[HIGH COURT OF AUSTRALIA.]

OFFICIAL RECEIVER IN BANKRUPTCY (TRUSTEE, ESTATE OF WILLIAM FOX, KNOWN AS RANKIN, DECEASED) } APPELLANT;

AND

FEDERAL COMMISSIONER OF TAXATION RESPONDENT.

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SYDNEY, *Aug.* 23, 24, 27, 28;

MELBOURNE, *Oct.* 15.

Dixon C.J., Williams, Webb, Fullagar and Kitto JJ.

Bankruptcy—Income tax—Assessable income—Official Receiver—Deceased estate—Administration in bankruptcy—Profit-making undertaking—Carrying on—Proceeds—Capital or income—Liability to tax—Income Tax and Social Services Contribution Assessment Act 1936-1954, *ss.* 4 (1), 6 (1), 17, 26 (*a*), 99, 197, 198.

From about 1938 as a partner, and from about 1946 on his own account, one R. carried on the business of reclaiming and selling certain low-lying and mostly tidal lands at Southport, Queensland, according to a scheme approved by the council and involving expenditure in pumping sand in a fluid state on to the land thus raising its level, and in top-dressing, forming roads, constructing water channels, drainage and sub-dividing the land into allotments for sale. R. died in 1951 before the completion of the project and in 1953 his executors, not having done any construction or other work in connexion with the project, obtained an order for the administration of his estate in bankruptcy and the official receiver was appointed trustee. The creditors authorised the trustee to complete the project, and to use estate moneys for that purpose. The trustee obtained from the Land Administration Board a permit and a perpetual lease and he proceeded with the work and sub-divided and sold fully reclaimed allotments of land. Under s. 99 of the *Income Tax and Social Services Contribution Assessment Act* 1936-1954 the Commissioner of Taxation assessed the trustee to tax. The gross proceeds from the sale of the allotments were treated as the assessable income and deductions were made therefrom for an amount calculated by an apportionment of R.'s expenditure over the whole area and for expenses incurred by the trustee to determine the taxable income. The trustee's objection to the assessment was disallowed and he appealed to the High Court; *Webb* J. submitted certain questions for the Full Court by way of case stated.

Held (1) that, even though his object was to convert the assets he received into money and not to employ them to earn income, the trustee in bankruptcy

was carrying out a profit-making scheme; (2) that the profit if any consisted in the excess of the price recovered over the value of the assets that came into his hands; hence the assessments had been made upon an erroneous basis; (3) that in respect of any taxable income he might receive he was liable to be assessed under s. 99 of the Act.

CASE STATED

The official receiver in bankruptcy, as trustee of the estate of William Fox, commonly known as William Rankin, deceased, being dissatisfied with the decision of the Deputy Commissioner of Taxation upon his objection to an assessment to income tax based on income derived during the years ended 30th June 1954 and 30th June 1955 respectively, requested the deputy commissioner to treat each of those objections as an appeal and forward it to the High Court.

The grounds upon which the official receiver relied were:—(1) that the said amounts of taxable income (£2,911 and £12,057 respectively) were not assessable income or assessable net income of a trust estate within the provision of the *Income Tax and Social Services Contribution Assessment Act*; (2) that the amounts wholly comprised moneys realised by him as official receiver as trustee of the estate of Rankin, a deceased debtor, under an order for administration in bankruptcy of that debtor's estate made under Pt. X of the *Bankruptcy Act* 1924-1950 and as such were capital, and/or in any event were not assessable income within any provision of the Act; (3) that these moneys had been got in by him, the official receiver, wholly in his said capacity in due course of administration of the estate and in the realisation of the assets thereof and those moneys were not assessable income and neither he nor the estate was a person liable to pay tax in respect thereof within any provision of the Act; (4) that no part of those moneys represented profit arising from the sale by him or by the estate of any property acquired by him or the estate for the purpose of profit-making by sale, or arising from the carrying on or carrying out of any profit-making undertaking or scheme, and there was not any provision in the Act which imported into the realisation of the assets of the estate by him in his said capacity, or made him or the estate responsible for income tax by reason of any purpose for which Rankin acquired any of that property or those assets; (5) that no part of those moneys represented profit within the meaning of the Act; (6) that in realising the assets of the estate, he, the official receiver, had not carried on or carried out any profit-making undertaking or scheme, but had done no more than discharge the duty of his trust in accordance

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with the provisions of the *Bankruptcy Act* 1924-1950 to realise those assets to the best advantage on behalf of the creditors of the estate; (7) that in his capacity of trustee he was not and had not been concerned to make any profit within the meaning of that term in the *Income Tax and Social Services Contribution Assessment Act*, and in realising those assets his only purpose was and had been to get in sufficient money to pay in full all the debts due from Rankin together with the costs of administration, and neither he, the official receiver, nor any of Rankin's creditors nor any other person for whom he, the official receiver, was trustee had any interest in any surplus which might arise from such realisation over and above the amount of Rankin's debts and the costs of administration, no such surplus had yet arisen and he, the official receiver, had not yet realised sufficient to pay in full those debts and the said costs of administration; (8) that the only persons who would have any interest in any such surplus (if any) were the legal personal representatives of Rankin's estate and the beneficiaries under his will, and of the latter certain were charities which were exempt from the taxing provisions of the Act; (9) that each of the said assessments was unlawful and was not authorised by any provision of the Act and should be wholly withdrawn; and (10) that if the making of the assessments was authorised by any provision of the Act—(a) the amount of assessable income or assessable net income of the trust estate had not been ascertained upon a proper and lawful basis and should be reduced accordingly; (b) it was made arbitrarily and was based on a mistaken view of the law; and (c) and if and in so far as the commissioner in making such assessment purported to exercise any discretion in respect of any matter in relation to the income tax liability of the estate or of himself in his said capacity or to form any judgment as to the amount which income tax ought to be levied upon it or himself he, the commissioner, exercised his discretion and/or formed his judgment in an arbitrary, capricious and unreasonable manner and/or on a mistaken view of the law.

The appeals came on for hearing before *Webb* J. and, evidence having been taken, they were, by consent, referred to the Full Court of the High Court under s. 18 of the *Judiciary Act* 1903-1955.

After argument had ensued for some time before the Full Court a case, containing a statement of facts agreed upon by the parties and certain questions of law submitted by *Webb* J., was stated for the opinion of the Full Court in pursuance of the *Income Tax and Social Services Contribution Assessment Act* 1936-1954, and argument proceeded thereon.

The factual material contained in the case appears sufficiently in the judgment of the Court hereunder and need not here be repeated.

The questions posed by *Webb* J. for the opinion of the Full Court were :—On the materials contained in the case stated and the documents forming part thereof am I as a matter of law (a) at liberty to find (b) bound to find—(1) that the official receiver as trustee of the estate of the deceased debtor (i) carried on a business (ii) carried on or carried out a profit-making undertaking or scheme : (2) that as such trustee he did not (i) carry on a business (ii) carry on or carry out a profit-making undertaking or scheme ; (3) that what is shown in the assessments as income assessed in respect of (i) the income year ending 30th June 1954 or (ii) the income year ending 30th June 1955 (a) forms part of the proceeds of such a business or (b) is the profits arising from the carrying on or carrying out of such a profit-making undertaking or scheme ; (4) that what is shown in the assessments as income in respect of (i) the income year ending 30th June 1954 or (ii) the income year ending 30th June 1955 does not form (a) part of the proceeds of such a business or (b) the profits arising from the carrying on or carrying out of such a profit-making undertaking or scheme ; (5) that in respect of either or both of the said income years income (i) was (ii) was not derived by the official receiver as such trustee being (a) the proceeds of such a business or (b) profits arising from the carrying on or carrying out of such a profit-making undertaking or scheme ; (6) that the official receiver (i) was (ii) was not liable in respect of such income, if any, to be assessed under s. 99 of the *Income Tax and Social Services Contribution Assessment Act* 1936-1954 ?

C. G. Wanstall Q.C. (with him *D. G. Andrews*), for the appellant. Two questions are involved : (i) whether the sums received by the trustee are assessable income, and (ii) alternatively, or the consequence thereof, if those receipts are assessable whether the official receiver, in these present circumstances, is a trustee who is taxable under any provisions of this Act in respect of those receipts.

The subject receipts are not taxable under any provision of the Act. In order to be taxable they must be brought under one or other limb of s. 26 (*a*), or they must be income within the ordinary concept of that word or the statutory definition in s. 6. As the trustee of this estate the official receiver had in his hands a valuable right which, at that stage depended upon contract but as to which it was his duty as trustee to obtain the maximum benefit for the estate. Whatever title the deceased had, it was a piece of property that

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came to the official receiver. Although the deceased was at the date of his death carrying on a profit-making venture or an attempted profit-making venture it cannot be said that the official receiver was so doing. The character of the deceased's undertaking is immaterial (*Commissioner of Taxes (Vict.)* v. *Melbourne Trust Ltd.* (1)). The position here corresponds with that which the Privy Council said would have absolved the liquidating company from tax. That view was taken in *Melbourne Trust Ltd.* v. *Commissioner of Taxes (Vict.)* (2). The object was not profit, but salvage. Any profit made was not a taxable profit. There are not any beneficiaries. The official receiver, as a trustee, is assessable under Div. 6 of the Act only if there is not any beneficiary presently entitled and he is assessable only if there are beneficiaries. As to s. 26, see *Federal Commissioner of Taxation* v. *Becker* (3). No profit has here arisen. None of ss. 28, 32, 36, 37 and 38 of the Act apply here. It is only profit arising which can be taxed, whether by s. 26 (*a*) or some other provision of the Act. The second limb of s. 26 (*a*) covers two kinds of operations, one which involves the habitual pursuit of a course of conduct and the other which is satisfied by an isolated transaction in the nature of a plan or venture which does not involve the repetition (*Premier Automatic Ticket Issuers Ltd.* v. *Federal Commissioner of Taxation* (4)). The provisions of ss. 26, 28, 32, 36, 37 and 52 represent an attempt by the legislature to provide an artificial code for enabling the calculation of profit in circumstances where it might be difficult to ascertain the profit according to ordinary business methods. Unless there is some means of ascertaining that profit within the walls of the Act, the implication is that it is not to be taxed because it is only profit which may be taxed. The means by which profit may arise were considered in *Federal Commissioner of Taxation* v. *Becker* (5). What is called the taxable income here has not been properly so called and has not been properly assessed because it cannot, within any concept of the word, be treated as profit arising from any transaction of the official receiver: see *Hudson's Bay Co. Ltd.* v. *Stevens* (6). The official receiver did not acquire any property of a kind different from what the deceased had. He took only formal steps which were needed to convert the tenure from one form to another. By s. 155 of the *Bankruptcy Act* 1924-1955 all the provisions of that Act relating to the administration of the property of the bankrupt are applicable to the official receiver in this administration. As administrator he succeeded to the

(1) (1914) 18 C.L.R. 413, at pp. 419, 420; (1914) A.C. 1001, at pp. 1009, 1010.
(2) (1912) 15 C.L.R. 274, at p. 294.
(3) (1952) 87 C.L.R. 456.
(4) (1933) 50 C.L.R. 268, at p. 297.
(5) (1952) 87 C.L.R., at pp. 460, 467.
(6) (1909) 5 Tax. Cas. 424.

interests of the deceased; one of those interests was the right of having the title to the land converted under ss. 175B and 179 of *The Lands Act* 1910 *to* 1951 (Q.). It cannot be said within the framework of s. 26 (*a*) that if there were an acquisition by the official receiver of the property, that his dominant purpose was that of selling at a profit. His profit is not capable of being ascertained. The property cost him nothing of a capital kind; it cost him only his administration costs. He is not to be affected by any dealings, or motives, or purposes, or intentions of the predecessors-in-title, that is the deceased or his executors (*Hobart Bridge Co. Ltd.* v. *Federal Commissioner of Taxation* (1); *Glasgow Heritable Trust Ltd.* v. *Inland Revenue Commissioners* (2)). In order to change the character of the receipts in the hands of either the official receiver or the executors from mere realisation receipts to those of trading receipts, which are taxable, something more than action to obtain a beneficial realisation is required (*Alabama Coal, Iron, Land & Colonization Co. Ltd.* v. *Mylam* (3); *Marshall's Executors* v. *Joly* (4); *Federal Commissioner of Taxation* v. *Becker* (5)). It does not follow from the presence of s. 37 in the Act that every time the assets of the business devolved on an executor that he would be taxable on the realisation. Here there is nothing suggestive of a scheme whatever on the part of the official receiver except the realisation according to what was the only practicable way of realising the land. There is no evidence of the existence of a profit-making undertaking or scheme. If merely adding value to a property and thereby getting a higher price than it was worth at the death constituted such evidence the decision would have been differently given in *Scottish Australian Mining Co. Ltd.* v. *Federal Commissioner of Taxation* (6) and *Peel River Land & Mineral Co. (Ltd.)* v. *Federal Commissioner of Taxation* (7). The official receiver has done no more than realise land which he did not acquire for the purpose of making a profit. The various things done or steps taken were merely machinery steps. Those steps were taken by the company in *Scottish Australian Mining Co. Ltd.* v. *Federal Commissioner of Taxation* (8) in order to enable it to realise its land, and that did not constitute evidence of a profit-making scheme or engaging in a trade.

(1) (1951) 82 C.L.R. 372, at pp. 385, 386.
(2) (1954) 35 Tax. Cas. 196, at pp. 200, 201, 207, 216, 218, 219; (1954) S.L.T. 97.
(3) (1926) 11 Tax. Cas. 232.
(4) (1936) 20 Tax. Cas. 256, at pp. 261, 265, 267, 268.
(5) (1952) 87 C.L.R. 456.
(6) (1950) 81 C.L.R. 188, at p. 195.
(7) (1954) 92 C.L.R. 467.
(8) (1950) 81 C.L.R. 188.

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[DIXON C.J. referred to *Cohan's Executors* v. *Inland Revenue Commissioners* (1).]

The facts here are equivocal and they do not constitute the "something more" to which *Sargant* L.J. referred. As an illustration of circumstances in which executors were found to be carrying on a trade: see *Newbarns Syndicate* v. *Hay* (2) and *Commissioner of Taxes (Vict.)* v. *Melbourne Trust Ltd.* (3).

G. L. Hart Q.C. (with him *E. J. Moynahan*), for the respondent. The facts show that this was a profit-making undertaking or scheme. A business has been carried on and income has been derived both under s. 6 and under both limbs of s. 26 (*a*) because the official receiver has carried on the business or, alternatively, has carried on a business of his own. The only person who can have derived that income is the official receiver. Therefore he is liable whether he is a trustee or not within the meaning of the *Income Tax and Social Services Contribution Assessment Act*. He is such a trustee and is taxable under s. 99. The income in the absence of any particular provisions is estimated according to ordinary commercial practice (*Commissioner of Taxes (S.A.)* v. *Executor Trustee & Agency Co. of South Australia Ltd. (Carden's Case)* (4); *Joshua Bros. Pty. Ltd.* v. *Federal Commissioner of Taxation* (5)). "Profit" is dealt with in *Gunn's Commonwealth Income Tax Law and Practice*, 4th ed. (1954), p. 335, par. 942 and *Challoner and Collins—Income Tax Law and Practice (Cth.)* (1953), p. 212, par. 329. Once it is established that he is either carrying on business generally or he comes within s. 26 (*a*) then the way the profits have been estimated here is irrelevant; the onus is upon the appellant to show that some lesser sum than the sum for which he has been taxed is the correct sum: see *Trautwein* v. *Federal Commissioner of Taxation* (6). The appellant was and is carrying on the exact business that the deceased was carrying on; there is not any difference. Section 107 (*a*) of the *Bankruptcy Act* 1924-1954 is applicable under s. 155 of that Act. The appellant's purpose in carrying on the business was to make more profits. What was done constituted one project and clearly shows that the appellant was carrying on business. The question is one of degree (*Scottish Australian Mining Co. Ltd.* v. *Federal Commissioner of Taxation* (7)). The land sections Nos. 23, 24 and 25 were acquired by the appellant for the purpose of profit-making by sale. In no way could it be

(1) (1924) 12 Tax. Cas., at pp. 615, 620.
(2) (1939) 22 Tax. Cas. 461, at pp. 473, 474, 476, 477.
(3) (1914) 18 C.L.R. 413; (1914) A.C. 1001; (1912) 15 C.L.R. 274.
(4) (1938) 63 C.L.R. 108, at pp. 152-154.
(5) (1923) 31 C.L.R. 490, at p. 499.
(6) (1936) 56 C.L.R. 63, at pp. 87, 88, 110, 111.
(7) (1950) 81 C.L.R. 188.

said that the deceased so acquired that land. The appellant sought and obtained permission to complete a profit-making undertaking or scheme and to carry on the business of the deceased bankrupt. *Joshua Bros. Pty. Ltd.* v. *Federal Commissioner of Taxation* (1) is strongly relied upon. That case was considered as good law in *Archer Bros. Pty. Ltd.* v. *Federal Commissioner of Taxation* (2).

[FULLAGAR J. referred to *Commissioner of Taxes* v. *British Australian Wool Realization Association Ltd.* (3).]

Like the company in *Alabama Coal, Iron, Land & Colonization Co. Ltd.* v. *Mylam* (4), the appellant in this case "launched out". Trade can be carried on despite the fact that stock is merely being sold off (*J. & R. O'Kane & Co.* v. *Inland Revenue Commissioners* (5)). The question is whether in fact the business is carried on or not. The intention of the appellant is irrelevant: *O'Kane's Case* (6), see also *Joshua Bros. Pty. Ltd.* v. *Federal Commissioner of Taxation* (7). *Cohan's Executors* v. *Inland Revenue Commissioners* (8) was distinguished in *Hillerns & Fowler* v. *Murray* (9), which is directly relevant to this case, and also in *Newbarns Syndicate* v. *Hay* (10). In England the commissioner has to show that the subject is liable. In this country the onus is the other way. The appellant simply carried on with the contract entered into by the council and the deceased: see also *Executrices of Philip Weisberg, Dec'd.* v. *Inland Revenue Commissioners* (11); *Balgownie Land Trust Ltd.* v. *Inland Revenue Commissioners* (12); *Newbarns Syndicate* v. *Hay* (13); *Hillerns & Fowler* v. *Murray* (14) and *Wood* v. *Black's Executor* (15). It is admitted that each case depends upon its own particular facts. The appellant is liable under s. 99 whether he is a trustee or not. His income being involved brings the matter under s. 17. He is assessed as a trustee under the *Bankruptcy Act*. It does not matter whether he is a trustee under s. 99 or not he is still a trustee under the general provisions of definition of trustee. The matter of trustee was considered in *Stapleton* v. *Federal Commissioner of Taxation* (16). Section 101A is applicable.

C. G. Wanstall Q.C., in reply.

Cur. adv. vult.

(1) (1923) 31 C.L.R., at pp. 493, 495, 497, 498, 500, 502.
(2) (1953) 90 C.L.R. 140, at p. 153.
(3) (1931) A.C. 224.
(4) (1926) 11 Tax. Cas., at pp. 252, 254.
(5) (1922) 12 Tax. Cas. 303, at pp. 347-349; 126 L.T. 707.
(6) (1922) 12 Tax. Cas., at p. 347.
(7) (1923) 31 C.L.R. 490.
(8) (1924) 12 Tax. Cas. 602.
(9) (1932) 17 Tax. Cas. 77, at pp. 90, 91; 48 T.L.R. 213; 146 L.T. 474.
(10) (1939) 22 Tax. Cas., at p. 477.
(11) (1933) 17 Tax. Cas. 696, at p. 703.
(12) (1929) 14 Tax. Cas. 684.
(13) (1939) 22 Tax. Cas., at p. 476.
(14) (1932) 17 Tax. Cas. 77.
(15) (1952) 33 Tax. Cas. 172, at p. 182.
(16) (1955) 93 C.L.R. 603, at pp. 619, 620; (1956) Q.S.R. 291, at p. 304.

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THE COURT delivered the following written judgment:—

This proceeding came before the Full Court in the form of a reference under s. 18 of the *Judiciary Act* 1903-1955 of two appeals under s. 196 of the *Income Tax and Social Services Contribution Assessment Act* 1936-1954. But inasmuch as s. 197 of that Act provides that such an appeal shall be heard by a single justice and the power of the single justice given by s. 198 to obtain a decision of the Full Court is limited to a case stated upon questions of law, it was thought proper not to deal with the matter as a reference but to allow a case to be stated on the questions of law which appeared to arise. The parties accordingly agreed on a statement of facts and certain questions have been submitted for the opinion of the Full Court by *Webb* J. by whom the evidence had been heard.

The appeal is against an assessment for income tax which the commissioner made upon the official receiver as trustee of the property of a deceased whose estate is being administered in bankruptcy in consequence of an order made under s. 155 of the *Bankruptcy Act* 1924-1954. The assessment is made upon the official receiver as a trustee in respect of income of the trust estate, that is to say as under the authority of s. 99 of the *Income Tax and Social Services Contribution Assessment Act* 1936-1954, which makes the trustee assessable in respect of the net income of the trust estate where there is no beneficiary presently entitled to any part of that income.

The basis of the assessment is the view adopted by the commissioner that the official receiver derived income by carrying on or carrying out a profit-making undertaking or scheme, or even by carrying on a business, to which undertaking scheme or business the official receiver had succeeded when the property of the deceased debtor vested in him. The deceased debtor William Fox, commonly known as William Rankin, died on 7th June 1951. At that date the value of his assets may have exceeded his liabilities, but after his death the commissioner amended certain assessments for income tax which had been made upon him in his lifetime, increasing the tax due to the commissioner to such an extent that the executors to whom probate had been granted on 31st October 1951 decided to seek an order for the administration of the estate in bankruptcy. The order was made on 3rd July 1953. Rankin, as it is perhaps better to call the deceased debtor, described himself as a "casket agent", but he does not seem to have confined his business pursuits to selling lottery tickets. As early as 1938 he had become a member of a partnership the business of which was to reclaim and sell land at Southport. In 1946 he became the sole

owner of the business. The land which he set about reclaiming was low-lying and swampy and for the most part affected by tidal waters. The method of reclamation was by the pumping of sand in a fluid state from a neighbouring river bed until the level of the land was sufficiently raised. Then it would be top-dressed with soil. It was intended then to form roads, construct water channels and drains and to sub-divide the land into allotments for the purpose of sale. Rankin had, before the end of 1948, obtained from the Land Administration Board permits to reclaim sixty-seven acres of land on the Nerang River south of the Jubilee Bridge at Southport. The period of the permits was three years from 1st September 1948, a period which had almost three months to run when Rankin died. Under the permits Rankin was to have a special lease of the reclaimed land for a term of thirty years at a rent to be determined. The board agreed also that, subject to compliance with the conditions as to improvement of the land, it would consent to the conversion of the special lease to a perpetual lease and to the subdivision of the land contained in the perpetual lease. The special lease would be granted under s. 179 and the perpetual lease under s. 175B of *The Land Acts* 1910 *to* 1951 (Q.). Rankin caused to be prepared a plan of sub-division of the land as it would be after reclamation and this was submitted to the Southport Town Council. An agreement dated 13th April 1949 was entered into between Rankin and the Council by which the latter agreed to approve of the plan and Rankin agreed to reclaim the land by filling it up with sand and top-dressing it to the levels shown by the plan. Certain reserves, roads and footpaths were shown on the plan and Rankin's obligations were specifically described with reference to the top-dressing and filling of these areas. The Council undertook certain obligations as to road-making, channelling and drainage and as to the vesting in Rankin of part of the land forming the reserves and as to resuming another piece of land. Rankin was to contribute only a proportion of the cost of the work done by the Council.

The land was divided into three sections, A, B and C, shown on the plan and the agreement prescribed by reference to these sections the order in which the work was to be done. When section A was complete Rankin might sell the sub-divisional blocks comprised in that section. When he had sold sixty per cent of them the Council was required to proceed with section B, and so on. The three sections were each divided into survey sections. When Rankin died the work had been completed on three survey sections of section A except that the roads had not been sealed with bitumen. On three other survey sections of the same section the work had

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been done up to the point of grading the roads. The land in sections B and C, consisting of forty acres, had been reclaimed by filling with sand before Rankin's death and the greater part of it had been top-dressed and some roads had been formed. The work that remained to be done was to top-dress about fifteen acres, to form and top-dress a great number of roads and to construct the drains. As to title, it appears that before his death Rankin obtained perpetual country leases of the three survey sections of section A where the work had been completed except for the bitumen on the road surface. The three survey sections comprised twelve acres. With respect to the three survey sections completed to the point of grading the roads, Rankin had obtained a special lease according to the permit of 1948. The area of the three survey sections comprised in the special lease was fifteen acres. With respect to the remaining forty acres contained in sections B and C, Rankin had not obtained any lease or licence and his rights rested on the permit.

His executors did not carry on the work after his death. Three things only took place that are material between that date and the making of the order for administration in bankruptcy. In the first place, the period of three years from 1st September 1948 limited in the permit ran out. In the second place, the executors conveyed some allotments contained in the perpetual lease to the purchasers to whom Rankin had sold them. In the third place, not a little damage was done by rain and wind to the unfinished roads and to the drains.

After the order was made the official receiver summoned a meeting of creditors and to them the position was explained. A summary of assets and liabilities was before the meeting in which the assets available to unsecured creditors were put down at about £47,000 and the unsecured creditors at about £93,500, of which amount £53,000 was owing to the Commissioner of Taxation. After hearing the views of Rankin's engineer and others concerning the situation and the prospects of paying the creditors in full if the work were completed and the allotments sold, it was decided to call another meeting. At that meeting, which was held on 17th August 1953, a resolution was passed by the creditors (the commissioner's representative abstaining from voting) which was expressed to authorise the official receiver to complete the reclamation project at Southport and to utilise moneys in the estate for this purpose. Next day the official receiver wrote to the Land Administration Board explaining his appointment and seeking an extension of the period of the permit with respect to the forty acres comprised in sections B and C. On 1st September 1953 an extension of the

period for completing the work of reclamation was granted until 31st December 1953. Although the reclamation was not completed by that date the official receiver was successful in securing a special lease for the area. The special lease was granted to him on 1st October 1954 commencing from that date. Certain portion of the area reserved for a park was not included. This was because it was arranged by the official receiver that the property in the park reserves should vest in the Crown, an arrangement which was carried out by the surrender of so much of the park reserves as had already been included in the special lease.

Ultimately the special lease of the area comprised in sections B and C was converted into a non-competitive perpetual lease under s. 175B of *The Land Acts* 1910 *to* 1951 (Q.) and the special lease of the fifteen acres, being survey sections of section A, was similarly converted into a non-competitive perpetual lease. Both leases were, of course, granted to the official receiver as trustee of Rankin's estate; the former commencing on 1st July 1955 and the latter on 1st October 1954.

The official receiver encountered some difficulty with the Southport Town Council, which made some attempt to treat the agreement with Rankin as no longer binding upon it. But after discussions and negotiations with the official receiver the council agreed to go on with the contract. The official receiver then arranged terms with a contractor for the execution of the greater part of the work necessary to complete the undertaking left unfinished by Rankin. The work included some measures to put right the damage caused by weather in the interval. A contract was let dated 4th December 1953 which covered the supply and spreading of top-dressing, the re-shaping of certain allotments and park areas, the formation of some roads and footpaths and some drainage and other incidental work. The contract price was £5,585.

During the financial year ended 30th June 1954, the official receiver sold thirty-two allotments of land for a gross return of £13,130, paying selling commissions to an amount of £851 3s. 5d. The thirty-two allotments all form portion of those survey sections of section A on which at Rankin's death the work had been completed except for the sealing of the roads with bitumen.

During the next financial year, viz. that ending 30th June 1955, sixty-six more allotments were sold by the official receiver for a gross return of £30,900, paying selling commissions to an amount of £954 7s. 6d. Of these allotments sixteen formed part of the same survey sections and fifty formed part of those survey sections of section A the work on which at Rankin's death had been completed

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up to the point of grading the roads. As at 30th June 1955 there remained about two hundred and thirty-five allotments to be sold. There also remained the necessity of expending a not inconsiderable sum in completing the work before all these allotments could be sold.

On 29th September 1955 the commissioner issued two assessments for income tax upon the official receiver as trustee of Rankin's estate, one in respect of the year ended 30th June 1954 the other in respect of that ended 30th June 1955.

The first of these was based upon a taxable income for the year of £3,896 14s. 0d., but this was reduced to £2,911 14s. 0d. by deducting a loss of £985 for 1952-1953 said to have been made by the executors. The assessable income from which the taxable income results is the sum of £13,130, being the gross proceeds of the sale of the thirty-two allotments. On the side of deductions comes first a sum of £7,068, which is described as the cost price, and then the commission of £851 3s. 5d. The balance of £5,210 16s. 7d. is then reduced to the amount of £3,896 14s. 0d. by various deductions, such as interest rates and insurance of plant, which need not be stated more particularly. The cost of £7,068 is composed of two items, £5,826 for "reclamation etc." and £1,242 for road-making. The latter seems to be an expenditure by the official receiver but the former is a cost incurred by Rankin. It represents that proportion of the expenses he had incurred in his lifetime in the work which was attributed to the thirty-two allotments sold by the official receiver. It appears that Rankin had sold certain allotments and the basis on which he should be taxed had arisen as a question in his lifetime. Of the costs he had incurred in respect of the work done, a very considerable amount was treated by him as the capital outlay upon the respective sections A, B and C and apportioned among these sections. Then the average cost of a block in the given survey section was obtained from the apportioned cost and adjustments made for site and other advantages or disadvantages. Profit was calculated by deducting the cost of the block so determined from the net proceeds of sale of the block. Apparently it is on this basis that the item "£5,826 reclamation etc." is put down in the account for the purposes of assessment.

In the assessment for the following year, 1954-1955, the taxable income was set down as £12,057. This is based on an assessable income of £30,900 consisting in the gross proceeds of the sale of the sixty-six allotments sold in that accounting period. On the side of the deductions the first items consist of "cost price". It is

split into three amounts representing the allotments of three respective survey sections. These amounts are arrived at on the same basis of apportionment of the cost incurred by Rankin as in the corresponding item of " cost price " in the previous year. Then follows a deduction for commission and for the cost of road-making, presumably incurred by the official receiver. There are further deductions for other expenditure by the official receiver for interest rates and incidental expenses, leaving the net total of taxable income at £12,057.

The notices of objection are widely drawn and cover the questions (1) whether the official receiver was assessable at all as trustee; (2) whether any part of the proceeds of the sale of the blocks could be considered profit or income liable to be brought into assessment; (3) whether the basis adopted for ascertaining whether any and if so what taxable income arose in the respective years of assessment was lawfully open to the commissioner.

The question whether the official receiver should be assessed as a trustee assumes, of course, that he has derived taxable income upon which, in accordance with s. 17 of the *Income Tax and Social Services Contribution Assessment Act* 1936-1954, tax may be levied, and that he derived the taxable income in his capacity of trustee of Rankin's estate. On this assumption it seems clear enough that Div. 6 of Pt. III of that Act would apply to the case. Were it otherwise the official receiver would be taxed on the aggregate of his personal income with the total of whatever taxable income he might derive from the investments or activities which he made or conducted in the various estates of which he is trustee. The definition of trustee in s. 6 (1) is certainly wide enough to include him and there is no reason why Div. 6 should not apply to him. Section 99 operates to impose on a trustee the obligation of paying the tax " where there is no beneficiary entitled to any part of the income of a trust estate ". In the case of a trustee in bankruptcy, who has not reached the point of having a surplus in his hands all creditors having been paid, there can be no doubt that there is no beneficiary presently entitled to any part of the income of the trust estate. The creditors are not presently entitled to income as such. It was suggested that s. 99 pre-supposes the existence of beneficiaries who have or might have some title to the income but are not presently entitled, and that the section cannot apply in a case where such a beneficiary could not exist. That is to mistake the purpose of the provision. Section 97 is the provision which shows the primary policy of the Division, which is to ensure that the income to which a beneficiary is presently entitled is included in

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his income so that it forms part of his aggregate taxable income. That policy is carried out in detail by ss. 98, 100 and 101 in the special cases for which those sections provide. Section 99 deals with the contrary case where these provisions cannot apply and makes the trustee liable simply in default of persons filling the condition for which ss. 97, 98 and 101 provide. If the activities of the official receiver in the course of his administration of the trust estate have given rise to taxable income there can be no doubt that it is income of the trust estate within s. 99. The real question in the case is whether the official receiver has derived taxable income in the course of his administration of the trust estate.

The difficulty in supporting the assessments which have in fact been made in respect of the supposed income of the official receiver is that they do not recognise that the official receiver is not in the same situation as the deceased debtor Rankin but that on the contrary as trustee he begins *ab initio* with the assets that come to his hands and is pursuing a course for their realisation to the best advantage. If he has made a gain or profit in his capacity as trustee of Rankin's estate by the realisation of the assets that came to his hands, it must be because on a comparison, on the one hand, of the value of the assets in the condition in which they came to his hands when the order for administration of Rankin's estate in bankruptcy was made with, on the other hand, the net proceeds of sale after the deduction of all expenditure, it appears that owing to his activities there has been a real gain or profit. It is only when this appears that, if the matter be considered logically, the question presents itself whether the activities which gave rise to the gain or profit are of such a kind that it must be considered income liable to tax in the official receiver's hands.

A trustee of an estate administered in bankruptcy may no doubt be carrying on a business or be carrying on or carrying out a profit-making undertaking or scheme within the definition of "income from personal exertion" in s. 6 (1) of the *Income Tax and Social Services Contribution Assessment Act* 1936-1954. But a trustee's purpose is to realise the estate so that he may fulfil the duty placed upon him by s. 112 (1) of the *Bankruptcy Act* 1924-1954 which requires him, with all convenient speed, to declare and distribute dividends amongst the creditors who have proved their debts. His power of sale given by s. 105 (*a*) enables him to sell the property in parcels and so does that given to him by s. 107 (*a*). The powers given by s. 107 (*a*) are subject to the resolution of the creditors or the leave of the court and it is a power given by that provision which warrants him in carrying on the business of a bankrupt.

But it enables him to do so only " so far as may be necessary for its beneficial winding-up ".

It is true that there is no direct inconsistency between the exercise of such powers for such a purpose and the production of income either from carrying on the business or the carrying on or carrying out of a profit-making undertaking or scheme within s. 6 (1) (definition of income from personal exertion) and s. 26 (*a*) of the *Income Tax and Social Services Contribution Assessment Act* 1936-1954. As was said by *Isaacs* J. in *Joshua Bros. Pty. Ltd.* v. *Federal Commissioner of Taxation* (1): " Capital is still capital, and, if it fructifies and produces income, as it may, the income is still income. If a company in process of liquidation has deposits in a bank or outstanding mortgage investments, the interest does not change its legal character by reason of the winding up resolution " (2). His Honour went on to speak of the fallacy of seeking to drown under the general term " assets " the inherent distinction between capital and income. His judgment proceeds: " A profit made by an isolated transaction outside trade by which property is simply transformed, say land into cash, is not income. It is then a mere change in form of capital by which the resultant form may be larger or smaller than the original form. No legal formula can determine for all cases whether an enhancement is increased capital or is income. It must be determined by commercial principles. But one thing is very clear, namely, that profits made in the ordinary course of business are income. It was contended on behalf of the appellant that the process of selling the company's stock was properly described as ' realization '. The same could be truly said of all sales in business " (2). But, true as this all is, the character which a trustee in bankruptcy fills and the purpose with which he enters into transactions have a dual importance in considering a claim that a taxable profit has arisen from his operations. In the first place the assets are vested in him as capital and they are vested in him without reference to their value or to any criterion of value. In the next place, conversion into money to the extent needed for payment of creditors is the object, not employment of the assets for the earning of income. We may put aside the carrying on of an indefinitely continuing business which with its goodwill may itself be realised as capital. Whatever else may be said about the nature of the transaction in the present case by which the work of reclamation was completed and the land sold, it clearly was a thing done once for all and for the purpose of converting the whole of the assets into money. There was no continuing business.

(1) (1923) 31 C.L.R. 490.

(2) (1923) 31 C.L.R., at p. 497.

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The profit, if there be one, on such a transaction must consist in an enhancement of price recovered above value at the inception. When you see that such a thing has occurred, then and only then does the question arise whether the enhancement of price recovered has been brought about in such a way as to bring it within the general conception of income or the special test laid down in s. 26 (*a*), a test which is included also in the definition already mentioned in s. 6 (1).

Again the transaction upon which the official receiver embarked was an entirety. He was not selling blocks of land as a person habitually trading in land. He was simply realising assets in the way which appeared most advantageous. His profit, if any, could not be ascertained by reference to the costs incurred by Rankin and considered to be apportionable to the blocks sold by the official receiver. No doubt taxable income must be ascertained annually and no one would deny that if gains from the transaction were taxable a profit for a year might be estimated provided, however, that the value at which the land is taken into the account at the opening of the year were a value known or ascertainable. But in the end it would on that footing be essentially a case for the application of s. 170 (9). In any case the manner in, or the basis upon, which Rankin was taxed has nothing to do with the question.

It is clear, therefore, that the assessments made by the commissioner are made up upon a basis erroneously conceived and for that reason cannot be supported. No facts are made to appear from which we can know whether the land, as it came to the official receiver with the work uncompleted, possessed an ascertainable value in his hands which has been enhanced by his activities, so that the net proceeds have been enlarged. Conceivably the commissioner's method of assessment is more favourable to the taxpayer than a correct method might prove to be, but that we cannot know, though we may guess that it is unlikely. If the value of the land as it came to the hands of the official receiver were to be assessed for the purposes of compensation or in order to assess a rate or tax upon its capital value, doubtless the valuers would take into account the expenditure of Rankin ; but it would be necessary also for them to consider what might be obtained for the land from persons who might acquire it for the purpose of completing the work and doing just what the official receiver has done : see *Turner* v. *Minister of Public Instruction* (1). But to obtain a value thus involves a process of discounting the estimated returns by the rate of profit which such persons would look for. To adopt such a

(1) (1956) 95 C.L.R. 245.

method would almost be the equivalent of opening the account with a value based on the net enhancement of return for which, according to opinion more or less expert, the official receiver or the creditors should look in deciding to complete the work and sell in sub-division. If that were done, the other items of the account on which taxable income would be assessed would serve little purpose but to adjust expected return with actual results.

But let it be supposed that by some means it could be ascertained that the land as it came to the hands of the official receiver possessed a quite definite value which could be and was in fact fixed and that an account made up on that foundation disclosed a clear profit. On that assumption it is difficult to resist the conclusion that the activities of the official receiver producing the result would fall within s. 26 (*a*). It may be conceded that for the purpose of that provision the " profit-making undertaking or scheme " must be one pursued by the taxpayer, that is to say by the official receiver. But there can be little doubt that in embarking, in pursuance of the resolution of creditors, upon the course of strengthening the title to the land, persuading the Southport Town Council to continue the agreement and allow him to fulfil it, causing the work to be completed under contract and causing the sub-divisional sales to be made through commission agents, the official receiver was adopting a set plan with a view of securing from the ultimate sale of the land a much greater net return than otherwise could be expected. These activities were planned, organised and coherent. True it is that they formed only the final stages of a plan conceived by Rankin and carried partly into execution by him. But given the basal facts that land of a definite value was thus made to yield net proceeds considerably in excess of what otherwise could be obtained, it seems too difficult to deny that the official receiver adopted and pursued an undertaking or scheme that from his point of view satisfied the description " profit-making " and that he carried it out.

There is no reported case quite like this one. Moreover, although s. 26 (*a*) is founded on language which was used in judicial decisions (see *Premier Automatic Ticket Issuers Ltd.* v. *Federal Commissioner of Taxation* (1)) yet it provides a statutory criterion which must be applied directly and cannot be treated as going no further and producing no different result than would a criterion expressed as " exercising trade " or " carrying on a business ". English cases applying those tests cannot govern the application of s. 26 (*a*), although no doubt they may give some assistance. Of course in

(1) (1933) 50 C.L.R. 268, at pp. 297, 298.

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the end the question whether a case falls under the operation of s. 26 (*a*) must be determined as a matter of fact. It may be added that this is even more true of the essential question whether a profit was produced by the carrying on or carrying out of the undertaking or scheme.

But the Full Court is concerned with specific questions of law. Had it been otherwise it would have been easy, and no doubt it would have been proper, to dispose of the case simply by setting aside the assessments as misconceived basally and remitting them to the reconsideration of the commissioner. If it were objected to such a course that the taxpayer had not, by demonstrating that the basis of assessment was misconceived, sufficiently discharged the onus placed upon him by s. 190 an answer might be made depending on two considerations. One is that by destroying the assessments actually made upon him the taxpayer has advanced the proof a considerable distance, leaving nothing further than the bare logical possibility that even so he might turn out to be liable to no less tax, if the question of his assessability were examined afresh on a proper footing.

Secondly, having regard to what has already been said as to the difficulty of establishing a profit and as to the nature of the whole transaction as one and entire, it seems sufficiently unlikely that this logical possibility would turn out to be correct. But these are matters which would concern us only if we were called on to dispose of the appeals altogether.

As it is the questions submitted for the consideration of the Full Court should be answered to the following effect. The learned judge was at liberty and ought as a matter of law to find that the official receiver carried out a profit-making undertaking or scheme but not that what is shown as income is the profit arising therefrom ; because the basis of assessment is erroneous. The learned judge is, however, at liberty to find that some profits arose from the carrying out of such undertaking or scheme. He is so at liberty because the materials do not show the contrary, though they do show the assessments to be wrong. The official receiver is liable to be assessed under s. 99 on such profits if ascertained. There are no materials enabling the learned judge to quantify the profits.

Questions in the case stated answered as follows :—

As to question (1) *the learned judge was at liberty and bound so to find.*

As to question (2) *the learned judge was not bound or at liberty so to find.*

As to question (3) *the basis of such assessments being erroneous the learned judge was not bound or at liberty so to find.*

As to question (4) *the basis of the assessments being erroneous the learned judge was at liberty and bound so to find.*

As to question (5) *the learned judge was at liberty in respect of both of such years to find or to refuse to find that income was derived by the official receiver as such trustee being profits arising in the manner stated in part* (*b*) *of the question but not at liberty to find that income was derived being the proceeds of a business.*

As to question (6) *the learned judge was at liberty and bound to find that the official receiver was liable in respect of such income if any to be assessed under s.* 99 *of the Income Tax and Social Services Contribution Assessment Act* 1936-1954.

Costs of the hearing of the reference and case stated in the Full Court reserved for the judge disposing of the appeal.

Solicitors for the appellant, *O'Shea, Corser & Wadley.*

Solicitor for the respondent, *H. E. Renfree*, Crown Solicitor for the Commonwealth.

J. B.