

VOL. XII.—PART V.

No. 25*.—HIGH COURT OF JUSTICE, IRELAND
(KING'S BENCH DIVISION).—

28TH NOVEMBER, 1919, AND 26TH JANUARY AND
19TH MAY, 1920.

COURT OF APPEAL, IRELAND.—11TH, 12TH, 15TH AND
16TH NOVEMBER, AND 15TH DECEMBER, 1920.

HOUSE OF LORDS.—23RD AND 24TH JANUARY, 1922.

J. & R. O'KANE & Co. v. THE COMMISSIONERS OF INLAND
REVENUE.⁽¹⁾

Excess Profits Duty—Profits of trade—Realisation of trading stock by trader intending to retire from business—Question of fact—Finance (No. 2) Act, 1915 (5 & 6 Geo. V, c. 89), Section 38—Finance Act, 1918 (8 & 9 Geo. V, c. 15), Section 35 (1).

The Appellants, who carried on business as wine and spirit merchants, issued a circular letter early in the year 1916, announcing their decision to retire from business, and shortly afterwards they issued to their regular customers lists of spirits for sale. The lists were headed "Retiring from business" and contained certain conditions of sale which required, inter alia, that the purchaser should clear the goods from bond and retain the casks. During the year 1916 few sales were made, but during the year ended 31st December, 1917, practically the whole of the stock was sold. Meanwhile the Appellants had acquired a certain quantity of spirits up to the spring of 1917 under running contracts with distillers, but no other purchases were made.

The Appellants were assessed to Excess Profits Duty for the year 1917 in respect of the profits arising from the whole of their sales in that year, and, on appeal, the Special Commissioners found that they were still carrying on their trade during that period and that the profits in question were made in the ordinary course of trade.

Held, that there was ample evidence on which the Special Commissioners could arrive at their findings, and that the Appellants were accordingly liable to Excess Profits Duty in respect of the profits in question.

⁽¹⁾ Reported C.A., 55 I.L.T.R. 75, and H.L., 126 L.T. 707.

CASE

Stated under the Finance (No. 2) Act, 1915, Section 45 (5), and the Taxes Management Act, 1880, Section 59, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice in Ireland.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts, held on the 13th November, 1918, at Belfast, for the purpose of hearing appeals against Excess Profits Duty, J. & R. O'Kane & Company, late of 62-66 Great Patrick Street, and then of 132 Donegall Street, Belfast, Wholesale Wine and Spirit Merchants, hereinafter called the Appellants, appealed against an assessment to Excess Profits Duty in the sum of £27,903 for the accounting period commencing on 1st January, and ending on 31st December, 1917, made upon the Appellants by the Commissioners of Inland Revenue under the provisions of the Finance (No. 2) Act, 1915, Part III, and subsequent enactments.

The following facts were admitted or proved:—

1. The said sum of £27,903 was arrived at as follows, *videlicet*:—

12 months to 31st December, 1917—

Profits	£35,986
Add back Excess Profits Duty, 1915, charged as an expense in Profit and Loss Account for 1917	234
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	£36,220
Add 7 per cent. on decreased capital	469
	<hr/>
	£36,689
Deduct—Percentage standard £1,610	
Statutory excess 200	
	<hr/>
	1,810
	<hr/>
	£34,879
80 per cent.—£27,903 (as assessed for the accounting period).	
Note—Capital at 31st December, 1916	£16,302
Capital at 31st December, 1913	23,010
	<hr/>
Decreased capital	£6,708
7 per cent. on decreased capital £6,708 =	469
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The partners in the trade or business were Cornelius G. McKeown and James McKeown, trading as J. & R. O'Kane and Company, the Appellants.

The amounts in nearest round figures both of the purchases and the sales made by the Appellants in the four years 1914 to 1917 (both inclusive), and of their stock in each of those years are set forth in the following Table, viz. :—

	1914.	1915.	1916.	1917.		1914.	1915.	1916.	1917.
1st January— Stock on hand	£ 8,430	£ 9,024	£ 11,481	£ 6,456	Sales, less discounts	£ 21,928	£ 23,196	£ 20,081	£ 48,408
Purchases and duty, less discounts ...	18,388	25,088	8,709	4,961	31st Dec.— Stock on hand ...	9,024	11,481	6,456	1,020

2. Early in the year 1916 the Appellants decided to retire from business in due course, and issued from their offices and warehouse situate 62, 64, 66, Great Patrick Street aforesaid a circular under date 1st March, 1916, to their regular customers in the following terms :—

“ DEAR SIR (OR MADAM),

“ We have decided to retire from business, and wish to
“ embrace the opportunity of expressing our sincere thanks
“ to all our good friends for the generous support that has
“ been accorded us during so many years. We have the
“ pleasantest recollections of the friendly relations that have
“ always existed between us.

“ Wishing you the utmost prosperity,

“ We are, dear Sir (or Madam),

“ Yours faithfully,

“ J. & R. O'KANE & CO.

“ P.S.—We beg to hand you herewith Statement of
“ Account, and will thank you to give it your early atten-
“ tion. Please oblige by returning all empties as soon as
“ possible.”

At the same time as they issued that circular, the Appellants had in contemplation the early issue of another document, a specimen of which hereto annexed marked A. forms part of this Case. This document which the Appellants issued on or about the 24th March, 1916, to all regular customers was a Descriptive List of Whiskey and Rum for Sale in Bond, and the heading on its outside cover was “ Retiring from Business.” The Conditions of Sale were set forth in the said document (marked A.) on which are foot-notes to the effect (*inter alia*) that casks were not to be returned, but were to be paid for by purchasers. In the interval between the issue of the said circular and of the said document (marked A.) numerous customers who had received the circular made enquiries of the Appellants as to the quantities and prices of their stock-in-trade for disposal.

The Appellants were not desirous to sell their business as a going concern which they could have tried to do, and with every prospect of success, for when they did sell their stock-in-trade they wished to sell it to their regular customers, because they considered that that course of procedure would be only fair to them.

During 1916 there was not much demand, but in 1917 the Appellants were able to sell out practically the whole of their stock, and this fact is indicated in the copy of the Balance Sheet as on 31st December, 1917, and of the Trading and Profit and Loss Account for the year 1917, hereto annexed which is marked B. and forms part of this Case.

3. A copy of the list of the customers so supplied in that year, hereto annexed marked C., forms part of this Case⁽¹⁾, and particulars appear in such list of the value of the purchases made by such customers in 1915, 1916 and 1917.

A few of those in such list (marked C.) who are called customers, though they were in the same trade as the Appellants, had not been the regular customers of the Appellants, and those who come within that category are in such list numbered 2, 4, 6, 15, 17, 24, 39, 42, 55, 61, 62, 63, 64, 70, 71, 77, 83 and 84, and their purchases in 1917 were in value £15,600.

Taking No. 1 in that list (C.), viz. :—F. Lavery, a regular customer, as an illustration, his purchases in value in round figures in 1915 were £331, in 1916, £250, and in 1917, £6,151; again, No. 3, Mr. McDevitt, also a regular customer, his purchases were—in 1915, £318, in 1916, £291, and in 1917, £5,052 15s. 10d.

Those were the biggest purchases in value, but no definite conclusions can be drawn from value alone, because of the inflated prices of spirits. In every instance of purchase by regular customers there was a considerable increase in value over the value in their purchases in previous years. The Appellants had never offered stock for sale as per a list until they did so in 1916.

4. In the course of 1916, after the Appellants had decided to retire as aforesaid, in due course the Appellants prepared a Realisation Account made up to 31st December, 1916, but the precise commencing date is not shown in it. A copy of that Account hereto annexed marked D. forms part of this Case.

A balance of £20,492 4s. 1d. was carried forward. Some stock which had been included in that account sold in 1917 for £30,624 14s. 1d., and that account related only to stock which the Appellants had as at 31st December, 1915. The result of the sale or release of the business premises realising £980, the net sales of various trade items and office furniture by auction in July, 1917, for £231 14s. 7d. and book debts recovered, £2,873 8s. 8d., are all embraced in such 1917 Realisation Account D.

(1) Omitted from the present print.

The Appellants had not finally closed the accounts of their trade or business at the date of the hearing before us.

5. The Appellants had running contracts with various distillers to take a certain amount of spirits in each year, and having regard to the state of the market these contracts were beneficial to the Appellants, and therefore they kept to them, making after 31st December, 1915, more purchases of spirits in both 1916 and 1917, under these contracts. In 1916 such purchases amounted to £8,709 9s. 8d. net, and net sales (as above) £20,081 2s. 4d. which were carried into a Trading and Profit and Loss Account for 1916, showing £5,873 gross profit, and £3,878 4s. 10d. net profit. A copy of such Trading and Profit and Loss Account is hereto annexed (marked E.), and forms part of this Case. The results of similar purchases in 1917 appear in the trading account for that year.

Admittedly, those new purchases of stock sold to customers stand on a somewhat different footing for the reasons above shown to the realisation by sale of the stock in existence at 31st December, 1915.

6. On the 28th June, 1917, the Appellants had a sale on their business premises of stock by auction, but only a few hundred pounds worth were so sold, the result of which is embraced in the account for that year (B. as above), and the Balance Sheet at 31st December, 1917, (B.) shows that the Appellants retained then a substantial part of the business assets.

The Appellants moved after June, 1917, from 62-66 Great Patrick Street into offices in 132 Donegall Street, Belfast.

7. On a return for assessment to Excess Profits Duty made by the Appellants on 11th April, 1918, there was a statement that the Appellants desired to discontinue their business at the earliest possible date, which on the face of it showed that they were still in business, and the profits for the accounting period to 31st December, 1917, the subject of such return, were £36,689, being the basis of the sum brought into assessment for Excess Profits Duty for that year which is the subject of this Case.

The explanation given to us at the hearing, of the statements in the return referred to, was merely that the Appellants were indeed anxious to get out of business as soon as possible, and had then (April, 1918) only a little stock left. There were no purchases of stock in 1918, the said contracts referred to with the distillers having expired in the Spring of 1917, and there were no purchases by the Appellants after that event.

8. The Appellants also made up a Realisation Account to 31st December, 1917, and a copy of that account is hereto annexed marked F. This account also dealt, as in the case of the Realisation Account (D.) for 1916, with the stock as at 31st December, 1915, that is to say, with so much as remained of that stock at 1st January, 1917 (£20,492 4s. 1d.).

I. It was contended by Mr. Herbert Wilson, K.C., on behalf of the Appellants (*inter alia*)—

- (1) That the Appellants were not liable at all to be assessed in respect of the year 1917 for Excess Profits Duty, none of the stock having been disposed of in the ordinary course of their trade.
- (2) That Section 35 of the Finance Act, 1918, showed, on the face of it, that there was no such liability, and the assessment should therefore be discharged.

II. It was contended by the Surveyor, Mr. H. Edwards, on behalf of the Crown (*inter alia*)—

- (1) That the stock was sold, and the profits realised in the ordinary course of trade, as shown by the accounts, and the fact that for their own purposes the Appellants drew up a Realisation Account does not affect the questions at issue.
- (2) That the object of the issue of the said circular and the list to customers was to seize the advantage of high prices then obtaining, and that in view of those inflated prices no definite conclusions can be drawn from the size of the amounts only of the sales to customers.
- (3) That the Balance Sheet at end of 1917 shows that the Appellants retained a substantial part of the business assets, that only a small portion of the stock was sold by auction, the balance being disposed of by ordinary methods, there being in 1917 no less than 86 purchases.
- (4) That the figures of purchases, sales and stock shown by the accounts for the years 1914 to 1917 showed that the transactions were in the ordinary course of trade.
- (5) That the assessment was correct, and should be confirmed.

III. In reply, Mr. Wilson alluded to the fact that there were no purchases made after the contracts with the distillers had expired in the Spring of 1917. He contended that the circular and list of 1916 showed a *bona fide* intention to cease business, and the statement upon the returns of the Appellants, which statement had been commented upon by the Surveyor in the course of his argument, was quite correct in fact, because the Appellants had but a very small stock then (April 11th, 1918) left.

IV. Having regard to the evidence, we held that the Appellants were carrying on their trade or business⁽¹⁾, and were liable to be charged with £27,903 for Excess Profits Duty in respect of the profits arising therefrom for the accounting period which commenced on 1st January, and ended on 31st December, 1917, and we accordingly decided the question at issue in favour of the Crown, and confirmed the said assessment.

V. The Appellants, immediately upon the determination of the appeal, declared to us their dissatisfaction therewith as being erroneous in point of law, and in due course required us to state a Case for the opinion of the High Court pursuant to the Finance (No. 2) Act, 1915, Section 45 (5), and The Taxes Management Act, 1880, Section 59, which Case we have stated, and do sign accordingly.

VI. The question of law for the opinion of the Court is whether on the evidence the Appellants are liable to Excess Profits Duty on the amount by which their profits arising from their trade or business as wholesale wine and spirit merchants in the year 1917 exceeded the sum of £1,810.

If they are held to be so liable, it is admitted that the said assessment of £27,903 is correct.

H. W. PAGE-PHILLIPS, } Commissioners for the Special
P. WILLIAMSON, } Purposes of the Income Tax Acts.

Windsor House,
83, Kingsway,
London, W.C.2.

5th June, 1919.

(1) During the hearing of the appeal before the King's Bench Division it was agreed between the parties, at the suggestion of the Court, that the finding of the Commissioners should be amended so as to read "Having regard to the evidence we held that the Appellants were carrying on their trade or business, and that the profits were made on sales in the ordinary course of trade, and were liable to be charged with £27,903 for excess profits."

Exhibit " A. "

RETIRING FROM BUSINESS.

Attention is directed to the following parcels of Whiskey and Rum for sale in Bond. All these Whiskies have been bonded at 25 O.P.

J. AND R. O'KANE AND CO.,
62-66 Great Patrick Street,
Belfast.

24th March, 1916.

Murphy's (Midleton) Pot Still Whiskey.

Year.	Month.		Wood.	Where Lying.	Price per Original Liquid Gal.
					<i>s. d.</i>
1906	May	Butts	Fresh Sherry	Cork	13 6
1907	Dec.	Hhds.	" "	"	13 4
1908	April	Hhds.	Plain ...	"	12 11
1908	May	Butts	Fresh Malaga	"	13 1
1908	"	Hhds.	Fresh Sherry	"	13 2
1910	Dec.	Hhds.	" "	"	13 0
1910	"	Hhds.	Plain ...	"	12 9
1911	May	Hhds.	Fresh Sherry	"	12 9
1911	Dec.	Hhds.	" "	"	12 8
1911	"	Hhds.	Plain ...	"	12 5
1912	May	Hhds. and Quarters	Fresh Sherry	"	12 6
1912	Dec.	Hhds.	Fresh Sherry and Fresh Malaga.	"	12 3
1913	April and May	Puns, Hhds. and Quarters	Plain ...	"	11 8
1913	"	Hhds. and Quarters	Fresh Sherry	"	11 11
1913	Dec.	Butts	Plain ...	"	11 0
1913	"	Butts and Hhds.	Fresh Malaga	"	11 3
1913	"	Hhds.	Fresh Sherry	"	11 3
1913	"	Hhds.	Fresh Brandy	"	11 2
1914	May	Butts, Hhds. and Quarters	Plain ...	"	10 6
1914	"	Hhds.	Fresh Sherry	"	10 9
1914	"	Hhds.	Fresh Malaga	"	10 9
1914	"	Hhds.	Fresh Brandy	"	10 8
1914	Dec.	Butts and Hhds.	Plain ...	"	10 0
1914	"	Butts	Fresh Malaga	"	10 3
1914	"	Hhds. and Quarters	Fresh Sherry	"	10 3
1915	April	Butts	Fresh Malaga	"	9 9
1915	"	Butts and Quarters	Rum and Plain	"	9 6
1915	"	Hhds.	Fresh Sherry	"	9 9
1915	"	Hhds. and Quarters	Fresh Brandy	"	9 8

The foregoing of Murphy's are offered for sale, in Bond, at Cork, at prices quoted per original liquid gal. Not for resale directly or indirectly in Munster, subject to being unsold on hearing from you. Terms—Nett Cash on receipt of Invoice, when Transfer will be issued. Casks to be paid for, and not returnable. Butts 35*s.*, Hhds. 25*s.*, Qrs. 17*s. 6d.* each. Goods subject to Warehouse Rent, and entirely at Purchaser's Risk from date of Invoice.

NOTE.—Further parcels of Whiskey and Rum (of which details are not here reproduced) were offered for sale on similar conditions.

Exhibit "D."

MESSRS. J. & R. O'KANE & CO., GREAT PATRICK STREET, BELFAST.

REALISATION ACCOUNT MADE UP TO 31ST DECEMBER, 1916.

	£	s.	d.	£	s.	d.
To Cash paid Northern Bank, being amount due to them	103	18	2			
Cash to Sundry Creditors, amount due after deduction of Discounts and Returns... ..	5,521	7	7			
Cash expenses in connection with collection of Book Debts and Realisation of Stock	2,118	18	5			
Cash—C. G. McKeown on account of capital	498	4	6			
Cash—James McKeown on account of capital	1,924	5	1			
Balance carried forward	20,492	4	1			
	<hr/>					
	£30,658	17	10			
By Cash on hand						
Cash proceeds of collection from Book Debts after allowing for Discounts and Returns				13,457	8	9
Cash realised from sale of Stock				21,894	19	9
<i>Less—</i>						
Duty advanced on behalf of Customers to Customs				5,009	5	9
	<hr/>					
				16,885	14	0
	<hr/>					
	£30,658	17	10			

We hereby certify this account as a true record of the transactions in connection with the realisation of the Estate of Messrs. J. & R. O'Kane & Co.

Belfast, 20th June, 1917.

G. PICKERING & CO.

Exhibit "E."

MESSRS. J. & R. O'KANE & CO., GREAT PATRICK STREET, BELFAST.

BALANCE SHEET AS AT 31ST DECEMBER, 1916.

CAPITAL AND LIABILITIES.		£	s.	d.	£	s.	d.
Sundry Trade Creditors on open Accounts, as per Ledger		512	7	6			
CAPITAL ACCOUNTS—							
C. G. McKeown, Balance, 1st January, 1916	6,890	11	10½				
Add Cash	44	12	6				
	6,935	4	4½				
Less Drawings	107	10	0				
	6,827	14	4½				
C. G. McKeown, Balance 1st January, 1916	10,659	17	10				
Add Half Net Profit for year	1,939	2	5				
	12,599	0	3				
Deduct Drawings	435	6	0				
	12,163	14	3				
PROPERTY AND ASSETS.							
Property consisting of Warehouse and Offices situate 62/66 Great Patrick Street, Belfast .					2,813	8	9
STOCK-IN-TRADE—							
Goods Duty Paid	787	16	7				
Goods in Bond... ..	5,667	13	10				
	6,455	10	5				
Horse, van and harness	441	19	3				
Empties in Warehouse and in Bond	426	16	5				
Stationery, etc.	18	10	10				
Office Furniture	79	14	4				
Trade Utensils	88	12	11				
Do. Sundries	92	2	8				
	180	15	7				

Exhibit "F."

MESSRS. J. & R. O'KANE & CO., DONEGALL STREET, BELFAST.

REALISATION ACCOUNT MADE UP TO 31ST DECEMBER, 1917.

	£	s.	d.	£	s.	d.	£	s.	d.
TO CASH—SUNDRY EXPENSES									
ON REALISATION—									
Repairs	43	18	11						
Trade Utensils	1	15	9						
Travelling	150	0	0						
Wages	102	11	0						
Rent and rates	115	11	1						
Postages and Telegrams	14	10	10						
Freight	12	17	10						
General Expenses	277	11	10						
				718	17	3			
C. G. McKeown on account									
of Capital	27,551	16	9						
Jas. McKeown	16,010	16	2						
Balance on hand	10,920	11	3						
				£55,202	1	5			
By Balance on hand							20,492	4	1
Amount realised from									
Stock	32,694	11	11						
Duty paid to									
Customers	2,069	17	10						
				30,624	14	1			
Cash from property	1,000	0	0						
Less Costs	20	0	0						
				980	0	0			
T. H. Convery, Pro-									
ceeds of Auction Sale—									
Trade Sundries	15	5	6						
Office Furniture	22	16	0						
Trade Utensils	121	11	11						
Empties	72	1	2						
				231	14	7			
Book Debts recovered				2,873	8	8			
				£55,202	1	5			

The case came before the King's Bench Division of the High Court of Justice in Ireland, and was argued on the 28th November, 1919, before Gibson and Samuels, *JJ.*, and was re-argued before Molony, *C.J.*, and Gibson and Samuels, *JJ.*, on the 26th January, 1920, when judgment was reserved.

Mr. S. L. Brown, K.C., Mr. Herbert Wilson, K.C., and Mr. Maguire appeared as Counsel for the Appellants, and the Solicitor-General (Mr. D. M. Wilson, K.C.), Mr. W. E. Wylie, K.C., and Mr. G. W. Shannon for the Crown.

On the 19th May, 1920, judgment was given unanimously against the Crown, with costs.

JUDGMENT.

Molony, C.J.—In this case the question submitted for the opinion of the Court is as to whether, on the evidence, the Appellants are liable to Excess Profits Duty on the amount by which their profits arising from their trade or business of wholesale wine and spirit merchants in the year 1917 exceeded the sum of £1,810. The Commissioners have held that they are so liable, and the question which we have to determine is whether there is evidence to support that finding. (*American Thread Co. v. Joyce*⁽¹⁾, 108 L.T. 353, at p. 354, per Lord Haldane; *Gramophone and Typewriter, Ltd. v. Stanley*⁽²⁾, [1908] 2 K.B. 89, at page 95, per Cozens-Hardy, M.R.; *Cowan v. Seymour*⁽³⁾, [1920] 1 K.B. 500, at page 512, per Atkin, L.J.).

The facts of the case will be more fully stated in the judgment of my brother Samuels, with which I agree, and it is only necessary for me to briefly summarise them here.

The Appellants had carried on business as wine and spirit merchants in the City of Belfast for a number of years, and in the year 1916 they decided to retire from business. They communicated this decision to their customers in a circular dated the 1st March, 1916, which is set out in the Case, and on the 24th of March, 1916, they also issued to their customers a circular setting out the amount and nature of the goods which they had for sale, and in this circular they specifically stated that they were retiring from business.

It is found by the Commissioners that the Appellants were not desirous of selling their business as a going concern, and that they could have tried to do so with every prospect of success, but that they wished instead to dispose of their stock to their regular customers.

In 1916 there was not much demand for their stocks, but in the following year they were able to dispose of practically their entire stock, and they realised thereby the sum of £48,402 18s. 1d.

(¹) 6 T.C. 163. (²) 5 T.C. 358, at p. 374. (³) 7 T.C. 372, at p. 381.

(Molony, C.J.)

On the 28th June, 1917, they had a sale on their business premises by auction, but only a few hundred pounds' worth of stock was thus sold, and in the same month they sold their business premises in Great Patrick Street, and moved into offices in Donegall Street, Belfast.

They purchased no stock after the time that they had decided to retire, except that they had running contracts with some distillers to take a certain amount of spirits in each year up to 1917, and under those contracts they purchased stock in the year 1917 which they proceeded to sell, together with their old stock, and at the close of 1917 they still had stock in hand amounting in value to £1,020.

So far as the stock purchased in 1917 is concerned, the Appellants are liable to account for the profits, but the Commissioners have found in this case that the Appellants are liable to account not only for these profits, but also in respect of all the transactions which took place in the year 1917. They place reliance upon a return dated 11th April, 1918, prepared by a firm of accountants, and signed by one of the partners of the Appellants' firm, in which the amount of profits for the year 1917 is stated to be £36,689, but this statement, though a relevant fact, is not conclusive against the Appellants if it was prepared upon a wrong basis in law. Income Tax and Excess Profits Duty are only payable upon profits as distinct from the realisation of capital, and the Case stated by the Commissioners proceeds upon the basis that the Appellants honestly and *bona fide* desired to retire from business, but that by means of the method which they adopted the realisation was unduly prolonged. The mere fact, however, that the realisation extended over a long period does not make the Appellants liable. They would be liable if they were during that year carrying on their business, and if the profits had been made on sales in the ordinary course of trade.

It was agreed that the case should be dealt with on the basis that the Commissioners had so found, and by consent an amendment was made in the Case accordingly, but I am unable to see that there is any evidence upon which such a finding can be supported.

A person has stock, and he wishes to retire from business. It is open to him to dispose of his business and trading stock in any way he deems right. He is under no obligation to sell his assets at once, but so long as he can be considered as continuing in trade, and as using his assets for the purposes of his trade, he is then liable on the profits that he makes thereby.

The principle was stated in the case of *The Hudson's Bay Co., Ltd. v. Stevens*, 5 T.C. 424, by Farwell, L.J., (at page 437) :

" It is well settled that income, not capital, is taxable under the

(**Molony, C.J.**)

“ Income Tax Acts; and that income is so taxable notwithstanding that on an adjustment of accounts part of the sums accruing as income ought to go to recoup capital. . . . It is clear, therefore, that a man who sells his land, or pictures, or jewels, is not chargeable with Income Tax on the purchase money or on the difference between the amount that he gave and the amount that he received for them. But if, instead of dealing with his property as owner, he embarks on a trade in which he uses that property for the purposes of his trade, then he becomes liable to pay, not on the excess of sale prices over purchase prices, but on the annual profits or gains arising from such trade, in ascertaining which those prices will, no doubt, come into consideration.”

I hold that the sales of the old stock in 1917 were not sales in the ordinary course of trade, but were part of the realisation of the trading stock in winding up the business and consequently are not liable to Income Tax. Those sales, however, would clearly come within the provisions of Section 35 of the Finance Act, 1918, but as that Section only applies to sales after the 22nd of April, 1918, it has no application to the present case.

In my opinion, therefore, the Appellants are not liable to the assessment of £27,903, but they are liable to account for the profits arising from the sale of the stock which they acquired in 1917 in pursuance of the contracts previously existing.

Gibson, J.—The function of the Court being directed to the determination of questions of law on ascertained facts, and the decision of the Commissioners as to the facts, if there was evidence reasonably supporting such decision, binding the Court, I have felt difficulty in knowing what were the factors which led the Commissioners to their ultimate conclusion. They held that the winding-up of the business was *bona fide* and real, and apparently that the duration of realisation was not unreasonable. Nor does it appear that the continuance of the business to the small extent for which liability is admitted was for the purpose of enabling the capital stock of the ceasing business to be advantageously disposed of. Sections 31 and 35 of the Finance Act, 1918, plainly introduce a new subject of taxation which previously had not been liable in respect of Excess Profits Duty. Section 35, Sub-section (1), consists of two parts, dealing with a business in process of winding-up—the present case—and a business actually at an end. Whatever may have been the reasons on which the Commissioners acted, the materials disclosed in the Case do not enable me to hold that the traders, who certainly would have been within Section 35 if that enactment had been in force, were already liable. I therefore concur in the result stated by my Lord, though I should have desired to know exactly the elements on which the conclusion of fact below was intended to be based. The return relied on by Mr. Wylie

(Gibson, J.)

cannot be taken as a conclusive admission of the fact of liability; on the evidence it was apparently the result of a mistake of law. If the sales, in respect of which it is sought to charge Excess Profits Duty, represent capital selling off in the legitimate process of closing a business honestly intended to be wound up, such sales are not converted into sales in the ordinary course of trade by reason of the other matters appearing in the Case.

Samuels, J.—The firm of J. and R. O'Kane and Company appeals against an assessment to Excess Profits Duty in the sum of £27,903 for the accounting period commencing 1st January, 1917, and ending 31st December, 1917.

The question of law stated by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the Court is: "Whether on the evidence the Appellants are liable to Excess Profits Duty on the amount by which their profits arising from their trade or business as wholesale wine and spirit merchants in the year 1917 exceeded the sum of £1,810. If they are held to be so liable, it is admitted that the said assessment of £27,903 is correct."

The sum of £1,810 represents percentage standard of £1,610, and the statutory excess of £200 for the purpose of the Excess Profits Duty.

In paragraph IV of the Case, the Commissioners stated that: "Having regard to the evidence, we held that the Appellants were carrying on their trade or business, and were liable to be charged with £27,903 for Excess Profits Duty in respect of the profits arising therefrom for the accounting period commencing on 1st January, and ending on 31st December, 1917, and we accordingly decided the question at issue in favour of the Crown, and confirmed the said assessment."

At the hearing before this Court, this finding was, by consent of the Counsel for the Appellants and Respondents, amended by adding, "and that the profits were made on sales made in the ordinary course of trade."

From the manner in which the Case has been stated, I consider, to use the words of Cozens-Hardy, M.R., in *Gramophone and Typewriter, Ltd. v. Stanley*⁽¹⁾, [1908] 2 K.B. 89, at page 95, it is open, and was intended by the Commissioners that it should be open, to the Court to say whether the evidence justified what the Commissioners held (see also the judgment of Hamilton, J., in *American Thread Co. v. Joyce*, 104 L.T. 218, 6 T.C. 1, and of the Court of Appeal, 106 L.T. 171, and House of Lords, 108 L.T. 353, 6 T.C. 163).

The Case must be scrutinized to ascertain whether there is any evidence to support the legal conclusion arrived at by the Special Commissioners.

(1) 5 T.C. 358, at p. 374.

(Samuels, J.)

The following facts were found by the Commissioners:— Early in 1916, Messrs. O’Kane and Company decided to retire from business in due course, and on the 1st March they issued a circular to their regular customers informing them of this decision. They enclosed their accounts with the circular, and requested a return of all empties as soon as possible.

At the same time as they issued that circular the Appellants had in contemplation the early issue of another document which they sent out to their regular customers on 24th March, 1916. It was headed on the outside cover, “Retiring from Business”; it contained a descriptive list of whiskies and rum offered for sale lying in bond. The Conditions of Sale set out in it contained foot-notes to the effect that casks were not to be returned, but were to be paid for by purchasers.

In the interval between the issue of the circular of 1st March and that of the 24th March, numerous customers who had received the first circular made enquiries as to the quantities and prices of the stock-in-trade for disposal.

The Commissioners find that: “The Appellants were not “desirous to sell their business as a going concern which they “could have tried to do with every prospect of success, for when “they did sell their stock-in-trade they wished to sell it to their “regular customers, considering that this course of procedure “would be only fair to them.”

During 1916 there was not much demand, but in 1917 the Appellants were able to sell out practically the whole of their stock, and this fact is indicated in the Balance Sheet as on 31st December, 1917, and the Profit and Loss Account for the year 1917 annexed to the Case. The Appellants had never offered stock for sale as per a list until they did so in 1916.

In 1916, after they had decided to retire, a realisation account was prepared made up to 31st December, 1916. A balance of £20,492 was carried forward; some of the stock included in that account was sold in 1917 for £30,624 and that account related only to stock which the Appellants had as at 31st December, 1915. The realisation account for 1917 also forms part of the Case.

The firm had carried on business in Great Patrick Street, Belfast, but they sold their interest in these premises, together with the office furniture and trade utensils, by public auction on 28th June, 1917, and changed their address to 132, Donegall Street. The result of these sales is shown in the realisation account for 1917.

The firm, however, had not finally closed the accounts of their trade and business at the time of the hearing before the Special Commissioners on 13th November, 1918.

(Samuels, J.)

The realisation account to 31st December, 1917, also dealt—as in the case of the realisation account of 1916—with the stock at 31st December, 1915, that is to say, with so much of that stock as remained unsold at 1st January, 1917 (£20,492).

It appears that after the Appellants had determined to retire in March, 1916, they made no purchases of stock-in-trade with the following exceptions:—They had running contracts with various distillers to take a certain amount of spirits in each year; these contracts were beneficial, and after 31st December, 1915, they made purchases under these contracts in both 1916 and 1917. There were no purchases of stock in 1918, the contracts with the distillers expired in the spring of 1917, and there were no purchases by the Appellants after that. The result of the dealings under these contracts is shown in the accounts, and a summary is given in the Case.

The Commissioners state that admittedly these new purchases of stock sold to customers stand on a somewhat different footing to the realisation by sale of the stock in existence at 31st December, 1915, and Counsel for Appellants do not contest their liability to any assessment which may properly be attributable to these particular transactions. What the Court, therefore, has to decide is whether the realisation by sale of the stock-in-trade of the Appellants, as it existed on 31st December, 1915, has under the facts stated rendered them liable to Excess Profits Duty under the Finance (No. 2) Act, 1915.

Considerable reliance was placed by the Crown upon the 7th paragraph of the Special Case, which states that—“On a return for assessment to Excess Profits Duty made by the Appellants on 11th April, 1918, there was a statement that the Appellants desired to discontinue their business at the earliest possible date, which on the face of it shows they were still in business, and the profit for the accounting period to 31st December, 1917, the subject of such return, was £36,689, being the basis of the sum brought into assessment for Excess Profits Duty for that year, which is the subject of this Case.” It was urged that the return shows in the “Statement of Allowances and Reliefs Claimed,” relating to the 1917 accounts, that the Appellants then considered themselves liable to pay the £27,903 now claimed for Excess Profits Duty. On looking at the return, it appears that it was made in reply to a requisition dated 28th November, 1917, for return of profits for the accounting period to 31st December, 1916. I do not, however, consider that this return should be taken as evidence of liability to the assessment on the part of the Appellants. They cannot be estopped by it from contesting the validity of the assessment, and if they were then mistaken as to their legal position they should not be prejudiced by any statement made under such misapprehension. The passages relied upon in the return may

(Samuels, J.)

be compared to some extent with an incident referred to by the Lords Justices in their judgments in the *Gramophone* case—*Gramophone and Typewriter, Ltd. v. Stanley*⁽¹⁾, [1908] 2 K.B., at pages 95, 102. A speech of the Chairman and a report of the shareholders had treated the gross profits of the German Company as profits of the English Company. The Crown had relied upon this as evidence, and as an admission that the English Company were carrying on business in Germany, and that the profits made in Germany were accordingly liable to assessment under the Income Tax Act. Cozens-Hardy, M.R., dealing with this contention of the Crown, said: "In my opinion, it " would be wrong to attribute to the loose and inaccurate " language of the Chairman a force sufficient to over-ride the " formal acts of both the English Company and the German " Company and all the other circumstances of the case." And Lord Moulton (then, Fletcher Moulton, L.J.) said: "The only " special circumstances on which Counsel for the Crown relied " (beyond the fact that the English Company was the holder " of the whole of the shares of the German Company) are to be " found in the speech delivered by the Chairman of the English " Company at a general meeting of the shareholders and in a " report to those shareholders which was put before them at " that meeting. In my opinion, it is impossible to look upon " such statements as altering the legal position of the English " Company, or creating any estoppel against it."

Similarly in this case the statement embodied in the return cannot, in my opinion, be looked upon as altering the legal position of Messrs. O'Kane and Company, or creating any estoppel against them.

In my opinion, the finding of the Commissioners that the Appellants were carrying on their trade or business and were liable to be charged with £27,903 for Excess Profits Duty in respect of the profits arising therefrom for the accounting period which commenced in 1st January, and ended on 31st December, 1917, and the admission that the profits were made on sales made in the ordinary course of trade, does not determine the question of liability to the assessment. In the view that I take of the case, the test of liability depends not upon the continuance of the firm, but upon the particular character of the sales effected by the firm. We must decide whether the profits on these sales, all of which took place prior to 22nd April, 1918, were such annual profits or gains as would be liable to Income Tax. Judged by this criterion, I think they would not be liable to the assessment to Excess Profits Duty which has been made. The facts as found seem to me to admit of only one conclusion—that the sales in question were realisation sales; that they were capital transactions incident to the winding up of the business,

(1) 5 T.C. 358, at pp. 375 and 379.

(Samuels, J.)

and that the amount realised was not income within the Income Tax Code, which, in the words of Lord Halsbury in *Secretary of State, etc., for India v. Scoble*⁽¹⁾, "never was intended to "tax capital, as income at all events."

I do not consider that the finding that the Appellants had not finally closed the accounts of their trade or business at the date of the hearing before the Special Commissioners, affects the legal liability to assessment. The realisation was, it is true, prolonged. The sales had begun in March, 1916, realisation was not fully completed before the end of the accounting period, but there is no legal differentiation between a realisation carried into effect by one sale and a realisation carried into effect by a series of sales, and if traders dispose of their capital stock-in-trade with the object of winding up their business to the best advantage, through a series of transactions, the proceeds of such extended realisation are in the same position, so far as liability to assessment is affected, as if they resulted from one summary disposition. If, as in this case, the realisation is prolonged, the merchants will naturally require an extended time for finally closing their accounts, and in this point of view Messrs. O'Kane and Company may be still carrying on business. But if the sales were—as in my opinion the evidence shows they were—realisation sales on retirement, and capital transactions which took place before 22nd April, 1918, the assessment to Excess Profits Duty cannot be sustained. The wording of Section 35 (1) of the Finance Act, 1918 (8 & 9 Geo. V, c. 15), which created a new liability to Excess Profits Duty in the cases of sales after 22nd April, 1918, shows that sales, the profits of which are made liable to the duty, may take place while the trading still continues. It deals with "sales otherwise than in the ordinary course of trade of the "trading stock belonging or formerly belonging to any trade or "business," and provides that "where any such sale takes "place after a trade or business has ceased, the trade or business "shall be deemed to have been carried on up to and including "the date at which the sale takes place." As the sales in the present case took place before the 22nd April, 1918 (the date of the Budget Resolution of that year), the liability of the Appellants depends upon the Finance (No. 2) Act, 1915 (5 & 6 Geo. V, c. 89), Section 38 (1), which first imposed the Excess Profits Duty, and provided that there should be charged, levied and paid on the amount by which the profits arising from any trade or business to which the Act applied in any accounting period exceeded by more than two hundred pounds the pre-war standard of profits as defined by the Act, an Excess Profits Duty of fifty per cent. of that excess. This fifty per cent. was by the Finance Act of 1916 raised to sixty per cent., and in 1917 to eighty per cent., at which rate it was continued in 1918.

(1) 4 T.C. 618, at p. 624.

(Samuels, J.)

Section 40 (1) of the Finance (No. 2) Act, 1915, provided that the profits arising from any trade or business should be separately determined for the purpose of Excess Profits Duty, but should be so determined on the same principles as the profits and gains of the trade or business are or would be determined for the purpose of Income Tax, subject to the modifications set out in the First Part of the Fourth Schedule to the Act, and any other provision of the Act.

Section 35 (1) of this Act provides that where any person has paid Excess Profits Duty under this Act the amount so paid shall be allowed as a deduction for the purpose of Income Tax in computing the profits and gains of the year which included the end of the accounting period in respect of which the Excess Profits Duty has been paid.

This privilege of deduction for the purpose of Income Tax is not allowed in the case of transactions after the 22nd April, 1918, coming within Section 35 of the Finance Act, 1918 (8 and 9 Geo. V, c. 15). Section 31 of that Act provides that : " Any excess profits duty which becomes chargeable by virtue only of the provisions of this Act relating to profits from the sale of trading stock otherwise than in the ordinary course of trade, shall not for the purpose of the provisions of Section 35 of the Finance (No. 2), Act, 1915, which enacts that where a person has paid excess profits duty under that Act, the amount so paid shall be allowed as a deduction in computing profits and gains for the purpose of income tax, be deemed to be excess profits duty under that Act."

Mr. Herbert Wilson, K.C., effectively relied, in my opinion, upon the contrast between the 35th Section of the Act of 1915, and the 31st Section of the Act of 1918, as showing that the profits for the first time captured by the 35th Section of the Act of 1918 as arising from the sale of trading stock, or part of the trading stock, otherwise than in the ordinary course of trade, are altogether different to the profits which are assessable to Excess Profits Duty under the Act of 1915, which were taxable upon a different basis.

It was argued for the Crown that Section 35 (1) of the Act of 1918 should be considered as declaratory of Section 38 (1) of the Act of 1915. I cannot agree with this contention. The 35th Section of the Act of 1918 is clearly not retrospective. It only deals with sales taking place after the 22nd April, 1918, and was evidently intended to bring within the grasp of the Excess Profits Duty transactions which up to that date had escaped assessment.

Probably a very large number of such transactions escaped because, being capital realisation, they would not be assessable for the purpose of Income Tax.

I take an illustration from Mr. Snelling's practical book on the Excess Profits Duty, 4 Ed., p. 185.

(Samuels, J.)

“ Assume that a merchant's stock-in-trade cost him £10,000. At current prices he might perhaps be able to sell his stock in the ordinary course of trade for £30,000, his gross profit being £20,000. It is probable that such a series of transactions would yield a large excess profit, and that perhaps £12,000 (of the £20,000) would be payable as Excess Profits Duty; the gross profit remaining would be £8,000.

“ But the merchant might close his business, and form a company to purchase the stock for £25,000. If this sale took place after he had ceased to trade, and merely as incidental to the closing of his business, the ‘ gross profit ’ of £15,000 would not heretofore be considered to be a trading profit. It would not be liable to Excess Profits Duty, and the merchant would retain £15,000 instead of £8,000. The new company might sell the stock in a series of trading transactions for £30,000, but its gross profits would be £5,000 only, and liability to Excess Profits Duty would be little or nothing.”

To bring such transactions within the scope of the Excess Profits Duty it required the statutory fiction of “ deeming ” embodied in the 35th Section of the Finance Act of 1918. This fiction makes the profits arising from the class of sales characterised in that Section to be profits arising from a trade or business; and it can galvanise into a prolonged statutory existence a business which has ceased to be, but this operation can only take place where the sale occurs after 22nd April, 1918. The sales that we have to consider took place before that date.

The view I take of the facts as found is that there is no evidence to support the decision of the Special Commissioners, nor is it clear what was the precise construction they placed upon the Finance Act (No. 2) of 1915 under which the assessment has been made. The Court is, in my opinion, in a very similar position to that occupied by the Judges reviewing the decision of the Special Commissioners in *Farmer v. Cotton's Trustees*.⁽¹⁾ In that case an assessment had been made to Inhabited House Duty, and the Special Case set out the facts and the decision of the Commissioners without clearly indicating the legal view the Commissioners took of the effect of the evidence.

Earl Loreburn said⁽²⁾ in the House of Lords :

“ In the present case the Commissioners decided that the premises in question were not divided into and let in different tenements within the meaning of the Act, and as their determination is conclusive, unless it be erroneous in point of law, we have no jurisdiction to review it upon any issue of fact. We could, of course, interpose if it were clear that the Commissioners had proceeded upon a wrong construction of the Act, and I think they did by regarding the question as one merely

(1) 6 T.C. 590.

(2) *Ibid.* at p. 599.

(Samuels, J.)

“ of structural separation, but they have not told us what construction they placed upon the Act. If it were necessary, I should be disposed to move that this case be remitted for that information to be given. But I do not think it necessary, because there is another ground of law upon which I think the Commissioners are wrong. There is upon a true construction of the Act no evidence upon which their decision can be supported. They have given us the relevant facts in detail, and we can see for ourselves that taking those facts as found there are no materials at all upon which the conclusion they reached can be based. There was error in law, because there was no evidence for their conclusion when the Act is rightly construed.” And Lord Parker of Waddington said⁽¹⁾ the scheme of the Taxes Management Act, 1880, “ is to make the determination of the Commissioners final and conclusive on all questions of fact, and to allow an appeal only on questions of law. . . . In the special case, the Commissioners are bound to set forth the material facts, and also their determination, which is objected to as wrong in law. No Court has jurisdiction to go behind the facts so stated, but any Court which has seisin of the matter may reverse, affirm or amend the determination of the Commissioners on any point of law. It may not always be easy to distinguish between questions of fact and questions of law for the purpose of the Taxes Management Act, 1880, or similar provisions in other Acts of Parliament. The views expressed in this House have been far from unanimous, but in my humble judgment where all the material facts are fully found, and the only question is whether the facts are such as to bring the case within the provisions, properly construed, of some statutory enactment the question is one of law only.”

In the present case the facts, in my opinion, as found by the Commissioners are not such as to bring the case within the provisions properly construed of the Finance (No. 2) Act, 1915, Section 35, and the assessment to Excess Profits Duty was erroneous.

The Crown having appealed against the decision in the King's Bench Division, the case was argued before the Court of Appeal in Ireland (Sir James Campbell, *L.C.*, and Ronan and O'Connor, *L.JJ.*) on the 11th, 12th, 15th and 16th November, 1920, when judgment was reserved.

Mr. W. E. Wylie, K.C., Mr. G. W. Shannon and Mr. H. Kennedy appeared as Counsel for the Crown, and Mr. Herbert Wilson, K.C., Mr. S. L. Brown, K.C., and Mr. M. C. Maguire for Messrs. O'Kane.

On the 15th December, 1920, judgment was given unanimously in favour of the Crown, with costs, reversing the decision of the Court below.

⁽¹⁾ 6 T.C. at p. 600.

JUDGMENT.

Sir J. Campbell, C.—The Respondents were partners in the business of spirit merchants which they carried on in Belfast. In 1916 they resolved to discontinue trading and proceeded to realise their stock. They have been assessed in the sum of £27,000 as excess profits for the year 1917 as resulting from this realisation. I shall not criticise the figures or calculations upon which this sum is based, and am content to accept the estimate of experienced officials such as the Special Commissioners of the Inland Revenue, more especially as eminent Counsel for the Respondents have agreed that it is correct, and were precise and distinct in their assurance to the Court that the sole and only question involved was that of liability. Upon this question the case of *The Spanish Prospecting Company, Limited*, [1911] 1 Ch. 92, which was not cited before us, and appears to have been overlooked by Counsel and by the Court in the King's Bench Division, is of supreme importance, as it answers by anticipation every point that was made on behalf of the Respondents. Their whole case as presented by their leading Counsel, Mr. Brown, was shortly as follows: This sum of £27,000 was profits, and these profits were made in the carrying on of the business, but they were not profits in the sense that made them liable for the Excess Profits Duty, as they were made by the sale of the stock-in-trade as a means of realisation in the *bona fide* winding-up of the business, and without any replacement of the stock so realised. He contended, therefore, that as these profits were not made in the ordinary course of business, but as a means of, and in the course of, realisation in the winding-up of the business, they were, in accordance with well settled principles, not assessable for Income Tax under Schedule D, and, inasmuch as the liability for Excess Profits Duty was to be ascertained by the same principles as those regulating liability for Income Tax, the profits in this case must be held to be exempt from the duty. The only doubt I had at any period of the argument was due to this contention and I asked more than once how the law stood as to liability for Income Tax in respect of stock-in-trade realised at a profit in the due course of winding-up a business, whether by voluntary or compulsory liquidation, and while Counsel for the Respondents confidently replied that it was well settled that no Income Tax would be payable in respect of such gains, Counsel for the Inland Revenue contended that it would, and Mr. Shannon cited several cases from the Income Tax Cases, Vol. 5, in support of this contention; but it did not appear to us then, nor have I been able to satisfy myself since, that they have any direct bearing upon the question. But I am satisfied that the matter is disposed of by the judgments in the Court of Appeal in the case I have referred to of *In re Spanish Prospecting Company, Limited*. I shall not attempt by much repetition or quotation to weaken the effect of these judgments; suffice it to say that it was a Court of the highest

(Sir James Campbell, C.)

authority comprised of Lord Cozens-Hardy, M.R., Fletcher Moulton and Farwell, L.JJ. The facts were few and simple. The Claimants had agreed to serve the Company at a fixed salary, which was only to be paid out of profits (if any) arising from the business of the Company which might from time to time be available for the purpose. In the course of its business the Company, as it was empowered to do, acquired shares and debentures in another company, and these debentures were included in their yearly balance sheets as an unvalued asset. The Company having gone into voluntary liquidation, the assets were sold and the debentures realised £3,072, all the creditors except the Claimants being paid in full, and all the subscribed capital returned to the shareholders, leaving a surplus on realisation of £3,328 in the hands of the Liquidator. Counsel for the Liquidator in opposing the claim took precisely the same ground as that taken upon behalf of the Respondents on the hearing of this appeal. They contended that the meaning of the word "profits", as used in the Claimants' agreement, must be restricted to profits realised by the Company as a going concern, and that profits realised by a sale in a winding-up were not profits in this sense. The Court was unanimous in over-ruling the decision of Swinfen Eady, J., with whom this contention found favour; and almost every line of the judgments applies in this case. Fletcher Moulton, L.J., in a singularly lucid exposition of the law, points out that "profits" implies a comparison between the state of a business at two specific dates usually separated by an interval of a year, that their fundamental meaning is the amount of gain made by the business during the year, and that this can only be ascertained by a comparison of the assets of the business at the two dates. He further points out that while the methods of book-keeping in the case of any particular business may obscure, it cannot destroy this result, and that by merely referring in their accounts to assets of a speculative type, without placing a value upon them, they cannot exclude them from the calculation when the amount of the *de facto* profits comes to be ascertained. As a matter of domestic arrangement these methods of book-keeping only concern the Company or firm, but this liberty ceases when the rights of third parties intervene. He takes as an illustration the precise case of the Income Tax and says:—"The Revenue has a right "to a certain percentage of the profits by way of Income Tax. The actual profit and loss accounts of the Company do not in any way bind the Crown," and subsequently adds, "In the absence of special stipulations to the contrary, " 'profits,' in cases where the rights of third parties come in, " mean actual profits, and they must be calculated as closely as " possible in accordance with the fundamental conception or " definition to which I have referred." He then deals with the facts of the particular Company, and passes on to the argument

(Sir James Campbell, C.)

that the surplus on realisation was not profits, because it was not in the form of money at the date of the liquidation, but was turned into money during the realisation, as to which he says: "I am wholly incapable of appreciating this argument. It would apply to every asset of the Company at the moment of liquidation except the cash in the till or safe." He then considers the cases that were cited in support of the argument, and decides that they gave no support to the proposition that profits resulting from the realisation of the assets, in the course of winding up, were not profits of the business available as such in the satisfaction of the claims of third parties. To the same effect is the judgment of Farwell, L.J., who, after pointing out the distinction that exists for this purpose as between fixed and circulating capital, says, "the liquidator has simply wound up the business by realising the stock-in-trade," and he expresses his concurrence in the opinion of his colleagues that the profits, in their true sense, of such realisation can be made available for satisfaction of the claims of creditors, and that there is no authority which decides to the contrary. We must therefore reverse the decision of the King's Bench Division and affirm the assessment of the Special Commissioners.

Ronan, L.J.—I entirely agree with the judgment of the Lord Chancellor.

The tax is imposed by Section 38 (1) of the Act of 1915 "on the amount by which *the profits arising from any trade or business . . . in any accounting period . . .* exceeded by more than £200 the pre-war standard." The important words are those I have underlined. The words are not "the profits on sales" or "the profits in the ordinary course of trade" but simply the profits arising from any trade or business." Section 40 (1) says "The profits arising from any trade or business shall be separately determined for the purposes of this Part of this Act but shall be so determined on the same *principles* as the profits and gains of the trade or business are or would be determined for the purpose of income tax, subject to the modifications set out in the First Part of the Fourth Schedule to this Act and any other provisions of this Act."

These two Sections and the Schedule are the only parts of the Act which seems to me of importance in the case. Section 35 was strongly relied on by the Respondents but it appears to me to throw no light on the case. It provides that when the Excess Profits Duty has been ascertained and paid it "shall be allowed as a deduction for the purposes of income tax in computing the profits and gains of the year."

If it had been allowed as a deduction from the Income Tax it might have been important, as the Respondents' Counsel contended that Excess Profits Duty was in all respects identical

(Ronan, L.J.)

with Income Tax save that the one was chargeable for the financial year and the other for the accounting period.

They relied strongly on the fact that they had not been called on to pay Income Tax on the profits for the year 1917 in respect of which the Excess Profits Duty is claimed. This impressed me at first.

Section 40 applies "the same principles" as those of the Income Tax for the purposes of ascertaining the profits of any particular year.

Schedule D of the Income Tax Act imposes the duty "in respect of the annual profits and gains arising or accruing to any person from any profession, trade, employment or vocation"—almost identical terms with Section 38. Rule 1 of Schedule D provides that the duty to be charged "shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, adventure or concern upon a fair and just average of three years, ending on such day of the year immediately preceding the year of assessment on which the accounts of the said trade, manufacture, adventure or concern shall have been usually made up, or on the fifth day of April preceding the year of assessment." Thus the profits of the year 1917 would not be taken in account for Income Tax until they were assessing the tax for 1918, which would be based on the average of 1915, 1916 and 1917. They would not be taken into account even when assessing the tax for 1917. But in the case of Excess Profits, Schedule IV, Part I, Rule 1, provides "The profits shall be taken to be the actual profits arising in the accounting period; and the principle of computing profits by reference to any other year or an average of years shall not be followed." At the end of paragraph 1 of the Case there is a table giving particulars of the four years 1914, 1915, 1916, 1917. The Income Tax for the year 1917 is regulated by the average of the first three. In my opinion they have nothing to say to the present case, save as to showing the extent of trading each year. We are only concerned with the actual profits of the year 1917 so far as computation is concerned.

It is obvious that Income Tax, so far from being identical with Excess Profits Duty, really bears no direct relation to it.

What we have to deal with are the actual profits arising from the trade during the accounting period.

The fundamental principle of the Income Tax code is that it is a tax on income, not on capital.

Lord Blackburn says in *Coltness Iron Company v. Black*⁽¹⁾, 9 App. Cas. 315, at pp. 333-4, that he can see no difference between "the balance of profits for three years" and "the amount of the profits for three years."

(1) 1 T.C. 287, at p. 319.

(Ronan, L.J.)

The principles of the Income Tax code applicable to ascertaining the actual profits for any particular year or years would therefore apply to this case. The code does not define profits or gains, but as Lord Loreburn, L.C., says in *Strong and Co., Ltd. v. Woodfield*⁽¹⁾, [1906] A.C. 448, at p. 452, "That which has to be assessed is the balance of the profits or gains of a trade; that is to say, the sum left after subtracting the proper deductions from the profits and gains. . . . The Act does not affirmatively state what losses may be deducted. It furnishes merely negative information."

The Income Tax Acts prohibit various deductions which might seem reasonable. These are "principles" of the Income Tax. They are so called in Schedule IV, Part I, of the Finance Act, and thereby modified as applied to Excess Profits Duty. The principle is—you are to take the gross profits and subtract the lawful deductions.

Here there is no question as to the deductions. We are only concerned with the gross profits; that is, the increase in the value of the assets during the period. The tax is on income, not capital. It is essential to distinguish what capital means as distinguished from assets. The assets of a firm, company or business mean its property in the business for the time being.

If two partners put in £5,000 each, £10,000 is the capital at the start. If the assets increase from the trading by £1,000 per annum this £1,000 per annum is not capital but profit. If it is allowed to remain in the business it remains profits; undrawn profits continue profits.

The distinction is vital where the parties' rights to profits differ from their rights to capital; and still more so, where a third party has a charge on the profits only.

As to capital, Lord Wrenbury says at p. 653 of the 9th Edition of Buckley on Companies:

"In some cases the distinction here pointed to has been conveniently expressed by the use of the terms 'fixed capital' and 'circulating capital.' The capital of the Company at any particular moment is represented of course not by the money originally subscribed, but by the property bought with it and owned at that moment by the Company. The author would define 'fixed capital' as property acquired and intended for retention and employment with a view to a profit, as distinguished from 'circulating capital,' meaning property acquired or produced with a view to re-sale or sale at a profit. The appreciation or depreciation of fixed capital need not (or perhaps more accurately need not in every Company (f)), but that of circulating capital must, be the subject of entry in the

(1) 5 T.C. 215, at p. 219.

(Ronan, L.J.)

"profit and loss account." "(f)" refers to the case of *Bond v. Barrow Steel Co.*, [1902] 1 Ch. 353, 366, where Farwell, L.J., says:—

"There is no single definition of the word 'profits' which fits all cases. Take, for instance, Professor Marshall's definition ('Principles of Economics,' Vol. 1, p. 142), 'when a man is engaged in business his profits for the year are the excess of his receipts from his business during the year over his outlay for his business, the difference between the value of his stock and plant at the end and at the beginning of the year being taken as part of his receipts or as part of his outlay according as there has been an increase or decrease of value.' I am precluded from adopting this in its entirety by authorities which are binding on me, because in the definition 'stock and plant' obviously include both fixed and circulating capital as defined at page 134 of the same treatise, NOTE (1) . . . We may follow Mill in distinguishing "circulating capital", which fulfils the whole of its office in the production in which it is engaged by a single use, from "fixed capital", which exists in a durable shape and the return to which is spread over a period of corresponding duration."

Thus it appears that if there was only circulating capital in the case he would have accepted the definition.

Assuming nothing put in or taken out during the period, the assets at the end of a period represent the assets at the beginning of the period, plus the profits made during the period.

In the *Spanish Prospecting Company* case, [1911] 1 Ch. 92, the Claimant's salary was charged on the "profits (if any) arising out of the business." These words are identical with the words of Sec. 38 (1) if we substitute "from" for "out of." I have already pointed out their identity with the Income Tax Act.

The question was whether the value of certain debentures of the nominal value of £3,840 was to be taken into account in estimating the profits within the meaning of the above clause.

The Company had these debentures in their accounts but no value was put on them, but it was stated that there would be a further credit when the debentures were realised (pp. 94 and 97). In this state of things the Company was ordered to be wound up, and in the realisation of the assets of the Company by the Liquidator the debentures were sold for £3,072. This was claimed by the Claimants under their charge on the profits for their salary.

(Ronan, L.J.)

The judgment of Fletcher Moulton, L.J., seems to me to cover every point in the present case. The entire judgment must be read. It establishes the following propositions:—

- (1) The fundamental meaning of profits is the amount of gain made by the business in the year.
- (2) This can only be ascertained by comparison of the assets of the business at the two dates.
- (3) Increases of value of identical articles from rise of prices are to be included in valuation at end of period.
- (4) Where the rights of third parties do not intervene, considerable latitude is allowed. "Hence the strict meaning of the word 'profits' is rarely observed in drawing up the accounts of firms or companies." (Per Fletcher Moulton, L.J., at p. 99.)
- (5) Profits exist in kind as well as in cash.
- (6) Realisation is only the conversion of profits in kind into profits in cash.

I shall now refer specifically to some passages in this judgment.

At p. 101 Fletcher Moulton, L.J., says:—

"But though there is a wide field for variation of practice in these estimations of profit in the domestic documents of a firm or a company, this liberty ceases at once when the rights of third parties intervene. For instance, the Revenue has a right to a certain percentage of the profits of a company by way of Income Tax. The actual profit and loss accounts of the company do not in any way bind the Crown in arriving at the tax to be paid. A company may wisely write off liberally under the head of depreciation, but they will be only allowed to deduct the sum representing actual depreciation for the purpose of calculating the profits for Income Tax. The same would be the case if a person had a right to receive a certain percentage of the profits made by the company. In the absence of special stipulations to the contrary, 'profits,' in cases where the rights of third parties come in, mean actual profits, and they must be calculated as closely as possible in accordance with the fundamental conception or definition to which I have referred."

This seems to me to demonstrate the direct application of the principles of the judgment to the present case.

At pp. 103-104 he says: "Whether of much or little value, these debentures were unquestionably profits in kind made by the Company in its business during the time it was carrying on that business, and when turned into money by realisation the sum so realised stood in precisely the same position as the assets which it represented. It follows, therefore, that at the date of the liquidation the Company had in its hands 'profits' now represented by this sum of £3,328. No question arises as to the date at which such profits were earned, because

(Ronan, L.J.)

“ the right of the Appellants to payment is independent of any such question. But the Respondents contend, and have induced the learned Judge in the Court below to decide, that this sum is not ‘ profits ’ because it was not in the form of money at the date of the liquidation but was turned into money during the realisation. I am wholly incapable of appreciating this argument. It would apply to every asset of the Company at the moment of liquidation except the cash in the till or safe. All the other assets exist in the form of land or chattels or rights which have to be realised before they can be treated as money and applied to the payment of liabilities to creditors or returned to the shareholders as capital or paid as profits to the persons entitled to them . . .

“ But the main argument on behalf of the Respondents was based on certain decisions which are supposed to have established that if assets are realised by means of liquidation they can no longer be counted in the calculation of profits. The two cases thus relied upon are *Frames v. Bultfontein Mining Co.* ([1891] 1 Ch. 140) and *Rishton v. Frissell* (L.R. 5 Eq. 326).”

The Lord Justice then examines these cases and says :— “ Neither of these cases, therefore, gives in my opinion any support to the contention of the Respondents.”

The judgment of Farwell, L.J., is to the same effect as that of Fletcher Moulton, L.J.

Having referred for the principle to the passage quoted above from his judgment in *Bond's* case, he says (at p. 107) that Swinfen Eady, J., “ decided against the Appellants on two grounds, (1) because the ‘ profits ’ mentioned in Clause 5 (of the Agreement) are confined to ‘ profits ’ arising while the business of the Company is being carried on. But assuming this to be so, it does not preclude the creditor from obtaining payment out of profits *made* but *not* realised during the continuance of the business . . . ; (2) . . . that, on the authorities, the surplus of realised assets on winding-up over or above the subscribed capital is not a profit arising from the business of the Company. This, in my opinion, depends on the nature of the Company’s business and assets.” Then, having distinguished the case *Frames v. Bultfontein Mining Company* ([1891] 1 Ch. 140) on the ground that there the realised assets included the goodwill and diamond mine (fixed capital), he proceeds : “ In the present case all the profits arise from the sale of part of stock-in-trade after liquidation. There is no need for an inquiry because the amount is ascertained.” That is, the sale had ascertained the value of the unrealised assets at the date of the winding-up. The judgment of the Master of the Rolls was to the same effect but not so specific in its terms.

(Ronan, L.J.)

I now take a simple case to test the application of these principles. A bookseller leaves his business and stock-in-trade to his son. The stock-in-trade is valued at £10,000, i.e., that is what it would fetch if sold off at once. The son thinks better to try and realise the stock by keeping the shop open and selling it in the ordinary way. He puts up a notice "retiring from business; business only carried on until the present stock is disposed of." He could have got a safe 5 per cent. for his £10,000 and devoted himself to other remunerative work. He determines to manage the business himself, and take the risks of a rise or fall in prices, in wages, etc. He commences to do so on the 1st January, 1917.

The price of books increases by 100 per cent. during the year. He sells half the stock in the shop for, say, £15,000. (Retail prices are, of course, much higher than the valuation for a sale of the entire lot.) On the 31st December, 1917, he closes down and shuts the shop. He has then £15,000 and half the stock. This half (a) he gets valued or (b) he sells by auction on the 30th December, or (c) he sells by auction on the 2nd of January, 1918. The result in each case (a) (b) and (c) is, owing to the rise in prices, £10,000. It cost him £1,000 for rents, assistants, etc., to run the shop. His position therefore was:—

He had £15,000 in cash,
10,000 either in cash or goods.
<hr style="width: 10%; margin: 0 auto;"/>
£25,000

His original £10,000 was gone. This left £15,000.

He had paid to earn this £15,000—£1,000. He had, therefore, a balance to the good of £14,000. His original capital was at risk of rise or fall in prices in the shop so long as it was unsold. In my opinion his gross profit was £15,000 and his net profit £14,000. It seems to me absolutely immaterial whether the £10,000, the value at the end of the year of the unsold moiety of the stock, was ascertained by valuation or by either of the sales mentioned. Price is only material as a measure of value.

Over 100 years ago (1812) in *Eyre v. Glover* (16 East 218) there was an insurance "on profits" (without further description). It was argued that this was too vague. Lord Ellenborough held the contrary, saying: "Are profits anything more than an excrescence upon the 'value' of the goods beyond the prime cost? The difficulty of the calculation cannot affect the question of interest, or the legality of the contract." Ninety-nine years later, Fletcher Moulton, L.J., elaborately developed and illustrated this principle.

Let us assume in the case I have put that all the cash received on sales is put into a safe, and the expenses of running the shop, rent, etc., paid out of this. At the beginning of the year the

(Ronan, L.J.)

assets would be the stock value for £10,000. At the end of the year there would be £14,000 in the safe, and stock worth £10,000, total £24,000—difference, £14,000. The principle would be the same if it took him five years to sell off the entire stock.

There is another question in the case, viz., What was this man doing during the year, or the five years? I confess it seems to me there is only one possible answer. He was running a bookseller's shop as sole principal. He was carrying on the business of a bookseller. I cannot really understand the proposition that a bookseller who keeps his shop open and sells books as usual, ceases to carry on his business because he has determined only to *carry it on* until he has sold his existing stock, no matter how large, or how many years it may take him to do so. The sole ground on which it is contended that O'Kane & Co. were not carrying on the business of wine merchants is that they had determined not to purchase any more stock. In modern business life there are two classes of persons, viz., producers and distributors. The one class produces, the other distributes. The wholesale dealer and the retail dealer are both distributors; the distinction between them is that the former distributes the produce in larger parcels than the latter; say, not less than £10 in price. Indeed, generally the retailer distributes the parcel he has got from the wholesale dealer in smaller parcels. There is practically no limit in his case. The essence of the business of each individual is to distribute by means of sales in quantities to suit buyers, and to have a shop or office open for persons anxious to buy. By selling in such quantities and at such times as suits the convenience of those desirous of buying, they obviously obtain much larger prices than would be got on a sale of their entire stock on a day fixed by them.

The language of the Pharmacy Act, 1868, (31 & 32 Vict. c. 121) affords an illustration of the ordinary meaning of "carry-ing on business." Its object was to provide that persons carrying on the business of selling poisons should be qualified.

The preamble says: "Whereas it is expedient . . . that persons keeping open shop for the retailing . . . of poisons . . . should possess a competent practical knowledge of their business and . . . that all persons not already engaged in such business should, before commencing such business, be duly examined, etc." Sec. 1 says: "It shall be unlawful for any person to sell or keep open a shop for retailing . . . poisons" unless qualified. Sec. 15 imposes a penalty. Sec. 3 says: "Chemists and druggists within the meaning of this Act shall consist of all persons who at any time before the passing of this Act have carried on in Great Britain the business of a chemist and druggist, in the keeping of open shop for the compounding of the prescriptions, etc." This "keep open shop" seems to me a happy phrase to describe the essential act of the

(Ronan, L.J.)

carrying on the business of a seller and to apply to a bookseller, a coal merchant, a publican, a wholesale wine and spirit merchant, and a marine store seller.

The business of keeping open shop for sale and selling exists no matter how or when the vendor has acquired the goods he sells or offers for sale. He carries on the business so long as the open shop is kept on for customers to come to. When the shop is closed down there may be a question in some cases whether the business is carried on or not. So long as the shop is kept open and going, as in the present case, I really cannot see that there can be any doubt in the matter. At all events, there can be no doubt that there was evidence from which the Commissioners were at liberty to infer that it was carried on, and that is all that it is necessary to decide on this part of the case. If they were carrying on the business, did not the profits arise out of it?

The argument for the Respondents and the judgment of the Court below would seem to rest mainly: (1) On the fact that the Respondents were *bona fide* effecting "a realisation"; that there are no profits taxable except profits on sales, and that if you do not replace stock, and state your intention, you may go on for years keeping open shop, obtain high prices resulting from it, and so make, in fact, a large profit directly by carrying on the business, but that this is not profit within the meaning of Income Tax Acts or the Finance (No. 2) Act of 1915. The judgments I have read seem to me to put an end to any such argument. Profits earned are none the less real profits because they have not been converted into cash. Realisation only means exchanging assets for cash. (2) Secondly, on the Act of 1918. The argument from the 35th Section of the Act of 1918 seems to a great extent to have been the basis of the judgment of the King's Bench Division. We must start with the proposition that the value of the stock at the close of the period must be taken as a factor in finding the profits arising from the business. The scheme of the 35th Section is that certain things which are not such profits shall be deemed to be such profits. This has no application to such things as are already in fact such profits. The Section provides that profits arising from certain sales shall be deemed profits arising from the business. If the sale prices were the true measure of the value of the stock at the close of the period this would be inoperative. To give this provision any operation it must be confined to cases where the sale price is not the true measure of the value. Accordingly, we find that provision confined to sales otherwise than in the ordinary course of business; sales in the ordinary course would be the true measure of value.

Take the case of a man very anxious to purchase a business and premises. The vendor makes it a condition that he shall take over the stock at a price far beyond its value. The purchaser agrees. The Section captures this, though it is not a

(Ronan, L.J.)

profit arising from the business; it is a profit arising from sale, not in the course of the business or arising out of it. If necessary, there is an express finding there that the sales were in the ordinary course of business. There is ample evidence to sustain this finding. I confess I cannot see how they differed in any way from what they would have been if O'Kane & Co. had been getting in new stock; perhaps the prices were lower, but O'Kane & Co. have the advantage of this.

The Section also applies to the sale of what was formerly the stock-in-trade, and finally, that though the business had ceased, it shall be deemed to have continued up to the date of the sale.

A man not in business buys a library for his own use. One year afterwards he sells it at an enormous profit, owing to increase of prices. This is plainly not within the Acts.

A picture dealer shuts up his shop. He has a valuable stock of pictures. He sells most by auction, but keeps some of great value for himself. The value of the *whole* at the end of a period while the shop is open, less the value at the beginning and less deductions, is a profit arising from the business. Prices go up when he is no longer in business. After some time he sells those he has kept at a great profit. This is not profit arising from a trade or business. If in the *Spanish Prospecting Company* case, [1911] 1 Ch. 92, it had been shown that the price obtained by the liquidator partly arose from an increase in the value after the business had ceased by the winding-up order, in my opinion that part of the increase would not be profit arising from the business.

Here again the value of the assets at the ceasing of the trade is the clue.

In the *Spanish Prospecting Company* case the sale was by the liquidator after the trade was put an end to by the winding-up. But the price was held to be the measure of the value at the close of the trade, and therefore subject to the charge on profits.

But suppose the sale had not taken place for a long time after the business had ceased, and that there was a great increase of price in the interval, the profit arising from this would not have arisen from the trade which had ceased, but it would be captured by the latter part of Section 35 for Excess Profits Duty.

I do not think that Section 35 affords any reason for limiting the ordinary construction of the previous Act.

There is one other matter I wish to refer to. This is a case of a charge on profits. In the *Spanish Prospecting Company* case Fletcher Moulton, L.J., says (at p. 101) that in such a case "Profits . . . means actual profits, and they must "be calculated as closely as possible in accordance with the "fundamental conception or definition to which I have referred." Taking the figures in the Case Stated I have been unable to

(Ronan, L.J.)

arrive at the result arrived at on the principles of the *Spanish Prospecting Company* case.

On the second day of the argument I read out a memorandum I had prepared which in substance stated that principle. "Original cost" was the phrase I used instead of "value at the beginning of the period," otherwise it was identical with the rule as laid down in the case (which we only found after the argument).

Counsel on both sides refused to accept this principle.

In these circumstances I find it hard to believe that the profits in this case were calculated on this principle. However, both sides say that they are satisfied with the figures. If there is any necessity for amendment I presume it can be arranged. The parties can have my notes on the figures if they desire them.

O'Connor, L.J.—Messrs. O'Kane & Co., a firm of Belfast spirit dealers, resolved in the spring of 1916 to wind up their business. They publicly announced their intention, and invited the attention of all and sundry to their large stocks of excellent whiskey and rum. In 1916 the public did not respond to their invitations to purchase to any great extent, for the sales were little more than normal, but in 1917 there was a run on the whiskey and rum, and in that year the lucky firm sold over £48,000 worth of spirits, practically clearing out all their stock, and netting the large sum of £35,986 in the process.

The Inland Revenue Authorities claim that this sum of £35,986 was a profit arising from a trade or business, and the Special Commissioners having decided that it was such, the firm are liable, if that decision stands, in the sum of £27,903, being excess profits for the year 1917. The spirit dealers contend that this sum is not a profit arising from trade or business, because, as they say, and the facts prove, they did not replenish their stocks (with a trifling exception) during the years 1916 and 1917, and the transactions during 1916 and 1917 amounted really to a realisation of their business. The trifling exception to which I have referred arose in this way. Prior to 1916 the firm had certain whiskey contracts extending over the year 1917; for their own advantage, as I infer, they took the whiskey under these contracts, and sold it at a profit. These purchases and re-sales amounted only to £4,961; it is admitted that Income Tax and Excess Profits Duty are payable on the profits arising out of such purchase and re-sale. It is, to my mind, a very difficult position for the Respondents to maintain when they say they were trading and not trading at one and the same time, but, as I prefer to base my judgment against them on much broader grounds, I discard this circumstance altogether. The King's Bench Division have decided against the contention of the Commissioners of Inland Revenue, and from that decision the present appeal is brought.

(O'Connor, L.J.)

The Respondents say that the transaction, or, rather the series of transactions extending over the years 1916 and 1917, amounts to a realisation of their capital, and that no Income Tax or Excess Profits Duty is payable in respect of such realisation. This seems to me to involve a cardinal fallacy when applied to the facts of this case. A business man determines to retire from business and sells out lock, stock and barrel, on, say, the 31st March, the last day of his accounting year. Is it to be said that he thereby escapes all liability for all Income Tax or Excess Profits Duty from the preceding 1st April, merely on the ground that he has traded for 364 days and not for the 365 days of the financial year? To ask that question is to answer it. It is true to say that a man is not liable to Income Tax merely in respect of a sale of his capital, but in the illustration I have taken the Income Tax is payable in respect, not of the sale on the 31st March, but of what went on from the preceding 1st April to the date of sale. During that period the time and skill of himself and of his staff have been employed in the business of buying and selling to the best advantage; his capital, instead of earning dividends or income by being out on mortgage or invested in funds, has been devoted *inter alia* to the purchase of the necessary stock-in-trade for his business; from this combination of labour and capital he hopes to secure, and if successful does secure, a sum of money (or its equivalent in commodities, debts due, and assets generally) which will compensate him for the locking up of his capital in the business, including the risk which that involves, and for the time, skill, and labour of himself and of those employed by him. That will be his profit, and it will include the appreciation in value of his stock-in-trade, if such appreciation has taken place. If his stock-in-trade is worth £ X on the 1st April, and is £X + Y on the following 31st March, his profit—making such additions and deductions as may be necessary in respect of cash received, debts due by and to him, and so on—will be £Y. His sale on the 31st March has not made £Y profit for him; his antecedent trading for 364 days has. The sale may be a measure of the profit, but it has not created it. Nothing that I have said in any way affects Section 35 of the Act of 1918, which will capture an appreciation in value of stock-in-trade even where not caused or accompanied by trading.

In this case the Respondents, instead of selling at one time, took the best part of two years to complete the process. During these two years they employed their capital and the labour of themselves and their staff to augment their assets. Why should they not pay Income Tax and Excess Profits Duty on such augmentation?

Take a case which I put during the argument. A man heretofore not engaged in business sees a tempting offer of a large supply of war stores for sale. He buys them in the hope of reselling them at a profit. He sets up a shop or office for this

(O'Connor, L.J.)

purpose; he employs a staff, he circularises likely customers, he advertises his wares. The process of clearing off his stock takes three years, and at the end of that period he goes with a profit back to the obscurity of a private citizen again. Is he to be immune from Income Tax for the three years merely because he does not replenish his stocks? That, I think, would be a strange result, for his skill and time, and that of his staff, combined with the employment of his capital in the business, have contributed to make him a handsome profit. Such profit is just as much the profit of a trade or business as that of the dealer who sells and buys to replace what he sells.

It has been expressly admitted on both sides that if the Respondents are liable at all for Excess Profits Duty on the 1917 transactions, the amount found due by the Commissioners is correct. Accordingly I am of opinion that the appeal should be allowed, and that we should answer the question of the Commissioners in the Special Case by declaring that the assessment is correct.

Messrs. O'Kane having appealed against the decision in the Court of Appeal, the case came before the House of Lords (Lords Buckmaster, Atkinson, Sumner, Parmoor and Carson) on the 23rd and 24th January, 1922, and on the latter day judgment was given unanimously in favour of the Crown, with costs.

Mr. Herbert Wilson, K.C. (of the Irish Bar), Mr. A. M. Latter, and Mr. M. C. Maguire (of the Irish Bar) appeared as Counsel for the Appellants, and the Attorney-General (Sir Gordon Hewart, K.C.), Mr. A. B. Babington, K.C. (of the Irish Bar), Mr. R. P. Hills, and Mr. G. W. Shannon (of the Irish Bar) for the Crown.

JUDGMENT.

Lord Buckmaster.—My Lords, the Appellants in this case formerly carried on business as spirit merchants at 62 to 66, Great Patrick Street, Belfast. In the spring of 1916 they resolved that they would close their business, and published their intention in a circular which they sent round to their customers. They did not at any time effect or attempt to effect their purpose by disposing of the whole of their business as a going concern. On the contrary they proceeded to sell the stock in hand and to exhaust the benefit of certain contracts for supply of which they enjoyed the benefit, such contracts terminating in the spring of 1917. The only alteration that they made in their business was this: the goods that had formerly been sold to their customers, with the ordinary provision that the casks should be returned, were now sold under the condition that the casks should be

(Lord Buckmaster.)

retained and the customers were themselves to effect the liberation of the purchased parcel from bond, and not to take it direct from the spirit merchants themselves. The Appellants carried on their business in this way until the spring of 1918. During the year 1916, although there were some nine months during which they were engaged in the process of liquidation, their profits were not very greatly above their ordinary standard, but in the year 1917 very large profits were made, amounting to £35,986, and upon that the Commissioners fixed the sum of £27,903 as the amount payable under the Statute for Excess Profits Duty. The Appellants resisted this claim and after a hearing of the dispute before the Commissioners, a Special Case was stated by them, and was heard before the King's Bench, who decided that the Appellants were free from liability. That judgment was reversed by the Court of Appeal and from them the present appeal proceeds.

The first question that it is necessary to consider is what were the terms of the Statute by which the tax was imposed. It is the Finance (No. 2) Act of 1915. Section 38, Sub-section (1), of that Act provides that there shall be charged, levied and paid on the amount by which the profits arising from any trade or business to which that part of the Statute applies in any period, a certain duty called Excess Profits Duty, which is to be taken upon the amount by which the profits arising from that trade or business exceed the pre-war standard of profits as they are defined in the Statute.

The first question, therefore, is : Did the profits in question arise from any trade or business? It is alleged that they did not, for the reasons that they were derived, not in carrying on the business, but in the process of realisation under an altered method of trading not consistent with a continuing concern.

My Lords, 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 external 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 it is that 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?

Now there are two extreme cases which are put in the matter. It is said on behalf of the Appellants that if, instead of selling in this way, the whole of the stock had been sold by auction on

(Lord Buckmaster.)

one occasion, it would be impossible in those circumstances to claim duty upon the profits that were made. On the other hand, they admit that the process of liquidation might be so prolonged, and might be so associated with further replenishments of stock, that it would be impossible to say that the profits that were earned in the course of that liquidation were not profits to which the Statute applies. In other words, according to the Appellants' own contention the question must be a question of fact whether, in the particular circumstances of the case, the transactions on which the profits had arisen were transactions which can be found to be profits "arising from any trade or business." In the present case it has been found by the Commissioners that they do so arise, and not only, in my opinion, is there abundant evidence to support that finding, but, although this would be unnecessary for the purpose, the finding is, in my opinion, in entire agreement with what the facts established. If, therefore, my Lords, when you consider the Statute of 1915 you find that the profits in this case are within the taxing provisions, the question raised upon this appeal is determined, unless the subsequent Statute, to which Counsel for the Appellants referred, shows that the words that are used in the former Statute, if ambiguous, require a meaning to be put upon them other than that which you have given them.

My Lords, I can find nothing whatever of the kind in the Act of 1918. All I find there is this, that by Section 35 (1) a provision is introduced that Excess Profits Duty may be charged upon profits which do in fact arise from a sale "otherwise than "in the ordinary course of trade" of the trading stock or part of the trading stock belonging to or formerly belonging to any trade or business. That only shows that there may be other methods of disposing of the stock than the ordinary course of trade, and that in the course of those methods of disposal profits may arise which might not have been within the provisions of the earlier, and are within the compass of the later, Act. That does not, to my mind, assist in the least in considering what the meaning of "profits arising from trade or business" in Section 38 (1) may be.

But, even if it were to be held that Section 35 (1) of the later Statute should be read together with Section 38 (1) of the former Statute, so that the earlier Statute would be limited by a provision that the profits are to arise from the ordinary course of carrying on trade or business, the finding of fact in this case is that that is what has occurred; and once more I repeat, my Lords, that it appears to me that there was abundant evidence which would justify that conclusion.

I have assumed in favour of the Appellants that the two Statutes can be read together in the manner that they suggest, but in truth the point does not arise for decision for the reason

(Lord Buckmaster.)

that I have already urged. I therefore neither express any assent to, nor dissent from, the proposition that for the purpose of interpreting the Statute of 1915 the later Statute must also be regarded.

For these reasons, my Lords, in my opinion this appeal ought to be dismissed with costs.

Lord Atkinson.—My Lords, I concur and think it unnecessary to refer to the facts. A trader who wishes to retire from business may wind up his business in several ways; he may sell his concern as a going concern, or he may auction off his stock. But there is another way quite as effectual, and that is by continuing to carry on his business in the ordinary way, but not replenishing his stock which he has accumulated as it is sold. Then he will leave himself with no stock, and therefore he can retire from business. But the fact that he realises stock in the process of carrying on the trade as he has hitherto done will effectuate both purposes.

I only wish to say in reference to this amendment that the amendment which has been made I think would bring this case within the first limb of the Act of 1918, because that Statute really says "otherwise than in the ordinary course of trade." According to the amendment that has been made, here is the way that paragraph IV of the Case at page 8 runs: "Having regard to the evidence, we held that the Appellants were carrying on their trade or business and were liable to be charged with £27,903 for Excess Profits Duty in respect of the profits arising therefrom for the accounting period which commenced on the 1st January and ended on the 31st December, 1917." Amendment: "And that the said profits were made on sales in the ordinary course of trade." Those are the very words in the Act of 1918, so that no injustice is done; because, if you assume that the Act of 1918 is to be taken as a kind of glossary on what the words in the Act of 1915 mean, in my judgment there was ample evidence to justify the Commissioners, as reasonable men, in arriving at the conclusion at which they have arrived.

Lord Sumner.—My Lords, I agree with what has fallen from my noble and learned friend on the Woolsack.

Lord Parmoor.—My Lords, I regard the decision in this case as depending entirely on the question of fact, and I wish to emphasise that in a few words; because, if the facts had stood as they appear to have been assumed by the High Court in Ireland, and in the decision in the judgment of Mr. Justice Samuels, I should have agreed with that decision. I think the question is this: Were the transactions in question in this appeal transactions which took place in carrying on a trade or business? If so, the profits arising from any such trade or business are

(Lord Parmoor.)

undoubtedly subject to Excess Profits Duty. I am dealing there merely with the words of the Statute of 1915, quite apart from the subsequent Statute of 1918.

Now in my opinion the Commissioners have found as a matter of fact that these transactions were transactions in the carrying on of a trade or business, and indeed they have gone further in the second finding, namely, that they were transactions in carrying on the trade or business of the Appellants in the ordinary way. I do not, however, think that the second finding is necessary in order that the case may be determined. There was undoubtedly evidence. I do not think it is either the duty or within the jurisdiction of this House to consider whether the Commissioners have come to a right decision. This depends upon questions of trade which are intended to be left to persons cognisant with trade matters.

I want to refer quite shortly to what is said at page 42 in the judgment of Mr. Justice Samuels⁽¹⁾. He says this: "The facts as found seem to me to admit of only one conclusion, that the sales in question were realisation sales; that they were capital transactions incidental to the winding-up of the business, and that the amount realised was not income within the Income Tax Code which, in the words of Lord Halsbury in *Secretary of State, etc., for India v. Scoble* ⁽²⁾, 'never was intended to tax capital, as income at all events.'"

Now if that conclusion of fact had been warranted, to which Mr. Justice Samuels refers, that the sales in question were realisation sales and were capital transactions incidental to the winding-up of the business, personally I should have come to the conclusion that the Excess Profits Duty could not have been charged in respect of a transaction of that character. It is unnecessary to pursue the matter further, because the facts as found in this case appear to me to place the Appellants out of Court, and on that question of fact alone I am in favour of the motion which is to be made to your Lordships dismissing the appeal.

Lord Carson.—My Lords, I agree with the judgment and the reasons which have been expressed by the noble and learned Lord on the Woolsack.

Questions put:—

That the Judgment appealed from be reversed.

The Not Contents have it.

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

The Contents have it.

(1) Page 327 *ante*.

(2) 4 T.C. 618, at p. 624.