a case where the income sought to be brought into computation had not previously been taxable or taxed, but is based solely on the fact that the Crown had in the previous period taxed the profits on the footing that they arose from an English trading concern, and was thereby precluded from placing or reckoning the same profits under another category.

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Lord Shaw, after pointing out that it would clearly be contrary to law to compel a tax-payer while paying under one category also to pay taxation under another category, proceeds as follows :(1) " It " appears to me to be as contrary to law in principle to compel him " to go through the confusing process of treating profits which have " been already defined and taxed under one category as to be " taken into account for the purpose of averaging under another " category." This passage, although much relied upon by the Crown, can in my opinion have no application to a case like the present, where the profits of the preceding years have not been defined or taxed under any other category. It was indeed suggested that shareholders resident in the United Kingdom during the preceding three years would presumably have been taxed under Case V in respect of dividends remitted to them in this country during that period, and that such taxation would bring the present case within the principle enunciated by Lord Shaw. This suggestion in my opinion involves a confusion of ideas. The Income Tax which any individual shareholder may have had to pay in this country before the Company became resident and taxable here has nothing to do with the question now before the Court. What we are here concerned with is the tax payable by the Company in respect of its trade, and neither that trade nor the profits arising from it has or have in the hands of the Company been theretofore defined or taxed in this country under any category. A shareholder who is resident in the United Kingdom during the three years preceding the year of assessment, and has during that period been assessed to Income Tax under Case V in respect of the dividends remitted to him in this country, may possibly bring his case within the principle of the decision in *Bradbury's* case and, accordingly, obtain relief in respect of the tax deducted by the Company from his dividends for the year ending the 5th April, 1926, but I think that the Commissioners were wrong in suggesting in clause 5 of paragraph 12 of the Case that this fact would necessitate any adjustment of the assessment upon the Company under Case I.

In the result I have come to the conclusion that the point made on behalf of the Crown, that the profits arising from the previous three years' trading of the Company whilst resident in Burma cannot be brought into computation for assessing the tax payable by the Company in respect of its trade for the year ending the 5th April, 1926, (upon the soundness of which point the whole of the Crown's case is based), is not sustainable; that there is no authority which compels the Commissioners or the Court to attach any artificial meaning to the expression " set up and commenced " in Rule 1 (2), and that this expression should be construed, as the

(1) 8 T.C., at p. 511.

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Commissioners have construed it, according to its ordinary and natural meaning; and, lastly, that the question which the Commissioners had to determine was a pure question of fact and that there was ample evidence upon which they could come to their determination, and that therefore such determination ought not to have been disturbed.

For the reasons stated, I agree that the appeal succeeds, and that the Order of the Court below ought to be discharged, and the Case sent back to the Commissioners to assess the tax on the footing of their determination.

**Russell, L.J.**—The question for decision on this appeal is whether the assessment of the Company to Income Tax under Case I of Schedule D, in respect of the profits and gains arising from the Company's trade for the year ending the 5th April, 1926, falls to be made under the Rule applicable to Case I or under Rule 1 (2) of the Rules applicable to Cases I and II. I need not state in detail the facts of the case; it is sufficient to bear in mind the findings of the Commissioners which are contained in paragraph 8 of the Case and which show that the Company's trade is being carried on exactly as it was carried on for some years before the 1st July, 1925, with this single exception, that since that date it has been obligatory to hold all Directors' Board meetings in Great Britain. This obligation originally arose by reason of a memorandum in writing, signed by a majority of the Directors under Clause 106 of the Company's Articles of Association as then framed, by which it was determined that the meetings of the Board should thenceforth be held in London. By Clause 106 of the Company's present Articles, which were adopted by special resolution passed on the 30th December, 1925, and confirmed on the 15th January, 1926, it is provided that meetings of Directors shall be held in Great Britain, or if and when so determined by the majority of the Board in writing, in British India or elsewhere. The control of the Company's affairs, and with it the control, or the power of control over the carrying on of its trade, has thus since the 1st July, 1925, been transferred to Great Britain, with certain consequences as to liability in respect of Income Tax under Schedule D, which I will endeavour to indicate.

Down to the 1st July, 1925, no tax under Schedule D was chargeable in respect of the annual profits or gains arising or accruing to the Company from its trade; it was not resident here. No words of paragraph 1 (*a*) of Schedule D applied to the case. From the 1st July, 1925, onwards the position was changed. The Company became for all Income Tax purposes a person resident in Great Britain, and the words of paragraph 1 (*a*) (ii) of Schedule D applied to it; tax under Schedule D became chargeable in respect of the annual profits and gains arising or accruing to the Company

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from its trade. Whether the tax which thus became chargeable should be charged under Case I or Case V is not here in dispute. It is common ground that the tax is chargeable under Case I.

The question for decision is a pure question of construction of the Rules applicable to Schedule D, and, in particular, the two Rules mentioned above. The Rules in question have nothing to do with the charging of the tax, but are concerned only with the method or machinery of computing the tax which has already been charged under other provisions of the Act.

The argument by Counsel for the Company is based on the plain words of the Rule applicable to Case I. They say that the words fit the Company's case exactly. The tax now extends to the Company's trade; compute it then on an average of three years ending on one or other of the alternative days mentioned in the Rule. The necessary figures are all available, for the Company has carried on the same trade ever since its incorporation in 1919.

It seems to me that, unless for some reason we are compelled to place a special or restricted meaning upon the language of this Rule, the contention of the Company must succeed.

The Crown's argument on the construction of this Rule was, if I followed it correctly, two-fold. In the first place, it was said: Tax under Schedule D is not chargeable under Case I in respect of a trade which is carried on exclusively abroad: therefore, the Rule applicable to Case I does not contemplate or include the case of a business carried on exclusively abroad; therefore the words "the "said trade" cannot refer to a trade which during the three years in question was carried on exclusively abroad; therefore the present assessment cannot fall under that Rule.

Speaking for myself, I accept the first step in the argument, for I think that *Colquhoun* v. *Brooks*(1), 14 App. Cas. 493, did decide that Case I does not include the case of a trade carried on exclusively abroad, but that such a case falls within Case V. But with the rest of the argument I cannot agree. Although no tax under Schedule D is charged under Case I in respect of a trade while carried on exclusively abroad, I cannot see why, if some event happens which results in such tax being chargeable under Case I in respect of that trade, the figures of the previous profits and gains of that trade should not be resorted to as the measure for computing the tax which has become chargeable. The wording of the Rule applicable to Case I justifies the adoption of this method of computation, and it seems a reasonable method for the Statute to allow. The words "the said trade" cannot, in my opinion, properly be read, as the Crown seeks to read them, as limiting the application of the Rule to the case of a trade as to which it can be said that during each of the three years in question tax under

(1) 2 T.C. 490.

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Schedule D was chargeable in respect thereof under Case I. As was pointed out during the argument, the words " the said trade " appear in the Rule only for the purpose of defining the termination of one of the two alternative periods of three years which are specified in the Rule. If the other alternative period were adopted the words do not come into play at all.

In the next place, Counsel for the Crown contended that the Rule could not apply to the case of the Company, because it had been established by authority, that under the Act, income, in order to be available for use as a measure for the purpose of computing the tax, must have fallen to be taxed under the same Schedule and under the same Case as the income which is sought to be charged. It was alleged that this proposition was established by the case of *Bradbury* v. *The English Sewing Cotton Company, Limited*(1), [1923] A.C. 744.

I have considered that case with care, and I can find therein no justification for the proposition which the Crown seeks to found upon it. The decision as I read it was simply this, that dividends on the stock of the American company received by the English company during any part of what Lord Cave calls the first three years could not be brought into computation for the three years' average to be struck under Case V in assessing the English company's income from foreign possessions in respect of any of what Lord Cave calls the second three years; and for this reason, that during the first three years the stock of the American company was not a foreign possession of the British company and consequently dividends thereon were not income from foreign possessions. The stock was not a foreign possession because the locality of the stock was determined by the place of the American company's place of residence and trading, which during those first three years was England. That statement of the decision represents accurately, I think, the views of Lords Cave, Shaw, Wrenbury and Phillimore. There is no justification to be found therein for the Crown's proposition, which indeed seems hardly consistent with the following passage from Lord Cave's speech(2): " As was " pointed out in *Singer* v. *Williams*, the fact that the income of " a previous year is not taxable, does not prevent it from being " brought into computation for the purpose of assessing the tax " payable in a later year, and so being treated as a measure, though " not as a ground, of taxation." Reliance was placed on certain remarks by Lord Shaw at the top of pages 756 and 758, but I find myself unable to discover therein any support for the Crown's argument. All that Lord Shaw is saying is, I think, that the Crown cannot claim to tax for the same years the same income in two different categories; that is to say, the Crown could not in

(1) 8 T.C. 481. (2) 8 T.C., at p. 507.

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respect of the same periods treat the American company as taxpayer in respect of the profits from trade under Case I, and the English company as taxpayer in respect of income from foreign possessions under Case V. He is saying this in order to emphasise the fact that the dividends received by the English company during the first three years were not income from foreign possessions.

Accordingly, in my opinion, the proposition of the Crown is not established by the only authority which was vouched in support. Apart from authority, I see no reason for assenting to the proposition.

The result, so far, is that in my view the case of this Company falls within the language of the Rule applicable to Case I.

The Crown further contended that this Company's trade had been set up and commenced within the year of assessment, within the meaning of Rule 1 (2) of the Rules applicable to Cases I and II; and that the assessment fell to be made under that Rule. I cannot agree. The trade has been continuous since 1919. All that happened within the year of assessment was that the place from which the general control of the Company's affairs is exercised was shifted to this country. True it is that within the year of assessment tax under Schedule D became for the first time chargeable in respect of the profits or gains from this Company's trade, but by no stretch of language or imagination do I feel justified in holding that this trade was set up or commenced when its profits or gains became chargeable. It was set up and commenced long ago. The only change which has occurred is in the venue of the Board meetings. This change sets up and commences a new point of control of the trade, and has the effect of making tax in respect of the profits therefrom chargeable under Schedule D; but it does not constitute the setting up or commencement of the trade.

For these reasons I am of opinion that the decision of the Commissioners upon the question of general principle was correct; that the assessment falls to be made under the Rule applicable to Case I, and that the appeal should be allowed accordingly.

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The Crown having appealed against this decision, the case came before the House of Lords (Viscount Dunedin, Lords Warrington of Clyffe and Atkin) on the 24th and 25th February, 1930, and on the latter date judgment was given unanimously against the Crown, with costs, confirming the decision of the Court below.

The Attorney-General (Sir W. A. Jowitt, K.C.) and Mr. R. P. Hills appeared as Counsel for the Crown, and Mr. A. M. Latter, K.C., Mr. R. Needham, K.C., and Mr. I. Bailleu for the Company.

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JUDGMENT.

**Viscount Dunedin.**—My Lords, this is an appeal on a question of Income Tax which has arisen between H.M. Inspector of Taxes and the Burma Corporation, Limited, in these circumstances: The Burma Corporation are a corporation which existed and was created under the Indian Acts, and up till 1925 the Company not only did the whole of its business, but managed the whole of its business, in Burma, although, as a matter of fact, a very large proportion of its shareholders—the majority of them—were persons who lived in England. Of course, while it was in Burma the Company, as a company, was not subject to Income Tax, though, naturally, the shareholders who received their dividends in this country would pay Income Tax upon them. In 1925 the Company came to the conclusion that it would be more convenient for them to manage their business in England, and, accordingly, a change was made in the directorate, which was largely increased by the addition of English directors, and a regular office was established in London. Now the effect of that, it is admitted, was to make the Company resident in the United Kingdom, and as a person resident in the United Kingdom and carrying on a business elsewhere it became liable to Income Tax, and as to that there is no controversy between the parties. But the question that has arisen is as to what is to be done in the computation of the Income Tax for the first year of this changed management. The matter depends upon those well-worn Sections of the Income Tax Act, which are as follows, under Schedule D: "Tax under this Schedule shall be "charged in respect of (*a*) the annual profits or gains arising or "accruing . . . . (ii) to any person residing in the United Kingdom "from any trade, profession, employment, or vocation, whether "the same be respectively carried on in the United Kingdom or "elsewhere". That is the Section that hits the Company. Then it goes on to say: "2. Tax under this Schedule shall be charged "under the following cases respectively; that is to say, Case I— "Tax in respect of any trade not contained in any other "Schedule". I may mention at the moment, so as not to mention it again, although it does not apply here, Case V is: "Tax in "respect of income arising from possessions out of the United "Kingdom". Then we come to the Rules applicable to Schedule D. The first is "Rule applicable to Case I: The tax "shall extend to every trade carried on in the United Kingdom or "elsewhere"—that, of course, fits this case—"other than a trade "relating to lands, . . . . and shall be computed on the full amount "of the balance of profits or gains upon a fair and just average of "three years ending on that day of the year immediately preceding "the year of assessment". If that stood alone, of course, no question could arise, but then when we come to the Rules applicable to Cases I and II, Rule I, sub-rule (2) is "Where the "trade, profession, employment, or vocation has been set up and

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" commenced within the said period of three years, the computation " shall be made on the average of the profits or gains for one year " from the period of the first setting up of the same, and where it " has been set up and commenced within the year of assessment, " the computation shall be made according to the rules applicable " to Case VI ".

Now the controversy that arises is this: The Commissioners took the view that the three years Section applied, but the Crown said, " No, the three years Section does not apply; what applies " is this sub-rule (2) of Rule 1 of the Rules applicable to Cases I " and II." That depends upon whether, in the circumstances of this case, the trade has been set up within the said period of three years. Of course, it goes without saying that if sub-rule (2) applies it necessarily over-rules what is under the first Rule applicable to Case I. That is the question, and it is a very short question.

My Lords, I am bound to say that I do not think I have ever been called on to decide what I think is a more useless appeal than this appeal. I can quite understand that the Crown should bring to this House anything that raises a general question that is likely to affect the taxpayer one way or the other. It does not matter one whit which way this case is decided, because there is no general principle involved in it. The case is a very peculiar one, and not particularly liable to happen again, but, if it does happen again, nobody can tell whether it is for the interest of the Crown or for the interest of the taxpayer that the decision should be one way or the other. It all depends upon the particular figures. My remarks do not apply to the Attorney-General and Solicitor-General; they have far too much work to be able absolutely to advise as to all cases, but it really is high time—and I say this insistently—that those who advise the Crown in these matters should make up their minds that the Crown can be wrong, and not think it absolutely necessary to bring every case to this House, however trivial, simply because the Crown has been found wrong in that particular one.

My Lords, although I say that, it does not mean that this case is not arguable. It is arguable, and it has been remarkably well argued by the Attorney-General, and I say remarkably well argued because he has done what we in this House always like, that is, he has not troubled us with cases that do not apply. The books are full of such cases, and to a moderate extent one is accustomed to have them quoted, but here the Attorney-General at once went to the point, and said this really depends simply upon the construction of the words of the Section.

Now if one takes the Section as it stands, it would not be supposed that there could really be any question about it. From what I said in the narrative, it will be seen that, as far as the

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trade itself is concerned, there has not been the slightest alteration; it goes on now exactly as it went on before, and the Commissioners have found, as a fact, that there is no alteration in the trade, and, therefore, prima facie one would suppose that there could be no question that this trade had not been set up or commenced within the period of three years, because it has been going for a great deal longer. But, in spite of that, there is an argument, an ingenious argument not easily to be put aside, which the Attorney-General has developed, and that argument depends upon the decision of this House in the well known case of *Colquhoun* v. *Brooks*(1). Case I is: " Tax in respect of any trade not contained " in any other Schedule ". The case of *Colquhoun* v. *Brooks* decided that, although the word " trade " is a word of ordinary significance and would include every trade, yet its meaning where it is mentioned in Case I means a trade that, partly at least, is exercised within the United Kingdom, and therefore the Attorney-General says the effect of *Colquhoun* v. *Brooks* is that when you come to sub-rule (2) of Rule 1 of the Rules applicable to Cases I and II, the trade that has to be set up there is a taxable trade, a trade that under the decision of *Colquhoun* v. *Brooks* could be taxed under Rule 1, and he says that taxable trade has only been set up for the first time when they altered its direction and took it from Burma and brought it to England. My Lords, there is a great deal in that contention, and I confess I was at first inclined rather to think the Attorney-General had made out his point, but, on further consideration and certainly influenced by the fact that I know your two Lordships who are to follow me are of this opinion, I have come to the conclusion that, after all, it is really safest in this case to go by the ordinary meaning of the words. There is no absolute necessity for saying that " trade " in this Section (which has not anything to do with charging, but is only saying what is the method of computation that has to be taken) is to be pinned down to the exact meaning which it has under Case I, and it is safer to take the ordinary meaning of the word. If you take the ordinary meaning of the word, there is an end of the matter. I am quite aware that the question as to the ordinary meaning of the words came up in the case of *Colquhoun* v. *Brooks*, and, indeed, Lord Herschell in his judgment begins by confessing that that is so. In the case of *Colquhoun* v. *Brooks* there was a real practical question of very great moment to be decided. It did not mean that the business there was going to escape altogether—not at all, because it came under Case V; but at that time as the law then stood, it made this immense difference, that under Case V you did not pay Income Tax on anything except what was actually remitted to the United Kingdom, and you did

(1) 2 T.C. 490.

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not pay on what was left out. That law has since been altered, and the case of *Colquhoun* v. *Brooks* is in one sense of no practical importance; it has really come out of its grave to found the ingenious argument in this case. I do not think, therefore, that there is the same necessity, as there was in the case of *Colquhoun* v. *Brooks*, to search very carefully as between the possible meanings of the words. I think that on the whole it is safest to take the words as they stand in their natural meaning, and, if that is so, then it follows that the judgments of the Commissioners here and of the Court of Appeal are the right judgments.

My Lords, I say that the Attorney-General very rightly disregarded the cases, and there were only two that were mentioned. The one which seems to have had some force with Mr. Justice Rowlatt was the case of *Bradbury* v. *English Sewing Cotton Co., Ltd.*(1) I think that case does not apply, and the best way of showing that it does not apply is to read a short extract from the judgment of Lord Shaw in that case, in which he says : " It appears " to me to be as contrary to law in principle to compel him to " go through the confusing process of treating profits which have " been already defined and taxed under one category as to be " taken into account for the purpose of averaging under another " category." That shows, I think, without any more, the complete dissimilarity of that case from this. The case of *Singer* v. *Williams*(2), which was also quoted, has no application, because there the whole matter was decided by the chapter and verse of the statute.

My Lords, for these reasons I move that this appeal be dismissed with costs.

**Lord Warrington of Clyffe.**—My Lords, the question in this case is as to the mode in which Income Tax, admittedly payable by the Respondent Company on the profits arising from its trade, is to be computed. Is it to be on the average of three years as provided by Rule 1 of the Rules applicable exclusively to Case I under Schedule D, or is it subject to Rule 1, sub-rule (2) of the Rules applicable to Cases I and II, and therefore to be computed in accordance with the Rules applicable to Case VI?

On the 1st July, 1925, the Respondent Company, an Indian Company carrying on a large trade in Burma, for the first time became liable to British Income Tax under Case I of Schedule D. As from that date it became resident in England, and its trade was managed and controlled in this country. No break, however, occurred in the character of the trade itself, which continued to be carried on as before; this fact is found by the Commissioners in the Case stated.

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(1) 8 T.C. 481 at page 511. (2) 7 T.C. 419.

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My Lords, the material provisions of the Income Tax Act, 1918, are the following. There is first Schedule D: "Tax under this "Schedule shall be charged in respect of —(*a*) The annual profits "or gains arising or accruing . . . . (ii) to any person residing "in the United Kingdom from any trade, profession, employment, "or vocation, whether the same be respectively carried on in the "United Kingdom or elsewhere". Then 2: "Tax under this "Schedule shall be charged under the following cases respectively; "that is to say, Case I—Tax in respect of any trade not contained "in any other Schedule;" and "Case V—Tax in respect of income "arising from possessions out of the United Kingdom". Then there are the Rules applicable to Schedule D, and first there is a Rule applicable to Case I by itself: "The tax shall extend to "every trade carried on in the United Kingdom or elsewhere, "other than a trade" which it is immaterial to mention—"and "shall be computed on the full amount of the balance of the "profits or gains upon a fair and just average of three years "ending on that day of the year immediately preceding the year "of assessment . . .". Next there is one of the Rules applicable to Cases I and II, that is to say, the second sub-rule of Rule 1: "Where the trade, profession, employment, or vocation has been "set up and commenced within the said period of three years, "the computation shall be made on the average of the profits or "gains for one year from the period of the first setting up of the "same, and where it has been set up and commenced within the "year of assessment, the computation shall be made according to "the rules applicable to Case VI". The Rule applicable to Case VI which it is sought by the Crown to apply to the present case is: "The computation shall be made, either on the full "amount of the profits or gains arising in the year of assessment, "or according to an average of such a period, being greater or "less than one year, as the case may require, and as may be "directed by the Commissioners".

Under the decision of this House in *Colquhoun* v. *Brooks*(1), in 14 App. Cas., it is admitted that prior to the 1st July, 1925, the Company itself was not subject to tax on the profits of its trade, that trade, on what was there held to be the true construction of the Act, not being a trade within Case I. The shareholders, however, were, in accordance with the same decision, liable to tax under Case V in respect of so much of the profits as might be remitted to them in this country, as being profits arising from a foreign possession. Now, however, the Company is carrying on a trade which comes within Case I; it is resident in England, and is therefore itself liable to be assessed under Case I. Then

(1) 2 T.C. 490.

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arises the question : How is the tax to be computed? The general rule for the computation of the tax is Rule 1 of the Rules applicable to Case I, which I have already read. That rule does not bring into tax any of the profits for the three years therein referred to, but merely provides a measure for the computation of the profits for the year of assessment. On this Rule, taken by itself, no difficulty arises. The trade, the profits of which are to be ascertained, has been carried on for more than three years before the year of assessment, and the average of such profits could easily be struck. It is possible—I say no more, for this question is still open—that the Commissioners would properly assess the Company in three-fourths of that sum, seeing that they are taxing profits for nine months only of the Company's trade year, but that question is one which remains to be decided, and, as I say, so far as I am concerned I leave it quite open to the Commissioners to decide it according to whatever view they may take. But it is said that the general rule is excluded by the Rule applicable to Cases I and II—sub-rule (2) of Rule 1; in other words, that the trade, the profits of which are taxed, was set up and commenced within the year of assessment. I feel great difficulty in coming to the conclusion that " set up and commenced " means brought within the orbit of taxation, or in reading " trade " in this context as meaning the trade now for the first time brought under the operation of Case I or similar words. The trade has not altered its character; not a single business transaction has taken place since the 1st July, 1925, which might not have taken place before that date. The Attorney-General says the trade must mean the trade now controlled in this country, and he says you must read " trade " throughout as if it had been qualified by some such words as " home " or " controlled in this country ". I cannot adopt this view. The Legislature has employed a well-known business expression " trade set up and commenced ", and I think these words must have their ordinary business meaning. If so, this trade was set up more than three years before the year of assessment, and there is no ground for excluding the general rule. The cases cited seem to me really to have no bearing on the present question.

My Lords, for these reasons I think the appeal fails, and should be dismissed with costs. I may say that I agree with what has been said by my noble and learned friend on the Woolsack as to the uselessness of this appeal.

**Lord Atkin.**—My Lords, the Respondents in this case are a company registered under the Indian Companies Act, incorporated in 1919, having their registered offices in Rangoon and owning mines in Burma, from which they win lead, zinc and silver and dispose of the products apparently abroad. Until the year 1925 they were resident abroad in Burma, and they carried on the

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business of mine-owners in Burma; that was their trade. In the year 1925, in July, they determined to transfer the control of the Company to this country, which they did by merely passing a resolution increasing the number of their directors, so as to include a larger number of London directors, and passing a resolution that the Board should be able to meet in London, so that thereafter, by the carrying out of that resolution, the affairs of this Company were in fact controlled by a Board of Directors meeting in London. The result of that was, according to the decisions in this House, that this Company became resident in this country, and the further result followed that the business of the Company thereafter was at any rate partly carried on in this country. There seems to me to be no doubt at all that it was partly, indeed I should have said mainly, carried on in Burma, but it was partly carried on in this country. There is on the Case stated no evidence as to whether or not it may not have been carried on partly in this country before July 1925, but I think for the purpose of this case it is safe to assume that the real facts were that for the first time the business of this Company was partly carried on in London from July 1925.

The question then arises: In what circumstances and to what extent is it to be assessed to Income Tax? Being a resident in this country, it obviously for the year 1925–26 for the first time became taxable, and it became taxable under the terms of Schedule D of the Act of 1918, which prescribes: "Tax under "this Schedule shall be charged in respect of—The annual profits "or gains arising or accruing . . . . . (ii) to any person residing "in the United Kingdom from any trade, profession, employment "or vocation, whether the same be respectively carried on in the "United Kingdom or elsewhere". The tax is to be charged under the following Cases, namely, Case I: "Tax in respect of any "trade not contained in any other Schedule;" and the Rule applicable to Case I is: "The tax shall extend to every trade "carried on in the United Kingdom or elsewhere"—omitting immaterial words—"and shall be computed on the full amount of "the balance of the profits or gains upon a fair and just average "of three years ending on that day of the year immediately "preceding the year of assessment on which the accounts of the "said trade have been usually made up, or on the fifth day of "April preceding the year of assessment". The Respondents submit to be taxed on that footing, and they say that they are entitled to be taxed under the Rule applicable to Case I upon an assessment which has to be computed on the full amount of the balance of the profits or gains upon a fair and just average of three years ending on the day of the year on which the accounts of the trade have been made up. The Crown, on the other hand, say that is not the position and that the Respondents ought to be taxed

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under Rule 1, sub-rule (2) of the Rules applicable to Cases I and II, which provides that: "Where the trade, profession, employment, "or vocation has been set up and commenced within the said "period of three years"—that is the average period—"the com- "putation shall be made on the average of the profits or gains for "one year from the period of the first setting up of the same, and "where it has been set up and commenced within the year of "assessment, the computation shall be made according to the "rules applicable to Case VI". I do not pause for the moment to discuss what those Rules are. The Crown, therefore, say that the result of transferring the control of the trade to this country so that from that date the trade was partly carried on in this country, was to set up and commence the trade within the year of assessment. My Lords, that involves partly, no doubt, a question of construction, but when the construction has been determined it seems to me to raise a question of fact. What is the meaning of the words "set up and commenced" the trade? It is said by the Attorney-General that the words must be construed in reference to the whole of this Schedule and the Cases and Rules made thereunder, and I entirely agree with that view—I think that is so. Then it is said you must give the same meaning throughout the Schedules and the Cases and the Rules to the same words, and I agree that, unless the context makes it impossible to do so, you ought to give the same meaning to the words.

Then if you look to see what the Rules and the Cases are dealing with, the matter seems to be this. You are to tax only profits or gains, which is the first point. They must accrue to a person residing in the United Kingdom in respect of this matter on which they are charged; and they must accrue to a person residing in the United Kingdom from any trade carried on in the United Kingdom or elsewhere. The words "or elsewhere" have been limited by the case of *Colquhoun* v. *Brooks*(1), and those words, though they seem to have a simple meaning, must be construed, in reference to the territorial limit of taxing jurisdiction and to the other provisions of the Act, as only applicable to trade carried on in the United Kingdom, or partly in the United Kingdom and elsewhere; and we must accept that view. But it seems to me the word "trade" has still the same meaning throughout the Act. "Trade" refers to the various activities of commerce—the winning and using the products of the earth, or multiplying the products of the earth and selling them, or manufacturing them and selling them, the purchase and sale of commodities, or the offering of services for a reward, such as conveyance and the like. To my mind, throughout there is only one meaning to be attached to the

(1) 2 T.C. 490.

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word " trade ". Trade may or may not become taxable in accordance with the provisions of the Act, and, in this particular case that we are dealing with, the trade of a person will not be taxed unless that person is resident in the United Kingdom.

There is another matter which it is unnecessary to dispose of, which is on the other part of the Schedule which provides that if a trade is carried on in this country and profits accrue to a non-resident from such trade, those profits are taxable; but we are not concerned with that case.

My Lords, in view of those circumstances, what is the position here? Are these persons carrying on a trade in the United Kingdom, and are they entitled to have it computed on the full amount of the balance of the profits or gains for three years? It appears to me that they come within every word of that Rule applicable to Case I; they are carrying on a trade and they would be entitled to computation on the three years' average. The only objection that can be made to that claim appears to me to be, as far as it turns on those words, the suggestion that you cannot use profits of a trade which existed at a time when the trade was not taxable in this country to arrive at an average for the purpose of computing the profits of a year when it is taxable. That appears to me to have no authority at all to support it; indeed it seems to me to be entirely contrary to the decision in *Singer* v. *Williams*(1) and the statement of the Lord Chancellor, and to have no support at all from the *Bradbury*(2) case. There is no reason why, if the trade still continues, the profits made at the time when it was not taxable should not be taken into account for the purpose of computing profits in a year when it is taxable.

The other view put forward by the Crown was this: It was said that whatever may be the construction of the Rule relating to Case I, there is an express Rule relating to Cases I and II, which deals with the tax on a trade being set up and commenced within the year of assessment. Now in respect of that I venture to think the conception of setting up and commencing a trade is a very simple one, and I should have thought that on the ordinary use of the language there could be no conceivable doubt about it. In that I rather concur with an expression used by Lord Justice Russell, as he then was, in the Court of Appeal. To set up and commence a trade seems to me to mean to bring into existence for the first time those activities, which I have just described, which constitute trade; they relate to acts done for the first time to enable a person to engage in manufacture, barter, or profitable

(1) 7 T.C. 419.
(2) Bradbury v. English Sewing Cotton Co., Ltd., 8 T.C. 481.

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services, such as I have dealt with. They do not appear to me to convey the idea, which is suggested by the Crown, that the trade becomes for the first time taxable in this country. That is an idea which I think is very easy to express, and certainly it is a very remarkable way of expressing it to use the words " set up " and commence the trade ". I have said that the question may become a question of fact, and I think it may. It may very well be that the activities which are being indulged in in the way of trade may be so altered in their nature, in their geographical disposition, or possibly in the way of their control that the trade, which had been originated before the change, has been altered, so that a new trade is brought into existence; but that seems to be a question of fact, and in this case we have the findings of the Commissioners, which appear to me to be conclusive that the alteration which was made in the control of this business by altering the number of the directors and by arranging that the Board henceforward should meet in London and not in Rangoon, and from London control the operations of the Company, which otherwise continued unchanged in Burma, did not amount to a change in the trade.

My Lords, in those circumstances it appears to me that the Crown do not bring the case within the Rule applicable to Cases I and II, but the case remains within the Rule applicable to Case I, and the profits fall to be computed upon a fair average of the last three years. I pass no opinion at all upon the question of whether or not that involves that this Company, which is now resident in this country, will have to pay on the full year's profits, or on an apportioned average; that will be a matter which will have to be the subject of further adjustment.

My Lords, in his forcible reply made this morning the Attorney-General referred to the consequences that might befall a taxpayer if this construction were adopted, that is to say, if the taxpayer instead of beginning a trade in this sense, discontinued or ceased to carry on a trade. I am not myself at the present moment satisfied that the difficulties and inequalities which he suggested would really fall out to be quite as serious. That is a matter that would no doubt require further discussion, and it is not before us. In any event, it would not appear to me to be effective to alter what in my view is the plain meaning of quite simple business words used in this connection, and I may perhaps conclude by saying that, if the inequalities and injustices are as great as the Attorney-General points out, the Government have legal advisers who will be able to put them in a position to correct those obvious injustices and inequalities if they really follow from the words as construed by this House.

**(Lord Atkin.)**

My Lords, I agree with the words that have fallen from the noble Viscount on the Woolsack and that this appeal should be dismissed with costs.

*Questions put:*

That the Order appealed from be reversed.

*The Not Contents have it.*

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

*The Contents have it.*

**The Attorney-General.**—My Lord, in view of certain observations which fell from your Lordship which were not put to me in the course of the argument, I think it fair, particularly as your Lordship was good enough to indicate that I personally was not implicated and that others were, to say that the amount involved in this case is very large indeed and this case governs other cases, and the appeal is being taken for that purpose. Your Lordships were not aware of those facts.

**Viscount Dunedin.**—I still stick to my opinion. The Court of Appeal is the Court of Appeal, and this case raises no general question in this sense, that you yourself very candidly said you cannot tell whether it is for the interests of the taxpayers as a whole whether the case is on the one side or the other. I keep to my observations. I might have to repeat them, but I do not say so necessarily, because I quite see that, if there is a question of general importance, then, no matter how the decision is, it is for the Crown to go on, but I do notice that there are seven cases in the paper and in five of them the Crown is Appellant. I shall watch with interest what these cases are.

**The Attorney-General.**—My Lord, I thought I ought to point that matter out to your Lordship, particularly in view of the fact that the learned Trial Judge decided in our favour.

**Viscount Dunedin.**—You have not disturbed my observations.

[Solicitors :—The Solicitor of Inland Revenue; Messrs. Birkbeck, Julius, Edwards & Co.]