HIGH COURT OF JUSTICE—27TH AND 28TH FEBRUARY, 1951

COURT OF APPEAL—30TH APRIL, 1ST, 2ND, 3RD MAY AND 15TH JUNE, 1951

HOUSE OF LORDS—10TH, 11TH, 12TH, 16TH, 17TH MAY AND 31ST JULY, 1952

Littman

v.

Barron (H.M. Inspector of Taxes)[1]

Income Tax, Schedule D—Property held on short lease and re-let at a rent lower than that payable by lessee—Whether "loss" can be set against other income chargeable under Schedule D, Case VI*—Finance Act,* 1927 (17 & 18 *Geo.* V. *c.* 10), *Section* 27 (1); *Finance Act,* 1940 (3 & 4 *Geo.* VI. *c.* 29), *Section* 15.

The Appellant, a property dealer, held 28 *properties on short leases. He re-let* 23 *properties at advanced rents and was assessed to Income Tax under Case* VI *of Schedule D in respect of "excess rents" in accordance with the provisions of Section* 15, *Finance Act,* 1940. *Three properties were unlet and the Appellant received no rent in respect thereof; two properties were re-let at a rent lower, in each case, than that payable by the Appellant to his superior landlord.*

On appeal to the Special Commissioners, the Appellant contended (i) *that he sustained "losses" equal to the amount of the rent payable by him (in the case of each of the unlet properties) or equal to the excess of the rent payable by him over the notional annual value of the relevant property computed in accordance with the provisions of Section* 15, *Finance Act,* 1940, *(in the case of each of the properties re-let at reduced rents);* (ii) *that the losses were sustained in the course of "transactions" (within the meaning of Section* 27 (1), *Finance Act,* 1927) *of such a nature that if profits had arisen therefrom, he would have been liable to be assessed under Case* VI *of Schedule D in respect of such profits; and accordingly* (iii) *that he was entitled under the provisions of Section* 27 (1) *to set the losses against the excess rents assessable upon him in respect of the remaining properties. For the Crown it was contended* (i) *that the holding of the properties by the Appellant was not a "transaction";* (ii) *that if it was a transaction it was not a transaction such that, if any profits had arisen therefrom, the Appellant would have been liable to be assessed in respect thereof under Case* VI *of Schedule D, because such profits, if any, would have been covered by the Schedule A assessment; and* (iii) *that Section* 15, *Finance Act,* 1940, *did not charge to tax "profits" as such but a sum described as "the excess" of an amount calculated in accordance with the provisions of the Section over another specified amount. The Commissioners accepted the two latter contentions and dismissed the appeal. The Appellant demanded a Case.*

Held, *that the losses were sustained in "transactions" within the meaning of Section* 27; *and that the transactions were of such a nature that if*

[1] Reported [1951] 1 All E.R. 701; [1951] 2 All E.R. 393; [1951] 2 T.L.R. 323; [1952] 2 All E.R. 548; [1952] 2 T.L.R. 445.

profits had arisen therefrom they would have been assessable under Case VI *of Schedule D ; and that the excess rents chargeable under Section* 15, *Finance Act,* 1940, *were profits arising from transactions in respect of which the taxpayer was assessed under Case* VI *and accordingly that under the provisions of Section* 27 *the losses could be deducted from or set off against the excess rents.*

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 High Court of Justice.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 30th November, 1948, Mr. J. A. Littman (hereinafter called "the Appellant") appealed against assessments to Income Tax made upon him for the years and in the amounts following:—

1940-41 An original assessment of £665 and an additional assessment of £4,335.

1941-42 £5,000.

1942-43 £5,000.

2. The appeal was argued before us solely by reference to the facts as they existed in the year ended 5th April, 1943, it being agreed between the parties that our decision in principle on the 1942-43 assessment would govern the other assessments under appeal.

3. The assessment for 1942-43 under appeal was made under Case VI of Schedule D, by virtue of Section 15 of the Finance Act, 1940, in respect of excess rents arising from certain properties held by the Appellant on leases and re-let by him at advanced rents. Separate assessments under Case VI were not made in respect of each of the 23 properties concerned, but one assessment was made to cover the excess rents arising from all such properties.

It was not disputed by the Appellant (subject to his claim under Section 27 of the Finance Act, 1927, referred to below, and subject to detailed examination of the figures) that the assessment was properly made, and that a liability to Income Tax under Case VI of Schedule D arose in respect of the said 23 properties by virtue of the Finance Act, 1940, Section 15.

4. The Appellant, who is a dealer in property, claimed that he was entitled under the Finance Act, 1927, Section 27, to a deduction from, or set-off against, the amount of the profits assessed as aforesaid on account of a loss which he alleged he had sustained in the following circumstances.

In addition to the properties mentioned in paragraph 3 above, the Appellant held on lease the following five properties, all of which were held by the Appellant on "short leases" as defined in the Finance Act, 1940, Section 13 (1).

	Rent paid by Appellant	*Rent received by Appellant*
	£	£
(1) 220, Edgware Road	550	100
(2) 28–30, Wigmore Street	400	175
(3) 50, Oxford Street	2,500	nil
(4) 63–66, Central Arcade, Great Yarmouth	300	nil
(5) 31, Upper Street, Islington ...	100	nil

In the case of each of the above properties, the rent paid by the Appellant exceeded the net annual value for the purpose of Schedule A to the Income Tax Act, 1918. The properties numbered (1) and (2) were re-let by the Appellant at the annual rents shown above, and the properties numbered (3), (4) and (5) remained unlet. The Appellant had made endeavours to let the latter but had been unable to do so. A statement showing the profit rentals and loss rentals of the Appellant for 1942-43 is annexed hereto, marked A, and forms part of this Case[1].

5. Section 27 (1) of the Finance Act, 1927, provides as follows:—

"Where in any year of assessment a person sustains a loss in any "transaction, whether he was engaged therein solely or in partnership, "being a transaction of such a nature that, if any profits had arisen "therefrom, he would have been liable to be assessed in respect thereof "under Case VI of Schedule D, he may claim that the amount of "the loss sustained by him shall, as far as may be, be deducted from "or set off against the amount of any profits or gains arising from "any transaction in respect of which he is assessed for that year "under the said Case VI, and that any portion of the loss for which "relief is not so given shall, as far as may be, be carried forward "and deducted from or set off against the amount of any profits or "gains arising from any transaction in respect of which he is assessed "under the said Case VI for any of the six following years of "assessment."

6. It was contended on behalf of the Appellant;

(1) that the Appellant was engaged in a transaction within Section 27 of the Finance Act, 1927, namely, the acquisition and management of the properties listed in paragraph 4;

(2) alternatively, that the Appellant was engaged in five such transactions, namely, in respect of each of the said properties;

(3) that in respect of each of the first two of the said properties the Appellant sustained a loss in an amount represented by the excess of the rent paid by him over the supposed annual value computed according to Section 15 of the Finance Act, 1940;

(4) that in respect of each of the remaining said properties the Appellant sustained a loss in an amount equal to the rent paid by him;

(5) that if sums in excess, in each instance, of the net Schedule A assessments had been received by the Appellant in respect of the said properties, those sums would have been profits in amounts computed in accordance with Section 15 of the Finance Act, 1940 (there called an excess), and those profits would, by the express terms of the said Section 15, have been assessable under Schedule D, and under Case VI thereof;

(6) that the sums in question in this appeal were the amounts of losses sustained by the Appellant in transactions of such a nature that, if profits had arisen therefrom, the Appellant would have been liable to be assessed in respect thereof under Case VI of Schedule D;

(7) that the Appellant was entitled to carry forward the sums in question in this appeal, and to deduct them from, or set them off against, the amounts of the profits or gains forming the subjects of the assessments under appeal;

(8) that the appeal should be allowed.

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(1) Not included in the present print.

7. It was contended on behalf of the Inspector of Taxes;

(1) that the holding by the Appellant of the properties described in paragraph 4 hereof some of which he sub-let and some of which remained void was not a transaction or transactions;

(2) that even if there were in this case any such transactions they were not of such a nature, as is described in Section 27 (1) of the Finance Act, 1927, that "if any profits had arisen therefrom he would "have been liable to be assessed in respect thereof under Case VI of "Schedule D . . ." because such profits, if any, would have been covered by the Schedule A assessment;

(3) that Section 15 of the Finance Act, 1940, did not charge profits as such, but a sum described as the excess of an amount calculated in accordance with the provisions of the Section, and was therefore inapplicable in considering what relief should be given under Section 27 of the Finance Act, 1927.

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

(1) The Appellant appeals against assessments made under Case VI of Schedule D by virtue of Section 15 of the Finance Act, 1940, in respect of excess rents on a number of properties, on the ground that no deduction has been made under the provisions of Section 27 of the Finance Act, 1927, on account of losses which the Appellant claims he sustained in a number of other transactions. The Case VI assessments under appeal are single assessments and not a number of separate assessments in respect of each property, but the Appellant makes no objection and raises no special contention on that account. The appeal was argued before us with special reference to the assessment for 1942–43, but it was agreed between the parties that our decision in principle on that assessment would cover the other assessments under appeal.

(2) The five transactions in which the Appellant claims to have sustained a loss consist of—

(*a*) the taking on lease and re-letting at a lower rental of two properties, and

(*b*) the taking on lease of three other properties which he failed to re-let.

The loss which he claims to have sustained is, in the case of the two transactions in (*a*) above, the difference between the rent received and the rent paid to the superior landlord, and in the three cases in (*b*) above, the amount of the rent paid to the superior landlord.

(3) The primary question which we have to decide is whether, in the case of each of these five properties, there was a "transaction of such a "nature that, if any profits had arisen therefrom, he would have been "liable to be assessed in respect thereof under Case VI of Schedule D". The renting and re-letting of a house at an advanced rent may give rise to a "profit" in a business sense; the Appellant does not, however, contend that (had such a profit arisen) he could have been assessed in respect thereof under the terms of Schedule D, Paragraph (2), Case VI itself, by virtue of which tax is charged under Case VI in respect of certain "annual profits or gains": the Appellant relies upon the facts (which was not disputed) that had he been able to re-let at advanced rents, he might have become liable to assessment by virtue of Section 15

of the Finance Act, 1940, and such assessment would have been made under Case VI.

(4) In our opinion the Appellant's contention is open to a fundamental objection, in that a Case VI assessment under Section 15 is not an assessment in respect of the profits arising from a transaction of taking on short lease and re-letting property. A person carrying out such a transaction suffers Income Tax, in the first place, under Schedule A, by deduction from the rent he receives in so far as he may not be able to pass on such tax to his superior landlord. This tax is not tax in respect of any profit from the transaction, but in respect of the annual value of the property. In addition, he may, in certain circumstances, be liable to assessment under Case VI, by virtue of Section 15; this assessment, again, is not made in respect of the profit from the transaction, but is made "in respect of the excess, if any, of the amount "which would have been the amount of the assessment for the purpose "of Schedule A" over the amount of the rent payable to the superior landlord, or the amount of the net annual value, whichever is the greater. The *amount* of such assessment may, in cases where the rent payable to the superior landlord exceeds the net annual value, approximate closely to the "profit" from the transaction, although in cases where the net annual value exceeds the rent payable, it may not. In either case, however, by the terms of Section 15, it is not an assessment in respect of the "profit", but in respect of the "excess", and the charge to tax is, in our opinion, a charge upon part of the new net annual value specially calculated for the purpose.

(5) Furthermore, there will be many cases of "transactions" of the same nature as those under consideration where, although a profit in the commercial sense results, no Case VI assessment will follow; *e.g.* cases where property held on short lease is sub-let at an advanced rent, but at a rent less than, or equal to, the Schedule A annual value.

(6) It was further contended on behalf of the Appellant that Section 27, being a relieving section, should be construed in a way favourable to the taxpayer, and that the intention of the Section is to give relief in cases where (as it was contended, is the case here) there is a loss in certain "Case VI transactions" and assessments in respect of other "Case VI transactions". In our opinion, the crucial words in Section 27, in relation to this appeal are the words "liable to be assessed in respect thereof", *i.e.* in respect of "any *profits* therefrom". The word "profit" is used in contradistinction to the word "loss", and in our opinion we cannot construe "profit" as including an "excess" calculated for the purpose of Section 15, while at the same time construing "loss" as meaning an ordinary loss in a business sense. The Appellant however contends that the word "loss", in such a case as the present one, refers, not to the business or accountancy loss, but to a "rent deficiency" arrived at by applying the calculation provided in Section 15 for the case of an excess. In our opinion it is impossible to construe the word "loss" in this way; although in the present case the amount of the "rent deficiency" so calculated may approximate to the amount of the business or accountancy loss, in many other cases of the same "nature" (as in the illustration given in paragraph 5 above) there would be a "rent deficiency" according to this calculation while in fact there would be a business or accountancy profit.

(7) In our opinion, therefore, the transactions in question were not transactions of the nature indicated in Section 27, and the appeal fails.

We therefore dismiss the appeal in principle for all years of assessment under appeal, and leave the figures to be agreed.

The figures having subsequently been agreed we determined the appeals as follows:

1940–41 We confirmed the original assessment of £665 and increased the additional assessment to the agreed figure of £4,865.

1941–42 We reduced the assessment to the agreed figure of £3,603.

1942–43 We reduced the assessment to the agreed figure of £4,830.

(9) 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.

(10) The question of law for the opinion of the Court is whether the Appellant is entitled to any deduction from, or set-off against the amounts assessed, under Section 27 of the Finance Act, 1927.

R. A. FURTADO.
F. N. D. PRESTON.
R. COKE.

Commissioners for the Special Purposes of the Income Tax Acts.

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

5th October, 1950.

The case came before Wynn-Parry, J., in the High Court on 27th and 28th February, 1951, and on the latter date, judgment was given in favour of the Crown, with costs.

Mr. N. E. Mustoe appeared as Counsel for the taxpayer and the Solicitor-General (Sir Frank Soskice, K.C.), and Mr. Reginald P. Hills for the Crown.

Wynn-Parry, J.—The Appellant in this case is a dealer in property. Part of his activity consists in holding leasehold properties, in respect of some of which he receives rent. Prior to 1940, in respect of any excess represented by a surplus over his liability under Schedule A of rent received, he would not have been taxable. That position was established by a number of cases, culminating in the *Salisbury House* case [1]. In 1940 the Legislature desired to alter that position and for that purpose Section 15 of the Finance Act of that year was introduced. By Sub-section (1) of that Section it is provided that, "If, as respects any year of assessment, "the immediate lessor of a unit of assessment is entitled in respect of the "unit to any rent payable under a lease or leases to which this section "applies, he shall be chargeable to tax under Case VI of Schedule D in "respect of the excess, if any, of the amount which would have been the

[1] Salisbury House Estate, Ltd. *v.* Fry, 15 T.C. 266.

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"amount of the assessment of the unit for the purposes of Schedule A, as "reduced for the purpose of collection, if the annual value of the unit "had been determined (in accordance, in whatever part of the United "Kingdom the unit is situated, with the Rules applicable to Schedule A set "out in the First Schedule to the Income Tax Act, 1918) by reference to "that rent and the other terms of the lease or leases, over whichever "is the greater of—(*a*) the actual amount of the assessment of the unit for "the purposes of Schedule A, as reduced for the purpose of collection; "or (*b*) the amount of any rent payable by the immediate lessor in respect "of the unit under any short lease or short leases."

The appeal in question concerns assessments to Income Tax for the years 1940-41, 1941-42 and 1942-43, but the appeal was dealt with solely by reference to the facts as they existed in the year ended 5th April, 1943.

Shortly, the position is that the Appellant maintains he has suffered a loss as regards five leases held by him. As regards the first two the rent which he received was less than the rent paid by him, and as regards the other three he received no rent at all. In those circumstances he seeks to obtain relief in respect of the alleged loss by invoking the provisions of Section 27 (1) of the Finance Act, 1927. That Section, amongst other provisions, makes it clear that it relates only to a case where a person sustains a loss in respect of a particular type of transaction, namely, "of "such a nature that, if any profits had arisen therefrom, he would have been "liable to be assessed in respect thereof"—that is in respect of profits— "under Case VI of Schedule D".

The primary question which arises in this appeal is whether or not the Commissioners were correct in their view that that which is taxable under Section 15 (1) of the Finance Act, 1940, is not "profits" in the sense in which that word is used in Section 27 (1) of the Finance Act, 1927. Two views were put forward. On behalf of the Appellant it was argued that although the word "excess" is used in Section 15 (1), in its context the word connotes a profit, and that that is emphasised and underlined by the provision that that excess is to be chargeable to tax under Case VI of Schedule D, a Case which is defined as embracing "Tax in respect of any "annual profits or gains not falling under any of the foregoing Cases, and "not charged by virtue of any other Schedule". It was pointed out that unless Section 15 of the Finance Act, 1940, was so construed it would not be possible to invoke the provisions of Section 27 of the Finance Act, 1927, where a loss had been sustained, and that the resulting position must be that the Legislature had designed to levy a tax upon what the Appellant contends is a profit, although an artificially ascertained profit, while at the same time allowing no relief where a loss occurs.

Against that it was contended on behalf of the Crown by the Solicitor-General that Section 15 does exactly what it appears to do by its language. It sets out to tax an excess which, from the artificial nature of the calculation which is required to arrive at that excess, cannot be regarded as equivalent to the word "profit" as used in Section 27 of the Finance Act, 1927. In support of that contention the Solicitor-General put forward three hypothetical examples, into the details of which I need not go; but they were illuminating and showed quite clearly that, postulating figures not in the least degree unreasonable, the result may follow that in one case there would have to be a Case VI assessment under Section 15 of the Finance Act, 1940, although no profit in the business sense existed, while

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in other cases the result would be that there would be no Case VI assessment under that Section although upon the figures a profit in the business sense had been achieved. That in my view is a cogent reason for hesitating in giving to the word " excess " in Section 15 (1) of the Finance Act, 1940, a meaning which *prima facie* it does not bear.

Then it was argued that Case VI relates to tax in respect of annual profits or gains, whether those profits or gains are to be considered under Schedule D or any other Schedule. Upon the language of Case VI that no doubt is true, and from that it no doubt follows that so far as the Courts are concerned it would not be possible to introduce into Case VI a tax of the nature which is imposed by Section 15 of the Finance Act, 1940, assuming the Crown's case to be right.

On this matter, however, having given it the best consideration I can, I do not feel any difficulty. In my judgment the true view is that put forward by the Solicitor-General. What in effect has been done by Section 15 of the Finance Act, 1940, is to introduce within the purview of Case VI a new tax and that, for convenience, the machinery of Case VI has been directed to be employed. It therefore follows from this view of the matter that even assuming there was a transaction within the meaning of that word as used in Section 27 (1) of the Finance Act, 1927, a point which I do not find it necessary to decide, nevertheless it was not a transaction of the limited class there specified in that it was not a transaction of such a nature that if any profits had arisen therefrom the taxpayer would have been liable to be assessed in respect of those profits. Therefore in my view the Appellant is unable to pray in aid the provision of Section 27 of the Finance Act, 1927.

Upon those short grounds, in my view, this appeal fails and must be dismissed, with costs.

An appeal having been entered against the above decision, the case came before the Court of Appeal (Cohen, Singleton and Jenkins, L.JJ.) on 30th April, 1st, 2nd and 3rd May, 1951, when judgment was reserved. On 15th June, 1951, judgment was given against the Crown, with costs, Jenkins, L.J. dissenting.

Mr. J. Millard Tucker, K.C., and Mr. N. E. Mustoe appeared as Counsel for the taxpayer and the Attorney-General (Sir Frank Soskice, K.C.) and Mr Reginald P. Hills for the Crown.

Cohen, L.J.—The Appellant is an owner of properties. In the three financial years in question he owned 28 leasehold properties ; he had sub-let 23 of them at a profit rental ; two were let at rents lower than the rents payable by him to the respective head lessors ; he had failed to sub-let the remaining three although he had tried to do so.

He was assessed to Income Tax under Schedule A on the annual value of the properties and also, as regards the 23 properties in respect of what may be conveniently—though not entirely accurately—referred to as the excess rents derived therefrom, under Case VI of Schedule D pursuant

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to Section 15 of the Finance Act, 1940. Sub-section (1) of that Section provides as follows:

" If, as respects any year of assessment, the immediate lessor of a " unit of assessment is entitled in respect of the unit to any rent payable " under a lease or leases to which this section applies, he shall be " chargeable to tax under Case VI of Schedule D in respect of the " excess, if any, of the amount which would have been the amount of " the assessment of the unit for the purposes of Schedule A, as reduced " for the purpose of collection, if the annual value of the unit had been " determined (in accordance, in whatever part of the United Kingdom " the unit is situated, with the Rules applicable to Schedule A set out " in the First Schedule to the Income Tax Act, 1918) by reference to " that rent and the other terms of the lease or leases, over whichever " is the greater of—(*a*) the actual amount of the assessment of the unit " for the purposes of Schedule A, as reduced for the purpose of " collection ; or (*b*) the amount of any rent payable by the immediate " lessor in respect of the unit under any short lease or short leases."

The Appellant did not dispute the Crown's right to assess him in respect of those excess rents, but he claimed to be entitled to a deduction in respect of losses which he said he had sustained in respect of the other five properties. He claimed that deduction under Section 27 (1) of the Finance Act, 1927, which provided as follows:

" Where in any year of assessment a person sustains a loss in any " transaction, whether he was engaged therein solely or in partnership, " being a transaction of such a nature that, if any profits had arisen " therefrom, he would have been liable to be assessed in respect thereof " under Case VI of Schedule D, he may claim that the amount of the " loss sustained by him shall, as far as may be, be deducted from or set " off against the amount of any profits or gains arising from any trans- " action in respect of which he is assessed for that year under the said " Case VI, and that any portion of the loss for which relief is not so " given shall, as far as may be, be carried forward and deducted from " or set off against the amount of any profits or gains arising from any " transaction in respect of which he is assessed under the said Case VI " for any of the six following years of assessment."

The contentions advanced on behalf of the Appellant before the Special Commissioners are set out in paragraph 6 of the Case as follows:

" (1) that the Appellant was engaged in a transaction within Section " 27 of the Finance Act, 1927, namely, the acquisition and management " of the properties listed in paragraph 4 ;

" (2) alternatively, that the Appellant was engaged in five such trans- " actions, namely, in respect of each of the said properties ;

" (3) that in respect of each of the first two of the said properties " the Appellant sustained a loss in an amount represented by the excess " of the rent paid by him over the supposed annual value computed " according to Section 15 of the Finance Act, 1940 ;

" (4) that in respect of each of the remaining said properties the " Appellant sustained a loss in an amount equal to the rent paid by him ;

" (5) that if sums in excess, in each instance, of the net Schedule A " assessments had been received by the Appellant in respect of the said " properties, those sums would have been profits in amounts computed

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"in accordance with Section 15 of the Finance Act, 1940 (there called "an excess), and those profits would, by the express terms of the said "Section 15, have been assessable under Schedule D, and under Case VI "thereof;

"(6) that the sums in question in this appeal were the amounts of "losses sustained by the Appellant in transactions of such a nature "that, if profits had arisen therefrom. the Appellant would have been "liable to be assessed in respect thereof under Case VI of Schedule D;

"(7) that the Appellant was entitled to carry forward the sums in "question in this appeal, and to deduct them from, or set them off "against, the amounts of the profits or gains forming the subjects of the "assessments under appeal".

Before us his Counsel admitted that the dealing with each property must be regarded as a separate transaction. I need not, therefore, trouble further with the first contention.

The Crown's contentions are stated in paragraph 7 of the Case as follows:

"(1) that the holding by the Appellant of the properties described "in paragraph 4 hereof some of which he sub-let and some of which "remained void was not a transaction or transactions;

"(2) that even if there were in this case any such transactions they "were not of such a nature, as is described in Section 27 (1) of the "Finance Act, 1927, that 'if any profits had arisen therefrom he would "'have beeen liable to be assessed in respect thereof under Case VI "'of Schedule D . . .' because such profits, if any, would have "been covered by the Schedule A assessment;

"(3) that Section 15 of the Finance Act, 1940, did not charge profits "as such, but a sum described as the excess of an amount calculated "in accordance with the provisions of the Section, and was therefore "inapplicable in considering what relief should be given under Section 27 "of the Finance Act, 1927."

The Special Commissioners and Wynn-Parry, J., both decided in favour of the Crown in substance on the ground that whether or no there was a transaction within the meaning of Section 27, it was not a transaction of such a nature that if any profits had arisen therefrom, the taxpayer would have been liable to be assessed in respect of those profits. They took the view that Section 27 contemplated loss and profit ascertained in the commercial sense and that excess rents ascertained in the artificial way required by Section 15 of the 1940 Act could not be said to be profits within the meaning of Section 27.

From the decision of Wynn-Parry, J., the Appellant now appeals to this Court. The subjects debated before us were as follows:

1. What was the nature of the excess rents which were subjected to tax by Section 15 of the Act of 1940? Were they, as the Attorney-General contended, merely an addition to the annual value of the land, retaining the characteristics of income from property in land, but brought into charge for the purposes of administrative convenience under Case VI of Schedule D, or were they, as Mr. Millard Tucker argued, annual profits and gains taxable under Schedule D?

2. As regards the properties in respect of which the Appellant suffered a loss, could he be said to have incurred that loss in a transaction of such

a nature that if any profits had arisen therefrom he would have been liable to be assessed in respect thereof under Case VI of Schedule D? The second question raised two subsidiary points: (1) What was the transaction from which the profits could be said to be derived? (2) What was the meaning of the expression "profits" in Section 27?

In support of his argument on the first point the Attorney-General went shortly through the history of Income Tax and pointed out that from the beginning until 1930 the only method of taxing income from the ownership of land was under Schedule A on the annual value. When in the 1920's the Crown sought to tax a property company under Schedule D the claim was at once rejected by the House of Lords in the case of *Salisbury House Estate, Ltd.* v. *Fry,* 15 T.C. 266. Lord Atkin said at page 318:

"My Lords, I think that this case should be decided in favour of "the Respondents upon the simple ground that annual income derived "from the ownership of lands, tenements and hereditaments can only be "assessed under Schedule A and in accordance with the Rules of that "Schedule. In my opinion it makes no difference that the income so "derived forms part of the annual profits of a trading concern. For the "purpose of assessing such profits for the purpose of Schedule D the "income so derived is not to be brought into account. The option of the "Revenue Authorities to assess under whichever Schedule they prefer in "my opinion does not exist and is inconsistent with the provisions of the "Income Tax Acts throughout their history."

The decision was only of importance to the Revenue as regards London properties the annual value of which was fixed under the Valuation (Metropolis) Act, 1869. The annual value of other properties is measured by Rule 1 of the Rules applicable to Schedule A and is the actual rent if the hereditaments were let at a rack-rent within seven years of the assessment, or if not, the rack-rent which they were actually worth, subject to the statutory allowances. Under this Rule there could not be substantial divergence between annual value as ascertained under the Rule and the true rack-rent.

The trouble as regards London properties was met by Section 31 of the Finance Act, 1930, which, in effect, made the rules for ascertaining annual value theretofore applicable to the rest of England, applicable also in London. The sanctity of Schedule A was however maintained, and all income from the ownership of land continued to be taxed under that Schedule.

Section 15 of the Act of 1940 was, said the Attorney-General, introduced for a different reason. The war was on and it was anticipated that it would be impossible to carry out the quinquennial valuation of properties due to be carried out in 1941. If that were so and nothing were done it would necessarily mean that the Crown would suffer a substantial loss of revenue. This, said the Attorney-General, was the reason for Section 15. That reason did not require an infringement of the sanctity of Schedule A and we ought not so to construe Section 15 as to involve that sacrilege. He sought to reinforce this argument by a reference to the language of Section 15 itself. Sub-section (1) made assessment under Schedule A the basis of ascertainment of the higher figure in the subtraction sum by which the amount of the excess was to be ascertained.

Mr. Millard Tucker replied that we must construe the Section from its language and not by a research into ancient history. He took us at length through the provisions of the Income Tax Act, 1918, and pointed

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out that (*a*) no matter what be the Schedule under which the tax is levied, it is always a tax on income and that annual value is merely the prescribed method of measuring that income in the case of tax levied under Schedule A (see *per* Lord Atkinson in *Governors of the Rotunda Hospital, Dublin* v. *Coman*, 7 T.C. 517, at page 581); (*b*) the terms profits, or profits and gains, are used indiscriminately in a number of sections of the Income Tax Act, 1918, and the amending Acts, and in contexts in which they must include excess rents taxed under Section 15 of the Act of 1940—for instance, Section 100 of the Act of 1918—for if not the amount of the excess rents would not have to be included in the statement required under that Section.

He also pointed out that Parliament in 1940 had drawn a purely artificial distinction between short and long leases, the latter under Section 13 being leases for a term exceeding 50 years other than a lease for a term of years determinable after the death or marriage of a person. So far as long leases are concerned, Parliament had made a drastic alteration as regards the method of taxation of income derived from properties, for Section 17 (2) provided:

> "(2) Rules 1 and 4 of No. VIII of Schedule A shall not apply to "any payment to which this section applies, but any such payment shall, "so far as it does fall under any other Case, be charged with tax "under Case VI of Schedule D and be treated for the purposes of "such of the provisions of the Income Tax Acts as apply to royalties "paid in respect of the user of a patent as if it were such a royalty."

That being so, there was no reason for refusing to give to Section 15 the meaning which its language *prima facie* bore. That Section directed that the taxpayer should be assessed in respect of the excess, if any, as therein defined under Case VI of Schedule D. Looking at the relevant provisions of the 1918 Act, they define Case VI as covering "Tax in "respect of any annual profits or gains not falling under any of the "foregoing Cases, and not charged by virtue of any other Schedule". Anything assessed under Case VI, said Mr. Tucker, must therefore be a profit, and the true effect of Section 15 is that it directs a tax on profits, the amount of such profits being ascertained by working out the arithmetic prescribed by the Section.

I have come to the conclusion that up to this point Mr. Tucker is right, but it does not however necessarily follow that the Appellant is entitled to the relief he seeks under Section 27. He can only deduct the loss he suffered in respect of his dealings with any particular property if the second question is also answered in his favour, that is to say, if the loss he seeks to set off arises from a transaction of such a nature that, if any profits had arisen therefrom, he would have been liable to be assessed in respect thereof under Case VI of Schedule D.

The Attorney-General says that there is nothing which can be said to be a transaction. He asks: What is the transaction? Not, he says, the acquisition, for that does not *per se* involve profit or loss, and so far as the sale and purchase of land is concerned Section 15 is irrelevant. Not the letting of the property, since that will not help the Appellant, at any rate in cases where the property is unlet. He pointed out by reference to the list of subjects of charge brought into Case VI by amending Acts, which appear on page 169 of the Stationery Office reprint of the Act, that there are a number of such subjects of charge which cannot be said to have arisen from a transaction which was of a commercial nature or to give rise to loss or profit in the commercial sense; for example, excessive housekeeper relief resulting from apportionment of a double claim. He submitted

that Section 27 had been introduced as a result of such decisions as *Ryall* v. *Hoare,* 8 T.C. 521, and *Lyons* v. *Cowcher,* 10 T.C. 438. The effect of these decisions was to make the profits of isolated transactions of a commercial nature taxable under Case VI, and without Section 27 the taxpayer would have been without redress if in a subsequent year a similar transaction resulted in a loss. I am prepared to accept the Attorney-General's explanation of the origin of Section 27, but it does not seem to me necessarily to lead to the conclusion that Section 27 does not apply in the present case.

Mr. Tucker submitted that the transaction is the acquisition of the property and the subsequent management of it. Plainly, as Mr. Tucker points out, the transaction need not be in the year of assessment ; the only question is whether in the year of assessment loss or profit results from it. There is therefore no reason for not looking back to the original acquisition as part of the transaction. The transaction as a whole covers a number of acts: (1) the acquisition of the property ; (2) payment of the head rent ; (3) the attempt to sub-let ; (4) in three cases the actual sub-letting ; (5) the receipt of the rent from the subtenant.

I have come to the conclusion that on this point also Mr. Tucker is right, and that the losses in question arose in the case of each property from a transaction consisting, as it is put in paragraph 8 of the Case, in the acquisition and management of the property concerned.

A more difficult point, however, is as to the meaning to be put on " loss " and " profit " in Section 27. The argument of the Attorney-General may be stated as follows. Both words must be used in their ordinary commercial sense. If that be so it is clear that Section 27 cannot apply, since, using the formula prescribed by Section 15, it is quite possible that although there is in a given year a commercial profit, no assessment could be made under Case VI because the Schedule A assessment was higher than the rent receivable from the subtenant. In such a case it could not be truly said that the transaction was of such a nature that if any profit had arisen therefrom the immediate lessor would have been liable to be assessed.

Mr. Tucker suggested that this argument was based on a mis-reading of the word " assessed ". " To be assessed " meant, according to him, " to have his liability calculated ", and a taxpayer would have been assessed even though the result might be a nil assessment. In support of his argument, Mr. Tucker relied on the decision in *Harling* v. *Celynen Collieries Workmen's Institute,* 23 T.C. 558, but I do not think that case affords any assistance, as the Court was considering the meaning of the expression " year of assessment ", not of the word " assessed ". A year may well be a year of assessment, though owing to the result of the year's trading being a loss no assessment is actually made on the taxpayer. I think Mr. Hills gave the right answer to this argument when he said that although the Inland Revenue authorities may at times issue a " nil assessment ", that is merely a convenient method of informing the taxpayer that no charge is being made. In its literal meaning " nil assessment " is a contradiction in terms.

Alternatively Mr. Tucker argued that although there cannot be a loss unless there is a commercial loss, the reference to profit is not a reference to commercial profit, but to a profit taxable under Case VI. In considering, therefore, whether a particular transaction gives rise to a profit liable to be taxed under Case VI of Schedule D, you must apply the Rules to

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be found in the 1918 Act and the amending Acts in order to ascertain as regards any particular transaction whether there is such a profit. The fact that in some cases there may be a commercial profit and yet no assessment under Case VI is *nihil ad rem.*

The Attorney-General also submitted that Section 27 could not apply because the Appellant was taxed as regards rents partly under Schedule A and partly under Case VI. Both sources of income, said the Attorney-General, arose from the same transaction; therefore it was impossible to say that if there had been a profit the Appellant would have been liable to be assessed in respect thereof under Case VI.

The answer to this point, I think, is that if Parliament chooses, as it has done, to split the income arising from ownership of property into separate subjects of tax, the taxpayer who has made a loss is entitled to say that, although part of his income from the transaction is taxed under Schedule A, he would still be liable, if there had been a profit ascertained as directed by Parliament, to be taxed on that profit under Case VI, and it is immaterial that part of the commercial profit may have been taxable under Schedule A. On the whole, though not without hesitation, I have come to the conclusion that this argument is well founded, and that the Appellant is entitled to succeed.

In view of an argument addressed to us by Mr. Hills, I would add that I agree with him that the principle that in case of ambiguity a taxing statute should be construed in favour of a taxpayer does not apply to a provision giving a taxpayer relief in certain cases from a section clearly imposing liability. None the less, I arrive at the conclusion I have reached all the more gladly because it is manifest that the Crown's argument, if successful, might involve that the taxpayer would have to pay Income Tax and possibly Surtax on excess rents from one or more properties although his income from properties as a whole and possibly from all sources was nil. As my brother Singleton put it in the course of the argument, the taxpayer would be worse off than he would have been if the Crown had won the *Salisbury House* case[1]. The Crown's argument would also involve an unfortunate distinction between an owner of the unexpired portion of a lease for 50 years (a long lease to which Section 17 of the Act of 1940 applies) and the owner of the unexpired portion of a lease for 49 years (a short lease within Section 15), since it is common ground between the parties that in the case of excess rents under long leases the intermediate lessor by virtue of Section 17 gets the relief which the Appellant seeks to have in this appeal.

In conclusion, I would add that it seems to me reasonable to suppose that Parliament, when it placed excess rents within Case VI of Schedule D, intended the taxpayer to be entitled to any relief attaching to that Case, including Section 27 of the Act of 1927. Such an intention would be in conformity with what the Attorney-General said was the reason for the original introduction of Section 27.

I would allow the appeal.

Singleton, L.J.—The Appellant is described in paragraph 4 of the Case as a dealer in property. That, we were told, means that he is one who acquires leases of property and thereafter endeavours to let the properties comprised in the various leases on terms advantageous to himself. At all

(1) 15 T.C. 266.

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material times he held short leases of 28 properties; the leases were short leases as defined in Section 13 of the Finance Act, 1940. The Appellant is not assessable under Case I or under Case II of Schedule D of the Income Tax Act, 1918: that follows from the decision in the *Salisbury House* case(1), [1930] A.C. 432. In that case it was sought to assess the Company in respect of excess rents under Schedule D, though the property was already assessed under Schedule A, and it was held that the rents were profits arising from the ownership of land in respect of which the assessment under Schedule A was exhaustive, and that they could not be included in the assessment under Schedule D as trade receipts of the company.

If a company or an individual could be regarded as a trader, trade losses would be a proper and legitimate deduction, and if the nature of the trade consisted of taking leases and re-letting a loss on one would be set off against profits on others in order to arrive at the annual profits or gains from the trade or business.

Under Section 15 of the Act of 1940 excess rents of immediate lessors arising under certain short leases are made subject to tax. The immediate lessor is chargeable to tax under Case VI of Schedule D in respect of the excess. Leaving out any question of allowances, the excess is the amount by which the rent received exceeds the rent paid, or by which it exceeds the Schedule A assessment if that is greater than the rent paid. It is thus profit to the immediate lessor. The liability to tax is in respect of the excess, and to bring it within the framework of the Income Tax Act, 1918, it is put, and rightly put, under Schedule D and embraced under Case VI of that Schedule—" Tax in respect of any profits or gains not falling " under any of the foregoing Cases, and not charged by virtue of any " other Schedule ". The Section was dealing with excess rents: it was designed to enable tax to be collected in respect of profit rentals. Thus from the passing of, or from the coming into force of, the 1940 Act, if profits arose from the transaction the Appellant was liable to be assessed in respect of them, that is, in respect of the excess rents. He was brought in under Schedule D, which covers annual profits or gains, but he was brought under Case VI and not under Case I.

The claim of the Crown in this appeal is that the Appellant is in a far worse position than he would be if he was to be regarded as a trader. They say that Section 15 of the Act of 1940 ought not to be regarded as undoing the effect of the *Salisbury House* case, but that it goes much further, and that its effect in the case of short leases is that a man who engages in this business of taking short leases and re-letting must pay tax on each case in which he makes a profit but can never deduct or set off a loss which he makes on another property. The position is shown by the figures given on document A attached to the Case—on 23 properties the Appellant receives excess rents amounting to £4,830, whereas on five other properties he incurs a loss of £3,575. The claim of the Crown is that he is chargeable to tax in respect of the £4,830, and that he is not entitled to any deduction in respect of the other properties on which he lost £3,575—and this involves a considerable sum in Income Tax and Surtax. It would strike one as surprising if this should be the true position in regard to short leases, for it is agreed that in the case of excess rents under long leases the position is otherwise, and the immediate lessor by virtue of the provisions of Section 17 is given the relief which the Appellant seeks to have in this appeal. And no one can suggest any reason why the taxpayer

(1) 15 T.C. 266.

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should be differently treated according to whether he held short leases or long leases. (A long lease might be approaching its end while a short lease might have many years to run.)

I do not think that I have encountered anything more complicated than the Act of 1940. This Court spent much time on *Tamplin's case*(1), [1950] 2 All E.R. 93, last year in considering the true meaning and effect of Section 17 (long leases) and we have now spent some days on Section 15 (short leases) and these are not the only troublesome sections. I cannot believe that it was the intention of the Legislature to make the position of the Appellant in this case worse than it would have been if the *Salisbury House* case(2) had been decided the other way, nor can I see any reason why he should be better off if he held long leases than he would be if he held short leases.

The whole question depends on whether Section 27 of the Finance Act, 1927, applies to this case. I have come to the conclusion that it does apply. The Act of 1940 does not interfere with the incidence of Schedule A tax. If the excess rent is the difference between the rent received and the rent paid it is profit to the taxpayer: if the excess rent is the difference between the rent received and the Schedule A assessment it is part of the profit made by the taxpayer. In either case it is profit within the words "profits or gains not falling within any of the foregoing Cases". They are profits in fact and they are so treated for the purpose of the Income Tax Act, 1918; the Appellant is chargeable to tax under Case VI of Schedule D in respect of the excess; that I read in the same way as "liable to be assessed in respect thereof under Case VI of Schedule D" in Section 27 of the 1927 Act. Was there a *transaction* of such a nature that if profits had arisen therefrom the taxpayer would have been liable to be assessed in respect thereof under Case VI of Schedule D? If so, the provisions of Section 27 of the 1927 Act apply. Now the Legislature has said by Section 15 of the 1940 Act that in respect of excess rents therein mentioned the taxpayer shall be chargeable to tax under Case VI of Schedule D—which excess, as I have said, is profit to the taxpayer. How did the taxpayer become entitled to the excess rent? Surely the answer is by the transaction of acquiring the lease, managing and sub-letting: that is the transaction. It was argued on behalf of the Crown that the original taking by the taxpayer was not a transaction within the Section even if it could be said that a letting by the taxpayer was; and further, that it could not be said that the failure to let a property was a transaction which resulted in a loss. It is necessary to consider the taxpayer's activities. He acquired leases of properties for the purpose of obtaining profit in the way of increased rent. Each acquisition by him was for him a transaction out of which profit or loss might result, perhaps a profit in one year and a loss in another or the following year. In my view the transaction ought to be regarded as being the acquisition of the lease and if a loss occurs it matters not for the purposes of the Section whether the loss results from letting at a smaller rent than that paid or from failure to let at all.

This I believe provides the right answer to the problem. Any other view would be placing too narrow a construction on the word "profits" in Section 27 of the 1927 Act and would result in injustice and in a wholly unexplained distinction between the position of the taxpayer in regard to short leases as against long leases.

I am in favour of allowing the appeal.

(1) Tamplin & Son's Brewery (Brighton), Ltd. *v.* Nash, 32 T.C. 415. (2) 15 T.C. 266.

Jenkins, L.J.—This is an appeal from a judgment of Wynn-Parry, J., affirming a decision of the Special Commissioners in favour of the Crown on a question arising under Sections 27 of the Finance Act, 1927, and 15 of the Finance Act, 1940, in the following circumstances.

The Appellant, who is described in the Stated Case as a dealer in property, and appears to have made a practice of acquiring leasehold properties with a view to re-letting them at a profit, had on hand during the year ended 5th April, 1943, (which has been taken as typical for the purpose of deciding the question of principle involved in the case) 28 such properties. Of these 23 had been re-let by him at rents exceeding those at which he took them, and also exceeding the amounts of their respective assessments under Schedule A of the Income Tax Act, 1918, the aggregate excess of rents receivable over Schedule A assessments amounting in these 23 cases to £4,830. Of the remaining five properties two had been let by him at rents lower than those for which he was himself liable and three had not been let at all, the aggregate deficiency of rents receivable as compared with rents payable in respect of these five properties amounting to £3,575.

It will thus be seen that according to the ordinary acceptation of the expressions " profit " and " loss " the Appellant had made a profit for the year on the 23 properties represented by the excess of the rents he received over the rents he paid for them, but had made a loss for the year on the remaining five properties represented by the excess of the rents he paid over the rents (if any) he received in those five cases.

His actual profit on the 23 properties would in fact be greater than the £4,830 excess over the aggregate amount of their respective Schedule A assessments if, as would seem to have been the case, the rents he paid for them were below the amounts of those assessments ; but as will be seen hereafter the excess of rent receivable over the Schedule A assessment, not the actual profit, is the relevant figure for the present purpose in any case in which the Schedule A assessment exceeds the rent payable. On the other hand, the deficiency of £3,575 of rents receivable as compared with rents payable does represent his actual loss in the ordinary or business sense of that expression on the remaining five properties for the year in question.

In these circumstances the Appellant admittedly became liable, by virtue of Section 15 of the Finance Act, 1940, to be assessed to Income Tax under Case VI of Schedule D on the £4,830 representing the excess of the rents received for the 23 properties over the aggregate amount of their respective Schedule A assessments. But while not contesting this liability he claimed by virtue of Section 27 of the Finance Act, 1927, to be entitled to set off against or deduct from this excess of £4,830 the loss of £3,575 sustained on the remaining five properties. That claim was rejected by the Special Commissioners. Their decision was affirmed by the learned Judge, and the present appeal results.

As the law stood before Section 15 of the Finance Act, 1940, came into operation, the Income Tax liability in respect of the 23 houses would have been limited to tax at the standard rate on the amounts of their Schedule A assessments notwithstanding that they had in fact been let at rents exceeding those amounts, so that in effect the Appellant would have enjoyed tax-free so much of the profit rental received by him in respect of each property as represented an excess over and above the amount of its Schedule A assessment. I will assume by way of illustration that in a year when the standard rate of tax was 10*s.* in the £ the Appellant held

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at a rent of £100 a property with a Schedule A assessment of £300 and had re-let it to an occupying tenant at a rent of £400. In such a case the occupier would in the first instance have paid tax at the standard rate of 10*s.* in the £ on the Schedule A assessment of £300 = £150. Having so paid, the occupier would have been entitled to deduct the £150 tax from the rent of £400 payable by him to the Appellant, who would thus have received £400 less £150 = £250. The Appellant, in his turn, on paying the rent of £100 to his superior landlord, would have been entitled to deduct the tax thus suffered by him up to 10*s.* in the £ on the amount of rent payable by the Appellant, the superior landlord thus receiving £100 less £50 = £50. In the result therefore the Appellant would have borne tax on the rent of £400 received by him only to the extent of £100 (that is, £150 less £50 recovered by deduction from the superior landlord) or in other words tax at the standard rate of 10*s.* in the £ on so much only of his profit rental as represented the difference (that is, £200) between the rent payable by him (that is, £100) and the Schedule A assessment (that is, £300) and would thus in effect have enjoyed tax-free the remaining £100 of his profit rental, representing the excess of the rent receivable by him over the Schedule A assessment.

On the other hand, if with rents payable and receivable of £100 and £400 respectively as above the Schedule A assessment had been £400 instead of £300, the occupying tenant would have paid and deducted from the rent payable to the Appellant £200, and the Appellant would have deducted as before £50 from the rent payable by him, and would thus have been left to bear himself tax amounting to £150, or in other words, tax at the full standard rate of 10*s.* in the £ on the whole of the profit represented by the £300 by which the rent he received exceeded the rent he paid. Moreover, although charged with tax at the full standard rate on the whole of the surplus of £300 realised by him in this imaginary example, there would have been no question of his setting off against that figure any amount he might have been out of pocket over some other property which he had only been able to re-let at a lower rent than the rent he had himself to pay for it, or had been unable to re-let at all.

To summarise the position as it stood before Section 15 of the Finance Act, 1940, came into operation:—

(*i*) The charge of tax at the standard rate on the amount of the assessment made under Schedule A by reference to the annual value of a property ascertained in accordance with the provisions of that Schedule exhausted the liability of tax of the income derived from the letting of that property even though the rent actually derived from it might exceed the amount of the Schedule A assessment.

(*ii*) Schedule A was not concerned with profit and loss in the sense of excess or deficiency of receipts as compared with outgoings, but simply with the annual value ascertained in accordance with its terms, which was presumed for tax purposes to represent the income derived from the property and served as the statutory measure of such income. See for the first proposition *Salisbury House Estate, Ltd.* v. *Fry*(1), [1930] A.C. 432, and for the second *Governors of the Rotunda Hospital, Dublin* v. *Coman,* 7 T.C. 517, *per* Lord Atkinson at pages 586-7.

(1) 15 T.C. 266.

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The group of Sections in which Section 15 of the Finance Act, 1940, appears (comprising Sections 13 to 18 of that Act) has undoubtedly displaced the first of these propositions. The question in this case is in effect how far, if at all, these Sections in conjunction with Section 27 of the Finance Act, 1927, have displaced the second.

There is no doubt that the primary object of this group of sections in the Finance Act, 1940, was designed to bring into effective charge to tax the amounts by which rents received for properties assessable to tax under Schedule A exceed the amount of their Schedule A assessments, or to be strictly accurate, to subject rents received for properties to the same amount of tax as they would have attracted if the Schedule A assessment had been made in each case by reference to the rent actually received for the property during the relevant period.

Section 13 of the Finance Act, 1940, contains a number of definitions:—

". . . 'immediate lessor' means in relation to any premises—(*a*) if "different parts of the premises are the subject of separate tenancies "or separate occupations, a lessor of the whole or any part of the "premises whose estate or interest extends to the entirety of the "premises and is not subject, immediately or mediately, to a lease "of the entirety thereof; and (*b*) in any other case, a lessor whose "immediate tenant is occupying or entitled to occupy the entirety of "the premises: Provided that if, in any case to which paragraph (*a*) "of this definition applies, there is more than one lessor satisfying "the conditions set out in that paragraph, that one of those lessors "shall be deemed to be the immediate lessor whose estate or interest "is not reversionary on the estate or interest of any of the others;"

"'long lease' means a lease granted for a term exceeding fifty years, "other than a lease which is or takes effect as a lease for a term of "years determinable after the death or marriage of any person;"

"'short lease' means a lease which is not a long lease; 'unit of "assessment' means any land which forms a unit of assessment for "the purposes of Schedule A."

The leases with which this appeal is concerned are all short leases and the Appellant is in each case the immediate lessor. The section directly applicable is therefore Section 15, which provides as follows:—

"15. (1) If, as respects any year of assessment, the immediate lessor "of a unit of assessment is entitled in respect of the unit to any "rent payable under a lease or leases to which this section applies, he "shall be chargeable to tax under Case VI of Schedule D in respect "of the excess, if any, of the amount which would have been the "amount of the assessment of the unit for the purposes of Schedule A, "as reduced for the purpose of collection, if the annual value of "the unit had been determined (in accordance, in whatever part "of the United Kingdom the unit is situated, with the Rules applicable "to Schedule A set out in the First Schedule to the Income Tax "Act, 1918) by reference to that rent and the other terms of the lease "or leases, over whichever is the greater of—(*a*) the actual amount of "the assessment of the unit for the purposes of Schedule A, as reduced "for the purpose of collection; or (*b*) the amount of any rent payable "by the immediate lessor in respect of the unit under any short lease "or short leases . . . (3) Where for any year an assessment has been "made on an immediate lessor by virtue of this section, the amount of

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"any relief which may be claimed by him under Rule 8 of No. V of "Schedule A shall be such amount as could have been claimed by him if "the annual value of the unit had been determined in the manner "described in subsection (1) of this section. (4) A lease shall be "deemed to be a lease to which this section applies if, and only if, the "following conditions are fulfilled with respect to it—(*a*) that it is a short "lease; (*b*) that the land comprised in it is or forms part of a single unit "of assessment; (*c*) that the rent under it is payable to the immediate "lessor of that unit; (*d*) that the estate or interest of the immediate "lessor of that unit is not, as respects any part of that unit, subject to "any short lease which comprises also land not wholly within that unit, "being a lease the rent under which is payable to that immediate lessor."

It will be seen that the method of charging tax on rents in excess of actual Schedule A assessments prescribed in cases to which Section 15 applies is to make the "excess" ascertained as therein provided chargeable to tax under Case VI of Schedule D.

For the Appellant it is in effect contended that this is a new departure in the method of taxing rents which, while making him liable to tax on the excess admittedly realised as regards the 23 properties, does so not by treating the excess as rent to be brought into effective charge to tax by means of an upward revision of the Schedule A assessments, but by treating it as a profit taxable under a different Schedule, namely Schedule D, Case VI; and that as he is thus made liable to assessment under Case VI on the footing that the excess is a profit arising from his lettings of the 23 properties it follows that he must be entitled by virtue of Section 27 of the Finance Act, 1927, to deduct from or set off against such profit the loss he has sustained with respect to the five properties which he has either let at rents lower than those he had to pay or failed to let at all.

Sub-section (1) of Section 27 of the Finance Act, 1927, is in these terms:

"27. (1) Where in any year of assessment a person sustains a loss "in any transaction, whether he was engaged therein solely or in partner- "ship, being a transaction of such a nature that, if any profits had arisen "therefrom, he would have been liable to be assessed in respect thereof "under Case VI of Schedule D, he may claim that the amount of the loss "sustained by him shall, as far as may be, be deducted from or set off "against the amount of any profits or gains arising from any transaction "in respect of which he is assessed for that year under the said Case VI, "and that any portion of the loss for which relief is not so given shall, "as far as may be, be carried forward and deducted from or set off "against the amount of any profits or gains arising from any transaction "in respect of which he is assessed under the said Case VI for any of the "six following years of assessment."

There was some argument on the meaning of the word "transaction" in Section 27, and it was suggested on the part of the Crown that while the taking on lease and re-letting of premises might be a "transaction", a mere failure to let leasehold premises could hardly be so described. Examples were given, such as the case of a legatee of a leasehold house who fails to find a tenant for it, or the case of the owner of a leasehold house acquired as his own residence who goes to live elsewhere and makes abortive attempts to sub-let. It was asked whether it could be said that in cases such as these there was a "transaction" from which a loss arose in the shape of the rent which had to be paid without any return from the

property? The answer, I think, is that the facts supposed in the hypothetical cases put are far removed from those of the present case. As I have said above, the Appellant here appears to have made a practice of acquiring leasehold properties with a view to making a profit by re-letting them. That being so I think each acquisition by him of a leasehold property with this object in view, being in the nature of a business venture or investment, is on the whole rightly to be regarded as a transaction giving rise to a profit in any year in which income derived from re-letting exceeds outgoings under the superior lease and wherein he sustains a loss in any year in which the reverse is the case, whether through re-letting at an inadequate rent or through failure to re-let at all. I am at all events prepared to assume this much in the Appellant's favour for the purposes of the present case.

The main argument centred upon the question whether, given a "transaction" within the meaning of Section 27 with respect to each of the five properties in respect of which the Appellant, within the meaning of the Section, sustained a loss in the relevant year through failing to re-let at all or failing to re-let at an adequate rent, the transaction was, within the meaning of the Section, "of such a nature that if any profits had arisen "therefrom" the Appellant "would have been liable to be assessed in "respect thereof under Case VI of Schedule D".

The answer to this question depends largely on the meaning to be given to the words "loss" and "profits" in Section 27 (1) of the 1927 Act when considered in relation to the "excess" which Section 15 of the 1940 Act makes chargeable to tax under Schedule D, Case VI.

It is to be observed that what Section 15 of the 1940 Act makes chargeable to tax under Case VI of Schedule D is not the profit made by the immediate lessor in the shape of the excess of the rent he receives over the rent he pays (in other words his "profit" on the property for the year in the ordinary or business sense of that expression) but the excess of a notional Schedule A assessment based on the rent actually received by him over whichever is the greater of two amounts, namely (*a*) the actual Schedule A assessment of the property and (*b*) the amount of the rent paid under any short lease by the immediate lessor.

We were provided by the Crown in the course of the argument with a number of examples to show, as is indeed manifestly the case, that the "excess" charged with tax under the formula prescribed by Section 15 (1) bears no necessary relation to the immediate lessor's profit for the year in the ordinary or business sense (which may conveniently be termed "the commercial profit"). If the three elements in the formula are in the following ascending order of magnitude, namely; (1) rent paid by the immediate lessor under a "short" lease; (2) notional Schedule A assessment based on rent received; (3) actual Schedule A assessment; the commercial profit is represented substantially by the excess of (2) over (1), yet there is no "excess" for the purposes of Section 15, the reason why the formula is framed so as to exclude any statutory "excess" in such a case presumably being that where the rent received, while exceeding the rent paid, is less than the actual amount of the Schedule A assessment, the assessment under Schedule A effectively brings into charge to tax at the standard rate the whole of the rent actually received. Again, if the items in the ascending order of magnitude are; (1) rent paid by the immediate lessor under a "short" lease; (2) actual Schedule A assessment; (3) notional Schedule A assessment; the commercial profit is represented substantially by the excess of (3) over (1) but the statutory excess is limited to the excess of

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(3) over (2), the reason for so limiting the statutory excess presumably being that in such a case the excess of rent received over rent paid up to the actual Schedule A assessment is effectively brought into charge to tax at the standard rate by means of the actual Schedule A assessment. Finally, the ascending order of magnitude might be ; (1) actual Schedule A assessment ; (2) rent paid by the immediate lessor under a "short" lease ; (3) notional Schedule A assessment. In such a case the statutory excess does no doubt approximate to the commercial profit, though it does not exactly coincide with such profit on account of the adjustments, and in particular the conventional allowance for repairs, involved in the notional assessment made in accordance with the Rules applicable to Schedule A on the basis of an annual value determined in accordance with the provisions of that Schedule by reference to the rent actually received by the immediate lessor. It may be noted that in this instance the difference between the rent paid by the immediate lessor and the actual amount of the Schedule A assessment would under Section 16 be brought into account against the superior landlord for the purpose of determining the excess which that Section makes chargeable to tax in his hands under Case VI of Schedule D.

As was pointed out in the course of the argument it is for practical purposes true to say that where the lease under which the immediate lessor holds is a "short" lease the Section 15 formula at all events produces no "excess" unless there is in fact a commercial profit, that is unless the rent received exceeds the rent paid. But in any case in which the rent paid exceeds the rent received the whole of the rent paid, if less than the actual Schedule A assessment, is fully charged to tax at the standard rate under Schedule A, while if it exceeds the actual Schedule A assessment such excess is brought into account for the purpose of determining the "excess" in respect of which the superior landlord is himself made chargeable to tax under Case VI of Schedule D by virtue of the provisions of Section 16.

Moreover it should be noted that rent payable by an immediate lessor under a long lease is ignored for the purposes of the Section 15 calculation. This I take to be because any rent payable by the immediate lessor under a long lease would be payable under deduction of tax at the standard rate by virtue of the provisions of Section 17. It appears to follow that if an immediate lessor holding under a long lease at a rent of £300 *per annum* let the property on short lease at a rent giving a notional Schedule A assessment of £200 *per annum* and the actual Schedule A assessment of the property was £100, there would be an "excess" under Section 15 of £100, although in fact the immediate lessor had sustained a commercial loss of £100. The immediate lessor in such a case would I take it be entitled under Section 17 to deduct tax at the standard rate on the £200 rent payable by him and to retain the tax on £100 of it, and would thus in fact be recouped the tax with which he was charged on the Section 15 excess.

But this example, if it be right, affords yet another illustration of the absence of any necessary relation between the Section 15 excess and the commercial profit realised by the immediate lessor.

Bearing in mind these considerations as to the character of the "excess" which Section 15 of the 1940 Act makes chargeable to tax under Case VI of Schedule D, I return to Section 27 (1) of the 1927 Act. Does Section 15 have the effect of making the transaction of acquiring a leasehold property and re-letting it at a lower rent or failing to re-let it at all and thereby sustaining a loss on income account a transaction which is within

the meaning of Section 27 (1) a transaction of such a nature that if a profit had arisen therefrom the person concerned would have been liable to be assessed in respect thereof under Case VI of Schedule D?

In the submission of the Crown, which has so far prevailed, Section 15 has no such effect. The word "loss" in Section 27 (1) must (it is argued) obviously mean "loss" in the ordinary commercial sense, and the word "profits" used as it is in contradistinction to "loss" must likewise mean "profits" in the ordinary commercial sense. As has been seen above the Section 15 "excess" bears no necessary relation to commercial profit. There may be a commercial profit without any "excess", or again the "excess" if any may be only a fraction of the commercial profit. The nature of a transaction of the kind here in question is not such as to attract tax under Case VI of Schedule D on any profits arising therefrom. Its nature is such that by virtue of Section 15 of the 1940 Act it attracts tax under Case VI of Schedule D if, and only if (irrespective of any profit in the commercial sense), the amount of a notional Schedule A assessment based on the actual rent received exceeds both the actual amount of the Schedule A assessment and the amount of the rent paid by the immediate lessor under any short lease, and in such case the subject of tax is not the amount of any commercial profit but simply the excess of the amount of the notional Schedule A assessment over whichever is the greater of the other two factors in the calculation prescribed by Section 15. Moreover (it is argued) the "excess", if any, cannot be said to "arise" from the transaction in the sense of being the product of the transaction like the simple commercial profit represented by the excess of rent received over rent paid. It arises by virtue of the application of the statutory formula and is the product not of the transaction but of the calculation which Section 15 enjoins.

Mr. Millard Tucker for the Appellant argued that the word "profits" in Section 27 (1) means profits in the Income Tax sense, that is, taxable income of any amount which under the Income Tax legislation is treated as taxable income, and he referred us to a number of passages in the Acts in which the expressions "profits", "gains" and "income" are used in this sense. He invited us therefore to hold that inasmuch as the "excess" ascertained in accordance with Section 15 had been made by that Section chargeable to tax under Case VI of Schedule D, it followed that no matter how ascertained it became "profits" for all Income Tax purposes, and in particular "profits" within the meaning of Section 27 (1). He supported this contention by reference to the scope of Case VI of Schedule D itself, which is expressed to extend to "tax in respect of any annual profits or "gains not falling under any of the foregoing Cases and not charged by "virtue of any other Schedule". This reasoning enabled him in effect to substitute "excess" for "profits" in Section 27 (1) and to claim that the Appellant was entitled to the benefit of that Section with respect to the five transactions in which he had sustained "losses". He agreed, as I understood him, that "loss" in Section 27 (1) must mean "loss" in the commercial sense and not (in relation to Section 15 cases) a notional "deficiency" representing the converse of the Section 15 "excess". He contended in effect that there was no inconsistency in this if the "excess" computed as provided in Section 15 was regarded as the measure for Income Tax purposes of the actual profit, whatever it might be. He met the possible case of a commercial profit without any Section 15 excess by pointing out that liability to assessment could exist even though the statutory measure of the relevant profit might be such that the assessment

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was nil. He relied strongly on the apparent unfairness of the result contended for by the Crown, which meant that a man who had an "excess" on one such transaction while sustaining a loss on another would be liable to tax on the "excess" although the two transactions taken together had in fact brought him in no profit or even left him out of pocket. He pointed out that a person holding two properties under "long" leases at rents of £500 each, sub-letting one at a rent of £1,000 and failing to let the other at all, would under the provisions of Section 17 of the 1940 Act be entitled, on paying his rent of £500 in the unprofitable case, to deduct and retain tax equivalent to the tax he had paid in the profitable case (that is, tax on £500), thus in the result bearing no tax at all in respect of two transactions which taken together had brought him no profit. Mr. Tucker argued from this example that if Section 27 of the 1927 Act did not have the effect for which he contended the alterations in the law brought about by Sections 13 to 18 of the 1940 Act would involve what appeared on the face of it to be a wholly unreasonable discrimination in favour of the holders of "long" as opposed to "short" leases.

While by no means insensible to the attractions of Mr. Tucker's arguments, I find it impossible to place on Sections 27 of the 1927 Act and 15 of the 1940 Act the construction for which he contends. I agree with the Special Commissioners and with the learned Judge that the references to "loss" and "profits" in Section 27 are directed to profit and loss in the commercial sense. I also agree with them that the "excess" computed in accordance with Section 15 of the 1940 Act in relation to a transaction of the kind here in question, bearing as it does no necessary relation to any commercial profit, is not "profits" within the meaning of Section 27 of the 1927 Act. If "any profits" (that is, commercial profits) "had arisen" from such a transaction those profits would not necessarily have been assessable under Case VI of Schedule D. They might have been wholly covered by the Schedule A assessment (there being no "excess"). Again they might have been partly covered by the Schedule A assessment.

Substantial correspondence between the "excess" chargeable to tax under Schedule D, Case VI, by virtue of Section 15 and the commercial profit arising from the transaction would only have been achieved on the assumption that the rent paid and the higher rent received both exceeded the actual amount of the Schedule A assessment, and even then the liability to tax under Case VI of Schedule D on a figure of "excess" substantially corresponding to the commercial profit would have been due, not to the nature of the transaction, but to the inadequacy of the actual Schedule A assessment in the particular case.

The truth, as I think, is that Section 15 of the 1940 Act is directed not to taxation of commercial profits but to more effective taxation of annual values. This is to my mind implicit in the formula adopted, with its introduction of a notional Schedule A assessment based on the actual rent as an essential factor in the computation of the "excess" to be charged with tax. The use of Case VI of Schedule D for the purpose of charging the "excess" with tax lends colour to the argument that Section 15 is for the first time introducing considerations of commercial profit and loss into the taxation of income derived from the ownership of land, but I agree with the submission made on behalf of the Crown that the use of this Case is mere machinery for effecting the adjustment considered necessary in the liability to tax on annual values and should not be regarded as involving

the substitution, *quoad* the "excess", of commercial profit for annual value as the measure of liability. As was pointed out for the Crown this is not the only instance of recourse to assessment under Case VI of Schedule D for the purpose of adjusting tax liability.

As to the distinction made by the 1940 Act between "long" and "short" leases and the difference in the treatment accorded to them by Section 17 on the one hand and Sections 15 and 16 on the other, no satisfactory explanation was advanced in argument, and I confess my own inability to provide one. But I cannot regard the anomaly suggested by Mr. Tucker as between cases under Section 15 and cases under Section 17 as sufficient ground for departing from the conclusion I have stated. Moreover, as it seems to me, Mr. Tucker's argument would produce yet another anomaly, based on the accidental circumstance of the adequacy or inadequacy of Schedule A assessments instead of the arbitrary distinction between long and short leases. A man who acquired a "short" leasehold and re-let it at a profit would be entitled to set off against that profit losses sustained in other similar transactions if a notional Schedule A assessment based on the rent he received exceeded the actual amount of the Schedule A assessment, but he would have no such right if such notional Schedule A assessment was less than the actual amount of the Schedule A assessment, although the commercial profit represented by the excess of rent received over rent paid might in either case be precisely the same.

For the reasons I have stated, being in substance the same as those which commended themselves to the Special Commissioners and the learned Judge, I would for my part dismiss this appeal.

Cohen, L.J.—The appeal will be allowed with costs here and below. I suppose we should remit the matter to the Special Commissioners to do what is necessary according to the judgment.

Mr. Mustoe.—Yes, my Lord.

Mr. Hills.—I am instructed on behalf of my clients to ask your Lordships for leave to take this case to the House of Lords if, after having considered the judgments, my clients wish to do so.

Cohen, L.J.—Do you want to say anything about that, Mr. Mustoe?

Mr. Mustoe.—I must leave it to your Lordships, but if your Lordships decide to give leave to my friend it should be on terms, I submit.

Cohen, L.J.—Why? It is not a matter where you have a very small interest and very little is involved in the way of taxation. It is a case where you have a very substantial interest.

Mr. Mustoe.—It is a case which affects a very large number of taxpayers besides Mr. Littman, and it is a case in which the public interest is involved.

Cohen, L.J.—Do you care to make any offer, Mr. Hills?

Mr. Hills.—It is customary to leave the decision of these things in the hands of the Court.

Cohen, L.J.—It is a matter of general importance, is it not?

Mr. Hills.—Yes, but I do not quite know whether that ought to be regarded as very material.

Cohen, L.J.—Is not it a measure?

Mr. Hills.—It is not the case that the taxpayer is a person of no means or anything of that kind. Many cases of this kind are of general importance.

Singleton, L.J.—If it be of general importance and the sections are very difficult to construe, why should one taxpayer have to pay the costs of putting it right for the Revenue authorities? When I say put it right, I mean to find out what it means.

Mr. Hills.—I do not want any long discussion. I think the first thing, with the utmost respect, that the Court has to do is to decide whether this is a proper case in which to give leave to appeal. If it is a proper case—there is no suggestion that either side have no money—I should have thought on the whole that the Crown were entitled to have leave, whoever may be the other party.

(*The Court conferred.*)

Cohen, L.J.—Mr. Hills, we are prepared to give you leave if you are prepared to undertake not to ask the House of Lords to interfere with the Order as to costs so far. We make no suggestion as to what happens with the costs of the appeal to the House of Lords. That is within the power of the House of Lords.

Mr. Hills.—I accept leave from your Lordships on those terms.

Cohen, L.J.—So be it. I hope you will be able to bring it on soon because however the meaning of this section is finally interpreted it looks like being a matter which the Royal Commission may want to consider when we know what the section really does mean.

Mr. Hills.—If your Lordship pleases.

The Crown having appealed against the above decision the case came before the House of Lords (Viscount Simon, Lords Normand, Oaksey, Reid and Asquith of Bishopstone) on 10th, 11th, 12th, 16th and 17th May, 1952, when judgment was reserved. On 31st July, 1952, judgment was given unanimously against the Crown, with costs.

Mr. J. Millard Tucker, Q.C., and Mr. N. E. Mustoe, Q.C., appeared as Counsel for the taxpayer and Sir Frank Soskice, Q.C., and Sir Reginald Hills for the Crown.

Viscount Simon.—My Lords, the question in this appeal arises on a Case stated by the Special Commissioners pursuant to Section 149 of the Income Tax Act, 1918. The Special Commissioners' decision was in favour of the Crown and this decision was confirmed by Wynn-Parry, J. In the Court of Appeal there was a difference of opinion, Cohen and Singleton, L.JJ., being in favour of the present Respondent, while Jenkins, L.J. would have upheld the decision of the Court below. The taxpayer's appeal was, therefore, allowed, but, upon the present Appellant undertaking by his Counsel not to seek to disturb the Order of the Court of Appeal as to costs, he was given liberty to lodge a petition of appeal to the House of Lords, and this appeal is the result.

The matter under discussion concerns certain assessments to Income Tax for the years 1940–41, 1941–42 and 1942–43. It is only necessary to consider and decide the issue in the third and last of these years, since it is agreed that this decision will equally govern the two previous years.

(Viscount Simon.)

The controversy that has arisen between the Crown and the taxpayer involves the consideration of Section 15 of the Finance Act, 1940, under which the Respondent, who is a dealer in property, has been charged to tax under Case VI of Schedule D in respect of excess rents in 23 cases where he has succeeded in re-letting property so as to attract tax under that Section, and raises the question whether, under Section 27 of the Finance Act, 1927, he may set off against the amounts so assessed losses which he has incurred in five other cases where he acquired properties on lease for the purpose of re-letting, but only succeeded in re-letting them at a substantially lower rent or failed to re-let them at all.

In the well known case of *Salisbury House Estate, Ltd.* v. *Fry*(1), [1930] A.C. 432, it was decided that the holder of property assessed under Schedule A, who received rents from letting the property which gave him a profit over and above the Schedule A annual value, was not liable to tax under Schedule D in respect of that extra profit inasmuch as the annual income derived from the ownership of lands, tenements and hereditaments could only be assessed under Schedule A and in accordance with the rules of that Schedule. While the Revenue has an option to choose under which Case of Schedule D they will claim tax, they have no option as between Schedules, and the annual value to the taxpayer of property assessed under Schedule A did not, as the law then stood, expose the holder to additional tax under another Schedule on the ground that he was receiving more profit from the properties than was represented by Schedule A values. At the time of the decision in the *Salisbury House* case, the annual value of London properties was fixed under the Valuation (Metropolis) Act, 1869, while the annual value of properties elsewhere was measured by Rule 1 of the Rules applicable to Schedule A, and was the annual rent if the hereditaments had been let at a rack-rent within seven years of the assessment, or, if not, the rack-rent which they were actually worth subject to the statutory allowances. This difference of treatment was got rid of by Section 31 of the Finance Act, 1930, which in effect made the rules for ascertaining annual value under Schedule A in the rest of England applicable also in London. Schedule A was, however, itself preserved as the Schedule under which all income from the ownership of land continued to be taxed.

Partly for the reason that the *Salisbury House* decision left the profit which the Revenue sought to tax in that case untaxed, and partly because a quinquennial valuation of properties was due to be carried out at a time when the country was involved in war and those concerned in such a valuation would be otherwise occupied, Parliament enacted Section 15 of the Finance Act, 1940. That Section is as follows:—

"(1) If, as respects any year of assessment, the immediate lessor "of a unit of assessment is entitled in respect of the unit to any rent "payable under a lease or leases to which this section applies, he shall "be chargeable to tax under Case VI of Schedule D in respect of the "excess, if any, of the amount which would have been the amount of "the assessment of the unit for the purposes of Schedule A, as reduced "for the purpose of collection, if the annual value of the unit had been "determined (in accordance, in whatever part of the United Kingdom "the unit is situated, with the Rules applicable to Schedule A set out "in the First Schedule to the Income Tax Act, 1918) by reference to "that rent and the other terms of the lease or leases, over whichever "is the greater of—

(1) 15 T.C. 266.

(Viscount Simon.)

" (*a*) the actual amount of the assessment of the unit for the " purposes of Schedule A, as reduced for the purpose of collection ; " or

" (*b*) the amount of any rent payable by the immediate lessor " in respect of the unit under any short lease or short leases.

" (2) Where the immediate lessor of any unit of assessment is " occupying any part thereof, subsection (1) of this section shall apply " as if the rent to which he is entitled in respect of the unit under any " lease or leases to which this section applies were increased by so much " of the annual value of the unit (as ascertained for the purposes of " Schedule A) as is attributable to the part which he is occupying.

" (3) Where for any year an assessment has been made on an " immediate lessor by virtue of this section, the amount of any relief " which may be claimed by him under Rule 8 of No. V of Schedule A " shall be such amount as could have been claimed by him if the annual " value of the unit had been determined in the manner described in " subsection (1) of this section.

" (4) A lease shall be deemed to be a lease to which this section " applies if, and only if, the following conditions are fulfilled with respect " to it—

" (*a*) that it is a short lease ;

" (*b*) that the land comprised in it is or forms part of a single " unit of assessment ;

" (*c*) that the rent under it is payable to the immediate lessor " of that unit ;

" (*d*) that the estate or interest of the immediate lessor of that " unit is not, as respects any part of that unit, subject to any short " lease which comprises also land not wholly within that unit, " being a lease the rent under which is payable to that immediate " lessor."

The expression " immediate lessor " is by Section 13 (1) of the Finance Act, 1940, defined in relation to any premises as:—

" (*a*) if different parts of the premises are the subject of separate " tenancies or separate occupations, a lessor of the whole or any part of " the premises whose estate or interest extends to the entirety of the " premises and is not subject, immediately or mediately, to a lease of the " entirety thereof ; and

" (*b*) in any other case, a lessor whose immediate tenant is occupy- " ing or entitled to occupy the entirety of the premises:

" Provided that if, in any case to which paragraph (*a*) of this " definition applies, there is more than one lessor satisfying the condi- " tions set out in that paragraph that one of those lessors shall be " deemed to be the immediate lessor whose estate or interest is not " reversionary on the estate or interest of any of the others ".

The portion of this definition that is applicable to the present case is the portion at (*b*) above. The phrase " short lease " is defined by Section 13 as a lease which is not a long lease ; and " long lease " means a lease granted for a term exceeding fifty years, other than a lease which is or takes effect as a lease for a term of years determinable after the death or marriage of any person. The phrase " unit of assessment " means, by the same Section, any land which forms a unit of assessment for the purposes of Schedule A.

(Viscount Simon.)

The Respondent does not dispute that the "excess" in respect of which he is chargeable to tax under Case VI of Schedule D has been correctly calculated in accordance with Section 15 of the Act of 1940. For example, he held 22, Oxford Street on a short lease and re-let it at a net rent of £3,500. The actual Schedule A assessment on this property was £2,100, but if its annual value had been determined by reference to the rent he received, it would have been £3,500. The rent payable by him is not stated in the Case, but it was less than £2,100, or at any rate not more than that figure, and consequently the excess to be charged to tax under Section 15 was £1,400. Similar calculations in 22 other cases bring out other figures of "excess", making a total of £4,830.

The Respondent, however, claims to deduct from, or set off against, this total of £4,830 losses which he has sustained in five other instances. For example, he took a short lease of 220, Edgware Road at a rent of £550, but only succeeded in re-letting it at a rent of £100. The rent of £550 paid by the Respondent exceeded the net annual value of this property for the purpose of Schedule A. Comparing the rents paid and received, he sustained a loss of £450. The question to be decided is whether, in virtue of Section 27 of the Finance Act, 1927, he is entitled to set off this and four other similar losses totalling £3,575 against the £4,830.

Section 27, Finance Act, 1927, is as follows:

"(1) Where in any year of assessment a person sustains a loss "in any transaction, whether he was engaged therein solely or in "partnership, being a transaction of such a nature that, if any profits had "arisen therefrom, he would have been liable to be assessed in respect "thereof under Case VI of Schedule D, he may claim that the amount "of the loss sustained by him shall, as far as may be, be deducted from "or set off against the amount of any profits or gains arising from any "transaction in respect of which he is assessed for that year under the "said Case VI, and that any portion of the loss for which relief is not "so given shall, as far as may be, be carried forward and deducted from "or set off against the amount of any profits or gains arising from "any transaction in respect of which he is assessed under the said "Case VI for any of the six following years of assessment.

"(2) In the application of this section to a loss sustained by a "partner in a partnership the expression 'the amount of any profits "'or gains arising from any transaction in respect of which he is "'assessed' shall be taken to mean in respect of any year such portion "of the amount on which the partnership is assessed under Case VI in "respect of any transaction as he would be required under the Income "Tax Acts to include in a return of his total income for that year.

"(3) Any relief under this section by way of the carrying forward "of the loss shall be given as far as possible from the first subsequent "assessment in respect of any such profits or gains as aforesaid for any "year within the said six following years, and, so far as it cannot be so "given, then from the next such assessment and so on.

"(4) The provisions of this section shall extend so as to apply "to a loss sustained in the year ending on the fifth day of April, nineteen "hundred and twenty-seven."

This Section cannot, of course, have been framed with Section 15 of the Act of 1940 in mind, for it was enacted thirteen years earlier. Sir Frank

(Viscount Simon.)

Soskice pointed out that its introduction may well have been due to such decisions as *Ryall* v. *Hoare*(1), [1923] 2 K.B. 447, and *Lyons* v. *Cowcher*, 10 T.C. 438. The effect of those decisions was to make the profits of certain isolated transactions taxable under Case VI, and without Section 27 the taxpayer would have been without redress if in a subsequent year a similar transaction of his left him with a loss. The question now to be decided, however, is not what were the illustrations of hardship which the Legislature had in mind when the taxpayer was given the relief under Section 27, but what upon its true construction is the extent of the operation of Section 27, and whether it authorises the setting off of these losses in the present case.

The argument of the Appellant that Section 27 does not apply involves two main contentions, first, that the loss was not sustained " in any trans-" action " ; and, secondly, that, even if it was, it was not " a transaction of " such a nature that, if any profits had arisen therefrom, the Respondent " would have been liable to be assessed in respect thereof under Case VI " of Schedule D ".

In my opinion, there was in each case a transaction out of which the loss arose. The transaction consisted in taking a lease of property with a view to re-letting it and either succeeding or failing to re-let it. It is just as much a transaction as would be the purchasing of an article by a trader, who seeks to re-sell it at a profit, and who either does sell it at such a profit or sells it at a loss or does not succeed in selling it at all. On the facts of the present case, there clearly is a transaction, and this was the view of every member of the Court of Appeal. If all that could be said was that an owner of property, freehold or leasehold, had tried to find a tenant for it and had failed, it would be a question whether his unsuccessful effort could be regarded as a transaction. A similar difficulty would arise if the taxpayer had become the owner of property by bequest or inheritance, which he failed to re-let. But, in the present case, no real difficulty arises on this first point.

On the second and much more difficult point, the Appellant's argument is that " loss " means what he calls " commercial loss ", and that, correspondingly, " profits ", where this word first appears in Section 27, means what he calls " commercial profits ". Assuming this, he then argues that Section 15 of the Act of 1940 does not assess a dealer in property on the commercial profits he might make from re-letting, since the " excess " on which tax under Case VI of Schedule D is charged is the result of a formula. The formula might bring out a figure of excess when there was no commercial profit, and there might be commercial profit though the formula would bring out no excess to be taxed. Finally, it is argued that before a set-off of loss under Section 27 can be authorised, the total figure of profits referred to in the Section, neither more nor less, must be liable to be assessed under Case VI of Schedule D, and that this condition is not fulfilled in these transactions.

I agree with the majority in the Court of Appeal in thinking that these arguments are unsound. It is not disputed that losses occurred to the extent claimed, and even if the word " loss " is treated as equivalent to " commercial loss ", this would not justify interpreting the word " profits " as meaning something different from what the law of Income Tax regards as profits. The Appellant suggests that " profits or gains " lower down in the Section is to be contrasted with the word " profits " standing alone. This is not so. Lord Halsbury, in an Income Tax case with a name which only Welshmen can pronounce—*Ystradyfodwg and Pontypridd Main*

(1) 8 T.C. 521.

Sewerage Board v. *Bensted*(1), [1907] A.C. 264, at page 267, observed: "It "appears to me that there is a mixture, not to say a confusion, of thought "in using the word 'profits' in a sense which is not consistent with the "mode in which it is used in the statutes relating to income tax." "Profits" means "profits or gains" in the Income Tax sense, and this can be illustrated from many places in Income Tax legislation, for example, in the Rules relating to Case III of Schedule D. Lord Wrenbury pointed out in *Kensington Income Tax Commissioners* v. *Aramayo*, [1916] 1 A.C. 215, at page 225(2), that Income Tax legislation is not entirely consistent in using the same phrase for the same thing throughout.

The question, therefore, comes to be whether the tax imposed on an "excess" under Case VI of Schedule D is to be regarded as a tax in respect of profits or gains. Case VI itself is described as "tax in respect of any "annual profits or gains not falling under any of the foregoing Cases and "not charged by virtue of any other Schedule". It appears to me that the tax on "excess" under Section 15, assessed as it is under Case VI, must be regarded as a tax in respect of annual profits or gains, notwithstanding that the figure of assessment is arrived at by the formula contained in the Section. Tax under Schedule A remains unaffected; Section 15 does not modify or enlarge the operation of Schedule A in any way. The Section imposes, in the circumstances to which it applies, a tax on an "excess" which is assessed under a different Schedule, and which is paid by the immediate lessor. Once the conclusion is reached that the tax on this "excess" is a tax in respect of profit and gains, the main difficulty which has been suggested by the Appellant disappears.

This conclusion is reached by putting a correct interpretation on the relevant sections, but it is legitimate to add that it is also the conclusion which one would expect, for there are many instances in Income Tax law where Parliament has thought proper to allow losses to be brought into account for the purpose of reducing what would otherwise be the taxpayer's liability.

I move that the appeal be dismissed with costs.

Lord Normand.—My Lords, the Respondent, who is a dealer in property, made a practice of acquiring leasehold properties with a view to sub-letting them at a profit. In the year ended 5th April, 1943, he had 28 such properties of which 23 had been sub-let by him, each of them at a rent in excess of the sum at which it had been assessed under Schedule A. The difference between the aggregate of the rents under the sub-leases for these properties and the aggregate of the Schedule A assessments was £4,830. The excess of the aggregate of the sub-rents over the aggregate of the rents paid by the Respondent in respect of the same 23 properties was a still larger sum. Of the remaining five properties the Respondent failed to let three, and two had been sub-let by him at rents lower than those payable by him. The difference between the rents received by the Respondent and the rents paid by him in respect of these five properties was £3,575.

The assessment for the year 1942–43, now under appeal, was made under Case VI of Schedule D by virtue of Section 15 of the Finance Act, 1940, in respect of the excess of the aggregate rents received by the Respondent for the 23 properties over the aggregate of the Schedule A assessments. The original assessment was for the estimated sum of £5,000, but the Special Commissioners have corrected it to the sum of £4,830. Assess-

(1) 5 T.C. 230. (2) 6 T.C. 613, at p. 622.

(Lord Normand.)

ments on the same principles were made for the years 1940-41 and 1941-42. They also are under appeal and the decision on the 1942–43 assessment will govern them.

It is admitted by the Respondent that he was liable by virtue of Section 15 of the Finance Act, 1940, to be assessed to Income Tax under Case VI of Schedule D on the "excess" in respect of the 23 properties. But he claims that under Section 27 of the Finance Act, 1927, he is entitled to deduct from that excess the loss of £3,575 suffered on the other five properties.

Before Section 15 of the Finance Act, 1940 (which I call "Section 15" for short hereafter), came into force the total Income Tax liability in respect of the 23 properties would have been ascertained and measured by the assessment made under Schedule A. That is not to say that the Respondent would have been entitled according to Income Tax law to enjoy part of his profit free of tax. In principle, Income Tax is a single tax levied upon the whole profits or income of the subject, and it is assessable, according to the nature of the profits, under one or other of the Schedules of the Act. The whole taxable profits from property were assessable under Schedule A and an assessment under that Schedule exhausted the tax liability of the lessor in respect of it. Schedule A is based on annual value, and annual value was the measure of the whole taxable profits from the property. These principles were settled by decisions of this House in *London County Council* v. *Attorney General*(1), [1901] A.C. 26, and *Salisbury House Estate, Ltd.* v. *Fry*(2), [1930] A.C. 432.

Section 15 of the Finance Act, 1940, innovated upon these principles. The reason for the innovation appears to have been twofold. The *Salisbury House Estate* case had shown that, whatever might be the theory of the Income Tax Acts, there might be a margin between the annual value of property and the actual net receipts of the lessor, and after the quinquennial valuation of property was suspended by Section 27 of the Finance Act, 1940, this margin became of greater importance. It was, therefore, considered expedient to deal with the discrepancy by new legislation even at the cost of violating the principle that a Schedule A assessment subjects to tax the whole profits from property.

Section 15, which deals with leases for a period not exceeding 50 years, imposes a tax upon an "excess". It involves a subtraction sum, in which the figure in the upper line is the amount of a notional Schedule A assessment (as reduced for the purposes of collection) based on an annual value determined by reference to the rent under the lease and the other terms of the lease, and the sum to be subtracted is the greater of (*a*) the amount of the actual Schedule A assessment (as reduced for the purpose of collection) or (*b*) the rent payable by the immediate lessor. The excess so arrived at is made chargeable to tax under Case VI of Schedule D.

The first thing to notice about the provisions of the Section is that they do not in any way affect the Schedule A assessment, nor is the new tax liability created by them a tax liability under a Schedule A assessment, though both the actual Schedule A assessment and a notional Schedule A assessment are used in computing the taxable profits. The tax is in fact a new tax upon taxable profits derived from property, which are now not to be deemed to be exhaustively charged under Schedule A. It is a tax under Schedule D, Case VI and, therefore, by definition a tax in respect of profits or gains not falling under any other Schedule. Accordingly, the total profit is divided into two parts, one assessable under Schedule A and the other under

(1) 4 T.C. 265. (2) 15 T.C. 266.

(Lord Normand.)

Schedule D, Case VI, but both parts are " profits " or " profits and gains " in Income Tax law.

It is under Section 27 of the Finance Act, 1927 (which I shall call " Section 27 " for short hereafter) that the Respondent claims to deduct " losses " in respect of the five properties. This Section was, no doubt, enacted in order to redress an injustice which arose when the profits of an isolated transaction of a commercial nature (as in *Ryall* v. *Hoare,* 8 T.C. 521, and *Lyons* v. *Cowcher,* 10 T.C. 438) were taxed under Case VI, and when in another year a similar transaction resulted in a loss which could not be set off against the taxed profits. But the origin of the Section is irrelevant, and the only relevant question is whether the Respondent can bring himself within the language of the Section.

If the Respondent is to succeed, he must show (1) that as regards the five properties he had engaged in a transaction within the meaning of the Section ; (2) that he made a loss in the transaction ; and (3) that the transaction was of such a nature that, if any profits had arisen therefrom, he would have been liable to be assessed in respect thereof under Case VI of Schedule D.

Neither the Special Commissioners nor Wynn-Parry, J. decided whether there was a transaction within the meaning of Section 27. All three members of the Court of Appeal held that there was a transaction. In my opinion, " transaction " is a comprehensive word which includes any dealings with property. The " transaction " entered into by the Respondent as a dealer in property was the acquisition of leases of property, the attempt to sub-let at a rent in excess of the rent payable by him, and the success or failure of this attempt. I therefore agree with the Court of Appeal on this point. I see no difficulty on the facts of this case, though there may well be difficulty on other facts.

That the Respondent sustained a loss in the transaction as regards the five properties admits of no doubt. The loss is ascertained by ordinary business methods. But though the Income Tax Acts do not impose a special meaning on the word " loss ", the loss is none the less a loss in the sense in which the Income Tax law has regard to losses.

The real crux of this appeal, however, is the meaning of the word " profits " in Section 27. " Profits " and " profits and gains " are terms often used interchangeably in the Income Tax Acts with the meaning " assessable " or " taxable profits " (*London County Council* v. *Attorney General,* [1901] A.C. 26, per Lord Davey, page 45(1)). In my opinion, that is the meaning of the word " profits " standing alone in Section 27, as it is also the meaning of the words " profits and gains " lower down in the Section, and it is impossible to draw a distinction which would assign to the words " profits " and gains " the ordinary meaning in Income Tax law and to " profits " the meaning of " commercial profits ".

The Crown contended that since the word " loss " means " commercial loss ", the word " profits " must correspondingly mean " commercial profits ". It was further suggested that unless that were so, some absurdity would result such as arises when peas are to be deducted from beans. The difficulty is imaginary, for there is nothing absurd in a contrast between losses and profits, provided that the losses and profits are reckoned on principles recognised by Income Tax law, though for each of them a different but appropriate mode of reckoning is used. The Crown maintained, as a last resort, that a tautology is involved if " profits " means " assessable " or

(1) 4 T.C. 265, at p. 301.

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" taxable profits ". That is not so. The words " he would have been liable " to be assessed in respect thereof under Case VI of Schedule D " define or describe the category of taxable profits which would have arisen from a transaction, if it had had a successful issue. The Section is not saying the same thing twice ; it is saying two things—that the transaction would have given rise to taxable profits, and, that these profits would have been assessable under Case VI of Schedule D. Given that the word " profits " means " taxable " or " assessable profits ", the Respondent has to show that if the transactions as regards the five properties which led to a loss, had given rise to any profits, he would have been liable to be assessed in respect of them, and of the whole of them, under Case VI of Schedule D. The Section does not expressly say that all the profits would have been assessable under Case VI, but I think the Crown was right in submitting that that was its meaning. It is, however, quite plain that all the profits, if there had been any, would have been assessable under Case VI. In strictness, it may be more accurate to say that the whole profits would have been liable to be assessed under Section 15 and would have been chargeable under Case VI of Schedule D. But the language of the Income Tax Acts does not always strictly observe the distinction between assessing and charging. The Crown did indeed show that if " profits " means " commercial profits ", not all these profits would be chargeable under Case VI, Schedule D. The example given was a sub-letting at a net rent greater than the rent payable by the lessor but less than the Schedule A assessment. But this argument falls to the ground if " profits " is given its correct meaning. Then it was said that not all the taxable profits were assessable under Case VI of Schedule D, because the Schedule A assessment remained and tax would still be payable in respect of it. The answer to this is that it is impossible to say that the profits and gains assessable under Schedule A arise from the transaction. The very reason for the enactment of Section 15 was to create a new liability to tax with new rules of assessment in order to trap " profits and gains " which Schedule A failed to trap ; and the Schedule A assessment would have been the same both in amount and in the ultimate liability whether there had been a " transaction " or not. In view of the terms of Section 15 and the express provision that the profits shall be chargeable under Case VI of Schedule D, I find it impossible to accept the view that the new tax is an additional Schedule A tax directed to more effective taxation of " annual value ".

I therefore agree with my noble and learned friend on the Woolsack that the appeal should be dismissed.

Lord Oaksey.—My Lords, I agree that this appeal should be dismissed.

Sir Frank Soskice's main argument, if I understood him aright, was, firstly, that the word " profits " in the fourth line of Section 27 of the Finance Act, 1927, means " actual profits " and not " profits computed in accordance with the Income Tax Acts " ; secondly, that the word " any " in the third line of that Section means " all " ; thirdly, that Section 15 of the Finance Act, 1940, in charging to tax excess rents, does not charge profits within the meaning of Section 27 of the Act of 1927 ; and lastly, that, in any event, as the properties in question are assessed under Schedule A it cannot be said that " all " the profits which arise from such a transaction as those in question are liable to be assessed under Case VI of Schedule D.

In my opinion, these arguments are fallacious.

The word " profits " cannot mean " actual profits " since the hypothesis is that if there had been profits arising from the transaction they would have been liable to be assessed under Case VI of Schedule D. The words used

are to define the nature of the transaction in which a loss, if sustained, may be set off against profit from any transaction which has been assessed on the taxpayer under Case VI of Schedule D.

In the next place, the word " any " in the third line of Section 27 does not, in my opinion, mean " all ". The word can mean " all " but it can also mean " some ". But it is also necessary to interpret the words " if any profits " had arisen therefrom ". Now, the transactions in question were the sub-letting or attempting to sub-let properties of which the Respondent was the lessee and the profits which arose therefrom were not the profits chargeable under Schedule A. Schedule A is a tax on the ownership of land, not on its letting, although rent is used as the measure of the tax.

Sir Frank Soskice then argued that the profits and losses which arise from such transactions as these do not arise from them within the meaning of Section 27, and that the transactions are merely instances of *causa sine qua non,* but I do not think any such investigation of the nature of causes is necessary for the true interpretation of the Section. Section 27 of the Act of 1927 and Section 15 of the Act of 1940 both deal with profits which are liable to be assessed under Case VI of Schedule D and not with profits assessable under Schedule A or any other Schedule. Section 27 is a perfectly general section providing for a set-off of losses against profits which are assessable under Case VI of Schedule D. When, therefore, the Act of 1940 made excess rents chargeable under the same Case of Schedule D it required clear words to show that it was not the intention that losses arising from transactions of the same nature should not be set off against such profits.

What the taxing authorities have to investigate is whether there has been a transaction in which, if it had resulted in a profit, that profit would have been assessed under Case VI of Schedule D ; if there has been such a transaction and the transaction has resulted in a loss, then that loss may be set off against any profits which have been assessed under Case VI of Schedule D in respect of transactions for that year.

Lord Reid.—My Lords, the Respondent acquired a number of leases with a view to sub-letting the properties at a profit. In the year in question in this case, 1942-43, he was successful in this in many cases, but in other cases he incurred losses either because he had to sub-let at rents lower than the rents which he paid, or because he could not sub-let at all, so that in that case the whole rent which he paid was a loss to him. He now seeks to set off those losses against certain assessments under Case VI of Schedule D in respect of the cases where he made profits, and I think that the question whether he is entitled to do that is best approached by considering first what the position would have been if these events had occurred before 1940 and then considering the effect of Section 15 of the Finance Act, 1940, and Section 27 of the Finance Act, 1927.

If Section 15 had not been passed the position would have been that when the Respondent acquired the leases he became liable in each case on coming into occupation to pay Income Tax on the amount of the Schedule A assessment, but in paying rent to his lessor he was entitled to deduct tax at the standard rate from that rent up to a maximum of the amount of tax which he had himself paid. So if the rent which he paid was equal to or exceeded the amount of the Schedule A assessment he passed on the whole burden of tax, and in the end bore no tax himself. But if the rent which he paid was less than the amount of the Schedule A assessment he could not pass on the whole burden but had to bear tax

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himself to the extent of the difference between the whole tax payable and the amount which he could deduct from the rent which he paid. If he sub-let he never had to pay any more tax however large the rent might be which he got from the subtenant and however large his profit from sub-letting might be. But, on the other hand, he got no relief if he failed to sub-let. And if he sub-let at a loss all that he was able to do was to pass to the subtenant any liability to pay tax under Schedule A: he could get no relief in respect of his loss through paying more rent than he received. There are a number of provisions in the Income Tax Acts which permit losses of various kinds to be taken into computation in various ways, but there was none which then applied to a loss of that character.

The Finance Act, 1940, contains provisions for the taxation of lessors who make profits. It deals differently with long leases and short leases. All the leases with which this case is concerned were within the definition of short leases in the Act and came within the scope of Section 15. The provisions of the Act dealing with long leases are so different that I do not think that any assistance can be got from them in interpreting Section 15, and I do not propose to consider them further.

The provisions of Section 15 do not alter in any way rights or liabilities in respect of assessment or taxation under Schedule A. They create a new subject of taxation assessable under Case VI of Schedule D, and Case VI deals with profits or gains not falling under any other Case of Schedule D and not charged by virtue of any other Schedule. It is true that the provisions of Section 15 involve, as a step in the calculation which it directs, a notional revaluation of the property according to the Rules applicable to Schedule A, and that in certain cases the actual Schedule A assessment must be taken into account as a deduction. And it may well be that the reason, or one of the reasons, for these provisions in the Act of 1940 was that on account of delay in revaluation for the purpose of Schedule A those who let property were thought to be inadequately taxed. So the provisions of Section 15 can be regarded as supplementary to Schedule A. But they are not an extension of Schedule A. They tax a new kind of profits or gains, and they tax it under Case VI of Schedule D because it does not come within the scope of any other Schedule or Case. Moreover, liability to pay tax under Section 15 is imposed directly on the lessor who makes the profit, whereas the occupier pays tax, at least in the first instance, under Schedule A.

Section 15 imposes liability to tax if a notional revaluation of the property, based on the rent which the taxpayer actually receives, exceeds whichever is the greater of the actual Schedule A assessment or any rent which he has to pay under a short lease. Broadly speaking, that is a case where the taxpayer has made a profit by letting or sub-letting and where tax on the amount of his profit would exceed the tax due under Schedule A, or such part of that tax as he has to bear himself; and the amount of tax payable under Section 15 when added to the tax under Schedule A or that part of it which he bears himself will roughly correspond to what he would have had to pay in tax if he had had to pay nothing under Schedule A but had been taxed on his whole profit from letting or sub-letting the property. The correspondence may be far from exact because, as is well known, allowances under the Rules applicable to Schedule A may differ widely from expenses which the taxpayer has had to incur.

It must have been fairly obvious when Section 15 was enacted that there would be cases of the kind to which it applied where the taxpayer

incurred a loss—as the Respondent did here in some instances. Section 15 is silent about such cases. The Respondent says that that is because the terms of Section 15 are such as to bring Section 27 of the Finance Act, 1927, into operation with regard to such losses, and, therefore, Parliament must be held to have intended that losses should be dealt with under that Section. The Appellant denies this, and contends that the Respondent must pay tax under Section 15 in respect of adventures in which he has made a profit without any deduction in respect of any other adventures in which he has made a loss ; the Appellant asserts that Section 27 has no application to losses of this character, and if that is right it follows that Parliament must be held to have intended that this new tax should be paid in every case where the taxpayer has made a profit sufficient to bring Section 15 into operation without the taxpayer having any right to bring into computation losses which he has sustained in other cases of exactly the same kind.

So the case turns on the proper interpretation of Section 27. That Section applies where and only where " a person sustains a loss in any " transaction . . . of such a nature that, if any profits had arisen therefrom, " he would have been liable to be assessed in respect thereof under Case VI " of Schedule D " ; and it allows such a loss to be " deducted from or set " off against the amount of any profits or gains arising from any transaction " in respect of which he is assessed for that year under the said Case VI ", with a provision for carrying forward losses which cannot be so set off. At first sight the provisions of Section 27 might appear to fit the present case exactly. There is no doubt that the Respondent sustained a loss, and there is no doubt that each of the operations in which he sustained the losses was of such a nature that, if it had been more successful, Section 15 of the Act of 1940 might have applied and the Respondent would then have been chargeable to tax under Case VI in terms of that Section. And the Respondent only seeks to set off his losses against assessments under Case VI. But the Appellant argues that that is not enough to satisfy the requirements of Section 27.

In the first place, the Appellant contends that the Respondent's operations in which he sustained loss were not " transactions " within the meaning of the Section. I can see no substance in this contention, and I agree with your Lordships that it is wrong.

Then the Appellant founds on the limited nature of the wording of the condition " if *any profits* had arisen therefrom he *would* have been liable to " be assessed *in respect thereof* under Case VI ". First he says that Section 15 of the Act of 1940 is not dealing with profits ; no doubt there must be profit before it can apply but it does not tax profits, it taxes excess rents ; if profits arise there may be an assessment under Case VI but it will not be an assessment " in respect thereof ", and therefore the condition in Section 27 of the Act of 1927 is not satisfied. I think that the answer to that can be shortly stated. Chargeability under Section 15 must be in respect of profit of some kind. The fact that Case VI applies shows that profit is being dealt with ; the definition of Case VI at the beginning of Schedule D makes it clear that Case VI only applies to " annual profits or gains " and it is well established that the words " or " gains " add nothing to the word " profits ". The calculation which Section 15 directs is simply the method by which the profits from the transaction are to be measured for Income Tax purposes, and the assessment and charge to tax under the Section are in respect of the profits so measured.

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Then the argument for the Appellant is put in another way. He says that, whatever "profits" may mean in Section 27, this Section has no application to a case where, if "profits" had arisen, those "profits" might or might not have been assessable under Case VI. So far I think that he is right. The Section requires that if any profits had arisen the taxpayer *would* have been liable to be assessed—not *might* have been liable to be assessed—under Case VI. Then he says that "profits" must mean "actual" or "commercial profits", and that such profits might arise in a case of this kind without there being any possibility of an assessment under Case VI. If that were the meaning of "profits" here again I would agree with him. There can be no assessment under Case VI unless there are sufficient profits to bring Section 15 into operation, and there can be actual or commercial profits in a case of this kind without there being any such profits. For example, let me suppose a property with a Schedule A assessment of £500. If a taxpayer acquires a lease of that property under which he pays a rent of £200 and then sub-lets it for a rent of £350 he makes a profit. The commercial profit might be somewhat less than £150, the difference between the rent he pays and the rent he receives, because there might be expenses which could be deducted from the gross profit. But I assume that there would be a substantial profit. Nevertheless, Section 15 would not apply and there could be no assessment under Case VI. Section 15 only applies if the notional revaluation based on the rent which the taxpayer is receiving exceeds whichever is the greater of the Schedule A assessment or the rent which he pays, and here the notional revaluation though exceeding the rent which he pays would not exceed the Schedule A assessment. So there would be an actual profit but no liability to assessment under Case VI.

But I do not agree that "profits" in Section 27 means "actual" or "commercial profits". In legislation dealing with Income Tax one might expect "profits" to mean profits in the Income Tax sense or profits which have been made subject to taxation, and that is not by any means the same thing as actual profits in a commercial sense; in some cases taxable profits are more than actual profits and in other cases less. Moreover, when Section 27 refers to profits in respect of which the taxpayer would have been liable to assessment it must, I think, be referring to profits in the Income Tax sense, because it is only in respect of such profits that a taxpayer can ever be liable to assessment. It appears to me that what the Section means is that the transaction must be of such a nature that, if any assessable profits arise from it, the taxpayer will be liable to assessment in respect of those profits under Case VI of Schedule D, and not under some other Case or Schedule.

The Appellant's argument that "profits" means "actual profit" was based largely on the contrast which is made in the Section between "loss" and "profits". It was said that "loss" must mean "actual loss" and, therefore, "profits" must mean "actual profits". I do not think that the argument is valid. The Section later makes the loss deductible for Income Tax purposes and that would indicate that "loss" must mean loss in an Income Tax sense or a loss which can properly be taken into computation for Income Tax purposes. In a way, I think that the Appellant's argument is right: there is no Rule applicable to Case VI which deals with losses, and no special meaning attaches to the word in this context, so one takes actual loss into this Income Tax computation. But that is not taking actual loss in contradistinction to Income Tax loss; that is taking actual loss because in this case it corresponds with loss in the Income Tax sense. If

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that is so, there is plainly no reason to suppose that "profits", when contrasted with loss in this sense, means anything but profits in the Income Tax sense.

If that is right the crucial question comes to be this: Could there be assessable profits from a transaction of this kind which were not assessable or chargeable under Case VI of Schedule D but were assessable or chargeable under some other Schedule or Case? The Appellant maintains that there could be. Taking the example which I have already given—Schedule A assessment £500, rent paid by the taxpayer £200, rent received by him £350—the Appellant would say that the taxpayer's actual or commercial profit of £150 (or somewhat less) would be an assessable profit and would be assessed under Schedule A. But in my opinion it would not be an assessable profit at all. So long as there is no revaluation for the purposes of Schedule A it cannot come into any computation or calculation for Income Tax purposes, and the amount of the Schedule A assessment would be exactly the same whether that profit had been made or not, and even on a revaluation the amount of the profit from sub-letting would be irrelevant, though the rent under the sub-lease might be important. Until the profits from sub-letting are of such a character as to bring Section 15 of the Act of 1940 into operation they are not profits in respect of which anyone is liable to be assessed, and if those profits are such as to bring Section 15 into operation then the only assessment in respect of them will be the assessment under Case VI of Schedule D which Section 15 directs. So it follows that the condition in Section 27 of the Act of 1927 is satisfied. These transactions are of such a nature that if any profits which were assessable arose from them those profits would in every case be assessable under Case VI of Schedule D and could in no case be assessable under any other Case or Schedule. Accordingly in my judgment this appeal should be dismissed.

Lord Asquith of Bishopstone.—My Lords, I concur. The activity on which the Respondent was engaged was that of acquiring property—freehold or leasehold—with the design of letting, or re-letting it at a commercial profit to himself. Under the *Salisbury House* decision[1] it had been established that profit resulting from a transaction of this kind and consisting of the difference between net outlay and net return, could not be taxed as such under Schedule D, and that the only Income Tax liability which could attach in such a case was one on the annual value of the property under Schedule A. This was held to exhaust the tax gatherer's rights. The system worked fairly, so long as Schedule A value was frequently revised and so kept in step with commercial value. But when, during the war, quinquennial revaluations under this Schedule were suspended, an increasing disparity declared itself between the old Schedule A values and the rents which the premises in fact commanded in the market, and therewith an increasing tax-free commercial profit lodged in the hands of the *entrepreneur*.

Section 15 of the 1940 Act was clearly designed to "catch" this profit. It might have provided—I leave aside for the sake of simplicity, freeholds—that in the case of property acquired on lease and re-let, the subject matter of tax should be simply and in all cases the difference between rent payable and rent receivable, less expenses. It did not in fact so provide. The new, and the only new, subject matter of tax was what may be called for short "excess rents": a figure arrived at by the application of an arbitrary formula laid down in the Section. Excess rent (again leaving freeholds for

[1] 15 T.C. 266

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simplicity out of account) would very frequently be the excess of the rent at which the premises were re-let, over the Schedule A value, a figure which might be almost unrelated to actual commercial profits. (The wording of the Section is complex but I do not think this statement is a dangerous over-simplification of its gist, at least on the facts of this case.) The Section provided that "excess rent", computed according to this formula, should be "chargeable under Case VI of Schedule D". Case VI deals, and deals solely, with "profits or gains" in the Income Tax sense of those terms; and it is impossible to suppose that the Section would have operated differently if it had provided in terms that excess rents should be "deemed to be 'profits 'or gains' within Case VI" and chargeable as such.

The short point in this appeal is whether in a transaction of this kind losses, in any and what sense of that term, can be set off against profits, in any and what sense of that term; for while 23 of the 28 properties in this case were re-let at a profit, five were re-let at a loss. The answer depends mainly on the construction of Section 27 (1) of the Finance Act, 1927, and on the application of its language (and in particular of the word "profits" in its fourth line) to the new subject matter of taxation created by Section 15 of the Finance Act, 1940. The first five lines of Section 27 read as follows:

> "27.—(1) Where in any year of assessment a person sustains a loss "in any transaction, whether he was engaged therein solely or in "partnership, being a transaction of such a nature that, if any "profits had arisen therefrom, he would have been liable to be assessed "in respect thereof . . ."

The word "loss" in line 1 has, it would seem, no esoteric significance in fiscal statutes, and the Respondent concedes (if it be a concession) that it may be taken to mean ordinary commercial loss, as when I take premises on lease at £500 a year and re-let them at £200 or fail to re-let them at all. But what of the word "profits" in line 4? The main contest was about the meaning of this word. Does this mean, in a transaction of this kind, actual commercial profit, or does it mean the notional profit represented by the "excess rent" as defined in Section 15 of the 1940 Act; a "profit" which is capable of existing where there is no commercial profit at all, or where such a profit exists, may bear little or no mathematical relation to it.

Section 27 (1) bids us to envisage "transactions" of various kinds. Your Lordships are only concerned with its construction in relation to the type of transaction involved in the present case. In regard to such transaction (resulting in an actual loss) we are enjoined to ask whether, if any "profit" had arisen therefrom, the taxpayer would have been "liable to be assessed "thereon under Case VI of Schedule D". If, and only if, the answer to this question is "Yes", can the loss be set off against the profit on other transactions, similar or dissimilar, in respect of which he is assessed in the same year.

The main argument of the Crown was that "set-off" involves deduction and can only exist when the thing sought to be deducted and the thing from which it is sought to deduct it, are homogeneous. ("You cannot deduct peas from beans.") And that since the losses are, *ex concessis*, true commercial losses, the profit we are bidden to imagine in line 4 must, to enable a "set-off", be true commercial profits, not the conventional or notional profits represented by excess rents in Section 15 of the 1940 Act.

I agree with your Lordships in rejecting this contention. It seems to me that the subtraction of an actual loss from that which, by Section 15 of the

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1940 Act, is deemed to be a profit is the subtraction not of peas from beans but of like from like, namely, of a sum of money from another sum of money, and these are none-the-less homogeneous because the second sum is to be computed artificially. In a transaction of this character the only " profits " which can be assessed under Case VI are the excess rents which are deemed to be " profits or gains " by Section 15 of the Finance Act, 1940, and these have no necessary relation to " commercial " profits, and may totally diverge therefrom. I agree with my noble and learned friend on the Woolsack that the appeal should be dismissed.

Questions put :

That the Order appealed from be reversed.

The Not Contents have it.

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

The Contents have it.

[Solicitors:—Tobin & Co.; Solicitor of Inland Revenue.]

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