VOL. XXX—PART VIII

No. 1413—High Court of Justice, Northern Ireland (King's Bench Division)—23rd and 24th November, 1943

Court of Appeal, Northern Ireland—16th, 17th, 21st, 22nd February and 9th March, 1944

House of Lords—5th, 6th and 7th February, 1945

Russell (H.M. Inspector of Taxes) *v.* Scott [1]

Income Tax—Receipts from sale of sand by owner of sandpit—Income Tax Act, 1918 (8 & 9 *Geo.* V, *c.* 40), *Schedule A, No.* III; *Finance Act,* 1926 (16 & 17 *Geo.* V, *c.* 22), *Section* 28 *and Third Schedule.*

The Respondent owned a sandpit on his property and sold sand to builders and others requiring it. He simply managed the sandpit, employing a man to keep records of the amount of sand taken, and took no part himself in winning it; the purchasers came on the land and dug and carried the sand away. He sold the sand for prices varying between 6*d. and* 9*d. per ton (according to grade), which he insisted on receiving in full without deduction of tax; he had no written agreements with the purchasers.*

The Special Commissioners, on appeal by the Respondent against assessments to Income Tax under Schedule D made upon him in respect of the sums so received, held that the sums in question were rent payable in respect of an easement within the meaning of those words in Section 21 *of the Finance Act,* 1934; *that that Section made it mandatory to pay such rents under deduction of tax; and that, if not so paid, and in the absence of any evidence as to whether they fell within General Rule* 19 *or General Rule* 21, *there was no jurisdiction to assess the recipient in respect thereof.*

In the High Court the Crown contended, inter alia, *that the Respondent was carrying on a concern within No.* III *of Schedule A, and that accordingly Section* 21 *of the Finance Act,* 1934, *did not apply to the payments, because the Section applied only to payments by the person carrying on the concern. The Respondent did not controvert that Section* 21 *did not apply.*

The King's Bench Division, Northern Ireland, held that a sandpit is neither a "quarry" within Rule 1 *nor a "concern of the like nature" with those enumerated in Rule* 3 *of No.* III *of Schedule A.*

The Court of Appeal, Northern Ireland, before which the only question argued was the applicability of Rule 3 *of No.* III *of Schedule A to the Respondent's sandpit, held that it had not been established, on the evidence and findings in the Case, that the sandpit, as used by the Respondent, was a "concern" within the meaning of that word in the Rule in question, but that in any event it was not a "concern "of the like nature" with those enumerated in the Rule.*

[1] Reported (C.A. (N.I.)) [1944] N.I. 57; (H.L.) [1945] N.I. 47.

*The House of Lords discharged the Orders of the Court of Appeal and the King's Bench Division, Northern Ireland, without pronouncing upon the correctness or otherwise of the opinions expressed in the judgments, and ordered that the assessments be restored and the case remitted to the Special Commissioners for them to rehear the appeal and, if requested, to state a fresh Case for the opinion of the High Court.**

CASE

Stated under Section 149 of the Income Tax Act, 1918, 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 Northern Ireland.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held at the Guildhall, Londonderry, on 20th November, 1942, the Respondent appealed against assessments to Income Tax made upon him under Schedule D for the years 1940-41, 1941-42 and 1942-43 in the sums of £4,000, £10,000 and £10,000, respectively.

2. The assessments appealed against included certain sums received by the Respondent in respect of sales of sand in the circumstances hereinafter appearing, and the sole question at issue in this appeal is whether or not the Respondent was liable to be so assessed.

3. The Respondent, who lives at Glebe, Greysteele, County Londonderry, Northern Ireland, owns a sandpit on his property, and has for some time past sold sand to builders and any others who required it. Such persons come upon the land and dig and carry away the sand therefrom. He receives so much per ton for such sand, the price varying between 6*d.* to 9*d.* per ton according to the grade of sand gotten. He employs a man to keep records of the amount of sand taken. He takes no part himself in winning the sand, but simply manages the sandpit. He has no written agreement with the purchasers, but he insists on receiving the 6*d.* or 9*d.* per ton in full without deduction of tax, and it was these sums so received which form the subject-matter of the assessments appealed against. No evidence was adduced before us as to whether these sums were or were not payable wholly out of profits and gains brought into charge to tax.

4. It was contended by the Inspector of Taxes that these sums were income in the hands of the Respondent; that they had not been paid under deduction of tax; and that the Respondent was liable to be assessed in respect of them under Schedule D.

5. It was contended on behalf of the Respondent that he was not so liable to be assessed under Schedule D in respect of the sums so received.

The cases of

Stratford v. *Mole & Lea*, 24 T.C. 20;

Renfrew Town Council v. *Commissioners of Inland Revenue*, 19 T.C. 13, and

Elliott v. *J. H. & F. H. Burn*, 18 T.C. 595,

were referred to.

6. We, the Commissioners who heard the appeal, were of opinion that the sums received in full by the Respondent in respect of the sales

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* For subsequent proceedings see page 394 *post*.

of sand were rent payable in respect of an easement within the meaning of those words in Section 21 of the Finance Act, 1934; that that Section made it mandatory to pay such rents under deduction of tax, and that if not so paid, and in the absence of any evidence as to whether they fall within Rule 19 or Rule 21, All Schedules Rules, there was no jurisdiction to assess the recipient in respect thereof. We accordingly discharged the three assessments appealed against.

7. The Inspector of Taxes immediately after the determination of the appeal declared to us his dissatisfaction therewith as being erroneous in point of law and in due course required us to state a Case for the opinion of the High Court of Justice in Northern Ireland pursuant to Section 149 of the Income Tax Act, 1918, which Case I have stated and do sign accordingly.

F. ENGLAND, Commissioner for the Special Purposes of the Income Tax Acts.

[Mr. C. C. Gallagher died before the Stated Case could be put before him for his signature.]

Turnstile House,
94/99 High Holborn,
London, W.C.1.
18th May, 1943.

The case came before Brown, J., in the King's Bench Division, Northern Ireland, on 23rd and 24th November, 1943, and on the latter date judgment was given against the Crown, with costs.

The Attorney-General, Northern Ireland (Mr. John C. MacDermott, K.C.), Mr. L. E. Curran, K.C., and Mr. C. A. Nicholson appeared as Counsel for the Crown, and Mr. W. F. McCoy, K.C., and Mr. H. A. McVeigh for the Respondent.

JUDGMENT

Brown, J.—In this case, which comes before me by way of Case Stated, the facts as found were that the Respondent owned a sandpit on his farm at Glebe, Greysteele, County Londonderry, and had sold sand to builders and any others who required it. These persons came upon the land and dug and carried away the sand. The Respondent received so much per ton for the sand, the price varying between 6*d*. to 9*d*. per ton according to the grade of sand. He employed a man to keep records of the amount of sand taken. He took no part himself in winning the sand, but simply managed the sandpit. He had no written agreement with the purchasers, but he insisted on receiving the 6*d*. or 9*d*. per ton in full without deduction of tax. These sums so received form the subject-matter of the assessments appealed against.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts the Respondent appealed against assessments to Income Tax made upon him under Schedule D for the years 1940-41, 1941-42 and 1942-43 in the sums of £4,000, £10,000 and £10,000, respectively. The Special Commissioners discharged the assessments but stated a Case for the opinion of the High Court of Justice. It was contended before me on behalf of the Respondent that the sale of sand was merely an exploitation of his rights of property and came under Schedule A, No. I. It was argued on behalf of the Appellant that the sale of sand came under either Rule 1 or Rule 3 of No. III of Schedule A.

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I am of opinion that a sandpit is not a stone quarry within the meaning of Rule 1. I cannot say that a sandpit is something that can be brought in as a "concern of a like nature". Something so different as a sandpit cannot be included in "concerns of the like nature" to any of the concerns enumerated in Rule 3. I am satisfied that this sandpit is not "a concern of a like nature", and the Commissioners are not entitled to tax this man under Rule 3 of No. III, Schedule A.

In *Sywell Aerodrome, Ltd.* v. *Croft*, [1942] 1 K.B. 317, at page 325; 24 T.C. 126, at page 135, Lord Greene, M.R., said: "The owner of lands "is deemed to obtain income from his mere ownership, and the occupier "of lands is deemed to obtain income from his mere occupation. The "measure of the income so deemed to be derived is in the ordinary case "determined by reference to the annual value as defined. 'The result' "(to quote the language of Lord Dunedin in *Fry* v. *Salisbury House* "*Estate, Ltd.*(1)) 'is that by the operation of the assessment under Schedule "'A, which is made imperative by the statute . . . the income of the "'assessee is so far dealt with and cannot be dealt with again.' The "same is true of income which is assessed under Schedule B. Where, "therefore, in respect of any particular land, tax has been assessed (as "it must be) both in respect of the property in the land under Schedule "A and in respect of the occupation of the land under Schedule B, no "further tax is exigible in respect of any income referable to that property "or that occupation even if such actual income greatly exceeds the value "on which the tax is calculated. Similarly, apart from specific provisions, "the taxpayer who derives from his property or his occupation an actual "income which falls below the assessed value can obtain no reduction "of tax. It is perhaps not unnatural that the revenue authorities, "finding in certain cases a very large excess of actual income over the "assessed value have endeavoured to levy tax on that excess by treating "it as referable to a trade under Case I of Schedule D or to a profit "under Case VI. Instances of these endeavours are to be found in the "case of Schedule A in *Fry* v. *Salisbury House Estate, Ltd.* and in the "case of Schedule B in *Lord Glanely* v. *Wightman*(2). The effect of "these decisions is that where profits are referable to property or "occupation the Crown, like the subject, is bound by the statutory measure "in accordance with which such profits fall to be ascertained. A further "principle I think also emerges, namely, that, even if the profits in "question are made by means of a highly organized commercial operation "and one which in ordinary parlance would be described as a trading "operation, the relevant Schedule, be it A or B, must be applied. When "once a profit is referable to property or occupation, in that category it "must remain. It cannot be taken out of that category by calling the "operation which gives rise to it a trading operation."

At page 327 (24 T.C., at page 136), Lord Greene said: "On principle "and apart from authority and leaving aside special cases for which "particular provision is made, the broad distinction between the two "Schedules appears to me to be that the profits falling under Schedule "A are those annual profits which an owner makes or could make by "granting or limiting part of his rights as owner of the land in favour "of others; while those falling under Schedule B are those annual profits "which an occupier makes or could make by his own operations on the

(1) 15 T.C. 266, at p. 307. (2) 17 T.C. 634.

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"land itself or by the unaided bounty of nature. The essence of the "distinction which I see, lies in the difference between rights which are a "legal conception with no physical existence or reality and the land "itself as a physical thing. Let me take the simple case of land belonging "to A which is let at a rackrent to B. Here A is not himself by his "own operations extracting profit from the land itself—he is transferring "to B for an annual consideration part of his rights of property in "relation to the land. B, on the other hand, is the occupier and as such "is in a position to extract profit from the land itself by his own operations. "In other words, A is exploiting his rights, B is exploiting the land "itself which is the subject-matter of those rights. If, on the other "hand, A, instead of leasing the land, retains it in his own hands, he "is treated for tax purposes as deriving two different profits, the one "which he could have made by exploiting his rights of property, the other "which he makes or could have made by exploiting the land itself."

The principle is that where a man has a profit he is only entitled to be taxed under Schedule A.

It was contended on behalf of the Crown that Section 21 of the Finance Act, 1934, does not apply, and this was not controverted by the Respondent. Both sides agree that this is not an easement; both sides agree that it is a sale of sand.

The net point is whether it comes within Rule 3 of No. III, or Rule 1 of No. III of Schedule A as a stone quarry. I decide that it comes within neither of these. I need not decide the point raised in paragraph 6 of the Case Stated.

I dismiss the appeal with costs.

The Crown having appealed against the decision in the King's Bench Division, Northern Ireland, the case came before the Court of Appeal, Northern Ireland (Andrews, L.C.J., and Babington and Murphy, L.JJ.) on 16th, 17th, 21st and 22nd February, 1944, when judgment was reserved. On 9th March, 1944, judgment was given unanimously against the Crown, with costs, confirming the decision of the Court below.

The Attorney-General, Northern Ireland (Mr. John C. MacDermott, K.C.), Mr. L. E. Curran, K.C., and Mr. C. A. Nicholson appeared as Counsel for the Crown, and Mr. W. F. McCoy, K.C., and Mr. H. A. McVeigh for the Respondent.

JUDGMENT

Andrews, L.C.J.—The point involved in this case is confined to a narrow compass. Briefly expressed, it is whether a certain sandpit, the property of the Respondent, falls within the scope of Rule 3 of No. III of Schedule A contained in the First Schedule to the Income Tax Act, 1918, so that the profits thereof are taxable thereunder. Nothing in this judgment is intended to affect the Respondent's liability under any other Rule or Schedule of the Income Tax code.

The matter comes before us on a Case stated under Section 149 of the Income Tax Act, 1918, by the Commissioners for the Special Purposes of the Income Tax Acts. At the hearing before them at Londonderry the

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Respondent appealed against certain assessments made upon him for the years 1940-41, 1941-42 and 1942-43 in the sums of £4,000, £10,000 and £10,000, respectively. These assessments included certain sums received by the Respondent in respect of sales of sand from the said sandpit to builders and others who required it. The Case Stated is most meagre in its particulars regarding the nature and extent of the sandpit, but it appears that the persons who required the sand came into the sandpit and dug and carried away the sand therefrom at the prices of 6*d*. and 9*d*. per ton, graded according to quality. These sums were paid in full without deduction of tax. The Respondent did not win or apparently do any other work in connection with the sand. It is stated that he "simply "manages the sandpit", but whether this is intended to mean anything more than that he employs a man to keep records of the sand taken, does not appear. The Commissioners who heard the appeal were of opinion that the sums received in full by the Respondent in respect of the sales of sand were rent payable in respect of an easement within the meaning of those words in Section 21 of the Finance Act, 1934; that that Section made it mandatory to pay such rents under deduction of tax; and that if not so paid, and in the absence of any evidence as to whether they fall within Rule 19 or Rule 21, All Schedules Rules, there was no jurisdiction to assess the recipient in respect thereof. They accordingly discharged the assessments. This finding, it is agreed, is unsustainable, and no attempt was made to support it before Brown, J., who heard the Case Stated in the High Court, or in this Court. No easement existed and, accordingly, no rent could be said to have been payable in respect thereof.

Before Brown, J., it was contended that the case fell within either Rule 1 or Rule 3 of No. III of Schedule A, but the learned Judge rejected both submissions; and before us the Attorney-General admitted that without further evidence or findings in regard to the geological nature of sand he could not succeed in bringing the case within Rule 1. The issue for our determination is, accordingly, narrowed down to that stated in the opening paragraph of this judgment. It is indeed unfortunate that we are called upon to decide a point which was apparently not before the Commissioners when stating this Case.

Counsel for both parties dealt fully in argument with the nature of the tax under Schedule A which is charged "in respect of the property in all "lands, tenements, hereditaments, and heritages in the United Kingdom, "for every twenty shillings of the annual value thereof." It is unnecessary in referring to the different numbers or classes into which such lands are sub-divided in the Schedule to say more than that No. I embraces all lands which do not fall within Nos. II or III; and it is the submission of the Respondent that his lands, including the sandpit, fall within this class No. I in which the annual value is determined, under what is designated as the "General Rule", on a rackrent basis irrespective of profits. Clearly a sandpit does not come within No. II which is confined to such property as tithes, royalties, and fines received in consideration of a demise. No. III contains nine Rules for estimating the annual value of "certain other "Lands, Tenements, Hereditaments, or Heritages which are not to be "charged according to the preceding General Rule", and for determining the person chargeable. The first of these (no longer relied upon in the present case) provides that in the case of quarries of stone, slate, lime-stone, or chalk, the annual value shall be understood to be the profits of the

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preceding year. Rule 2 relates to mines of coal, tin, lead, copper, mundic, iron and other mines, where the annual value is understood to be the average amount for one year of the profits of the five preceding years. The properties embraced in these two Rules are clearly defined. In the one we find certain quarries of a specified character; in the other certain mines.

The drafting of Rule 3 is essentially different. Its importance necessitates my setting it out *in extenso*:—"In the case of ironworks, gasworks, "salt springs or works, alum mines or works, waterworks, streams of "water, canals, inland navigations, docks, drains or levels, fishing, rights "of markets and fairs, tolls, railways and other ways, bridges, ferries, and "other concerns of the like nature having profits from or arising out of "any lands, tenements, hereditaments or heritages, the annual value shall "be understood to be the profits of the preceding year."

Now this detailed enumeration of so-called "concerns" does not expressly include a sandpit; and, accordingly, the sandpit in the present case can only be brought within the Rule if it is properly described as a "con- "cern of the like nature". My first difficulty in so holding is that unfortunately I do not find in the Case Stated sufficient material to enable me to form a definite opinion as to whether or not this particular sandpit would be aptly designated a "concern". This is a word, no doubt, of somewhat wide import and application. The appropriate meaning which is assigned to it in the New English Dictionary, Vol. II, page 762, No. 10, is "a business organisation; a business, a firm; a commercial or manu- "facturing establishment." That a sandpit may be a "concern" of this character I have no doubt. The owner of a sandpit may not only "manage" it; he may operate it, and carry on a business in connection with it with the assistance of his own employees, and possibly also with the aid of certain mechanical plant or equipment which he has provided for the purpose. No one could question a finding that such a sandpit constituted a "concern". On the other hand, it is, in my opinion, equally clear, that if the owner told a neighbour that he could enter upon his lands and take therefrom a few loads of sand for his own purposes, this would not make the portion of the lands from which the sand was taken a "concern", whether such sand was given voluntarily or sold for reward. The present appears to me to be an intermediate case; but, in the absence of particulars such as those to which I have referred in an earlier part of this judgment, and in the further absence of any express finding of fact by the Special Commissioners, I am not prepared to express any definite opinion, or myself to arrive at any conclusive finding thereon. Perhaps, on such evidence as we have, it looks more consistent with a mere exploitation of his rights of property than the establishment of a "concern" in the commercial or trading sense of the term.

I desire, however, to go further. It would not be sufficient to find that this sandpit is a "concern". To come within Rule 3 of No. III it must be a "concern *of the like nature*". I confess that these words in the context in which they are placed have for me no clear or certain meaning whatever. What nature, for example, is common to ironworks and ferries, to salt springs and rights of market, to alum mines and railways? Some of the concerns so specified relate to land, some to waters, some are rights corporeal and some incorporeal, some provide a medium for transport whilst others are of a wholly fixed and stationary character. What is the

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genus common to them all? What is the common feature in them which must also be found in any other "concern" before it can be brought within Rule 3? My examination of authority has failed to provide me with any satisfactory answer. The learned Attorney-General submitted that it is such concerns, and only such concerns, as by their nature require a special and active user of the land that come within the Rule. He may be right, but the Statute itself doesn't say so. Let us then consider some of the relevant authorities.

In *Edmonds* v. *Eastwood*, 2 H. & N. 811, which it is rightly pointed out was not a Revenue case, the opinion of the Court (consisting of Pollock, C.B., and Martin, Watson and Channell, BB.) clearly was that "the case "of a brickfield was not intended to be included within No. III"; and, not being within either No. II or No. III, it falls within No. I because of the more general character of its words. I am unable, however, to find in any of the judgments any helpful interpretation of the words "other concerns "of the like nature". Thus Watson, B., at page 825, after quoting Rule 3 down to the words "of the like nature", merely adds: "These latter words "refer to works, etc., *of the same kind* as those before mentioned; but the "digging clay and making it into bricks is a very different matter." One experiences just the same difficulty in assigning a meaning to the words "of "the same kind" as one finds in interpreting the words "of the same "nature". What is the "nature" or what is the "kind" referred to?

The words of Rule 3 of No. III came under review also in the case of *Edinburgh Southern Cemetery Co.* v. *Kinmont*, 2 T.C. 516, in which the Court of Exchequer in Scotland held that where the Cemetery Company sold the use in perpetuity of grave spaces in the cemetery to be used for burial purposes only, the company was assessable under the 3rd Rule of No. III, Schedule A. I am not called upon in the present case to express any definite opinion by way of approval or disapproval of this decision as there appears to me to be little in common between a public cemetery and a private sandpit. One naturally looks, however, to see what there was found to be "of the like nature" in a cemetery, such as that in the *Edinburgh* case, and the several concerns specifically enumerated in Rule 3. Lord President Inglis merely said (at page 528): "It appears to me "that the present Cemetery Company falls very fairly within the words "'other concerns of the like nature,' as occurring in that rule, and there-"fore the charge should be made under No. 3 of Schedule A, Rule 3." Lord Shand came to closer quarters with the problem, but to me his words are not convincing: "At first sight, of course", he says (at page 528), "the notion that a Cemetery Company is a concern of the like nature with "any of the others mentioned is a little startling, but the true solution of "that question is to be found in this, that all of these different concerns "relate to companies which, having purchased or acquired land, remain "in the occupation and use of that land themselves, and are using it for "the purpose of some trade or business whereby they acquire profits. If "any company has that feature in common with the ironworks and other "works that are enumerated under Rule 3 of No. 3 of the statute, then I "think it falls to be assessed in terms of that rule." Twice in these words does Lord Shand refer to the apparent necessity for the concern being a "company", which seems to me to be an unwarranted assertion, not only because Rule 3 contains no words which justify it, but also because the very next Rule (No. 4) opens with the words: "Tax under the above

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"rules shall be assessed and charged *on the person* or body of persons "carrying on the concern". Likewise, I am unable to accept his last condition—that the companies "are using it for the purpose of some trade or "business". The several quarries and mines enumerated in Rules 1 and 2, respectively, would stand the test of this criterion, yet they cannot fall to be assessed both under one of those Rules and also under Rule 3. Finally (at page 530), Lord McLaren refers to the general words which, as he says, are "descriptive of things *ejusdem generis*." He issues a warning that one must be careful not to give too wide an extension to such general words, and adds that he would not be disposed to hold that any unnamed business or trade carried on by the use of land would fall under Rule 3, if it were possible by fair construction to bring it within Rules 1 or 2. "It is "certainly not sufficient", he continues, "to bring a particular use of land "within the scope of Rule 3 that the proprietor of the land is using it in "connexion with his trade or for purposes of trade, because in such cases "it is generally possible to separate the income into two parts, the one "representing the rent or annual value of the heritable property, and the "other representing commercial profit. Where this can be done, the proper "mode of assessing seems to me (to be) to assess under Schedule A in "respect of annual value, and also under Schedule D for the commercial "profits of the business or manufacture carried on within the heritable "subjects. But there are cases where it is very difficult to separate the "income of a proprietor into rental and commercial profits. Rule 3 appears "to have been devised to meet such cases, though it is proper to observe "that the enumeration also includes works of a description in which it "seems to be quite possible to make such a separation into income assess-"able under Schedule A and income assessable under Schedule D." I shall only say by way of comment, but with all possible respect, that the divergent views of the learned Lords do not assist me in determining the genus; and that Lord McLaren, in laying down his test, appears to me rather to be legislating than interpreting the words "of the like nature". Even, however, if his test be accepted as the proper one, and if it be applied to the present case, it does not, in my opinion, assist the Appellant, on whose behalf the case was cited by the Attorney-General, as there should not be the slightest difficulty in this case in separating the income or commercial profit derived from the sandpit trade or business from that which Lord McLaren calls "the rent or annual value of the heritable property".

In *Humber Conservancy Board* v. *Bater*, [1914] 3 K.B. 449; 6 T.C. 555, Scrutton, J. (as he then was) held that certain statutory contributions which the Conservancy Board, who were the lessees of certain foreshores and the bed of the River Humber, received from four railway companies and a canal company, were liable to Income Tax as being either profits from an "inland navigation" within Schedule A, No. III, Rule 3, or as annual profits and gains within Section 2, Schedule D—he was "inclined "to think" the former. I shall only say that if the learned Judge thought there was a doubt in that case as to whether the Board's said receipts fell to be taxed under Schedule A, No. III, Rule 3, there would appear to me to be infinitely greater room for doubt in the present. In the course of his judgment he says ([1914] 3 K.B., at page 455; 6 T.C., at page 569) that "rule 3 sets out a list of things all of which have some connection with "land"; and that "The whole classification is directed to profits in some "way arising out of land or interests in land." With both these dicta I expressed my respectful concurrence; but it is quite another thing to say

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that all profits in some way arising out of land or interests in land are taxable under No. III, Rule 3. If this were the true test of inclusion in No. III, Rule 3, one would naturally ask: Why specially enumerate any concerns in that Rule? Indeed, under such a test all lands and interests in lands in any part of Schedule A would come within the scope of the Rule provided they produced taxable profits. Expressed in another way, it seems to me that a sole test of "profits from or arising out of any lands" would wholly ignore the words "of the like nature" in the Rule. In effect it would interpret the Rule in the manner which I suggested for consideration during the argument, namely, that the word "having" might be read as "in that they have"; or, as the learned Attorney-General perhaps more simply suggested, that "i.e." be interposed in the Rule between the words "nature" and "having profits". The simplicity of such a construction appeals to one; but on reflection I am of opinion that this would be a dangerous method of interpretation to introduce into the construction of statutes, and that it would be doing unjustifiable violence to the actual language of the Rule. Moreover, in the present case one would, it seems to me, be ignoring the earlier history of the Rule, for it was only in the Act of 1918 that the words "having profits" were introduced into it.

The decision of the House of Lords in *Salisbury House Estate, Ltd.* v. *Fry*, [1930] A.C. 432; 15 T.C. 266—that rents received from a block of buildings let out as unfurnished offices to tenants were profits arising from the ownership of land in respect of which the assessment under Schedule A was exhaustive, and that they therefore could not be included in the assessment under Schedule D as trade receipts of the company—does not directly affect the present case, and I refer to it only because Lord Macmillan, immediately prior to his citation from Lord McLaren's judgment in the *Edinburgh* case(1), refers to Rule 3 of No. III as comprising "an "enumerated series of undertakings *mostly of a public utility character* "and 'other concerns of the like nature'" ([1930] A.C., at page 469; 15 T.C., at page 329). If by these words Lord Macmillan is to be understood as implying that the true genus of the Rule is public utility, clearly the present sandpit, which is privately owned and managed for personal profit, does not fall within its scope. In this connection it may not be regarded as inappropriate to mention that Sir Francis Gore, Solicitor to the Inland Revenue, in his article upon Income Tax in 16 Halsbury, 1st edition, page 619, whilst describing the properties comprised in class No. I of Schedule A, says that it applies generally to all corporeal hereditaments capable of actual physical occupation with the exception of mines and quarries and certain other *large trading concerns* enumerated in class No. 3. As indicating another possible genus, these words equally fail to embrace this private sandpit.

Finally, I would refer to the words of Lord Buckmaster in *Commissioners of Inland Revenue* v. *Forth Conservancy Board*, [1929] A.C. 213; 14 T.C. 709, in which the terms of Schedule A, No. III, Rule 3, came under consideration because of the claim that the surplus of certain shipping dues levied by the Conservancy Board was a profit arising out of lands or heritages within Schedule A and assessable as such. In the opening words of his speech (at page 215) Lord Buckmaster states that the Commissioners of Inland Revenue had deliberately elected to base their claim on Schedule A, No. III, Rule 3, which he refers to as a "narrow foundation"(2); and

(1) 2 T.C. 516. (2) 14 T.C., at p. 720.

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again (at page 218), in rejecting the claim, he expresses it as his view that "there is no particular reason why an extended interpretation should be "given to the illustration of properties subject to the charge contained in "the third sub-head."(1).

It is in this state of the law that I bear in mind the fact that we are called upon in the present case to interpret the language of a Rule forming part of a code to which the learned author of Konstam upon the Law of Income Tax stated in the 9th (1943) edition at page 6, "ordinary canons "of construction cannot be applied". He says of this code that it is unsafe to assume without diligent study that the same word is used in two places in the same sense; that different words are not used to mean the same thing, or that any series of expressions or any set of provisions is intended to be exhaustive, so that what is not mentioned is excluded. Lord Wrenbury, Earl Loreburn, and more recently Lord Macmillan in the *City of London Commissioners* v. *Gibbs*, [1942] A.C. 402, at page 424; 24 T.C. 221, at page 250, are amongst those who have referred to the code in highly disparaging terms. In reference to the principle of construction to be applied to the code we have also the opinions of many Judges of the highest eminence. These opinions will be found conveniently collected in Beal on Rules of Legal Interpretation. From them I make two selections. The first is in the words of Bayley, J., in *Denn & Manifold* v. *Diamond* (1825), 4 B. & C. 243, at page 245, that it is a settled rule of law that every charge upon the subject must be imposed by clear and unambiguous language. The second—a hundred years later—is from the speech of Lord Buckmaster in *Ormond Investment Co., Ltd.* v. *Betts*, [1928] A.C. 143, at page 151; 13 T.C. 400, at page 425, where, after citing with approval from the speech of Lord Blackburn in *Coltness Iron Co.* v. *Black*(2), he says that the imposition of a tax must be in plain terms—kindred in that respect to the creation of a penalty or the establishment of a crime.

In my opinion if the practice of the past in regard to the taxation of the profits of sandpits, gravelpits, brickfields, and the like, is to be altered, and if such profits are to be brought within the scope of the taxation imposed by Schedule A, No. III, Rule 3, this should only be effected by unambiguous amending legislation or by authoritative decision of the House of Lords.

We affirm the decision of Brown, J. The Respondent must have his costs of the Case Stated.

Babington, L.J.—I agree that the decision of Brown, J., must be affirmed. The Lord Chief Justice has summarised the facts and arguments and I will not repeat them but proceed at once to the point which appears to me to be decisive in the Respondent's favour.

It was not seriously argued that this sandpit is a quarry of stone within the meaning of Schedule A, No. III, Rule 1. No evidence was given nor any authority cited in support of this contention which accordingly fails.

The Appellant must therefore bring the case within the express words of Rule 3 by showing that, as worked by the Respondent, the sandpit is a concern of the like nature with all or some of the concerns mentioned in the Rule.

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(1) 14 T.C. at p. 722. (2) 6 App. Cas. 315, at p. 330; 1 T.C. 287, at p. 316.

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It has been argued by Counsel for the Respondent that in construing a taxing statute express words must be used, or obvious intention shown, to impose liability on the taxpayer. It is not necessary to rely on any special rule of construction in this case, but I am not satisfied that there is any peculiar canon applying to taxing statutes, and though a number of cases have been cited which are said to support this contention, they amount to no more than this, in my opinion: that when the Legislature purports to impose a direct liability or charge, the intention to do so must be expressed in plain and unambiguous language, whether the charge be by way of tax or otherwise, and I have not heard any case cited in which words have been held *not* to impose a tax which would have imposed liability other than by way of tax.

Upon any canon of construction the Appellant must bring this sandpit within Rule 3 as being a concern of the like nature and must in the first place show that, as used by the Respondent, it is a concern. The evidence as to this is set out in the Case Stated and is very meagre. It can be reduced to two simple statements of fact. First, that the Respondent owns a farm on which there is a sandpit, and secondly, that he sells sand from this pit to all comers at 6*d*. to 9*d*. a ton. Is this sufficient to constitute a concern within the meaning of Rule 3? If it is, then every farmer or owner of land who sells any substance found on his land carries on a concern within the Rule.

The size of the concern cannot be the test of its legal nature, and it is impossible to say that a man who sells hundreds or thousands of tons of sand from a pit on his land is in law carrying on a concern while a man selling a few tons is merely exercising his rights of ownership.

It may be that an owner could carry on the sale of sand off his land under circumstances that would constitute a concern, but this would be a matter of fact and the fact would have to be found on evidence adequate to support it. There is no such finding in this Case nor any such evidence, and we are asked to hold that the mere sale of sand, in law, constitutes a concern. When the various concerns enumerated in the Rule are scrutinised it will be seen, however, that something more than a mere sale is required to constitute a concern—how much more being a question of fact which must be found and cannot be implied as a matter of law.

If there be any finding as to the nature of the sales in the present case, Mr. McCoy maintains it is in the Respondent's favour, and that the finding of the Special Commissioners in paragraph 6 of the Case Stated, that the sums received in respect of the sales were rent in respect of an easement, negative the existence of a concern and is conclusive in his client's favour.

Whether this be so or not, I hold that in the absence of any positive finding that these sales constituted a concern, this Court cannot determine this question in the Appellant's favour as matter of law, for this would involve the proposition that every farmer or owner of land who sells any substance found on his land thereby carries on a concern within Rule 3 irrespective of the size or nature of his operations. This conclusion is unsustainable. It would make the working of a turf-bank, a sandpit or a gravelpit by an owner who sells turf, sand, gravel or clay off his farm to his neighbours a concern, and the terms of Rules 1 and 3 do not suggest that the Legislature intended to lay down any such rule.

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It is not necessary to express any opinion as to whether, if this be a concern, it is one of a like nature with the concerns enumerated in Rule 3. These concerns do not constitute a genus as there is no similarity between them. The Attorney-General argued that they are connected by user. He said that each of these concerns has to do with a special user of land and that when you find a special user of land, whatever that user may be, there is a concern of a like nature with those enumerated. This construction assumes the existence of a *concern*, and was based mainly on the case of *London Cemetery Co.* v. *Barnes*, [1917] 2 K.B. 496; 7 T.C. 92; but in that case the cemetery carried on upon the lands was clearly a concern and the sole question was whether it was of the like nature with the enumerated concerns. It was held that the cemetery was of the like nature, but I do not think it is necessary to consider whether, if the user of the sandpit in the present case had been proved to constitute a concern, the same rule would apply, and I express no opinion one way or the other.

The distinction between cases in which a concern has been found to exist and those in which there is no concern may appear to be a fine one, but I think a comparison between the *London Cemetery* case and *Roberts* v. *Executors of Lord Belhaven*, 1925 S.C. 635; 9 T.C. 501, where the sale of colliery dross off the lands was held not to be profits but the price of the material sold, shows that this distinction determines liability. In the former case there was a concern and in the latter I read the decision as negativing the existence of a concern.

I hold, accordingly, that it has not been established that this sale of sand amounted to carrying on a concern, from which it follows that the Respondent cannot be taxed under Rule 3. The terms of Rule 1 substantiate this view. That Rule applies to quarries of stone, slate, etc., whether their working constitutes a concern or not. Sandpits are not included, as they might have been if the Legislature intended them to be subject to tax, and they are, therefore, only taxable when their working constitutes a concern. This suggests that the Legislature did not intend to tax sandpits as concerns irrespective of the way they are worked, otherwise they would have been grouped along with quarries in Rule 1.

As there is no evidence that the Respondent was carrying on a concern within the meaning of Rule 3, the appeal must be dismissed with costs.

Murphy, L.J.—I agree. The question arising on this appeal is whether the operations described in paragraph 3 of the Case Stated constitute a "concern of the like nature" within the meaning of those words in No. III, Rule 3, of Schedule A of the Income Tax Act, 1918. While the question is a net one, its solution is beset with difficulties. At the outset it appears to me that, owing doubtless to the ground on which the decision of the Commissioners was based, the facts relating to the alleged "concern" are stated in the most meagre fashion. We are not told the size of the holding from which the sand is being taken, the period during which sand has been taken from this pit, nor the number of "builders and any others" who have been so taking sand: these are some of the factors which might throw light on the question for our decision.

On the facts as stated, it appears that on the lands of Mr. Scott, builders and others dig and carry away sand from a sandpit, paying 6*d.* to 9*d.* a ton (presumably according to quality) for such sand. Mr. Scott "manages" the pit—the nature of such management not being stated—and

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employs a man to keep a record of the amount of sand taken. Mr. McCoy submits that this does not constitute a "concern", and secondly that, if a concern, it is not of the like nature with those enumerated in No. III, Rule 3. Trade as defined by Section 237 of the Income Tax Act, 1918, includes "every... concern in the nature of trade"; but neither this definition nor the other references to "concern" in the Act or Schedules throw any light on the present question.

The principle enunciated by Lord Blackburn in *Coltness Iron Co.* v. *Black,* 6 App. Cas. 315, at page 330; 1 T.C. 287, at page 316, in the words, "No tax can be imposed on the subject without words in an Act of "Parliament clearly shewing an intention to lay a burden on him", was specifically adopted and approved by Lord Buckmaster in *Ormond Investment Co., Ltd.* v. *Betts,* [1928] A.C. 143, at page 151; 13 T.C. 400, at page 425, where, in quoting Lord Blackburn's words, he says that there is "a "principle well known to the common law and that has not been and "ought not to be weakened—namely, that the imposition of a tax must "be in plain terms", and added, "It is in that respect kindred to the "creation of a penalty or the establishment of a crime. The subject ought "not to be involved in these liabilities by an elaborate process of hair-"splitting arguments." No doubt as Lord Sumner in *Brown* v. *National Provident Institution,* [1921] 2 A.C. 222, at page 257; 8 T.C. 57, at page 97, says "Applied to income tax, however, this is an ironical proposition"; but I consider that I must have regard to the principle in arriving at a decision in the present case.

Even in 1842, I would assume that sandpits must have been a not uncommon feature of the countryside, and if it had been intended that the profits from such sandpits should be brought within No. III of Schedule A, it seems to me remarkable that they were not included specifically in Rule 1, which enumerates not merely quarries of stone but also quarries of limestone and chalk. It would have been more natural to include sandpits in Rule 1 than in Rule 3, but again, if the intention of the Legislature had been to include sandpits they might have been added to the remarkable list of diverse "concerns" in Rule 3. While I do not agree with Mr. McCoy that a "concern" must connote something which requires substantial machinery or buildings, I am not satisfied that this selling of sand by Mr. Scott, on such information as we can glean from the Case Stated, constitutes a "concern" within the meaning of that word in No. III, Rule 3. It is to be observed that the Commissioners have not expressly held that these sales of sand constituted a "concern" (while such a finding may be implicit in their decision on Section 21 of the Finance Act, 1934), and this would appear to me to be a question of fact for the Special Commissioners if they were of opinion that there was any evidence to warrant such a finding (see *Shingler* v. *P. Williams & Sons,* 49 T.L.R. 221; 17 T.C. 574). *Shingler's* case may be distinguishable on the ground that the slag had been brought on the land by human activity; but it is certainly instructive as the Special Commissioners had found that the respondents, who had granted to a company the right to get and carry away for seven years, in consideration of payments on a royalty basis, the slag which covered a field of ten acres the property of the respondents, were not carrying on a trade within Schedule D. If the sale of sand as described in the Case Stated constitutes a "concern" so, necessarily, would the sale by a farmer of turf to persons who cut and won it on his holding.

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Mr. McCoy stated that the present case is the first instance in Ireland of an attempt to assess under No. III of Schedule A a sandpit worked as this pit has been worked, and I did not understand that this was seriously challenged; the case of *Stratford* v. *Mole & Lea,* 24 T.C. 20, cited by Mr. Curran, was decided in 1941, and may have been based on the view that a gravelpit was a quarry of stone. The war has doubtless increased greatly the demand for sand, but it is certainly remarkable that for one hundred years no instance is known of an argument that sandpits come within No. III of Schedule A.

If the working of this sandpit does not constitute a "concern" it is unnecessary to consider whether or not it is a "concern of the like "nature" with those enumerated in No. III, Rule 3; but having regard to the arguments addressed to us I desire to express my opinion on the construction of this phrase.

Apart from authority I should have no hesitation in coming to the conclusion that these remarkably diverse "concerns" did not constitute any genus—I entirely fail to appreciate any common feature, "thread" or "theme", that would constitute a connecting link between (for example) ironworks, salt springs and fishings. The arguments that fishings involved a "special use of land", or "a substantial use of the corpus of land", carry no conviction to my mind. It has not been very strenuously argued on behalf of the Appellant that the words "other concerns of the like nature" should be related not to a preceding genus but to the several enumerated "concerns", but, even if such a construction could be adopted, I do not think that this sandpit is "of "the like nature" with any of the enumerated "concerns". To constitute such a "like nature" it is not sufficient, in my opinion, to say that sand constitutes a part of the soil of Mr. Scott's holding.

The two cases which have a direct bearing on the question for our decision are *Edmonds* v. *Eastwood,* 2 H. & N. 811, and *Edinburgh Southern Cemetery Co.* v. *Kinmont,* 2 T.C. 516. There are several passages in the judgments in the first case which go to show that brickfields are not of a like nature with any of the concerns enumerated in No. III, Rule 3, but this point was not definitely decided. In the second case it was decided that an unincorporated cemetery company, which granted for payment the right of burial in perpetuity and distributed the profits amongst its members, was wrongly assessed under the 6th Rule of No. II, Schedule A (now No. II, Rule 7) but should have been assessed under the 3rd Rule of No. III, Schedule A. The Lord President (Inglis) merely stated (at page 528) that "the present Cemetery Company falls very "fairly within the words, 'other concerns of the like nature' as occurring "in that rule". Lord Shand (at page 528), who said that at first sight the notion was "startling", held that "the true solution of that question "is to be found in this, that all of these different concerns relate to "companies which, having purchased or acquired land, remain in the "occupation and use of that land themselves, and are using it for the "purpose of some trade or business whereby they acquire profits." Lord Adam (page 530) concurred "on the same grounds". Lord McLaren, in a closely reasoned judgment, said that No. III, Rule 3, appeared to have been devised to meet cases where it is very difficult to separate the income of a proprietor into rental and commercial profits, and that according to the constitution of the Cemetery Company there

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was no separable part of its income which was capable of being represented as rental (pages 530 and 531). Lord McLaren, however, pointed out that the enumeration in this Rule also included "works of a description "in which it seems quite possible to make such a separation into "income assessable under Schedule A and income assessable under "Schedule D"—instancing gasworks as a case in which "it would not "be so difficult to separate rent from commercial profits; and for other "purposes such a separation has been made" (page 531). Lord McLaren also stated that "It is certainly not sufficient to bring a particular use "of land within the scope of Rule 3 that the proprietor of the land is "using it in connexion with his trade or for purposes of trade, because "in such cases it is generally possible to separate the income into two "parts, the one representing the rent or annual value of the heritable "property, and the other representing commercial profit" (page 530).

In referring to this *Cemetery* case (1) in *Salisbury House Estate, Ltd.* v. *Fry*, [1930] A.C. 432; 15 T.C. 266, Lord Dunedin at page 445 (2), and Lord Macmillan at page 469 (3), quoted this part of Lord McLaren's judgment, in which as Lord Dunedin said, Lord McLaren "seems almost "to anticipate the present case"—that is to say a case distinguishable from the *Cemetery* case. Both these learned Lords recognise the decision in the *Cemetery* case, but it was not necessary for them to do more than to distinguish it. For my own part, I find it difficult to understand why Lord Shand in the *Cemetery* case should have been, apparently, impressed by the consideration that "all these different concerns" (in No. III, Rule 3) "relate to companies . . . ". If there is any materiality in this consideration, it does not apply to the present case; and again I can see no difficulty in distinguishing between "rental" and "commercial "profit" in the case of a sandpit. While, therefore, the *Cemetery* case is an authority for the "startling" proposition that a cemetery, owned and managed as was this Edinburgh Cemetery, is a "concern of the like "nature" with those enumerated in No. III, Rule 3, I do not think that it would compel me to hold that this sandpit as "managed" and worked—if a "concern"—is also a "concern of the like nature". The words of Blackburn, J., in *Rex* v. *Cleworth* (1864), 4 B. & S. 927, seem to be apposite where, on the question as to the application of the words "or "other person whatsoever" under the Lord's Day Observance Act, 1676, 29 Car. II, c. 7, s. 1, to a farmer, he said (at page 934): "The ratio "of the decision in *Sandiman* v. *Breach* (4), is, that where it appears "that the class which it is sought to bring within the Act was known to "the Legislature at the time the Act was passed, and that class is "omitted, it must be supposed to have been omitted intentionally. It is "impossible to suppose that so numerous and extensive a class as "farmers would be referred to under general words, if it was meant "to be included."

By the use of the words "of the like nature" it is clear that the Legislature intended that the general words "other concerns" should have a limited interpretation, and Lord McLaren's judgment in the *Cemetery* case seems to me to negative the existence of any "genus" to which the several concerns enumerated in No. III, Rule 3, could be said to belong.

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(1) 2 T.C. 516. (2) 15 T.C., at p. 311. (3) *Ibid.*, at p. 330. (4) (1827) 7 B. & C. 96

We have not been asked to decide any question save the application of No. III, Rule 3, to this sandpit, and in deciding, on such facts as are before us, that this Rule does not so apply, I wish to make it clear that I have not considered the applicability of any other Rule or Schedule.

The Crown having appealed against the decision in the Court of Appeal, Northern Ireland, the case came before the House of Lords (Viscount Simon, L.C., and Lords Russell of Killowen, Macmillan, Porter and Simonds) on 5th, 6th and 7th February, 1945, and on the latter date it was ordered that the case be remitted to the Special Commissioners for them to rehear and, if requested, to state a fresh Case for the opinion of the High Court. Costs were awarded against the Crown.

The Attorney-General (Sir Donald Somervell, K.C.), Mr. L. E. Curran, K.C., Mr. Reginald P. Hills and Mr. C. A. Nicholson appeared as Counsel for the Crown, and Mr. Cyril L. King, K.C., Mr. W. F. McCoy, K.C., and Mr. H. A. McVeigh for the Respondent.

JUDGMENT

Viscount Simon, L.C.—My Lords, this case comes to the House in unusual circumstances. It is the appeal of the Crown against an Order of His Majesty's Court of Appeal in Northern Ireland, which affirmed the Order of Brown, J., on an appeal to the High Court of Northern Ireland, by way of a Case Stated, from the determination of the Commissioners for the Special Purposes of the Income Tax Acts on assessments to Income Tax against the present Respondent. The Case Stated arrived at the surprising conclusion in law that payments made to the Respondent by various persons who came upon his land in order to dig and carry away sand from a sandpit on his property were rent payable "in respect of an easement" within the meaning of those words in Section 21 of the Finance Act, 1934, and that inasmuch as that Section made it mandatory to pay such rent under deduction of tax (though this was not done), there was no jurisdiction to assess the Respondent in respect thereof. There was no possibility of an easement in such circumstances, and Section 21 of the Act of 1934 has nothing whatever to do with the case. No one in Northern Ireland, either Counsel or Judge, has found it possible to support the reasoning of the Commissioners—or rather of the surviving Commissioner, for his colleague died before he could sign the Case. One might have expected, therefore, that the appeal would have been allowed and the matter would have been referred back to the Special Commissioners, with a direction to discharge the assessments unless the Crown established a right to tax against the Respondent on some other ground. This, however, was not the course taken.

The Crown, while rejecting the proposition of law upon which the Case was stated, sought to use the meagre materials of fact contained in the Case and the implications said to arise from the reference to Section 21 as establishing that a separate assessment of this sandpit, based on the profits of the preceding year, was justified under Schedule A, No. III, Rule 3, as being within the words "other concerns of the like nature" which occur in that Rule. It may be so, but it is quite impossible for the House of Lords to decide whether it is so or not in the present case

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on the scanty materials before it. Such a question has nothing to do with the question of law raised in the Case Stated upon which the decision of the Commissioners was founded. Brown, J., held that this sandpit was not proved to be a stone quarry within the meaning of Rule 1, No. III of Schedule A. Indeed, before the Court of Appeal the Attorney-General for Northern Ireland admitted that, without further evidence or findings in regard to the geological nature of sand, he could not succeed in bringing the case within Rule 1. But both Brown, J., and the Court of Appeal reached the conclusion, basing themselves on the exiguous information contained in the Case Stated, and regardless of the fact that the question raised in the Case Stated was something quite different, that this sandpit was not a "concern of the like nature" within Rule 3, No. III. It is this issue which is now brought before the House, and before deciding it, the House ought to be furnished with adequate information. If the House were to give a decision on the point now brought before it without complete materials, there is a grave danger that the terms of our decision might have unintended application to cases not before us. It is possible (though I do not say it is so) that some sandpits would be within the taxing Section and others would not, and the only way in which the House can expound the law on this subject with accuracy and with fairness between the Crown and His Majesty's lieges is to have the facts of the present case more fully ascertained and stated.

Accordingly, I propose to your Lordships that the House should discharge the Orders of the Court of Appeal and High Court, except as to costs, without pronouncing on the correctness or otherwise of the opinions therein appearing. The assessments against which the Respondent appealed should be restored, but the appeal against the assessments should be remitted to the Special Commissioners for them to rehear and, if so requested, to state a fresh case for the opinion of the High Court. The Case should state what are the existing assessments against the Respondent, as regards his property (which we gather belongs to him in fee simple) within which the sandpit is is to be found. In particular, it should be made plain whether the area of the sandpit forms part of the property assessed under Schedule A, No. I, or not. A properly drawn Case will include a statement of the facts ascertained or at any rate of the conclusions of fact drawn from the evidence; it will record what are the contentions on either side; and it will then state the conclusion at which the Commissioners arrived; so far as this is a conclusion of law it would be subject to appeal. In the present instance, the question would appear to be as to whether the sandpit is or is not a "concern of the like nature" within Rule 3 of No. III, and consequently the Case Stated should find facts relevant to this question, such as whether the sales of sand were by way of trade, and what was their extent, and over what period of time they have extended, and whether the sales were merely casual and occasional, or whether they were a series of transactions carried out in pursuance of a regular method or organisation. With this sort of material ascertained, it would seem possible to arrive at a conclusion as to whether the sandpit was a "concern". The question whether it was a concern "of the like nature" involves the construction of the Rule which we are not at present called upon to undertake to pronounce.

There remains the question of costs. The Attorney-General for England, rightly recognising that the course which this case has taken

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has involved the Respondent in considerable expense (though I am far from saying that this can be laid to the blame of the Crown, or indeed to either side), proposes that the Crown should bear the costs already incurred before Brown, J., and before the Court of Appeal, but that there should be no costs in respect of the present appeal to this House. I think, however, that the costs of the present appeal to this House should also be borne by the Crown. I move the House accordingly.

Lord Russell of Killowen.—My Lords, I agree.

Lord Macmillan.—My Lords, I also agree.

Lord Porter.—My Lords, I agree also.

Lord Simonds.—My Lords, I agree.

Questions put:

That the Order appealed from be reversed.

The Not Contents have it.

That, without pronouncing upon the correctness or otherwise of the opinions expressed in the judgments, the Orders of the Court of Appeal and of the High Court be discharged, except as to costs.

The Contents have it.

That the assessments be restored, but that the appeal against the said assessments be remitted to the Commissioners for them to rehear and, if so requested, to state a fresh Case for the opinion of the High Court.

The Contents have it.

That the Appellant do pay to the Respondent his costs in this House.

The Contents have it.

[Solicitors:—Solicitor of Inland Revenue; Solicitor to the Ministry of Finance (Northern Ireland); Rising & Ravenscroft; W. J. G. Seeds, Belfast.]