[HIGH COURT OF AUSTRALIA.]

RUHAMAH PROPERTY COMPANY LIMITED APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION . . . . . RESPONDENT.

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BRISBANE, *June* 26, 27.

SYDNEY, *Aug.* 20.

KNOX C.J., ISAACS, GAVAN DUFFY, POWERS and STARKE JJ.

Income Tax—Assessment—Board of Review—Appeal to High Court—Question of law—Company formed by father for purpose of division of his property—Family company—Sale of assets—Realization of assets—Profits of business—Income Tax Assessment Act 1922-1927 (*No.* 37 *of* 1922—*No.* 32 *of* 1927), *sec.* 51 (6).

By sec. 51 (6) of the *Income Tax Assessment Act* 1922-1927 it is provided that a taxpayer may appeal to the High Court from any decision of the Board of Review "which, in the opinion of the High Court, involves a question of law."

M., the owner of certain real property, in order to make additional provision for his family formed a company to which he transferred the property, the objects of the company being to acquire the property by way of gift from M. and also to acquire, purchase and resell land, including the property acquired by gift. The shares in the company were held by M. and the members of his family. No money was paid for the shares; and the company acquired no other property and did nothing in the way of business except collect the rents and profits of and make repairs to the property so acquired. M. died, having bequeathed his shares to his children, and one of his sons died some months later. Another family company also formed by M. having financed the payment of the duties payable on the estates of M. and the deceased son, the first-mentioned company sold the property and deposited the proceeds of the sale with the other company. A Board of Review decided that the company, in selling the property, had carried on an operation of business in carrying out a scheme of profit-making—the majority of the Board deciding that as there was a power of sale in the company a sale pursuant to the power must be in pursuance of a business operation in carrying out a scheme of profit-making.

Held, by the whole Court, that there was a question of law involved and therefore an appeal lay to the High Court; and that in such an appeal the whole of the decision of the Board, and not merely the question of law, is open to review.

Held, also, by *Knox* C.J., *Gavan Duffy*, *Powers* and *Starke* JJ. (*Isaacs* J. dissenting), that the sale of the property was not a business operation carrying out a scheme of profit-making but the realization of a capital asset and, therefore, was not liable to taxation.

Per Isaacs J.: If a company by realization or change of investment does some act that is truly the carrying on or carrying out of a business (which was the case here), then the profits resulting are liable to income tax.

APPEAL from the Board of Review.

In 1913 Thomas Morrow, being then the owner of certain properties in George Street, Brisbane, and being desirous of making provision for his family, formed a company called the "Ruhamah Property Co. Ltd." to take over those properties. The Company was duly formed and registered. According to the memorandum and articles of association the objects of the Company were (*inter alia*) to acquire by gift from Thomas Morrow the above-mentioned properties and also to acquire, purchase and resell land of any tenure, and generally to deal in and to traffic by way of sale, lease, exchange or otherwise with real and personal property of any tenure, including the properties acquired by gift as aforesaid. The shares in the Company were all allotted to Thomas Morrow and the members of his family. After the death of Thomas Morrow and one of his sons a company called "Morrows Ltd.," a trading company (which was also a family company formed by Thomas Morrow), by arrangement with the Ruhamah Property Co. Ltd., advanced or financed the amount required for probate and other duties payable on the estates of both the deceased. The Ruhamah Property Co. sold the properties above referred to, and the proceeds of the sale were deposited at interest with Morrows Ltd. In his assessment of the Ruhamah Property Co. to income tax the Commissioner included a sum of £1,414 as profits made by the Company on the sales of the above-mentioned properties; and the Company objected to such assessment on the ground that the profits on the sales were profits connected with the realization of the Company's assets, and that, consequently, they related to a capital profit and not to a trading profit, and should not be assessed for income tax.

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The Commissioner having disallowed the objection to the assessment, his decision was referred to a Board of Review, which upheld the assessment.

From the decision of the Board of Review the Ruhamah Property Co. now appealed to the High Court.

Further material facts are set out in the judgments hereunder.

Graham, for the appellant. The appeal involves a question of law (*Melbourne Trust Ltd.* v. *Commissioner of Taxes (Vict.)* (1); *Hudson's Bay Co.* v. *Stevens* (2)). The Board ignored every consideration except the words of the memorandum and articles. The proceeds of sales are not liable to taxation, because they are the result of an investment and also because the sales amount to the realization of the Company's property. [Counsel cited *Ducker* v. *Rees Roturbo Development Syndicate* (3); *Commissioner of Taxes* v. *Melbourne Trust Ltd.* (4); *Roberts* v. *Deputy Commissioner of Taxation* (5); *Californian Copper Syndicate* v. *Harris* (6); *C. H. Rand* v. *Alberni Land Co* (7); *Tebrau (Johore) Rubber Syndicate* v. *Farmer* (8); *Commissioner of Taxation for Western Australia* v. *Newman* (9); *Blockey* v. *Federal Commissioner of Taxation* (10).]

Henchman, for the respondent. The jurisdiction of the Court is limited to an appeal from the decision of a Board of Review involving a question of law. No question of law is involved, only a question of fact. There was ample evidence on which the Board could arrive at its conclusion. There is no evidence on which the Court can form the opinion that the Board misdirected itself in law.

Cur. adv. vult.

Aug. 20.

The following written judgments were delivered :—

KNOX C.J., GAVAN DUFFY, POWERS AND STARKE JJ. The Ruhamah Property Co. Ltd. was assessed to Federal income tax for the financial year 1923-1924 in respect of a sum of £1,414 calculated by the Commissioner to be the profit on the sale in 1922 of a property

(1) (1912) 15 C.L.R. 274, at p. 298.
(2) (1909) 5 Tax Cas. 424; 101 L.T. 96.
(3) (1928) A.C. 132, at p. 140.
(4) (1914) A.C. 1001, at p. 1009; 18 C.L.R. 413, at p. 420.
(5) (1919) S.A.S.R. 143.
(6) (1904) 5 Tax Cas. 159.
(7) (1920) 7 Tax Cas. 629.
(8) (1910) 5 Tax Cas. 658.
(9) (1921) 29 C.L.R. 484.
(10) (1923) 31 C.L.R. 503.

in George Street, Brisbane. The Company appealed to a Board of Review under the *Income Tax Assessment Act*, which, however, affirmed the Commissioner's assessment. An appeal has now been brought to this Court under sec. 51 (6) of the Act, which provides that a taxpayer may appeal to the High Court from any decision of the Board which in the opinion of the High Court involves a question of law. If some question of law be involved in the decision of the Board we apprehend that the whole decision of the Board, and not merely the question of law, is then open to review (cf. *Ex parte Walsh and Johnston*; *In re Yates* (1)). The principle of law is that profits derived directly or indirectly from sources within Australia in carrying on or carrying out any scheme of profit-making are assessable to income tax, whilst proceeds of a mere realization or change of investment or from an enhancement of capital are not income nor assessable to income tax (*Commissioner of Taxes* v. *Melbourne Trust Ltd.* (2); *Ducker* v. *Rees Roturbo Development Syndicate* (3); *Commissioner of Taxation for Western Australia* v. *Newman* (4); *Blockey* v. *Federal Commissioner of Taxation* (5)).

Now, it has been suggested that the Board of Review acted upon a mistaken view of the law and came to a conclusion in point of fact without any evidence to support it (*American Thread Co.* v. *Joyce* (6)). The error in point of law on the part of the majority of the Board is said to reside: firstly, in treating the objects and power of the Company which are contained in the memorandum and articles of association as decisive of the question that it was engaged in a scheme of profit-making in the sale of the property; secondly, in neglecting to consider whether the formation of, and transfer of the property to, the Company did more than provide the machinery whereby Thomas Morrow divided his property—his domestic capital—amongst himself and his children; and, thirdly, in neglecting to consider whether the sale of the property by the Company went beyond the mere stage of realization and embarked upon a business or scheme of profit-making in land.

In our opinion the authorities show that the objects and powers of the Company contained in its memorandum and articles of

(1) (1925) 37 C.L.R. 36, at p. 130.
(2) (1914) A.C. 1001; 18 C.L.R. 413.
(3) (1928) A.C. 132.
(4) (1921) 29 C.L.R. 454.
(5) (1923) 31 C.L.R. 503.
(6) (1913) 6 Tax Cas. 163.

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association are not decisive of the question whether the sale was an operation of business in carrying out a scheme of profit-making, but that a consideration of all the matters advanced by the Company was relevant to a determination of that question (*Hudson's Bay Co.* v. *Stevens* (1); *Tebrau (Johore) Rubber Syndicate* v. *Farmer* (2); *C.H. Rand* v. *Alberni Land Co.* (3); *Alabama Coal &c. Co.* v. *Mylam* (4)).

The facts of the case stated by or proved before the Board of Review were substantially as follows:—Thomas Morrow was the owner of the property in George Street, Brisbane, and desired to make additional provision for the members of his family. So in 1913 he formed, for family reasons, the Ruhamah Property Co. Ltd. —the appellant Company—with a capital of £30,000 divided into 30,000 shares of £1 each. He transferred his George Street properties to the Company, and one of its objects was to acquire the property by way of gift from him. The property was entered as of a value of £24,000 in the Company's accounts. Morrow also procured the issue to himself of 15,002 shares in the Company and to each of four children of 3,740 shares, and to the wives, we think, of two sons, 19 shares each. No one paid any cash in respect of these shares, but the memorandum of association provided that they should be deemed to be paid up to 10s. each. The Company held the George Street property for some nine years. It acquired no other property and did nothing in the way of business beyond collecting the rents and profits of the George Street property and making necessary repairs. The directors and shareholders of the Company were always members of the Morrow family. Thomas Morrow died in 1920 and bequeathed his shares in the Company to his children. William Morrow, his son, died about fifteen months later. Heavy probate and succession duties to the extent of £22,800 became payable on their estates. No liquid assets were available for payment of these duties, and it became necessary for members of the family of Thomas Morrow to raise money for this purpose. They arranged with a company called Morrows Ltd. to advance or finance the payment. Morrows Ltd., it should be stated, was another family company

(1) (1909) 5 Tax Cas. 424; 101 L.T. 96 (C.A.).
(2) (1910) 5 Tax Cas. 658.
(3) (1920) 7 Tax Cas. 629.
(4) (1926) 11 Tax Cas. 232.

formed by Thomas Morrow to carry on his business as a manufacturer of confectionery and biscuits. Its shareholders and directors were members of the Morrow family, and they controlled its operations. Morrows Ltd., in providing or financing this large sum of money, suffered in the development of its business and Morrow's children recognized that it must be recouped or provided with further funds to carry on and develop the business. The sale of the George Street premises provided the only practicable method of recouping or supplying Morrows Ltd. with funds. So before June 1922 Thomas Morrow's family resolved upon a sale of those premises. Consequently they directed a sale by the Ruhamah Property Co. of the premises, and between June 1922 and March 1927 sales were effected realizing some £52,700. As before stated only £1,414 of this sum has been assessed by the Commissioner to income tax for the financial year 1923-1924 and the calculation is not material for present purposes. The Ruhamah Property Co. put the Morrows Co. in funds by depositing with it £42,000 of the proceeds of sale at 6 per cent interest. Now, the Board of Review have held that the Ruhamah Property Co. in selling the land carried on an operation of business in carrying out a scheme of profit-making. According to *Farwell* L.J. in the *Hudson's Bay Co.'s Case* (1), the point whether they were right or wrong in drawing that inference is one of law, and if so appealable. Apart from this view, it is important to consider the reasoning by which the majority reached this conclusion. The chairman stated that the Company had power to acquire, purchase and resell land of any tenure, and generally to deal in and traffic by way of sale or otherwise with real and personal property, including also the lands in George Street transferred to it by Thomas Morrow, and to carry on any other business calculated directly or indirectly to enhance the value of or render profitable any of the Company's assets, property or rights for the time being. These objects the chairman said were not only the principal objects but the main purposes for which the Company was formed and he therefore concluded that the Company, in selling the land and investing the proceeds after the payment of liabilities, was merely carrying into effect its principal objects and purposes. The other member of the Board who, with the chairman, formed the

(1) (1909) 5 Tax Cas. 424.

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majority held that the reality of the Company's incorporation and the powers it took and exercised under the memorandum of association determined that the profit at issue was not an accretion of capital. Now, that is a decision, as we understand it, that as there was a power of sale in the Ruhamah Co. a sale pursuant to the power must be in pursuance of a business operation in carrying out a scheme of profit-making. That is distinctly a question of law, and we do not think that it follows either necessarily or at all that a sale in such circumstances is a business operation carrying out a scheme of profit-making. A man has capacity to sell his property, but he may be realizing it and changing his form of investment and not engaging in a profit-making scheme. So it is with a company with power to sell: it may be realizing its property and changing the form of investment and not engaging in any profit-making scheme. Much must depend upon whether the company has taken the property into its trade and traded in it: whether it conducted a trading concern as opposed to a mere realization (cf. *Alabama Co.'s Case* (1)). The nature of the company, the character of its assets, the nature of the business carried on by it and the particular sale or realization are all relevant to the issue. In our opinion, therefore, a question of law is involved in the decision of the Board of Review, and it is consequently appealable to this Court. Further, it appears to us that the Board did not consider all the relevant factors for the proper determination of this case, and so misdirected itself and erred in point of law. Accordingly it is for this Court to determine the fact in issue upon a proper view of the law. In our opinion the sale of the George Street property was not, on the facts proved, a business operation carrying out a scheme of profit-making but the realization of a capital asset. The facts that lead us to this conclusion are (1) the character of the Company, a family company with family capital and family shareholding—it is not perhaps unimportant to observe that the father retained a half interest in the property by his shareholding; (2) the holding of the property during the lifetime of the father Thomas Morrow; (3) that the Company did not acquire or deal in any property but the George Street property transferred to it by

(1) (1926) 11 Tax Cas., at pp. 253-255.

Thomas Morrow; (4) the purpose and the use of the proceeds of realization practically to finance probate and succession duties.

The appeal, in our opinion, should succeed and the assessment of the Company to income tax for the financial year 1923-1924 should be reduced by the sum of £1,414 proceeds of the realization of the George Street property.

ISAACS J. This is an appeal from a decision of the Board of Review, brought under sub-sec. 6 of sec. 51 of the *Income Tax Assessment Act* 1922-1927. Such an appeal is competent only if the decision of the Board involves a question of law. It will be observed that it is the "decision" which must involve a question of law. If that condition exists, then the whole case is within the original jurisdiction of the Court (see *Federal Commissioner of Taxation* v. *Munro* (1)). If the Board's decision, on examination, be found to be unaffected by any erroneous view of the law—as, for instance, if it be found that the question of law has been correctly apprehended, then, in my opinion, on a true construction of the sub-section, it is the duty of this Court to abstain from altering the Board's conclusion of fact. Any other course is, in my opinion, contrary to the intention of Parliament. Parliament has created a business tribunal, and has given taxpayers a choice of Courts or Board. If a taxpayer prefers the Board's opinion on business facts, and if, although a contested point of law brings the case within the legal reach of this Court, no error in the law can be found, it would frustrate the plain intention of Parliament if this Court seized the merits of the case and supplanted the Board's view of facts by its own independent view. In such case the Board would soon become a costly legal appendix, the elimination of which would save time, money and disappointment.

The appellant Company was assessed by the Commissioner in respect of certain profits as being income within the definition of sec. 4 of the *Income Tax Assessment Act*, namely, "the proceeds of any business carried on by the taxpayer." The profits actually assessed typify about £42,000 profits in all, the taxability of which is now to be determined. The only question is whether the profits

(1) (1926) 38 C.L.R. 153, at p. 196.

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in question answer the description quoted. It is, to my mind, difficult to imagine why they do not.

The material facts in the present case may be very briefly stated. The Ruhamah Property Co. Ltd. was incorporated in 1913 under the Queensland *Companies Acts* 1863-1909. It was incorporated with objects which constitute a purely business company. All its transactions must at least be business transactions, and unless any given profits made by it as a going concern can be allotted to some capital asset in connection with that business, they must inevitably be the proceeds of carrying on the business as plant or permanent office, &c., which is impossible here. Its memorandum of association specifically indicated as the object of acquisition certain land which is the identical land from the sale of which the profits charged were obtained. The Company never acquired any other land—this being its only stock-in-trade. The declared objects of the Company as to this land were to acquire it by gift from Morrow, and generally to deal in and traffic by way of sale, lease, exchange or otherwise. Besides this land, other property, real and personal, could be acquired and trafficked in similarly. There was power also to carry on " any other business " in connection with " *the general business* " of the Company, the " general business " being obviously that which included the dealing with the lands specifically referred. Other objects are stated, but are irrelevant, except so far as they provide for the improvement, management and development of any part of the Company's property.

In 1913 the Company acquired this land from Thomas Morrow for £24,000, represented by 30,000 shares of £1 each paid up to 10s. and the taking over of a mortgage obligation of £9,000 to a bank. The shares were distributed, 15,002 to Morrow and the balance to his nominees, who were members of his family. Until 1922 " the business of the Company " (see the Company's agents' letter to the Commissioner on 13th May 1927) consisted only of the collection of rents derived from letting the property to various tenants. In 1919 the gross income from rents was £2,464 6s. 8d., and up to the end of that year the total profits from 1913 were £4,428 or thereabouts, the profit for 1919 being £1,033. The Company had annual meetings, and at the fifth of these meetings a dividend was declared.

The Company had a yearly profit and loss account, a reserve building depreciation account, and, apparently from the documents in evidence, carried on generally its accounts on a regular business footing. There can be no shadow of doubt it was carrying on its business, and, indeed, as above appears, that is admitted.

In 1920 Thomas Morrow died, and in 1921 a son (shareholder) also died. There were heavy probate duties in each estate, and the individual estates for the purpose of paying these duties obtained an advance from another incorporated company called Morrows Ltd. Then the present appellant determined to sell some or all of its land as it could. The witness Henry Cooke Morrow says: "We let it be known that we were prepared to consider *sales*." In 1922 there was the first sale to Allen for £6,000. In 1923 there was a subdivisional sale when four purchasers bought land at £13,500, £8,600, £7,000 and £8,600 respectively. The sales were on terms extending over years. In 1924 a portion of the subdivision which did not sell previously was sold to Jensen for £8,000, and the final portion was sold to the Commonwealth Bank in March 1927.

To all outward appearances the Company was a land trading company, holding its land and letting it as long as it thought fit, and then selling it, making considerable business profits; and, prima facie at all events, no reason appears why it should escape contributing to the revenue equally with much humbler contributors. The Commissioner having assessed it, and the Board, looking at the matter in a very broad and practical way, having confirmed the assessment, we have, therefore, not only the prima facie statutory effect of the Commissioner's opinion, but we have the further opinion of the Board on a matter of business.

There is no doubt that in this case the Board's decision involves a question of law—in fact, several questions of law. The majority of the Board held to be irrelevant certain considerations which the minority thought relevant, and the majority also ruled against contentions which the minority supported, all of which considerations and contentions have been renewed by the appellant and pressed upon this Court. The rival views of the members of the Board, which have been reproduced in this Court, constitute the very questions of law which we have to consider, and as to which, I

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regret to say, I find myself unable to share the prevailing opinion. I can find no error whatever in the law as apprehended by the majority of the Board. I have read and re-read with great care the opinion delivered by the chairman (Mr. Hulme), whose views were in brief terms concurred in by Mr. Lightband, as I read that gentleman's words. Mr. Hulme, it was urged before us, erred in assuming that the result in fact was conclusively established by the objects of the Company's memorandum, and therefore did not examine those facts for himself. I can see no trace of any such procedure on his part. He certainly gave very great weight, and in a sense a determining weight, to the objects of the Company, but only applied that to the resultant conclusion of fact after examination of the evidence. In justice to both members constituting the majority, I think I should let their own words speak for themselves. After recounting certain undisputed facts, the chairman first set aside the personal intentions of the late Thomas Morrow as irrelevant to the matter in hand, and then proceeded: "This brings me to a consideration of the memorandum of association, and the objects of the Company as set out therein, *and* as to whether the sale of the properties in question are in furtherance of those objects." After referring to what he considered the principal objects, stating in summary form the broad facts appearing in evidence, he continued:—"The objects stated appear to me to be not only the principal objects, but also include the main purposes for which the Company was formed, and, in my opinion, the Company's action in selling the land and investing the proceeds after payment of the liabilities referred to, was merely carrying into effect its principal objects and purposes. *After a very full consideration of all the facts submitted,* and also of the decision referred to . . . I am of opinion that the Commissioner's contentions must be upheld and that the appeal should be dismissed." Mr. Lightband said:—"*After considering the facts adduced* at the hearing and the arguments . . . I am of opinion that this appeal cannot be sustained. The reality of the Company's incorporation . . . and the powers it took *and exercised* under this memorandum of association determine to my mind that the profit at issue was not an accretion of capital." The Board not having erred in law, my view is that

the intention of Parliament is that their decision of fact should be regarded as final. In the circumstances, however, it is my duty to form my own conclusion.

For my part, I think it right to say that not only do I agree with that of the Board, but I also entirely approve of the principles and the method by which it was reached. And, what is more important to me, the opinion I have formed as to principles and method has, as I conceive, the support of very high and very abundant authority, which must be disregarded in order to reach the opposite conclusion. As this case, therefore, manifestly involves points of great importance, and must in future largely control the administration of company income taxation throughout Australia, I shall state the result as I understand it of the principal authorities on the relevant point with some particularity.

The reasons advanced in argument on behalf of the appellant were practically those relied on by the third member of the Board, Mr. Canning, for holding the appellant not liable. Shortly summarized they are (1) the object and intention of the late Thomas Morrow in forming the Company and handing over to it his land and dividing his shares; (2) the equivalence of this to a division of the land itself by him among his family; (3) the Company was, in effect, a mere instrument to carry out Morrow's intention; (4) in pursuance of this intention the land was kept for years as an investment and was always intended as an investment; (5) on the deaths mentioned and for the purpose of finding probate duties, the investment was realized and was a mere realization of capital.

The groundwork of these contentions was that Thomas Morrow, having reached the age of seventy-two, desired his family should receive shares in his property undiminished by probate and estate duties. At the same time he desired to maintain his personal control over the property, and so this company scheme was devised. Similarly a company had been created, Morrows Ltd., with reference to his manufacturing business. He desired that the property should not be sold during his life, and this he could and did secure. But he could and did so only by his rights, not as proprietor but as shareholder and director. The powers of the Company were exerted so far only with respect to letting the property. When he died and

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his son died, the position was altered. The Company's determination to hold in the meantime is in some way attributed to the individual intention, and the motive of the Company to sell is regarded as a sudden determination of an individual proprietor of land, who so far has done nothing but exercise the power of ownership, to transform his landed possessions, unconnected with any business, into money. A chain of several links is constructed to explain the motive : (1) the deceased persons' estates needed money for taxation; (2) Morrows Ltd. obtained accommodation from the bank to supply the estates with the necessary funds ; (3) Morrows Ltd. lent money to those estates ; (4) Ruhamah Property Co. Ltd. sold some of its land in the way described, partly to enable Morrows Ltd. to repay the bank, and partly to invest in Morrows Ltd. on loan ; (5) Ruhamah Property Co. Ltd. lent the money to Morrows Ltd. at interest. By this series of financial operations it is sought so to identify the business transactions of the appellant with the affairs of the late Thomas Morrow as to place the transactions of sale in the same position as if he had never parted with the land until he sold it as part of his capital assets. Now, it appears to me the contentions of the appellant cannot be given effect to without overturning some fundamental principles of law. I think I can best serve the purpose of clarifying the subject if I formulate certain propositions : (1) The character of a taxpayer's profits is determined by his acts, and not by the intention or motive with which he does the acts ; (2) the nature of his acts is a question of fact, their effect is one of law ; (3) an incorporated company's liability in respect of its own property cannot be affected by the intentions or motives of individuals, and that company is not to be considered as machinery for carrying out individual purposes or projects ; (4) different considerations as to differentiating between investment and business may have to be applied according as the taxpayer is an individual or a company ; (5) if a company makes profits in carrying on a business the nature of the business is immaterial for present purposes. I refer to the authorities for these propositions in order.

(1) In *J. & R. O'Kane & Co.* v. *Commissioners of Inland Revenue* (1) Lord *Buckmaster* (with whom Lords *Atkinson* and *Sumner* and

(1) (1922) 12 Tax Cas. 303, at p. 347.

Carson agreed) dealt with an argument that the profits did not arise in carrying on business but in a process of *realization* under an altered method of trading not consistent with a continuing concern. He said:—"I find it difficult to think that these considerations can in the circumstances of this case afford any protection to the appellants. For in truth it is quite plain that right up to the end of 1917 they were engaged in trading, which, *so far as the outer world is concerned*, was the ordinary method of carrying on trade modified only by arrangements which were merely part of the machinery of business dealing adopted to effect their intention to retire. It may well be accepted that they did so intend; yet *the intention of a man cannot be considered as determining what . . . his acts amount to*; and the real thing that has to be decided here is *what were the acts that were done in connection with this business* and whether *they amount to a trading* which would cause the profits that accrued to be profits *arising from a trade or business*?" In *Gas Lighting Improvement Co.* v. *Commissioners of Inland Revenue* (1) Lord *Sumner* says: "A noun substantive in a statute does not take its colour, like a chameleon, from such surroundings as the motives of the persons, whose property it correctly describes." His Lordship applied that to "investments." It is equally applicable to "income" and "profits."

(2) *O'Kane's Case* (2) is a final authority that the question we are concerned with is a question of fact. There are some cases, as, for instance, *Hudson's Bay Co.* v. *Stevens* (3), where the facts are so strong that only one conclusion is legally possible. There the property sold was not acquired in trade, it was an inheritance, and, when disposed of, was in law simply a patrimony turned into cash (see *Thew* v. *South-West Africa Co.* (4) and *Alabama Coal &c. Co.* v. *Mylam* (5)). In any event the Commissioner's conclusion of fact was the basis of the judgment (see per *Pollock* M.R. in *Thew's Case* (6)). It is of course obvious that considerations of law may always have to be taken into account, but if the ascertainment of taxable profits were not in substance a question of fact,

(1) (1923) A.C. 723, at p. 741.
(2) (1922) 12 Tax Cas. 303.
(3) (1909) 5 Tax Cas. 424; 101 L.T. 96.
(4) (1924) 9 Tax Cas. 141, at p. 156.
(5) (1926) 11 Tax Cas. 232.
(6) (1924) 9 Tax Cas., at p. 161.

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sub-sec. 6 of sec. 51 would have no meaning, and so every decision of the Board would be *ex necessitate* appealable.

(3) It is not uncommon to hear it said, as Mr. *Graham* has in effect put it, that a company is only the *alter ego* or the agent of an individual, and that its activities are so coloured by his interests and directions and intentions. That was the root idea of the unsuccessful argument in the celebrated one-man company case (*Salomon* v. *Salomon & Co.* (1)). The complete legal independence of a company was then established. But in different forms the same erroneous notion persists and reappears. It has reappeared in this case. It reappeared in *Gas Lighting Improvement Co.* v. *Commissioners of Inland Revenue* (2). Lord *Sumner* took occasion to say of the company's activities (3) :—" It is said that all this was 'machinery,' but that is true of all participations in limited liability companies. They and their operations are simply the machinery, in an economic sense, by which natural persons, who desire to limit their liability, participate in undertakings which they cannot manage to carry on themselves, either alone or in partnership, but *legally speaking, this machinery is not impersonal though it is inanimate.* Between the investor, who participates as a shareholder, and the undertaking carried on, the law *interposes another person*, real though artificial, the company itself, and *the business carried on is the business of that company*, and the capital employed is its capital and not in either case the business or the capital of the shareholders. Assuming, of course, that the company is duly formed and is not a sham (of which there is no suggestion here), *the idea that it is mere machinery for effecting the purposes of the shareholders is a layman's fallacy.* It is a figure of speech, which cannot alter the legal aspect of the facts." (See also per *Sargant* L.J. in *Commissioners of Inland Revenue* v. *Westleigh Estates Co.* (4).) It is, I think, rare and deserving of acknowledgment that laymen, however experienced, so clearly perceive and act on the true legal position upon this phase of the law, as did Mr. Hulme explicitly and Mr. Lightband by implication.

(1) (1897) A.C. 22, see pp. 28, 29.
(2) (1923) A.C. 723.
(3) (1923) A.C. at pp. 740-741.
(4) (1923) 12 Tax Cas. 657 ; (1924) 1 K.B. 390.

(4) In the *Westleigh Estates Co.'s Case* (1) Lord (then Lord Justice) *Warrington* said :—" It was contended indeed that the company was merely in the position of an ordinary landowner dealing with his land and granting leases thereof and so receiving rents and profits. But, assuming that in the case of an individual to do such things would not be to carry on a trade or business, it does not at all follow that the conclusion would be the same in the case of a company *the end and object of whose being is to transact the business in question*, and thereby to make a profit for division among its shareholders. (See the remarks of Lord *Sterndale*, Master of the Rolls, in *Commissioners of Inland Revenue* v. *Korean Syndicate Ltd.* (2)). It seems to me *also* quite immaterial that the actual operations of the company have been few in number and perhaps of no great importance. If you find a company formed to carry on a business, and in fact carrying it on, it cannot matter that its activities have been restricted. The learned Judge seems to ground his decision largely on the notion that the company ' did nothing except what would have been done by the executors and trustees of a will administering the trusts for the beneficiaries.' With all respect, this at all events is a false analogy. The company is *not a trustee* in any sense ; *it is doing on its own account and for its own profit the several things authorized by its memorandum.*" In the same case *Sargant* L.J. (3) disagreed with the view of *Rowlatt* J. (very similar to the one presented by the appellant in this case) that the company had come into existence for a certain purpose, not with any notion of trade or business, but to act as an executor. The Lord Justice said :—" The company has become the absolute legal and beneficial owner of the estates, and no relation of trustee and cestuis que trust exists between it and the beneficiaries. They are relegated to the ordinary position and rights of shareholders in an ordinary limited company, and have no further or other interest in the properties which formerly belonged to them." Then the learned Lord Justice says : " I am altogether unable to distinguish the case from the ordinary case of the out-and-out sale of a mining or urban estate to a company which is thereafter to manage, improve and develop it, and to

(1) (1923) 12 Tax Cas., at p. 693 ; (1924) 1 K.B., at p. 417.
(2) (1921) 3 K.B. 258, at p. 273.
(3) (1923) 12 Tax Cas., at p. 698; (1924) 1 K.B., at p. 423.

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distribute the profits to arise therefrom amongst its shareholders in the ordinary way." The judgment of Lord *Sterndale* M.R., referred to by Lord *Warrington*, contains this important passage (1) :—" The fact that the limited company comes into existence in a different way from that in which an individual comes into existence is a matter to be considered. An individual comes into existence for many purposes, or perhaps sometimes for none, whereas *a limited company comes into existence for some particular purpose.*" In *Bonanza Creek Gold Mining Co.* v. *The King* (2) the Privy Council, speaking by Viscount *Haldane*, said of a company like the present: " A company incorporated by the statutory memorandum of association which the Act prescribes could have *no legal existence* beyond such as was required for the particular objects of incorporation to which that memorandum limited it." This is there contrasted with corporations created by charter or under statutes of a wider scope than the ordinary Companies Acts. It is a necessary consequence that a company bounded by its memorandum may be in an entirely different position from that of a natural person, whose capacities are unlimited and therefore permitting of attribution of a given transaction to any one of those capacities. It is, therefore, not only permissible but essential to consider the objects in the memorandum in connection with the actual transactions. It may even be proper, as in *South Behar Railway Co.* v. *Commissioners of Inland Revenue* (3) to seek for the principal object of the company's formation.

(5) In the *South Behar Railway Co.'s Case* (4) Lord *Sumner* points out that in a case of this description it is useless to consider the company as " holding property for beneficiaries," and that " the issue is between carrying on a business and being out of business altogether." His Lordship then says : " To ascertain the business of a limited liability company one must *look first at its memorandum* and see for *what business* that provides, and whether *its objects* are still being pursued." As to the case in hand, Lord *Sumner* says : " It is common ground that the company, when first incorporated and for some years afterwards, did carry on a business." The learned

(1) (1921) 3 K.B., at p. 273.
(2) (1916) 1 A.C. 566, at p. 577.
(3) (1925) A.C. 476, at p. 480.
(4) (1925) A..C., at p. 485.

Lord says (1): "The important thing is that the old business still continues of getting some return for capital embarked in the line." And he points out (2) there has not been such a termination "as has been held to be the criterion of ceasing to carry on business." There is, he says, "a presumption that a company continues to carry on business as long as it is engaged in collecting debts periodically falling due to it in the course of its former business. *Business is not confined to being busy; in many businesses long intervals of inactivity occur.*"

All those observations apply cogently to the facts between 1913 and 1922, and afterwards. The period for holding and in which rents were received in return for the capital invested, about 6 per cent per annum, was incontestably a period when the Company was doing its "business"; it could have been doing nothing else and, as above stated, the Company's agents admit as much in their letter to the Commissioner. Its sales, and the continued receipts under the contracts on terms, were equally transactions of its business. But the point to be observed is that the liability to pay income tax does not depend on whether the business was a holding business or an investment business or a selling business: whichever it was, it was the Company's "business." It seems to be thought, and this in my opinion is one of the fallacies in the appellant's contention, that once establish that there is a realization or change of investment and there is an end of the matter. That is not so: it may be all that and something more. If a company does that, and what is done is also "an act done in what is truly the carrying on, or carrying out, of *a* business" (*Commissioner of Taxes* v. *Melbourne Trust Ltd.* (3)), then the profits resulting are proceeds liable to income tax as the proceeds of a business. In *Californian Copper Syndicate* v. *Harris* (4) there was no limited company, but the presence or absence of the condition is more readily ascertained in the latter case than where individuals are concerned. As to this, the prior propositions indicate the law.

Applying the authorities quoted, which I just accept as beyond criticism, I have no hesitation in holding that this appeal should be dismissed.

(1) (1925) A.C., at p. 487.
(2) (1925) A.C., at p. 488.
(3) (1914) A.C., at p. 1010; 18 C.L.R., at p. 421.
(4) (1904) 5 Tax Cas. 159.

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Before parting with the case I should add, and I think this is the more convenient course, a few words as to one or two other cases cited during the argument. In *C. H. Rand* v. *Alberni Land Co.* (1) *Rowlatt* J., as he pointed out in the later case of *Alabama Coal &c. Co.* v. *Mylam* (2), rested largely, if not decisively, on the company being merely machinery for carrying out the projects of other people. In my opinion that reason cannot survive the criticism of Lord *Sumner* in *Gas Lighting Improvement Co.* v. *Commissioners of Inland Revenue* (3), and of *Warrington* L.J. in the *Westleigh Estates Co.'s Case* (4). However, in the *Alabama Co.'s Case* (5) the learned Judge distinguishes the case before him and holds the company liable for a reason which seems to me to bear against the present appellant. *Rowlatt* J. says (6) that though the company did "realize," yet "on the whole I think they have conducted a trading concern as opposed to a mere realization, which prescribes a very special state of facts in the case of a company." And the learned Judge rightly says the *Hudson's Bay Co.'s Case* (7) and the *Alberni Land Co.'s Case* were very special cases. I do not think either of them can ever be of assistance in any Australian case. One word as to *Tebrau (Johore) Rubber Syndicate* v. *Farmer* (8). The objects of the company were found on examination not to include the business of selling the lands, and they were in fact sold, not in carrying on the rubber business, but as putting an end to the undertaking. The distinction between that case and the present is vital.

Appeal allowed. Order that assessment for financial year 1923-1924 *be reduced to the sum of* £1,414. *Costs to be paid by the respondent.*

Solicitors for the appellant, *Wilson & Hemming.*

Solicitor for the respondent, *W. H. Sharwood*, Crown Solicitor for the Commonwealth, by *Chambers, McNab & McNab.*

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(1) (1920) 7 Tax Cas. 629.
(2) (1926) 11 Tax Cas., at pp. 253-254.
(3) (1923) A.C., at p. 740.
(4) (1924) 1 K.B., at p. 417; 12 Tax Cas., at p. 693.
(5) (1926) 11 Tax Cas. 232.
(6) (1926) 11 Tax Cas., at p. 255.
(7) (1909) 5 Tax Cas. 424; 101 L.T. 96.
(8) (1910) 5 Tax Cas. 658.