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Admitting the difficulty of the case, I come to the conclusion that the decision of the learned Chief Justice of this State is correct, and that the appeal should be dismissed.

Appeal dismissed with costs.

Rev *Taxes, Comr of v Melbourne Trust Ltd* (1914) 18 CLR 413

Solicitor, for the appellant, *Guinness*, Crown Solicitor for Victoria.

Solicitors, for the respondent, *Cohen & Herman.*

B. L.

[HIGH COURT OF AUSTRALIA.

THE MELBOURNE TRUST, LIMITED . . APPELLANTS;

AND

THE COMMISSIONER OF TAXES (VICTORIA) . . . . . } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Oct.* 3, 4, 7, 14.

Griffith C.J., Barton and Isaacs JJ.

Income tax—Company—Profits—Company formed to realize assets of companies in liquidation—Surplus proceeds of realization—Business of company—Income Tax Act 1903 (*Vict.*) (*No.* 1819), *sec.* 9.

Three assets companies were formed in England in December 1897 to carry out schemes of arrangement of the affairs of three Victorian banking companies then in course of liquidation in England and Victoria. In each case provisional agreements had been made with the sanction of the Courts in England and Victoria. The basis of each scheme was that the whole of the assets of the banking company should be handed over to a company to be formed for the purpose of carrying it into effect. The creditors of the respective banks were to accept in full satisfaction of their claims, shares

and debenture stock in the respective assets companies. The objects of each assets company was stated in its memorandum of association to be (*inter alia*) to carry out the provisional agreement; to acquire, take over and carry on the undertaking, property and assets of the banking company, and to issue the shares and debenture stock provided for in the agreement; and "to carry on the business of an assets company in all its branches, to nurse, use, employ, manage, develop, and liquidate for such time, and to realize at such time or times and in such manner as may be deemed expedient all property of every description including debts, claims, and demands which may at any time come into the hands of the company." The form adopted in the provisional agreements embodying the schemes was that the banking companies and their liquidators should respectively "sell and transfer" to the assets companies all the assets of the banking companies "in consideration whereof" the assets companies were to issue the debenture stock and shares. The values of the assets taken over by the respective assets companies were entered in their books according to valuations made by the liquidators of the banking companies respectively. The conditions of the issue of the debenture stock of each assets company authorized the redemption of it by purchase from the holders at a discount, or by distribution of money amongst the stock holders *pari passu*. No dividends were payable until all the stock had been redeemed. The three assets companies, which under the several schemes of arrangement were managed by the same body of persons, proceeded to realize their respective assets, and by the beginning of 1903 all the debenture stock had been redeemed out of the proceeds, and a large quantity of property still remained unsold. In 1903 the appellant company was formed in England with the objects, as stated in its memorandum of association, of carrying out three several draft agreements made respectively with the three assets companies. Each of those agreements provided that the assets company should "sell," and the appellant company should "purchase," the undertaking of the assets company and all its assets in consideration (*inter alia*) of shares and debenture stock of the appellant company. The memorandum of association of the appellant company also included the following purposes:—"To nurse, use, employ, manage, develop and liquidate for such time, and to realize at such time or times and in such manner as may be deemed expedient, all property of every description, including debts, claims and demands which may at any time come into the hands of the company"; "to carry on the business of an estates development and assets company in all its branches."

Held by *Griffith* C.J. and *Barton* J. (*Isaacs* J., dissenting) that, so far as the realization of the assets acquired by the appellant company from the three assets companies was concerned, the business of the appellant company was not a trading enterprise for the purposes of the *Income Tax Acts* (Vict.), but that the operations of the three assets companies should be regarded in the same light as if the assets realized by them had been realized by the liquidators of the respective banking companies, and the operations of the appellant company in the same light as if the liquidators of the three banking companies had, with the sanction of the Court, associated themselves

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together to realize and dispose of the remaining assets of the three banking companies on the terms of pooling them.

Held, therefore, by *Griffith* C.J. and *Barton* J. (*Isaacs* J., dissenting) that the surplus of the proceeds of sales of assets by the appellant company above the estimated values of those assets when acquired by the appellant company were not profits of the appellant company within the meaning of sec. 9 of the *Income Tax Act* 1903 so as to render the appellant company liable to income tax in respect of them, and that no part of such proceeds could be regarded as profits until the whole amount of the debts of the original creditors of the banking companies had been discharged with interest.

Decision of the Supreme Court of Victoria: *In re Income Tax Acts*, 34 A.L.T., 17, reversed.

APPEAL from the Supreme Court of Victoria.

A special case was stated by the Commissioner of Taxes (Victoria) under the provisions of the *Income Tax Acts* and was as follows :—

"1. The City of Melbourne Bank Limited, Federal Bank of Australia Limited, and English and Australian Mortgage Bank Limited (hereinafter called 'the banks') were incorporated in the State of Victoria under the Victorian Companies Acts, and carried on the business of banking in Victoria and in London, England. The Federal Bank of Australia Limited also carried on business in New South Wales and in South Australia.

"2. Orders were made by the High Court of Justice in England for the compulsory winding up of the banks as follows :—Against English and Australian Mortgage Bank on the 9th November 1892, against Federal Bank of Australia Limited on the 11th March 1893, and against City of Melbourne Bank Limited on the 17th July 1895. Each of the banks also went into liquidation in Victoria, and the Federal Bank of Australia Limited also went into liquidation in New South Wales and in South Australia. Certain dividends were paid to creditors in all the liquidations between their commencement respectively and the happening of the events stated in the next paragraph of this case.

"3. Three several schemes of arrangement were entered into between the banks severally and their respective creditors, and were duly sanctioned (*a*) under the provisions of the English *Joint Stock Companies Arrangement Act* 1870 by three several orders of the High Court of Justice in England made on the 25th

November 1897 and (*b*) under the provisions of the Victorian *Companies Act Amendment Act* 1892 by three several orders of the Supreme Court of Victoria made on the 7th September 1897. The scheme of arrangement between Federal Bank of Australia Limited and its creditors was also duly sanctioned in the liquidation in New South Wales by an order of the Supreme Court of that State dated 16th November 1897 and in the liquidation in South Australia by an order of the Supreme Court of that State dated 23rd March 1898. It was proved to the satisfaction of the said respective Courts that the shareholders of none of the banks had any interest in the assets thereof by reason of the extent of the insolvency of the banks respectively.

"4. In pursuance of the said schemes of arrangement, three companies named respectively Melbourne Assets Company Limited, Federal Assets Company Limited, and English and Australian Assets Company Limited (hereinafter called the Assets Companies) were incorporated on the 17th day of December 1897 under the English Companies Acts.

"5. The objects of the Melbourne Assets Co. Ltd. set out in its memorandum of association were (*inter alia*) as follows:—

"III. (*a*) To execute and carry into effect the two several draft agreements made in the matter of 'City of Melbourne Bank Limited' hereinafter called the 'Liquidating Bank' and other banks copies whereof are set forth in the first and second schedules to the articles of association registered herewith with such modifications if any as may hereafter be lawfully made; and to acquire take over and carry on the undertaking property and assets of the liquidating bank and to issue the shares and debenture stock provided for in the agreement set forth in the said first schedule.

(*b*) To carry on the business of an assets company in all its branches, to nurse, use, employ, manage, develop and liquidate for such time and to realize at such time or times and in such manner as may be deemed expedient, all property of every description, including debts, claims and demands which

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may at any time come into the hands of the company.

"6. The objects of the other two of the assets companies were (*inter alia*) set out in their respective memoranda of association in substantially the same terms as those used in the clauses of the memorandum of association of Melbourne Assets Company Limited, set out in paragraph 5 of this case. In all other material respects the terms of the memoranda of association and the articles of association of the other two assets companies were exactly the same (*mutatis mutandis*) as those of Melbourne Assets Company Limited.

"7. In further pursuance of the said schemes of arrangement each of the banks entered into an arrangement with its relative assets company. Each agreement was with some modifications in the same words and figures (*mutatis mutandis*) as the draft agreement referred to in clause III. (*a*) of the memorandum of association of Melbourne Assets Company Limited whereof a copy is set forth in the said first schedule to the articles of association of that said company. By each of these agreements it was provided that the bank executing it should release and transfer to the assets company executing it all the assets of the bank subject to any subsisting charges thereon (if any) in consideration whereof the assets company should issue the debenture stock and fully paid shares of such assets company in the said agreements mentioned; and that the assets company should (subject to certain provisions) against claims of creditors admitted as in the said agreement mentioned and in full satisfaction thereof issue in exchange for the deposit receipts or other evidences of indebtedness held by the admitted creditors certain sums of debenture stock and certain fully paid shares of the assets company in such agreement mentioned.

"The sums of debenture stock and shares to be so issued for each £100 of admitted claims were as follows:—

"To creditors of City of Melbourne Bank Limited—£15 of debenture stock of Melbourne Assets Company Limited and one fully paid up £1 share.

"Federal Bank of Australia Limited—£12 10s. debenture stock of Federal Assets Company Limited and one fully paid up £1 share.

"English and Australian Mortgage Bank Limited—£10 debenture stock of English and Australian Assets Company Limited and one fully paid up £1 share.

"8. Agreements in the terms of the copy draft agreements referred to in the respective memoranda of association of the assets companies as being contained in the respective second schedules to the articles of association registered therewith were also duly executed. They provided for the management of the assets companies and another company by the same body of persons and for the apportionment of the expenses of such management between all the companies interested, but their contents are not further material to this case.

"9. The amounts of admitted claims of creditors of the assets companies were as follows:—

City of Melbourne Bank Ltd.	...	£3,248,582	12 9
Federal Bank of Australia Ltd.	...	£1,585,764	1 4
English & Australian Mortgage Bank Ltd.	...	£798,029	11 8

and the amounts of debenture stock and shares issued to creditors in respect of such admitted claims were as follows:—

To creditors of	Debenture Stock.	Fully paid £1 shares.
„ City of Melbourne Bank Ltd. ...	£487,287 7 11	32486
„ Federal Bank of Australia Ltd. ...	198,220 10 2	15865
„ English and Australian Mortgage Bank Ltd. ...	79,802 19 2	7960

"10. The assets of the banks taken over by the assets companies were entered in the books of the said companies at the time of the sanctioning of the said schemes of arrangement as of the following estimated values on information supplied by the respective liquidators of the banks, viz.:—

Assets of City of Melbourne Bank Ltd.	...	£662290
„ Federal Bank of Aust. Ltd. ...	...	250753
„ English & Austn. Mortgage Bk. Ltd. ...		105280
Total		£1,018,323

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and upon these valuations the amounts of debenture stock and shares were issued as mentioned by the respective assets companies in satisfaction of admitted claims of creditors and the value of the assets taken over was stated in the first balance sheets of the assets companies respectively in accordance with these estimates.

"11. The conditions of issue of the debenture stock of each of the respective assets companies gave such assets companies power to redeem such stock by tender or by purchase in the open market or *pro rata* out of proceeds of realization of assets and receipts from every source. The debenture stocks were secured by trust deeds which all contained proper provisions for carrying out the redemption.

"12. In the year 1899, the assets of the several assets companies then remaining unrealized as at 31st August 1899 were entered in the books of the said companies as of the estimated values as follows:—

Assets of Melbourne Assets Co. Ltd. at ...	...	£615838
„ (*b*) Federal Assets Co. Ltd. at	. .	192913
„ (*c*) English and Australian Assets Co. Ltd. at ...	... ...	61349

"13. The respective assets companies from time to time as occasion offered realized some of the assets taken over by them from the banks and applied the greater part of the proceeds in redemption of their respective debenture stocks and the remainder in defraying the general expenses of carrying on the companies. By the beginning of the year 1903 the whole of the debenture stocks of all the assets companies had been redeemed.

"14. In July 1903 a plan of amalgamation was duly agreed to at meetings of the shareholders of all the assets companies. In pursuance of this plan, Melbourne Trust Limited (hereinafter called "the new Company") was duly incorporated under the English Companies Acts on 13th day of July 1903 with a nominal capital of £320,000 divided into 1,600,000 shares of 4s. each. The principal objects of the new Company were set out in clause III. (1) of its memorandum of association as follows:—

(1) To execute and carry into effect the three several draft agreements expressed to be made respectively between

Melbourne Assets Company Limited, Federal Assets Company Limited and English and Australian Assets Company Limited, hereinafter referred to as the vendor companies and this company, copies whereof are set forth in the first, second and third schedules to the articles of association registered herewith, with such modifications, if any, as may hereafter be lawfully made; and to acquire, take over, and carry on the undertaking, property and assets of the vendor companies, and to issue the shares and debenture stock provided for in the said agreements; and to nurse, use, employ, manage, develop, and liquidate for such time, and to realize at such time or times and in such manner as may be deemed expedient, all property of every description, including debts, claims and demands which may at any time come into the hands of the company.

"There are other objects set out in the said memorandum, but the new Company contends that they are only ancillary to those set out in the said clause III. (1).

"15. In further pursuance of the said plan of amalgamation the new Company entered into three separate agreements with each of the assets companies respectively, whereby it was provided that each of the assets companies should sell and the new Companies should purchase the undertaking of such assets company and all its assets subject to any subsisting charges in consideration that the new Company shall discharge all the obligations of the assets Companies and the costs of their winding up and should pay all or certain sums of cash and stock and certain shares as follows:—

	Cash.	Stock.	Shares.
To Melbourne Assets Co. Ltd.	£1493 3 2	£293202 0 0	977340
To Federal Assets Co. Ltd.		99999 18 0	333333
To English and Australian Assets Co. Ltd.	1699 11 6	16795 16 0	55993

These amounts were calculated on the basis that:—

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Under the plan of amalgamation the shareholders—

Of Melbourne Assets Company received in exchange for each share :—30 shares of 4s. each of the Melbourne Trust, £9 debenture stock and 11d. in cash.

Of Federal Assets Company received in exchange for each share :—21 shares of 4s. each of the Melbourne Trust, and £6 6s. debenture stock.

Of English and Australian Assets Company received in exchange for each share :—7 shares of the Melbourne Trust, £2 2s. debenture stock, and 4s. 3d. in cash.

"The new Company took power to pay cash in lieu of issuing small amounts of debenture stock, and the total amount of stock issued was £392,485 10s.

"The said amounts were duly paid and issued in pursuance of the agreements and distributed amongst the shareholders on the said basis.

"16. The conditions of the issue of debenture stock of the new Company gave the new Company power to redeem such stock by tender or by purchase in the open market or by drawings, out of proceeds of realization of assets and receipts from every source.

"17. No. 131 of the articles of association of the new Company prevented the new Company from paying dividends except out of the profits derived from revenue until the whole of its debenture stock should be redeemed.

"18. The new Company from time to time as occasion offered, realized some of the assets taken over by it from the assets companies and by 31st December 1909 the total net proceeds of such realization amounted to £477,490 0s. 9d. Of this sum, the new Company applied various sums at various times amounting in all to £388,542 4s. 6d. in redeeming its debenture stock. The remainder of the said sum of £477,490 0s. 9d. was used to meet interest on debentures and the general expenses of carrying on the new Company. The whole of its debenture stock was redeemed by 15th October 1909. Some of the debenture stock was redeemed below par, and the difference between the prices paid and par amounted to £3,943 5s. 6d.

"19. The assets so realized were entered by the respective assets companies in their books as mentioned in paragraph 12

of this case at £332,725 11s. 1d. The surplus left, after deducting this amount from the total net proceeds of realization viz. the sum of £477,490 0s. 9d. was £144,765 9s. 8d. This surplus together with the amount of £3,943 5s. 6d. mentioned in paragraph 18, in all £148,708 15s. 2d., was carried in the books of the new Company to a realization reserve account, and has never been included in profit and loss account. Such amount of £148,708 15s. 2d. comprised £104,782 1s. 4d. surplus on realization of Victorian assets, and £509 1s. being the difference between the prices paid and par on the debenture stock redeemed in Victoria.

"20. Subject to the final redemption of its debenture stock, the new Company distributed a cash bonus of 6d. per share amongst its shareholders. The new Company also on and after 10th August 1910 made a distribution of debenture stock at the rate of 3s. 4d. per share to its shareholders.

"21. By reason of all payments made to them under the circumstances set out in this case, including the distribution of 6d. per share in cash and of the debenture stock of 3s. 4d. per share mentioned in paragraph 20, the creditors of City of Melbourne Bank Limited have received what corresponds to 11s. 7d. in the £ upon their admitted claims, the creditors of Federal Bank of Australia Limited have received what corresponds to 13s. 1d. in the £ upon their admitted claims, and the creditors of English and Australian Mortgage Bank Limited have received what corresponds to 3s. 9d. in the £ upon their admitted claims.

"It is contended by the taxpayer that in no reasonable circumstances can the difference between those figures and 20s. in the £ of original claims be made good, and that the most that the remaining assets can be expected to realize would not increase the said payments in City of Melbourne Bank Limited to above 13s. 3d. in the £ or thereabouts, in Federal Bank of Australia Limited to above 14s. 3d. in the £ or thereabouts, and in English and Australian Mortgage Bank Limited to above 4s. 2d. in the £1 or thereabouts. The foregoing portion of this paragraph is inserted in this case by the Commissioner of Taxes at the express request of the taxpayer but the Commissioner of Taxes contends that it is irrelevant to the questions for the opinion of the Supreme Court hereinafter set forth.

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"22. The new Company was assessed to income tax in respect of the year 1910 in the sum of £113,998 upon the figures appearing in the balance sheet and report of directors of the said company dated 9th day of April 1910 and has paid the sum of £3,324 18s. 10d. as the tax thereon. The said sum of £113,998 includes the surplus sum of £104,782 1s. 4d. and the sum of £509 1s. difference between prices paid for debenture stock and par both mentioned in paragraph 19 of this case.

"23. The new Company has duly objected to the said assessment, and the Commissioner of Taxes has stated this case for the opinion of the Supreme Court as to such objection.

"24. The several memoranda of association, articles of association, agreements, and the balance sheet and the report of directors hereinbefore referred to are to be taken as incorporated in and to form part of this case.

"25. The questions for the opinion of the Supreme Court are:—

(1) Whether the surplus of £104,782 1s. 4d. mentioned in paragraphs 19 and 22 of this case is profits earned in or derived in or from Victoria by the new Company during the year 1909 or previous years within the meaning of sec. 9 of Act No. 1819 so as to subject the new Company to income tax in respect thereof?

(2) Whether the difference of £509 1s. between the prices of debenture stock and par mentioned in paragraphs 19 and 22 of this case is profits of the kind mentioned in Question (1)?"

Provisions of the memoranda of association and agreements which are material to this report and are not contained in the special case above set forth are stated in the judgments hereunder.

The special case coming on for hearing before *à Beckett* J. was by him referred to the Full Court which, by a majority, answered both questions in the affirmative: *In re Income Tax Acts* (1).

From this decision the company now appealed to the High Court.

(1) 34 A.L.T., 17.

Mitchell K.C., and *Davis*, for the appellants. This case is covered by the principle laid down in *Webb* v. *Australian Deposit and Mortgage Bank Ltd.* (1). The only distinction between that case and the present is the interposition of the three assets companies between the three liquidating banks and the appellant company. The whole transaction is a device for the more convenient realization of the assets by the creditors of the liquidating banks. The real nature and substance of the transaction must be looked at in determining whether the surplus realizations are taxable: *Secretary of State in Council of India* v. *Scoble* (2). The circumstance that the transaction is called a sale is not a reason for treating it as a sale for the purpose of determining whether the appellant company has a taxable income: *Stevens* v. *Hudson's Bay Co.* (3). So far as the realization of the assets taken over from the assets companies the business of the company was not trafficking in land, and there can therefore be no profits from it. They also referred to *Tebrau (Johore) Rubber Syndicate Ltd.* v. *Farmer* (4); *California Copper Syndicate* (5); *Osborne* v. *Commonwealth* (6).

[ISAACS J. referred to *In re Spanish Prospecting Co. Ltd.* (7).]

Irvine K.C., and *Pigott*, for the respondent. The appellants purchased the assets in order to re-sell them for gain, and the gain made on the re-sale is taxable income. The acquisition of these assets can be put under no other category than a purchase and sale. The parties interested deliberately entered into a perfectly well known and definite relationship created by the purchase and sale of the assets, and that relationship cannot be deemed to be non-existent for the purpose of the Income Tax Acts although existent for all other purposes. The business of the appellant company is under the memorandum of association to trade in these assets and any others which they may acquire. The fact that a particular legal means was adopted in order to effect the realization of the assets cannot alter the character of that legal means. Although this transaction may be called an amalgamation it is nevertheless a sale: *Wall* v. *London and*

(1) 11 C.L.R., 223.
(2) (1903) A.C., 299, at p. 302.
(3) 101 L.T., 96.
(4) (1910) 2 Scots Law Times, 89.
(5) 5 Tax Cas., 159.
(6) 12 C.L.R., 321, at p. 337.
(7) (1911) 1 Ch., 92.

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Northern Assets Corporation (1). The appellant company cannot be identified with the creditors of the original banks: *Ryhope Coal Co. Ltd.* v. *Foyer* (2). This case is distinguishable from *Webb* v. *Australian Deposit and Mortgage Bank Ltd.* (3), for in that case the respondent company was formed to carry on the business of the old company, and the assets of the old bank were to be kept separate and realized. The creditors of the liquidating banks when they entered into the transaction with the assets companies intended to become partners and not co-owners, and the surplus on realizations were profits and not accretions to capital: *Lindley on Partnership*, 8th ed., p. 27; *Darby* v. *Darby* (4). [They also referred to *John Foster & Sons Ltd.* v. *Commissioners of Inland Revenue* (5); *Sharpe* v. *Cummings* (6); *Smith* v. *Anderson* (7); *Northern Assurance Co.* v. *Russell* (8).]

Mitchell K.C., in reply, referred to *In re Bank of Hindustan, China and Japan Ltd., Higgs's Case* (9).

Cur. adv. vult.

October 14.

The following judgments were read:—

GRIFFITH C.J. The main question for determination in this case is whether a sum of £104,782 1s. 4d., being part of a larger sum received by the appellant company in or before the year 1909, ought to be regarded as taxable income, or as representing a mere enhancement of value ascertained upon the realization of securities. A subsidiary question is whether that sum represents profits at all. As was pointed out by this Court in *Webb* v. *Australian Deposit and Mortgage Bank Ltd.* (3), profits may or may not be income, but that which is not profit cannot be taxable income.

The appellants are an English company, formed in 1903, with a nominal capital of £320,000 divided into 1,600,000 shares of 4s. each, of which 1,366,666 were issued as fully paid. The principal objects of the company as set out in clause III. (1) of its memorandum of association were as follows:—

(1) (1898) 2 Ch., 469.
(2) 7 Q.B.D., 485, at p. 498.
(3) 11 C.L.R., 223.
(4) 3 Dr., 495, at p. 503.
(5) (1894) 1 Q.B., 516, at p. 521.
(6) 2 D. & L., 504.
(7) 15 Ch. D., 247, at p. 260.
(8) 2 Tax Cas., 551.
(9) 2 Hem. & M., 657, at p. 665.

"To execute and carry into effect the three several draft agreements expressed to be made respectively between Melbourne Assets Company Limited, Federal Assets Company Limited and English and Australian Company Limited, hereinafter referred to as the vendor companies and this company, copies whereof are set forth in the first, second and third schedules to the articles of association registered herewith, with such modifications, if any, as may hereafter be lawfully made; and to acquire, take over, and carry on the undertaking, property, and assets of the vendor companies, and to issue the shares and debenture stock provided for in the said agreements; and to nurse, use, employ, manage, develop, and liquidate for such time, and to realize at such time or times and in such manner as may be deemed expedient, all property of every description, including debts, claims, and demands which may at any time come into the hands of the company."

The memorandum of association also, as is now usual, contained other powers, including power to carry on the business of an Estates Development and Assets Company in all its branches, power to purchase the business of another assets company named, power to distribute property of the company in specie among the members, and the usual ancillary powers found in modern memoranda of association.

The three assets companies mentioned in clause III. (1) had been respectively formed in England in December 1897 to carry out schemes of arrangement of the affairs of three Victorian banks then in course of liquidation. In each case provisional agreements had been made with the sanction of the High Court of Justice and the Supreme Court of Victoria. The basis of each scheme was that the whole of the assets of the bank should be handed over to a company to be formed for the purpose of carrying it into effect. The creditors of the respective banks were to accept in full satisfaction of their claims one fully paid £1 share in the respective companies for each £100 of debt, together with debenture stock of the company to the amount of £15, £12 10s., and £10 respectively for each £100 of debt.

The objects of the respective companies as stated in their respective memoranda of association were to carry out these

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agreements and also a further agreement by which the affairs of the three companies and another of like kind were to be managed by a joint committee at joint expense to be apportioned, and also "to acquire take over and carry on the undertaking property and assets of the Liquidating Bank and to issue the shares and debenture stock provided for in the agreement . . . and to carry on the business of an assets company in all its branches, to nurse, use, employ, manage, develop and liquidate for such time and to realize at such time or times and in such manner as may be deemed expedient, all property of every description including debts, claims and demands which may at any time come into the hands of a company."

The form adopted in the draft agreements embodying the schemes was, as usual in such cases, that the old companies and the liquidators should respectively "sell and transfer" to the new companies all the assets of the old companies, "in consideration whereof" the new companies were to issue the debenture stock and fully paid shares.

The three companies issued 32,486, 15,865, and 7,960 fully paid shares respectively to the creditors of the respective banks and debenture stock to the amounts stipulated.

The values of the assets taken over by the respective companies were entered in their books according to valuations made by the liquidators of the banks respectively, the total estimated value being in each case somewhat larger than the total face value of the debenture stock and shares.

The conditions of issue of the debenture stock of each company authorized the redemption of it by purchase from the holders at a discount, or by distribution of money amongst the stock holders *pari passu*. No dividends were payable until all the stock had been redeemed.

The real substance of these transactions was that the creditors, who in each case were the only persons having any real right of recourse to the assets, took them over by way of accord and satisfaction for bad debts, and that the companies were merely agencies or instruments designed and created for the purpose of enabling the creditors to save as much as they could from the

wrecks, and in the meantime to put their interest in a disposable form of equivalent nominal value.

The real object for which the companies were formed was, therefore, to realize securities, and not to engage in the business of trafficking in, *i.e.*, buying and selling, land. For the purposes of the Income Tax Acts the Court looks at the real nature of the transaction, and not at the name by which it is called, or the agency by which it is carried out: *Secretary of State in Council of India* v. *Scoble* (1). In that case part of the purchase money for a railway was paid by annual instalments called in the contract annuities, but it was held that the so-called annuities were not subject to income tax. In this case the acquisition of the property by the companies was in no real sense a sale, although the draft agreements used the word "sell." In that respect the case is the same as any other in which a debtor hands over to a creditor property of an estimated value which is less than his debt. The creditor would have to pay stamp duty on the transaction as on a sale, but, if on realization he obtained more than the estimated value but less than the amount of his debt, it would not occur to anyone either to say that he had made a profit or to call the difference income.

The three companies proceeded to realize their respective assets, and by the beginning of 1903 all the debenture stock had been redeemed out of the proceeds, but a large quantity of property still remained unsold.

In the year 1899 a valuation of the unsold assets of the three companies had been made as of 31st August of that year. The estimated values were respectively £615,838, £192,913, and £61,349.

In 1903 it was estimated that the value of the then unsold assets was in the case of Melbourne Assets Company about 15 times, in the case of Federal Assets Company about $10\frac{1}{2}$ times, and in the case of English and Australian Assets Company about $3\frac{3}{4}$ times, the amount of the issued share capital.

The effect of the operations of the three companies had thus been to distribute rateably among the shareholders, who were either creditors of the respective banks or assignees of the rights

(1) (1903) A.C., 299.

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represented by the shares issued to them, sums of money which represented instalments of the debts for which the assets had been taken in satisfaction. This had been effected by the redemption of the debenture stock, but that method was no longer available after the stock had been redeemed. The several shareholders (creditors or assignees of their rights) were entitled to the beneficial interest in the remaining assets in proportion to the number of their shares; but there was no convenient way of distributing the proceeds of the assets upon sale, or of giving the shareholders an effective present means of disposing of their interests.

Under these circumstances the appellant company was formed on 13th July 1903. I have already referred to its memorandum of association. In substance the transaction was the coalition or amalgamation of the three companies for the purpose of completing the objects for which they had respectively been formed, with the additional element of putting their property into a common fund.

It is contended for the Commissioner of Taxes that this was a new speculative adventure formed for the purpose of buying and selling land, and that all enhancement of prices obtained on sale over and above the purchasing price must be regarded as taxable income. I have already pointed out that the three companies and another were under joint management. The shareholders in the three companies represented creditors trying to realize securities for their debts through the agency of the companies. Does then the fact of their agreeing to complete the task of the old companies through the agency of a single company alter the substance of the transaction? I think not. In my opinion the enterprise for which the appellant company was formed was in substance the same as that for which the three companies had been formed, and which I have already described. Such an enterprise cannot, in any proper sense of the term, be described as the business of trafficking in land. "Trafficking in land" implies the purchase of land out of funds available for that purpose, and subsequent disposal of it. The term is not, in my opinion, applicable to the disposal of land by a company which is

a mere agency to dispose of investments or securities already belonging to the members.

In the case of the *California Copper Syndicate* (1) the company had been formed, as the Court of Session held, for the purpose of speculative purchase and sale of mining properties. In the case of *Stevens* v. *Hudson's Bay Co.* (2), on the other hand, land had been acquired for the general purposes of the company for a consideration given long before, but the only practical use which the company could make of it was to sell it. The proceeds were held not to be income, although distributed in the form of dividends.

The basis upon which the sum of £104,782 1s. 4d. was arrived at was by deducting from the net proceeds of assets realized the value which had been set against them in the books of the old companies in 1899. This is obviously a wrong basis. It is said, however, that these values were in substance the same as the total nominal value of the debenture stock and paid up shares issued by the appellant company. And this appears to be correct, so that the comparison may be taken to be in substance between the assumed value of the property taken and the amounts realized on sale.

In my judgment, the proceeds of the property acquired by the appellant company from the three old companies are to be regarded not as income, but as proceeds of the realization of investments or securities. Further, I think that no part of these proceeds can be regarded as profits until the whole amount of the debts of the original creditors of the banks has been discharged with interest.

For both reasons no part of it can be regarded as taxable income.

To sum up, I think that the operations of the three companies are to be regarded in the same light as if the assets realized by them had been realized by the liquidators of the respective banks, and the operations of the appellant company in the same light as if the liquidators of the three banks had, with the sanction of the Court, associated themselves together to realize and dispose of the remaining assets of the three banks on the terms of pooling them.

(1) 5 Tax Cases, 159. (2) 101 L.T., 96.

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Such an enterprise is not, in my opinion, a trading enterprise for the purpose of income tax.

The reasons which I have given cover the case also of a small sum of £509, discount on the redemption of debenture stock, as to which no separate argument was addressed to us.

A further argument was, however, founded upon the powers contained in the appellant company's memorandum of association to purchase the assets of another assets company, and also to acquire other property, and to dispose of property so acquired. It was contended that these powers showed that the company was a speculative company whose business was trafficking in land. It may be that, as to any property acquired under these powers for the purpose of re-sale, the appellants would be a trading company and their profits on re-sale would be taxable income. But that does not, in my opinion, alter the character of the operations of the company so far as regards the property taken over upon the amalgamation, although they had power to speculate in other property. If a man engages in the business of buying and selling land or stocks or shares it does not follow that he may not acquire and hold land or stocks or shares as securities, as distinct from stock-in-trade, or, as it is called, circulating capital. In the present case the appellant company has not engaged in any such operations, but has confined itself to the main purpose for which it was formed. In my opinion, the existence of those other powers does not affect the matter.

I agree, therefore, with the learned Chief Justice in thinking that the sum in question is neither income nor profits, and is not taxable as such.

BARTON J. *Webb* v. *Australian Deposit and Mortgage Bank Ltd.* (1) was the case of a company formed for the purpose (*inter alia*) of taking over and realizing the assets of another company, consisting of debts owing to it and real estate held as security therefor. Certain of the securities were realized for sums greater than their prior estimated value, but all for sums less than the amounts of the debts for which they were held as securities. This Court held that such surplus realizations were not profits within

(1) 11 C.L.R., 223.

the meaning of the *Income Tax Act* 1903, and were not chargeable with income tax. My learned brother the Chief Justice, dealing with that section, under which the tax is claimed in this case, said (1):—"As applied to the case of a company I think that the term 'income' necessarily connotes that the company has earned profits: see *Lawless* v. *Sullivan* (2). But it does not follow that all the profits of a company are taxable income. Whether they are or not must depend on circumstances, one of the most material of which is the object for which the company is formed. For instance, if a company is formed for the purpose of trafficking in shares, profits made by buying and selling shares would be income, but if the company is formed for acquiring and working land it does not follow that upon the sale of the whole or any part of the land at an enhanced price the amount of the enhancement would be income, although it would, no doubt, in the wider sense of the term, be 'profit' . . . The question for determination in each case is, therefore, what was the income of the company? The income cannot be greater, but may be less, than the profits" (3). The other members of the Court expressed opinions which embodied a similar view of the enactment. The respondents in the present case do not question that view.

A similar question arises for determination in the present case. Is the surplus of £104,782, mentioned in the special case, profits earned in or derived from Victoria within the meaning of sec. 9, so as to subject the appellant company to income tax in respect of it?

The question relates to realizations alone. Income tax has been duly paid on rents, interest and dividends, the profits on the working of unrealized station properties, and the like.

Upon the facts as set out in the special case, and "looking at the whole nature and substance of the transaction," so as not to be "bound by the mere use of the words" (see *per Lord Halsbury* L.C. in *Secretary of State in Council of India* v. *Scoble* (4). I am of opinion that the Commissioner's claim fails.

The three original assets companies respectively took over for

(1) 11 C.L.R., 223, at p. 227.
(2) 6 App. Cas., 373.
(3) 11 C.L.R., 223, at p. 228.
(4) (1903) App. Cas., 299, at p. 302.

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realization the assets of three banking companies which had been ordered to be compulsorily wound up in England and had gone into liquidation here. The three banks were so hopelessly insolvent that the shareholders could not claim any interest in the assets. That the companies took over these assets means that the creditors took them over. The banking business of course went by the board upon the failure of the banks. The formation of assets companies was a device adopted to avoid wholesale sacrifice, and to enable the properties to be so handled as to save as much as was practicable out of the ruin. The debts so greatly exceeded the estimated values that there could not be any prospect of their full repayment out of the proceeds of sales: indeed the results show that any such expectation would have been groundless. The use of the word "sell" in the draft agreement, or of the word "acquire" in the memorandum does not make the transaction a sale. In pursuance of a scheme of arrangement sanctioned by the Courts in England and Victoria, a liquidation managed by the creditors themselves was substituted for the official liquidation, and its operation had nothing in common with that of a company dealing in land as a business, and making profit by the purchase and re-sale of lands. It was not a case of investment or speculation. There was no outlay of capital, but merely an attempt to retrieve loss. In truth, the object was not profit but salvage, and the operations accorded with that object. Had there been a prospect of proceeds exceeding the debts, and had such a prospect been realized, there would have been more colour for the claim of tax. True, the companies were registered under the *Companies Act* and therefore come, for the purposes of that legislation, within the denomination of trading companies, but sec. 6 of that Statute allows every seven or more persons associated for any lawful purpose to form an incorporated company by registration in the manner required. I am of opinion that it was not the object of any of these three companies to carry on the business of trading in land, any more than that is the business of an official liquidator, and in any case their operations cannot accurately be described as such a business, or the result of their operations as profit or taxable income.

In 1903 the three assets companies had redeemed all their

respective debenture stocks out of the proceeds of realization. The shares remained. Of the holders of shares which represented parts of the debts due to creditors, many of course were assignees of original creditors. These assignees might speculate on the rise or fall of the shares, and they might make taxable income out of such speculations, but that could not affect the question of the character or the transactions of the companies themselves. When they had paid off their debentures they had still the object and the duty of paying the amounts of the shares. And when they had paid both debentures and shares, the amounts of the original debts would still greatly overtop both.

Did the formation of the new Company alter the transaction in any of its essential features? I think not. The objects of that company, as stated in its memorandum of association, were substantially the same as those of the three assets companies. It is simply a larger assets company. The holdings into which the existing interests were distributed were, as before, partly in shares and partly in debenture stock. The three companies came together for the purpose of forming it, and I suppose the process as described may fairly be called an amalgamation. All the remaining securities came thus to be held in one hand, and all the participants—creditors and their assignees—threw in their lot together under one control. The purpose of the new Company was the same as the purpose of those which had become merged in it, and the operations conducted after its formation were precisely such as had been conducted before it. The creditors and those who had bought the interests of creditors were still looking to the turning of the securities into money for the recovering of further portions of the debts. If, as I think, the three assets companies were neither in their objects nor in their operations trading in land for profit, so neither was the company which absorbed or replaced them—whichever term may be preferred. Two cases which were cited to us may be compared as illustrating the differing circumstances under which money arising from the sale of land is or is not regarded as profit or gain derived by a company from the conduct of a trade or business. These are *The California Copper Syndicate* (1), where

(1) 5 Tax. Cas., 159.

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the business was speculation in mining properties, and *Stevens* v. *Hudson's Bay Co.* (1) In the last-named case the net proceeds were distributed as dividends, but were held not to be taxable income. I regard these cases as more helpful than any others to which we were referred.

I am of opinion, then, that the surplus moneys which it is sought to tax are not profits in the ordinary sense of the term, the sense in which the section uses it. They represent the realization of property taken as part payment of debts of an amount much exceeding its value then and since. The creditor in such a case cannot in reason be said to be making a profit on the transaction, nor is the case different where a body of creditors have taken over a mass of securities for their debts. The creditors are not making profits, but getting some of their money back. In such circumstances it is not a material fact that the prices realized for some of the properties, while far less than the amounts of the debts for which they stood, exceed the valuations at which those properties stood in the books of the appellant company or of the old companies at some prior time. A surplus over such estimates is not necessarily a profit, and in this case there is only a recovery in part. The fact that some of the debts were assigned in the shape of shares or stock is not relevant to the purposes or transactions of the incorporated concern itself.

The sum of £509 1s., the subject of the second question, was not dealt with by counsel. It is not profit any more than is the sum of £104,782 1s. 4d., the subject of Question No. 1.

I must not omit to refer to a contention on behalf of the Commissioner, founded on clauses in the memorandum of association of the appellant company empowering it to purchase the assets of the Mercantile Bank Assets Company, and to buy and sell securities and investments, including the shares, debentures, property or assets of any company. The argument was that here, at any rate, the appellant company had dealing in land as an object. To the extent indicated, no doubt, it had, though it is not shown to have included such transactions in its actual operations up to the year of assessment. If it had used these powers by carrying on the business of buying and selling, the resulting profits could

(1) 101 L.T., 96.

have been made the subject of income tax. But these powers are perfectly distinct from those under which it has been realizing the assets of the three defunct banks, and their existence does not, in my opinion, affect the present question, which depends entirely on the company's transactions in respect of the securities which passed to it on its formation. The question is what the company has set out to do and has done, not what it might have done. It might indeed have carried on, independently of the mere realization of the assets, a business of dealing in land or shares, and have been taxable on profits so made, without being also taxable on operations quite distinct from that business and possessing the character of those to which it has in fact restricted itself: see *Stevens* v. *Hudson's Bay Co.* (1) already cited. It cannot be taxed on a mere power to trade which it has not exercised, nor does the mere existence of such a power give an altered character to its actual operations under a different power, which must be judged by themselves.

I am of opinion that the appeal ought to be allowed, and both the questions answered in the negative.

ISAACS J. In my opinion the appeal should be dismissed. I cannot see my way consistently with observing some fundamental principles of company law and income tax law, to accede to the appellants' views.

The company has from time to time as occasion offered during the period 1903-1909 sold Victorian properties to the net total amount of £477,490, of which a very large sum represents profits, said to be £104,782, but whether that is the precise sum further figures may be required to determine. My learned brother, the Chief Justice, thinks that the surplus receipts were not even profits. With deference I think they were. See *per* Lord *Macnaghten* in *Famatina Development Corporation Ltd.* v. *Bury* (2).

The Commissioner claims income tax upon the profits under sec. 9 of Act No. 1819, and the company objects on the ground that they are capital and not income. The crucial question is whether the sales were made by the company by way of traffic

(1) 101 L.T., 96.

(2) (1910) A.C., 439, at p. 443.

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in that kind of property; if so, the profits are taxable; if not, they are free: *Commissioners of Taxation* v. *Mooney* (1).

In one sense, and to the extent of ascertaining the actual circumstances in which the properties were sold that is a question of fact; but here all the facts are admitted, and it comes to depend on pure questions of law.

The material facts are that the company was formed and registered in England in 1903 under the *Companies Acts* 1862-1900; that its memorandum of association and articles are as set forth in the case; that in pursuance of its powers under those instruments it entered into and carried out the agreements scheduled to the memorandum; that with the properties so acquired it carried on its operations in Victoria, and made the sales and the profits referred to.

The second object enumerated is thus described:—"To carry on the business of an Estates Development and Assets Company in all its branches." That is really the dominant provision in the memorandum, and the first object is a particular instance—the first transaction.

The first object begins by reference to the scheduled proposed agreements with the three selling companies, by which the present company was to acquire, take over and carry on the undertaking, property and assets of those companies, called the "Vendor Companies," and to issue the shares and debenture stock which were to be the consideration. Then follows a passage which has two characteristics. It is physically placed as part of the same object, and so indicates that the acquisition provided for by the earlier words was not intended to be as a land holder or property holder intending normally to retain the things acquired, but as a speculator awaiting a favourable opportunity to sell at a profit, the interim retention being only ancillary to the ultimate realization. On the other hand, the generality of the language of the later part of the object establishes that the same intention applies to all other property acquired by the company.

The passage I refer to is:—"to nurse, use, employ, manage, develop and liquidate for such time and to realize at such time

(1) 4 C.L.R., 1439; (1907) A.C., 350.

or times, and in such manner as may be deemed expedient *all* property of every description which may at any time come into the hands of the company."

It will be observed there is nothing to indicate that the benefit of the transaction is to enure to any person other than the company itself. The remaining objects need not be quoted. They in no way weaken, but rather strengthen the view that those I have specially mentioned are of a trading character. As the first object refers to the undertaking of the vendor companies, a word or two as to their constitution is necessary. Their first object was to enter into certain agreements with certain liquidating banks by which they acquired all the banks' assets in consideration of shares and debenture stock. Those agreements were duly entered into and completed, and before the formation of the present appellant company in July 1903, all the debenture stocks had been redeemed. Nothing then remained to be done under the first object of the vendor companies—the properties belonged to them, free from any outside charge or claim.

Their second object was to carry on the business of an assets company in all its branches, to nurse &c. and realize its property as in the present company's case.

Thus we have all the materials for construing the first object of the appellant company as written instruments are ordinarily construed. I exclude extraneous considerations—that is all except the words of the memorandum and a knowledge of the subject matter. I exclude the financial history of the liquidating banks, the losses of their creditors, the fact that it was those creditors who formed the three vendor companies, that probably those creditors or a large proportion of them retained those shares up to the time the present company was formed; the motives for forming the assets companies, the antecedent history of those companies; that the three assets companies agreed to amalgamate, and for that purpose agreed to form and did procure the formation of the present company. I exclude those from the construction of the memorandum because as I understand the law, a Court is not permitted so to construe such a document. The document contains no reference to these circumstances. Its meaning is to be the same throughout the entire period of its

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existence, irrespective of the personnel of its shareholders, or the motives of its progenitors; and for this there seems to me overwhelming authority independently of the ordinary common law principle of interpreting written documents, where the pedigree of the respective parties would hardly be an aid to the construction of their business contracts.

In the case of a memorandum of association, there are very special reasons, when once the signification of its words and expressions is understood, for not going beyond the document itself to ascertain the objects of the company. The Statute law expressly requires the objects to be stated in the memorandum, so that all the world may there read and understand them as soon as the subject matter is known. It is obvious that if the true import of those objects is only to be gathered by the class of considerations imported into this case by the appellant company, the statutory precaution is entirely illusory. It is worse than nothing, it is dangerous, because it misleads.

Now there are few things more solidly established than this, that for such a purpose extraneous considerations are inadmissible. In *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1) Lord *Cairns* L.C., speaking of the *Companies Act* 1862, says: —"I come to the third item which is to be specified: 'the objects for which the proposed company is to be established.' That is, therefore, the memorandum which the persons are to sign as a preliminary to the incorporation of the company. They are to state 'the objects for which the proposed company is to be established'; and the existence, the coming into existence, of the company is to be an existence and to be a coming into existence for those objects, and for those objects alone." The same learned Lord adds (2):—"It is a mode of incorporation which contains in it both that which is affirmative and that which is negative. It states affirmatively the ambit and extent of vitality and power which by law are given to the corporation, and it states, if it is necessary so to state, negatively, that nothing shall be done beyond that ambit, and that no attempt shall be made to use the corporate life for any other purpose than that which is so specified."

(1) L.R. 7 H.L., 653, at p. 669.

(2) L.R. 7 H.L., 653, at p. 670.

Whatever gloss the appellants may put upon the argument, it really amounts to a denial of what Lord *Cairns* said, because it assumes that the construction of the document, that is, the legal ascertainment of the object, would be different if the foreign circumstances were excluded, and so, an object is sought to be created, entirely different from that specified. It is not a valid contention to say that these outside facts are available in order to construe the memorandum. In *Guinness* v. *Land Corporation of Ireland* (1), *Bowen* L.J. considered how far even the articles of association could be read to modify the memorandum. He says:—"In any case it is, as it seems to me, certain that for anything which the Act of Parliament says shall be in the memorandum you must look to the memorandum alone." In *Trevor* v. *Whitworth* (2) Lord *Macnaghten* says:—"The Act of 1862 requires that the objects for which a limited company is established shall be stated in its memorandum. Those objects cannot be enlarged by anything to be found in the articles, or by anything outside the memorandum." In *In re German Date Coffee Co.* (3) *Jessel* M.R. held it inadmissible to use the prospectus for the purpose of interpreting the memorandum. He did use it, as he said, for the purpose of showing that the construction he put on the memorandum was probably correct because the prospectus took the same view. And he added:—"It is the duty of the Court in construing a document, to read it and to ascertain its meaning fairly from the contents of it."

I therefore start with the position that the varied episodes in the life of the assets, their transmissions from hand to hand, and the ancestral history of their successive owners, are immaterial to the true construction of this new company's charter of existence.

Reading the first objects apart from irrelevant matters, I see no room to doubt that trafficking in the assets was its essential feature. They were to be disposed of by way of business. Humbly following *Sir George Jessel's* example, and while declining to allow even the articles to influence me in interpreting the objects of the company I may add my satisfaction that this was the view taken by those who framed the company's regulations.

(1) 22 Ch. D., 349, at p. 381. (2) 12 App. Cas., 409, at p. 433.
(3) 20 Ch. D., 169, at p. 184.

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See article 3, as to executing the agreement; article 5 stating that the *business* of the company may be commenced as soon as the directors think fit; article 9 contemplating shares being offered to the public; articles 35 to 43, transfer and transmission of shares; article 128, reserve fund; article 129 and following, dividends.

The company commenced its career by making a purchase on a scale so vast as to make for a time further purchases unecessary, at all events beyond the amount mentioned in article 5, in the absence of an extraordinary resolution. This resembled the purchase of a shipwrecked cargo, or a salvage stock followed by trade realizations. That comes within the meaning of traffic or trade operations. In *Grainger & Son* v. *Gough* (1) Lord *Davey* said:—"Now what does one mean by a trade, or the exercise of a trade? Trade in its largest sense is the business of selling, with a view to profit, goods which the trader has either manufactured or himself purchased."

In that case if Roederer had sold his wine in England, he would have been held to trade there, though he neither manufactured nor bought his goods in England. Lord *Davey* says (2):—"He exercises that trade where he makes his sales and the profits come home to him." I refer to this, because the appellants' argument laid some stress on words in some cases which refer to repeated buying as well as selling. Indeed, if there were but one instance of selling producing profit during the year under the powers of this company, it would be taxable, because it would be but the first transaction in an existing business, the first of an intended series: *In re Griffin*; *Ex parte Board of Trade* (3), and *Kirkwood* v. *Gadd* (4). In the last-mentioned case the Lord Chancellor said:—What is carrying on business? It imports a series or repetition of acts." Two cases decided in the Scottish Courts were cited, and to my mind admirably illustrate the position. In the *Californian Copper Syndicate* (5) the Lord Justice *Clerk* stated the law in words I adopt and quote:—"It is quite a well settled principle in dealing with questions of income tax that

(1) (1896) A.C., 325, at p. 345.
(2) (1896) A.C., 325, at p. 346.
(3) 60 L.J.Q.B., 235.
(4) (1910) A.C., 422, at p. 424.
(5) 5 Tax. Cas., 159.

where the owner of an ordinary investment chooses to realize it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of Schedule D of the *Income Tax Act* of 1842 assessable to income tax. But it is equally well established that enhanced values obtained from realization or conversion of securities may be so assessable where what is done is *not merely a realization or change of investment, but an act done in what is truly the carrying on, or carrying out of a business.*" In other words, the business character of the transaction makes the profit assessable notwithstanding the realization nature of the act. Then the learned Judge adds :—" The simplest case is that of a person or association of persons buying and selling lands or securities speculatively in order to make gain, dealing in such investments as a business, and thereby seeking to make profits. There are many companies which in their very inception are formed for such a purpose, and in these cases, it is not doubtful that where they make a gain by a realization, the gain they make is liable to be assessed for income tax." His Lordship proceeds to put the test, namely :— " Is the sum of gain that has been made a mere enhancement of value by realizing a security, or it is a gain made in an operation of business in carrying out a scheme for profit making ? "

Now, the present case is what the learned Judge called " the simplest case " one where the matter is " not doubtful," and unless the observations quoted are unsound, they decide the case in favour of the Commissioner.

There was here no realization of securities. The properties in the hands of the company were not securities, neither were they investments, they were stock-in-trade.

As against that case the appellants cited the *Tebrau Case* (1). But that is only a converse instance and emphasizes the principle. There as Lord *Salvesen* said the primary object of the company was to acquire and develop a certain rubber estate, and other such estates, and to develop and cultivate them. The company's business was to sell, not land but rubber. And though it was not *ultra vires* to sell some of its land, such sales were not part of the business. This formed the acknowledged distinction from

(1) 2 Scots Law Times, 89.

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the former case which, said the learned Judge, "had no application because it was part of the ordinary business of the company to make profits by the purchase and sale of investments." That resembled *Stevens* v. *Hudson's Bay Co.* (1). See also *Smith* v. *Anderson* (2) *per Jessel* M.R., *Brett* L.J. and *Cotton* L.J.

The appellants suggested that the transactions by which the present company acquired the assets was really not a sale. The motion sought to be conveyed was that the three assets companies, never intended to really part with their property, but to adopt a device by which they could amalgamate their interests. "In substance" it was said it was not a sale: "in form" it was; and form must be disregarded. I must confess my inability to find any legal standing ground for the proposition. It is utterly self-contradictory. A sale and yet no sale; a parting with property and yet a retention; consideration for the property and yet no price, the creation of a new persona, and yet the old personæ alone to be regarded; an election by the creditors not to own the properties individually but repeatedly to take advantages under the Companies Acts such as limited liability, and transferable shares, and yet to ignore the conditions which the law attaches to that election. To me it is utterly bewildering. The only course a Court can take as it seems to me is to ask definitely what does the law say on the matter?

Is this company a distinct personality, did it acquire the properties, did it own them in its own right, did it deal with them in the way of business in its own interests? And is not the Commissioner entitled to look to the company only as the real persona, and claim the tax as upon the profits of its business in trafficking with its own property purchased by it to re-sell? I was under the impression that *Salomon* v. *Salomon & Co.* (3) had for ever settled that question.

Lord *Halsbury* L.C. said (4):—"It seems to me to be essential to the artificial creation that the law should recognize only that artificial existence—quite apart from the motives or conduct of individual corporators." And further on the Lord Chancellor says:—"Short of such proof" (that is, that the company had no

(1) 101 L.T., 96.
(2) 15 Ch. D., 247, at pp. 261, 279, 283.
(3) (1897) A.C., 22.
(4) (1897) A.C., 22, at p. 30.

real existence) "it seems to me impossible to dispute that once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are."

His Lordship again says (1):—"Either the limited company was a legal entity or it was not. If it was, the business belonged to it and not to Mr. Salomon, if it was not, there was no person and nothing to be an agent at all; it is impossible to say at the same time that there is a company and there is not."

Lord *Herschell* says (2):—"In a popular sense, a company may in every case be said to carry on business for and on behalf of its shareholders; but this certainly does not in point of law constitute the relation of principal and agent between them."

An instance of the application of this principle is found in the recent case of *Gramophone and Typewriter Ltd.* v. *Stanley* (3). An English company carrying on business in the United Kingdom was the holder of all the shares in a German company, but nevertheless was held not to be liable for income tax on all the profits of the German company, but only for so much as it received in England. *Cozens-Hardy* M.R. says (4):—"The fact that an individual by himself or his nominees holds practically all the shares in a company may give him the control of the company in the sense that it may enable him by exercising his voting powers to turn out the directors and to enforce his own views as to policy, but it does not in any way diminish the rights or powers of the directors, or make the property or assets of the company his, as distinct from the corporation's. Nor does it make any difference if he acquires not practically the whole, but absolutely the whole, of the shares. The business of the company does not thereby become his business."

Following that line of reasoning, if the company here be the agent of any other persons, that would only have the effect of making those other persons liable. But there is no evidence of agency nor is there any suggestion to make them liable. They

(1) (1897) A.C., 22, at p. 31.
(2) (1897) A.C., 22, at p. 43.
(3) (1908) 2 K.B., 89.
(4) (1908) 2 K.B., 89, at p. 95.

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have not been pointed out and I venture to say cannot be. Clear non-liability of the income itself is claimed. *Fletcher Moulton* L.J. says (1):—"The fact that the whole of the shares of the corporation are held by one individual at one moment by no means implies that they will be so held at a future time, and the responsibilities of the directors and officers of the corporation is to the corportion itself, whatever be its composition at any moment as to number of corporators." *Buckley* L.J. says (2):—"It is so familiar that it would be waste of time to dwell upon the difference between the corporation and the aggregate of all the corporators."

Now that powerful Court of Appeal was applying to the very question of income tax the principle to which I have adverted, and the denial of which I cannot help thinking is involved in the present appellants' contention.

In *Prescott, Dimsdale, Cave, Tugwell & Co.* v. *Bank of England* (3), it was decided that where certain banks had been amalgamated into a new company and their businesses were continued after the amalgamation by the new company they had ceased to carry on business. *Lindley* L.J. said (4):—"The businesses now carried on are carried on, not by the old firms, but by the new company, and this is so, not in a merely technical sense, but in the ordinary business sense of the expression." That is "in substance." Valuable rights were lost by this fact. This accords entirely with what the same learned Lord Justice said in a familiar passage in *Farrar* v. *Farrars' Limited* (5), which I think is decisive of the position. His words were :—"A sale by a person to a corporation of which he is a member is not, either in form or in substance, a sale by a person to himself. To hold that it is, would be to ignore the principle which lies at the root of the legal idea of a corporate body, and that idea is that the corporate body is distinct from the persons composing it."

As to the Crown's right under the *Income Tax Act*, the case of *Mersey Docks and Harbour Board* v. *Lucas* (6), and the cases cited in *Webb* v. *Australian Deposit and Mortgage Bank Ltd.* (7)

(1) (1908) 2 K.B., 89, at p. 99.
(2) (1908) 2 K.B., 89, at p. 105.
(3) (1894) 1 Q.B., 351.
(4) (1894) 1 Q.B., 351, at p. 361.
(5) 40 Ch. D., 395, at p. 409.
(6) 8 App. Cas., 891.
(7) 11 C.L.R., 223, at p. 235.

show that the application of the profits is immaterial. In effect the appellant insists in opposition to those cases that as the company owes its existence to a pre-natal purpose among individuals of recovering losses sustained in connection with a former company, the intended recovery of those losses must be fulfilled in priority to the Crown's right of taxation. If, however, those losses were by a rise in values completely compensated for, and a surplus obtained by repeated sales, I suppose no one would would dispute the liability to taxation. And yet to be consistent that would have to be denied, which, as it appears to me, demonstrates the inaccuracy of the appellants' position.

For these reasons I think the judgment of the Supreme Court was right and should be affirmed.

Appeal allowed. Order appealed from discharged. Substitute declaration that neither of the sums mentioned is taxable. Questions answered in the negative. The respondent to pay the costs of the special case and of this appeal.

Solicitors, for the appellants, *Blake & Riggall.*

Solicitor, for the respondent, *Guinness*, Crown Solicitor for Victoria.

B. L.