(Lord Salvesen.)

enable him to purchase the premises solely occupied for business purposes and on the occupation of which his profits must be presumed to have largely depended. I am quite unable to see how such expenditure is in the nature of capital expenditure, looking to the identity of the ownership of the premises and of the business. In my opinion, therefore, the determination of the Commissioners was wrong.

With reference to your Lordships' observations, it is by no means certain that this is not to be a recurrent yearly expenditure. That depends entirely on the attitude the bondholders may take up. No doubt, if he could secure money on the footing that the bond was not to be called up for a given time, he would avoid this expenditure during that period. But it does not in the least follow that he would be able to make arrangements of such a permanent or *quasi* permanent nature, and, there being several bondholders here, the same thing might happen to them that has happened in the case of the one who has died and whose executors have therefore been compelled to call up the bond. That, however, is only by the way because I think there are many charges connected with a business which might only occur at intervals of time and yet are proper deductions from the profits of the business.

On the whole matter I am of opinion that the determination of the Commissioners is wrong.

NO. 27*.—HIGH COURT OF JUSTICE (KING'S BENCH DIVISION).—
13TH AND 14TH OCTOBER, 1920.

COURT OF APPEAL.—10TH AND 11TH FEBRUARY, 1921.

THE CAPE BRANDY SYNDICATE v. THE COMMISSIONERS OF INLAND REVENUE.(1)

Excess Profits Duty—Trade or business—Isolated transaction—Liability of business commenced after beginning of the war—Construction of Taxing Act—Finance (No. 2) Act, 1915 (5 & 6 *Geo.* V, *c.* 89), *Sections* 38, 39, *and* 40, *and Fourth Schedule, Part* II—*Finance Act*, 1916 (6 & 7 *Geo.* V, *c.* 24), *Sections* 45 (2) *and* 69—*Finance Act*, 1917 (7 & 8 *Geo.* V, *c.* 31), *Section* 20 (1)—*Finance Act*, 1918 (8 & 9 *Geo.* V, *c.* 15), *Section* 34—*Finance Act*, 1920 (10 & 11 *Geo.* V, *c.* 18), *Sections* 44 (3) *and* 45.

(1) Reported K.B.D., [1921] 1 K.B. 64, and C.A., [1921] 2 K.B. 403.

In March, 1916, the Appellants, three members of certain firms engaged in the wine trade, entered into an oral agreement to form a syndicate, independent of their respective firms, with a view to acquiring as a speculation a quantity of brandy from the Cape Government for subsequent sale on their joint account. The brandy was bought in three instalments through an agent in Cape Colony, the Appellants being unaware in the first instance of the total quantity available.

A small quantity of the brandy was sold by the said agent on commission and the balance was shipped to the United Kingdom, blended by the members' firms with French brandy purchased by the syndicate, and re-casked and sold in numerous lots, over a period ending September, 1917, by those firms on behalf of the syndicate. The proceeds of the sales, less the usual charges for commission and other expenses, were paid by the members' firms to the syndicate. None of the Appellants had previously or since been engaged in a similar transaction.

The Appellants contended that they carried out an isolated transaction of a speculative nature, which was not a trade or business within the meaning of Section 39 of the Finance (No. 2) Act, 1915; and, alternatively, that if they carried on a trade or business, the profits arising from a business commencing after 4th August, 1914, were not chargeable to Excess Profits Duty.

The Special Commissioners, on appeal, held that the profits in question arose from a trade or business carried on by the Appellants, and that Excess Profits Duty was chargeable in respect thereof.

Held, (1) *that the question whether the Appellants carried on a trade was one of fact, and that there was evidence on which the Special Commissioners could arrive at their conclusion; and* (2) *that, on a true construction of the Finance (No. 2) Act, 1915, and subsequent Acts, a trade or business commenced since the beginning of the war was liable to assessment to Excess Profits Duty.*

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.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 15th October, 1919, for the purpose of hearing appeals, Messrs. O. T. Norris, C. H. White, and R. C. Browning, hereinafter called the Appellants, appealed against assessments to Excess Profits Duty in the sums of £5,281 16*s*. 0*d*. for the accounting period commencing 11th March, 1916, and ending 31st December, 1916, and £4,532 for the

accounting period commencing 1st January, 1917, and ending 17th September, 1917, made upon them in the name of " The Cape Brandy Syndicate " by the Commissioners of Inland Revenue under the provisions of the Finance (No. 2) Act, 1915, Part III, and subsequent enactments.

2. No significance attaches to the name " The Cape Brandy Syndicate " which was not at any time used by the Appellants but was adopted merely for purposes of convenience in connection with the assessments under appeal, and was accepted by the Appellants in order that the appeal might be confined to points of substance.

3. Of the three Appellants, Mr. Norris was a member of the firm of Portal, Dingwall and Norris, Wine and Spirit Merchants, Mr. White was a member of the firm of E. H. Keeling and Son, Wine and Spirit Brokers, and Mr. Browning was a member of the firm of Twiss and Browning, Wine and Spirit Merchants, but it was agreed that the assessments were intended to be made in respect of profits arising to them from the undermentioned transactions undertaken by them on their joint account and not on behalf of their said respective firms.

4. Early in the year 1916, Mr. Norris chanced to hear from a friend that the Cape Government had a quantity of brandy of which it could not readily dispose and which it was prepared to sell at a low price. He came to the conclusion that a profit might be made out of the purchase and sale of this brandy, but the transaction was of a speculative nature and not suitable to be undertaken by his firm, while it required too much capital for him to undertake it alone. He accordingly approached Messrs. White and Browning, who entered into an oral agreement to join him in purchasing the brandy on their joint account. The Appellants did not consult the other members of their respective firms, but treated the transaction as a private one apart from the businesses of those firms.

5. On 11th March, 1916, the Appellants cabled to Messrs. Chiappini Brothers and Company, of Cape Town, a provisional order for the purchase of 100 casks of the brandy on their account, at the same time enquiring how much more there was available. Messrs. Chiappini Brothers and Company executed this order, and subsequently purchased 1,500 casks of brandy on 24th March, 1916, and a further 1,500 casks on 4th April, 1916, as agents for the Appellants. This quantity of 3,100 casks in all was the whole amount of the brandy which the Cape Government had to offer, and it was the Appellants' intention throughout to purchase the whole amount available, but the purchase was made in three instalments as stated above because the Appellants were not aware, in the first instance how much there was for sale. Messrs. Chiappini Brothers and Company sold a small quantity of the brandy as agents for the Appellants on commission for shipment to the East. The remainder was shipped to London

from time to time as ships could be found to carry it. On arrival in London the brandy was blended by the three firms in bond with French brandy purchased by the Appellants for the purpose in two or three lots. The brandy so blended was all sold on behalf of the Appellants by the three firms to which the Appellants respectively belonged. There were about 100 transactions of sale in all, the first taking place on or about 1st July, 1916, and the last on 17th September, 1917. These firms charged the Appellants the usual trade commissions for selling the brandy on their behalf and these commissions have been included in the trade receipts of the firms and taken into account in computing the profits of the firms for purposes of taxation. The firms supplied the necessary casks and paid dock charges and other expenses incidental to the storage and sale of the brandy and charged the cost of the casks and all other expenses incurred by them to the Appellants. The freight and insurance connected with the conveyance of the brandy from Cape Town to London were paid by or on behalf of the Appellants. Invoices for the brandy sold were sent to the purchasers by the selling firms and not by the Appellants. The selling firms collected the purchase price of the brandy and handed over to the Appellants the net receipts after deduction of their selling commissions and the expenses incurred on the Appellants' behalf, and the sums thus handed over have not entered into the taxable profits of the firms or otherwise been treated as appertaining to their trade or business.

6. It was admitted that the intention of the Appellants in purchasing the brandy in question was to sell the whole of it at a profit, and this intention was successfully carried out in the manner above described. None of the Appellants had previously or since been engaged in a similar transaction.

7. It was contended on behalf of the Appellants :—

(*a*) That the profits in respect of which the assessments were made were capital profits on the realisation of a speculative investment, and were not profits arising from any trade or business carried on by the Appellants.

(*b*) That an isolated and exceptional transaction does not amount to the carrying on of a trade or business.

(*c*) Alternatively, that if the profits arose from a trade or business, such trade or business did not commence until the year 1916, and any profits arising from a business commencing after 4th August, 1914, were not chargeable to Excess Profits Duty;

(*d*) That in either case Excess Profits Duty was not payable in respect of the profits in question and the assessments ought to be discharged.

8. It was contended on behalf of the Crown that the profits in question arose from a trade or business carried on by the Appellants during the accounting periods for which the assessments were made and were chargeable to the Excess Profits Duty imposed for those periods.

9. No question arises as to the amount of the assessments, there being no dispute in regard to figures.

10. We, the Commissioners who heard the appeal, were of opinion that the profits in question arose from a trade or business set up by the Appellants and carried on by them during the accounting periods for which the assessments were made and that Excess Profits Duty was chargeable in respect thereof, and we accordingly confirmed the assessment.

11. 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.

P. WILLIAMSON, } Commissioners for the Special
G. F. HOWE, } Purposes of the Income Tax Acts.

York House,
23, Kingsway,
London, W.C.2.
25th May, 1920.

The case came before Rowlatt, *J.*, in the King's Bench Division on the 13th and 14th October, 1920, and on the latter day judgment was given in favour of the Crown with costs.

The Hon Sir William Finlay, K.C., and Mr. A. M. Bremner appeared as Counsel for the Appellants, and the Solicitor-General (Sir Ernest Pollock, K.C.) and Mr. R. P. Hills for the Crown.

JUDGMENT.

Rowlatt, J.—In this case the subject appeals against an assessment to Excess Profits Duty. It appears that three gentlemen, who were members of three firms engaged in the wine trade, entered into a speculation independently of their firms, forming together a little syndicate consisting of their three selves for that purpose, and their speculation was this. They bought a large quantity of Cape brandy in South Africa from the Government there. They did not buy it all at once because they did not know originally how much there was for sale, but they bought ultimately all that there was. I do not think that the circumstance that they bought it piecemeal in that way makes very much difference in the case.

(Rowlatt, J.)

Having done so, they succeeded in selling some of it at a profit, as it was, for export to the East, and the remainder they brought home to this country, I think " as ships offered " is the wording of the statement in the Case, and when they had got it here, they caused it to be blended with a certain amount of French brandy. For that purpose they employed their three respective firms and paid them. They then re-casked it, of course, and re-casked it in more casks or receptacles than it had originally been in, and they then proceeded to dispose of it piecemeal through their three firms, and they disposed of it, I think, in about 100 transactions which lasted fourteen months.

Now under those circumstances it is said that they are not carrying on any trade or business, that this is a single isolated speculation, just as a man might buy property, real or personal, which he thought was going cheap, with a view to selling it, and sell it, and there would be the beginning and the end of it, and that would not be a trade. Well, it is very easy to put clear cases on one side like that, and it is very easy to put clear cases on the other side. But there is a large number of cases in between, in which it is very difficult to say whether there is a trade or business carried on or not.

Now in the case of the *Hudson's Bay Company* v. *Stevens*(1), where the Hudson's Bay sold the lands which were almost the ancestral possessions of that company—or rather, I think, if my memory is right, speaking more accurately they had been given them in liquidation of sovereign rights, or something very like sovereign rights, which they had enjoyed from the time of the Charter of Charles II—where they sold those lands it was held by the Commissioners that they did not carry on a trade. Mr. Justice Channell held that as a matter of law they did carry on a trade and the Court of Appeal held that they did not carry on a trade, that they were merely selling lands, as the Master of the Rolls says, as a landowner might sell the lands which had come down to him from his ancestors.

Then there was the case of *Californian Copper Syndicate (Limited and Reduced)* v. *Harris*(2), where apparently a company bought property for the purpose of selling it, and it was held that in that respect they carried on that trade. Apparently they had other business and this trade was not to be dissevered from that business.

Then there was the case of *Tebrau (Johore) Rubber Syndicate, Ltd. (in liquidation)* v. *Farmer*(3), where a company having an estate simply sold it and went into liquidation, and the Court held that that was not carrying on a trade. And there may be

(1) 5 T.C. 424. (2) 5 T.C. 159. (3) 5 T.C. 658.

(Rowlatt, J.)

other cases. But this case presents some curious features. It is quite clear that these gentlemen did far more than simply buy an article which they thought was going cheap, and re-sell it. They bought it with a view to transport it, with a view to modify its character by skilful manipulation, by blending, with a view to alter, not only the amounts by which it could be sold as a man might split up an estate, but by altering the character in the way it was done up so that it could be sold in smaller quantities. They employed experts—and were experts themselves—to dispose of it over a long period of time. When I say over a long period of time I mean by sales which began at once but which extended over some period of time. They did not buy it and put it away, they never intended to buy it and put it away and keep it. They bought it to turn over at once obviously and to turn over advantageously by means of the operations which I have indicated. Now under those circumstances the Commissioners have held that they did carry on a trade, and I think it is a question of fact, and I do not think, by telling me all the evidence, that the Commissioners can make me, or indeed give me authority—because they cannot give me authority if I do not possess it by law—to determine the question of fact. I think it is a question of fact, and a question of degree which generally is a question of fact. I need not say any more than that. I am not prepared to say that there was no evidence before the Commissioners. I think it is just one of those cases where there was evidence. I can conceive people deciding the other way. I do not say which way I should decide myself. But I certainly think that there were materials upon which they could find as they did. Therefore I think that point, to my great regret, fails because it brings me to the consideration of another point which I think is an extremely troublesome one. It is said that this business was commenced after the 4th August, 1914, and it is argued that the Excess Profits Duty has no relation to that state of affairs at all. If you have not got a business which was carried on before the 4th August, that is to say a pre-war business, the Excess Profits Duty has nothing to say to it.

Now the Excess Profits Duty was imposed by the Finance (No. 2) Act, 1915, and the Section which is, I think, the charging Section, is Section 38 which imposes a duty on the amount " by " which the profits arising from any trade or business to which this " Part of this Act applies, in any accounting period which ended " after the 4th August, 1914, and before 1st July, 1915, " exceeded by more than £200, the pre-war standard of profits." The duty in this Act is referred to as Excess Profits Duty. Therefore the charge is on the amount by which profits after the war exceeded what is called the pre-war standard of profits. Then Section 39, which is very much relied upon by the Solicitor-General, says that the trades and businesses to which the Act applies are all trades or businesses carried on or owned or carried

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on by any person residing in the United Kingdom. It does not say "carried on or to be carried on," and not saying that, I do not think this Section carries it any further at all because it only defines the trades or businesses, as Sir William Finlay pointed out, to which this Part of the Act applies. Therefore, so far, you have got all trades and businesses taxed on the difference between their profits in the accounting period after the war began and the pre-war standard of profits. What is the pre-war standard of profits? Section 40, Sub-section (2) says that "the "pre-war standard of profits . . . shall, subject to the pro- "visions of this Act, be taken to be the amount of the profits "arising from the trade or business on the average of any two "of the three last pre-war trade years." That "pre-war" is an adjective coined in the circumstances of the last few years but here it quite clearly means the three trade years which preceded the outbreak of the war which began on the 4th August, 1914. Then lower down in the same Sub-section it says: "The "provisions contained in the second Part of the Fourth Schedule "to this Act shall have effect with respect to the computation of "the profits of a pre-war trade year." So that we are still seeking for the standard of profits of what is called a pre-war trade year.

Then when you go to Part II of the Schedule which is referred to, the first paragraph says that the profits of any pre-war trade year shall be computed on the same principles as the accounting period. Then Paragraph 2 does not matter, and I do not think Paragraph 3 matters. It merely provides for the case of the three last pre-war trade years not being fair samples; and then Paragraph 4 deals with the case where there have not been three pre-war trade years. "Where owing to the recent "commencement of a trade or business there have not been three "pre-war trade years but there have been two", the standard of profits shall be taken in a certain way. "Where there have not "been two pre-war trade years, but there has been one pre-war "trade year," it is to be taken in another way. And now comes the sentence upon which everything turns. "And where there "has not been one pre-war trade year, the pre-war standard of "profits shall be taken to be the statutory percentage on the "average amount of capital employed in the trade or business "during the accounting period."

Now as to the words "where there has not been one pre-war trade year," of course, in the case of a company which has never begun business at all there has not been one pre-war trade year, but that is not the way you describe such a company. Where a company has commenced business after the war there has not been one pre-war trade year, of course. But these words in the collocation in which they are found seem to me quite clearly to mean "where there has been less than one pre-war trade year."

(Rowlatt, J.)

In the Act of Parliament hitherto the Legislature has been speaking of nothing else but cases where there is something pre-war and something post-war. It has spoken of nothing else, it is referring to nothing else, and when those words occur in that collocation, I feel bound to say that what is meant is, where there has not been, in the sense where there has been less than, one pre-war trade year. The other construction means that I am to take the statutory percentage of the average amount of capital as being the pre-war standard of profits, although there is nothing pre-war about the trade or business at all. We are here dealing in my judgment with something that quantifies a thing that there is, but which it is difficult to quantify. Here you are importing on this construction an entirely new thing, while you are saying you are quantifying the pre-war standard of profits. That is to say, you say a certain figure is to be taken to be, not the sum which is to be substituted in the particular case for the pre-war standard of profits, but it is to be taken to be the pre-war standard of profits, reducing the whole thing to the most artificial construction of an Act of Parliament that is to be found even in an age when artificial constructions by reference in this sort of way are, with increasing frequency, imposed upon us, bringing in by an artificial definition into the words " pre-war " standard " something which has nothing whatever to do with anything in connection with which the word " pre-war " can be properly employed.

Now of course it is said and urged by Sir William Finlay that in a taxing Act clear words are necessary to tax the subject. But it is often endeavoured to give to that maxim a wide and fanciful construction. It does not mean that words are to be unduly restricted against the Crown or that there is to be any discrimination against the Crown in such Acts. It means this, I think; it means that in taxation you have to look simply at what is clearly said. There is no room for any intendment; there is no equity about a tax : there is no presumption as to a tax; you read nothing in; you imply nothing, but you look fairly at what is said and at what is said clearly and that is the tax.

Applying those principles I am bound to say it is quite impossible for me to hold, and I cannot believe that any Court would hold, that a tax had been imposed by this Act upon the subject who had no pre-war business at all.

But the matter does not rest there, because I am now sent to what is a still more difficult question. By the next Act, the Act of 1916, Excess Profits Duty was imposed for the following year, and that Act is to be read with the Finance (No. 2) Act, 1915, which I have just been examining, and it says this in Section 45 (2) : " In the case of trades or businesses commencing " after the 4th day of August, 1914, the rate shall be 60 per " cent." and so on. Now Parliament there most certainly

(Rowlatt, J.)

legislated upon the footing that these businesses were already charged by the previous Act, and it has been urged before me that that concludes the matter in favour of the Crown. Now the Solicitor-General cited several cases and cited also from Maxwell, and in particular he cited a judgment of Sir Francis Jeune in the *Attorney-General* v. *Clarkson*(1) which makes it quite clear to my mind that if I had been construing the Finance Act, 1916, I should have been bound, having regard to the fact that I have to read these Acts together, indeed they say they are to be read together—I should have been bound to say that clearly Parliament in 1916 had imposed by necessity, not in direct words, but imposed by saying the thing was to be done which involved the necessary law, there being necessary authority to do it; it imposed a rate of tax on trades or businesses commencing after the 4th day of August. But that does not quite cover the ground —I wish it did—because I am not here construing the Act of 1916, I am construing an Act which does not contain those words and which preceded the Act of 1916, and Sir William Finlay drew my attention to another series of cases which decided that an Act of Parliament does not alter the law by merely betraying an erroneous opinion of it. But that does not cover this case either, because the cases which Sir William Finlay cited are cases in which argumentatively and indirectly it can be suggested that Parliament showed it thought the law to be different from what it in fact was. That is to say, take the simplest case, take a typical case where an Act of Parliament (7 Jac. I, c. 12) says that a trader's shop books should not be evidence above a year, that did not make them evidence within the year, though Parliament apparently thought that they were. It did not do that indirectly (see *Pitman* v. *Maddox*, 2 Salk. 690). But here I have something different because Parliament is saying that the two Acts shall be read together, and it provides that the tax shall be levied on businesses of this character—i.e, on post-war businesses. I have come to the conclusion that Section 45 (2) of the Act of 1916 extends the scope of the Act of 1915. I must treat this exposition in the Act of 1916 in the same way as if it had been given by a Court binding upon me, compelling me to construe the Act of 1915 in a way I could not otherwise have done. It is true, as Sir William Finlay says, that here you are only dealing with an enactment which fixes the rate, and that is a very good way of putting it, if Sir William will allow me to say so. It is the best way of putting it but I do not think it quite carries it, because the two Acts are to be read together, and it says the rate shall be so and so. I think that cannot be read otherwise than as saying that under the Act which is to be read with this Act a rate of 60 per cent. is to be levied, and that expounds the Act; and although I do not think there is authority precisely in point, I think the only possible

(1) [1900] 1 Q.B. 156.

(Rowlatt, J.)

effect I can give to the legislation on the subject is to say that that interpretation of the Act of 1915 given by the Act of 1916 must enure for the purposes of construing precisely similar Acts, although they do not contain the same words as the Finance Act, 1916.

Now I very much wish that I could have decided this case in some way without seeming to reflect upon the language of the Legislature; but I think the parties are entitled to know why I decide, and personally I am incapable of saying that I can construe the Act of 1915 in a way that I cannot construe it. I can only say that I consider that Parliament has bound me by authority if you like to put it that way, or has amended the Act by reason of what it has said in 1916. If I am wrong in that principle and right in the other, then the subject ought to have succeeded but as it is he fails and fails with costs.

An appeal having been entered against this decision, the case came before the Court of Appeal (Lord Sterndale, *M.R.*, and Scrutton and Younger, *L.JJ.*) on the 10th and 11th February, 1921, judgment being given on the latter day unanimously in favour of the Crown, with costs.

The Hon. Sir William Finlay, K.C., and Mr. A. M. Bremner appeared as Counsel for the Appellants, and the Solicitor-General (Sir Ernest Pollock, K.C.) and Mr. R. P. Hills for the Crown.

JUDGMENT.

Lord Sterndale, M.R.—This is an appeal from Mr. Justice Rowlatt, who held that the Appellants here were liable to be assessed to Excess Profits Duty. It raised two questions. One was a question of fact whether the Appellants were carrying on a trade or business, or whether they were only entering on an isolated transaction, and the other whether, assuming they were carrying on a business, they were liable to be charged with Excess Profits Duty. The first question is of importance only with regard to this case. The second question is a question of very far-reaching importance because if it be decided in favour of the Appellants the result is that no persons carrying on a business which began after the commencement of the war can be charged with Excess Profits Duty at all, and that is obviously a question of very great importance.

The questions arose in these circumstances. One of these three gentlemen, the Appellants, early in 1916, heard that the Government of Cape Colony had a quantity of Cape brandy which they were wishing to dispose of. He got the assistance of two friends in the speculation, and they bought a considerable quantity of this Cape brandy, over 3,000 casks. Some of it

(Lord Sterndale, M.R.)

was allowed to go to other countries, but the greater part of it was brought to London. These three gentlemen were all members of different wine merchants' firms, and when the brandy came to London it was blended with French brandy, which was purchased by the Appellants, the blending being done by their firms, and was sold in England under the description of Old Vatted Brandy, and it was sold, not all at once, but from time to time, in different sales ranging from July, 1916, to September, 1917, and profits were made upon the sale.

The first question, as I say, was whether they were carrying on a business. That is a question of fact, and the Commissioners decided the finding of fact that these gentlemen were carrying on a business and were not merely entering upon an isolated transaction. That was affirmed by Mr. Justice Rowlatt, and the learned Counsel for the Appellants—very properly if I may say so in the face of those findings—did not argue that matter before us, and therefore we start with the position that they were carrying on a business which was begun after the beginning of the war. It was not begun in fact till 1916.

The next question—whether in those circumstances they are chargeable with Excess Profits Duty—depends upon the construction of the Finance Acts of 1915 and onwards, and the contention on behalf of the Appellants is that under those Acts there is no power to charge Excess Profits Duty on any business which began after the beginning of the war.

The first Act that one has to go to is the Finance (No. 2) Act of 1915. The first section of importance is Section 38. Section 38, Sub-section (1), provides that: "There shall be "charged, levied, and paid on the amount by which the profits "arising from any trade or business to which this Part of this "Act applies, in any accounting period which ended after the "4th day of August, 1914, and before the 1st day of July, 1915, "exceeded by more than £200, the pre-war standard of profits "as defined for the purposes of this part of this Act, a duty "(in this Act referred to as 'excess profits duty') of an amount "equal to 50 per cent. of that excess."

Sub-section (2) provides for the way in which the accounting period is to be made out, and it is, taking it shortly, this, that where a business has been in the habit of making up its accounts for certain periods, that is to be the accounting period; but where that is not so, then the Commissioners of Inland Revenue may determine what is the accounting period. There are two accounting periods with which we have to deal in this case. Neither of those accounting periods comes directly under the Act of 1915, because that only dealt with accounting periods from August, 1914, to July, 1915. The first accounting period with which we have to deal comes under the 1916 Act which deals with accounting periods from July, 1915, to August,

(Lord Sterndale, M.R.)

1917, and the second accounting period comes under the 1917 Act, which deals with the accounting periods from July, 1917, to August, 1918.

Then Section 39 of the Act of 1915 provides: " The trades " and businesses to which this Part of this Act applies are all " trades or businesses (whether continuously carried on or not) " of any description carried on in the United Kingdom, or owned " or carried on in any other place by persons ordinarily resident " in the United Kingdom," excepting certain businesses with which I need not deal.

Section 40 provides first for the way in which the determination of profits is to be arrived at, then with the question of the pre-war standard, and it provides, by Sub-section (2), that: " The " pre-war standard of profits for the purposes of this Part of " this Act shall, subject to the provisions of this Act, be taken " to be the amount of the profits arising from the trade or " business on the average of any two of the three last pre-war " trade years, to be selected by the taxpayer (in this Part of " this Act referred to as the profits standard): Provided that " if it is shown to the satisfaction of the Commissioners of Inland " Revenue that that amount was less than the percentage " standard as hereinafter defined, the pre-war standard of profits " shall be taken to be the percentage standard."

Then it provides what the percentage standard shall be, and I do not think it necessary to read that. Then it goes on: " The " provisions contained in the Second Part of the Fourth " Schedule to this Act shall have effect with respect to the com- " putation of the profits of a pre-war trade year, and the provisions " contained in the Third Part of the Fourth Schedule shall have " effect with respect to the ascertainment of capital for the " purposes of this Part of this Act."

The argument upon that Act, pausing for a moment before I go to the schedule, is this: It is said first that it contemplates an excess profit—an excess profit over what? The excess profit in an accounting period over a pre-war standard, that is to say, pre-war standard as defined for the purposes of this Act. But a pre-war standard, it is said, only means a standard which is in existence before the war, and therefore unless there be something in the definition of pre-war standard in the Act, it is said that the charge imposed by this section cannot apply to any business in respect of which no comparison can be made with any pre-war period, because there is not any pre-war period or any pre-war standard with which to compare it. For the definition reference is made to the Fourth Schedule, Part II, and the important part of that is this. The heading is " Pre-War Standard." It speaks of the way in which the profits are to be computed, and then proceeds in this way in paragraph 4:

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" Where owing to the recent commencement of a trade or " business there have not been three pre-war trade years, but " there have been two pre-war trade years, the pre-war standard " of profits shall be taken to be the amount of the profits " arising from the trade or business on the average of " those two years, or, at the option of the taxpayer, the profits " arising from the trade or business during the last of those two " years "—that evidently cannot apply in ascertaining the pre-war standard of a business that did not exist until after the war. Then—" and where there have not been two pre-war trade years, " but there has been one pre-war trade year, the pre-war stand-" ard of profits shall be taken to be the profits arising from the " trade or business during that year."

Now that is a standard which cannot be applied to a business which did not exist till after the war. Then there follows the only one which can apply : " And where there has not been one " pre-war trade year, the pre-war standard of profits shall be " taken to be the statutory percentage on the average amount " of capital employed in the trade or business during the " accounting period."

The argument is this, that reading that with the previous part of the clause, that can only mean this : Where there has been some period of pre-war but there has not been a whole year, or, as Mr. Justice Rowlatt expressed it, where there has been less than one pre-war trade year. If it is to be read in that way, then it does seem very difficult to bring within the scope of this Act a business which began after the war, because it can only be taxed by a comparison with its pre-war standard as defined by the Act; and if the schedule which determines how the pre-war standard is to be arrived at necessarily pre-supposes some standard applicable to businesses carried on before the war, it is very difficult to see how a business beginning after the war is included. Unless there be a charging section in one of the subsequent Acts, the only charging sections are to be found in this Act, and therefore although this does not refer to the accounting periods with which we have to deal, it is, unless some thing be found in the subsequent Acts, the only Act under which the Excess Profits Duty can be charged.

Now what is said on behalf of the Commissioners of Inland Revenue is this, that the words " where there has not been one " pre-war trade year " are not confined to cases in which there has been some part of a year but not the whole, but may also be read " where there has been no pre-war trade year." That was rejected by Mr. Justice Rowlatt on the construction of this Act alone. For reasons that I shall give directly, I do not think it is necessary to decide whether Mr. Justice Rowlatt was correct in saying that, apart from any other Act, this Act of 1915 could not and did not refer to businesses commenced after the war. My inclination, I think, apart from any other Act, would be to agree

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with the construction put upon this by Mr. Justice Rowlatt, but as I say it is not necessary to decide that for reasons which I shall give directly. I must say that in all this legislation, and in all these Acts with which we have to deal, it does seem as if the framers had done their very best, and done it with very conspicuous success, to raise difficulties on the construction of the Act, and as if, if they had only considered the matter perhaps a little more, the sections might have been made so plain that the taxpayer would know whether he was taxed or not, and no Court would have any dealing with the legislation. Unfortunately that has not been done, and we have to deal with questions which are certainly difficult. The Finance Act of 1916, which extended the operation of the Act of 1915 to a later accounting period, in Section 45 contained this provision. After continuing the charge of Excess Profits Duty, as I have said, down to the 1st August, 1917, it went on to say this: "In the "case of trades or businesses commencing after the 4th day of "August, 1914, the rate of duty shall be 60 per cent. of the "excess in respect of any accounting period ending after the 4th "day of August, 1915."

When it was dealing with other businesses the provision was this: "Section 38 of the principal Act shall, as respects excess "profits arising in any accounting period beginning after the "expiration of a year from the commencement of the first "accounting period, have effect as if 60 per cent. of the excess "were substituted as the rate of duty for 50 per cent. of the "excess."

The curious result of those two parts of the sub-section is this, that there may be one accounting period at any rate in which a new business, if I may call it so, was paying 60 per cent. and an old business would be paying 50 per cent. showing that the matter again had not been at all carefully considered. It also shows in my opinion that the framers of the Act of 1916 were of opinion that the Act of 1915 did include those new businesses. For the moment I pass over the question of whether that is a charging section and imposed a new charge upon new businesses which did not exist under the old Act. It is provided that Part III of this Act, which is the Part dealing with Excess Profits Duty, shall be construed together with Part III of the Finance (No. 2) Act, 1915. That is the Part also dealing with Excess Profits Duty.

In 1917 the Excess Profits Duty was extended, as I have said, to a later accounting period. I do not think it is important to read that Act, because I do not think there is anything said which throws any light upon whether businesses commenced after the war were included in the charge or not. But that Act which governs the second accounting period which we have to deal with here, contains this provision: "Part III of this Act "shall be construed together with Part III of the Finance

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"(No. 2) Act, 1915," and does not mention the Act of 1916. That is a matter to which I shall have to refer again later. There were subsequent Acts extending the Duty to later accounting periods, to which I need not refer. There was an Act in 1920, to which I think reference must be made. Part IV of that is the Part which refers to Excess Profits Duty and it provides in Section 44, Sub-section (3): "In the case of a trade "or business which is owned or carried on by any person who "has served during the war as a member of any of the naval "or military forces of the Crown, or of the Air Force or in "service of a naval or military character in connection with the "war for which payment was made out of money provided by "Parliament, or in any work abroad of the British Red Cross "Society of the Order of St. John of Jerusalem or any other "body with similar objects, and which was commenced by that "person for the first time, or having been wholly discontinued "by him during the war or some part of the war was recom-"menced by him, after his demobilisation or discharge, sub-"section (1) of section 38 of the principal Act"—that is the Act of 1915—"shall have effect as though 'five hundred "'pounds' were substituted for 'two hundred pounds.'"

That is to say, in the case of a person in those particular services, he shall not pay any Excess Profits Duty until the excess amounts to at least £500. But obviously in giving that exemption to persons who had begun their businesses in those circumstances, it again contemplates as being clear that those businesses which commenced after the war are liable to Excess Profits Duty and would be liable for anything above the excess of £200 but for this privilege which is given to them. It then goes on to say in Section 45, Sub-section (1): "For the pre-war "standard of profit there shall, on the application of the tax-"payer, be substituted a standard (in this section referred to as "'the substituted standard') of an amount equal in the case of "a trade or business which had no pre-war trade year, to the "statutory percentage on the average amount of capital employed "in the first accounting period."

Therefore it speaks there of a business which had no pre-war trade year, and contemplates that such a business might and would be chargeable with Excess Profits Duty. I think it is clearly established in a case to which we were referred, the *Attorney-General* v. *Clarkson*(1), that subsequent legislation on the same subject may be looked to in order to see what is the proper construction to be put upon an earlier Act where that earlier Act is ambiguous. I quite agree that subsequent legislation, if it proceed upon an erroneous construction of previous legislation, cannot alter that previous legislation, but if there be

(1) [1900] 1 Q.B. 156.

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any ambiguity in the earlier legislation then the subsequent legislation may fix the proper interpretation which is to be put upon the earlier. As I have said, taking the Act of 1915, the words which are relied upon really, not entirely, but most strongly, as showing that what I may call post-war businesses were not included in the Act, are the words " where there has " not been one pre-war trade year." I do not find it possible to say that those words are not capable of two constructions. I have mentioned the two constructions. One would exclude post-war businesses; one would not exclude post-war businesses. I will not say it would include them because if they are not excluded they are included by Section 39. I think those are two possible constructions. It is perfectly obvious that the Act of 1916 and the Act of 1920 both assume that the 1915 Act was so framed as to include post-war businesses, and therefore it seems to me to assume and to direct really that the second construction, which does not exclude post-war businesses, is the right construction of the Fourth Schedule, Part II, of the Act of 1915. That was the view that was taken by Mr. Justice Rowlatt. He said this: " I have come to the conclusion that Section 45, Sub-" section (2), of the Act of 1916 extended the scope of the Act of " 1915." I do not personally like to put it quite in those words. I do not say it extends the scope, but I agree with what he goes on next to say: " I must treat this exposition in the Act of " 1916 in the same way as if it had been given by a Court bind-" ing upon me and telling me to construe the Act of 1915 in a " way that I could not otherwise have done."

Then, after saying a little more, he goes on: "Although there " is no authority precisely in point, the only effect I can give to " the legislation is to say that the interpretation of the Act of " 1915 given by the Act of 1916 must enure for the purpose of " construing similar Acts, although not containing the same " words as the Act of 1916."

That disposes of the matter, subject to this, that it is said that although that may be quite right as to the first accounting period, it is wrong as to the second accounting period, because it is governed by the Act of 1917, and the Act of 1917 takes no notice of the Act of 1916 and is only to be construed with the Act of 1915, and as the Act of 1917 does not contain the interpreting clause to which I have referred, of the Act of 1916, the Appellants must escape for the second accounting period. I do not think that is right, although I must say again I can see no reason whatever why the framers of this legislation should have gone out of their way to leave out a reference to the Act of 1916 in the Act of 1917, when, as a matter of fact, they put it, I think, in all the subsequent Finance Acts which were passed. It is quite unintelligible to me why they should have done it, but I do not think it makes any difference.

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I was wrong in saying all the subsequent Acts, because the Act of 1920 is the same as the Act of 1917: " Part IV of this " Act shall be construed together with Part III of the Finance (No. 2) Act, 1915." I see in the 1920 Act it is put in one way in one place and in another way in another, so far as I can see. What I have read is the last section, Section 64: " Part IV of " this Act shall be construed together with Part III of the " Finance (No. 2) Act, 1915." In Section 51, on the contrary, there is this provision: " In this part of this Act " (that is the Part IV) " references to the principal Act "—the principal Act is the Act of 1915—" or to any provisions of that Act, shall " be construed as references to that Act, or those provisions as " amended and extended by any subsequent enactment."

Section 34 of the Act of 1918 says: " The Finance (No. 2) " Act, 1915, in this part of this Act referred to as the principal " Act, as amended or extended by any subsequent enactment." The words in the 1917 Act are only " as amended, shall so far as " relate to Excess Profits Duty apply " and so on.

As I say, the point with regard to this second accounting period is: Can the 1917 Act be said to apply to that accounting period, although the 1916 Act is not mentioned in it? In my opinion, it can. When you say that the 1916 Act and the 1915 Act are to be construed together, then it seems to me that when the Act of 1917 says it is to be construed with the Act of 1915, it must be construed with the Act of 1915 as construed together with the Act of 1916. Therefore, it seems to me that that point fails also.

It was also argued that even if Section 45 (2) of the Act of 1916 did not interpret the Act of 1915, it was itself a charging section under which this Excess Profits Duty could be levied. I do not in the least dissent from that argument. I think it is very likely correct, but I prefer to base my judgment on the ground that I have mentioned.

I think, therefore, on all the points the appeal fails, and must be dismissed with costs.

Scrutton, L.J.—I arrive at the same result that Mr. Justice Rowlatt arrived at, but as I arrive at it by a method which I do not think was his method and which is a method which, I think, my learned brethren do not prefer to their own, I express my judgment in my own words.

Three gentlemen engaged in a transaction, and the question in this case is whether it comes within the Finance Act which charges trades or businesses with Excess Profits Duty. The transaction took place between the 11th March, 1916, and the 17th September, 1917, and it consisted in buying in three lots of 3,100 casks of Cape brandy, and inasmuch as apparently Cape brandy was not an attractive term to sell it under, mixing

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it with some undefined amount of French brandy, putting it into fresh receptacles, describing it as " old vatted brandy "—how old and in what vats not stated—and selling it in some 100 transactions spread over a period of 18 months, at a profit which, I suppose, was satisfactory to the persons who engaged in it, but, at any rate, is sufficient if it is taxable to come under the head of excess profits.

The first question argued below was, was that a trade or business as distinct from one transaction? Inasmuch as there were over 100 sales of this composite article extending over 18 months, it appears to me that there was abundant evidence on which the Commissioners could find that it was a trade or business, and Counsel for the Appellants very properly in this Court did not contest the finding of the Commissioners, affirmed by Mr. Justice Rowlatt, that it was a trade or business.

The next question is the really important one of general application, and it is whether, under the series of Finance Acts, businesses which are started after the war began are liable to Excess Profits Duty. Considering that the war began in 1914 and that the Excess Profits Duty Act began in 1915, it is very curious that it should take six years for this question to come to the Court of Appeal. It either suggests that the proceedings in ascertaining revenue liability are very dilatory or that the point had not such merits as made them conspicuous to people desiring to escape Excess Profits Duty. However that may be, it has now arrived in the Court of Appeal. The two accounting periods in which it is suggested that this tax should be levied are the accounting period commencing 11th March, 1916, and ending 31st December, 1916, and the period commencing 1st January, 1917, and ending 17th September, 1917. Now, neither of these periods would fall within the Act of 1915. It therefore seems to me respectfully, as at present advised, that I am not concerned to consider whether the Act of 1915 did cover post-war businesses. This case does not raise the question—it does not apply to accounting periods which come within the Act of 1915 at all. The first of these accounting periods comes within the Act of 1916 and the second comes within the Act of 1917, and I therefore look to the Act of 1916, in the first place, to see whether the first accounting period is charged. The Act of 1916, Section 45, Sub-section (1), provides in effect that the Finance Act, 1915, shall apply to two accounting periods, and, by Sub-section (2), " in the case of " trades or businesses commencing after the 4th day of August, " 1914, the rate of duty shall be 60 per cent. of the excess in " respect of any accounting period ending after the 4th day of " August, 1915." Now, as at present advised, those seem to me perfectly clear charging words, subject to your finding out what 60 per cent. means. There is a charge upon a trade or business commencing after the 4th day of August, 1914, of 60 per cent. of the excess to which the Act of 1915 applied.

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Now, no doubt, that does send us to the Act of 1915, but it sends us with a clause that Part III of the Act of 1916 shall be construed together with Part III of the Act of 1915, and I therefore have to construe the Acts of 1915 and 1916 as if they were one Act written out together, and in that one Act I find a clause: "In the case of trades or businesses commencing after the 4th "day of August, 1914, the rate of duty shall be 60 per cent." As at present advised it seems to me too clear for argument that the joint Act does charge this business with 60 per cent. of the excess, leaving you to find out what the excess is.

As I have understood the argument, it comes to this: Well, it is quite true that Parliament says that, but when you come to look into their machinery they have not provided how you are to find out what the 60 per cent. is, and therefore the business is not chargeable.

I go to the Act of 1915 and I find that Excess Profits Duty is to be levied on the profits arising from any trade or business to which this part of the Act applies. What is the business to which this part of the Act applies? All trades or businesses of any description carried on in the United Kingdom—not all trades or businesses carried on before the war in the United Kingdom but all trades or businesses carried on in the United Kingdom, in respect of certain accounting periods. This business was carried on in the United Kingdom and it was carried on during the accounting periods. So far why is the Act not to apply? It shall be levied on profits which exceed the pre-war standard of profits as defined. I look to see where the pre-war standard of profits is defined and I find that I am sent to Part II of the Fourth Schedule where I find a clause pointing out what is to be done in case there have not been three pre-war years of business. Where there have not been three pre-war years of business but have been two, you take the average of the two. If there have not been two but there has been one, you take the profits during that year; and where there has not been one pre-war trade year then you entirely abandon pre-war and go to the statutory percentage on the capital employed in the trade or business during the accounting period which is post-war. So if there has not been one pre-war trade year, you entirely throw over pre-war and look at a post-war figure entirely.

Now, when I have to construe that Statute, reading into it a clause, "In the case of trades or businesses commencing after the "war the rate of duty shall be 60 per cent.", it seems to me that the only intelligible way to read it is to assume that Parliament intended their means of assessing to relate to the business commencing after the war which they expressly said they were going to tax. And therefore as to the 1916 period, as to which I have to look to a combined Act of 1915 and 1916, it seems to me that there are clear words charging the particular business for the

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particular period, and a mode of calculating which could only be made intelligible and applicable to the subject matter which Parliament has stated in express words it is taxing, by assuming that when Parliament say " not one pre-war trade year " they mean " not one or any part of one."

I may say that if I am to look at the subsequent Acts, I find that view justified by the provisions to which the Master of the Rolls has referred about the taxing of the business started by demobilised soldiers after the war which are clearly assumed to be within the Taxing Act of 1915. There is a provision in Section 45 (1) of the Finance Act, 1920, " of an amount equal in " the case of a trade or business which had no pre-war trade " year," which appears to me again to point to post-war businesses, and the phrase is repeated in Section 26 of the Act of 1917. So much for the Act of 1916. For the second accounting period I have to look to the Act of 1917. The Act of 1917 begins as the Act of 1916 did : " The Finance Act (No. 2), 1915, shall apply " to any accounting period ending on or after the 1st day of August, 1917, and before the 1st day of August, 1918." The accounting period is covered. Section 39 of the Act of 1915 again makes the businesses referred to businesses carried on in the United Kingdom. There is no express statement in the Act of 1917 about post-war businesses, but there is a statement that references to the Act of 1915 shall be construed as references to those Acts or provisions as amended by any subsequent enactment; and in my view the provision in the Act of 1916 is an amendment or alteration of the Act of 1915. It is made clear by the phrase used in the later Acts—" amended or extended "—but in my view " amended " and " amended or extended " substantially mean the same thing, and I only regret that apparently through insufficient prevision the people who draft these Acts should use different language, with the result that one has a long argument to see whether they meant something different or whether they did not look back to see what language they had used before.

It seems to me that the legislation has the result of bringing both those accounting periods within the charging sections in the Acts of 1916 and 1917, and it is not necessary, in my opinion, to express a view as to the Act of 1915 by itself. I do not assent to or dissent from the view which Mr. Justice Rowlatt arrived at. When some post-war business with an accounting period in 1915 comes before the Court it will be time enough to decide what the effect of the 1915 Act only is. In this case there is no accounting period coming within the 1915 Act only.

For these reasons, which are not quite the reasons put forward by Mr. Justice Rowlatt, though I do not desire to say that I differ from them—I only say I prefer to put it in the way I have done—I think the appeal should be dismissed.

Younger, L.J.—I am of the same opinion. The result of the discussion which has taken place in this Court, and also of the judgment of the learned Judge from whom this appeal comes, has demonstrated, I think, that there are more roads than one by which one can arrive at the conclusion that the Appellants in this instance are subject to this tax. It is, of course, conceded by the Appellants that if a business, commenced for the first time after the war, is brought under the Excess Profits Duty by the Act of 1915, that the subsequent Acts which have fixed further accounting periods will automatically bring them within their charging provisions. And accordingly the Solicitor-General, in dealing with the case which was made against him by Sir William Finlay, elected mainly to reply upon his contention that upon the true construction of the Act of 1915 the business of these Appellants, which has been made subject to charge, was brought directly under charge.

Now the learned Judge has said in his judgment that it seemed to him quite impossible to hold that the Act of 1915 did impose this Excess Profits Duty upon a person in respect of a business that had no pre-war existence. Now, speaking for myself, I am not able to arrive, with the certainty that the learned Judge has expressed, at the same conclusion. Indeed, with reference to businesses generally, the result of the full discussion, I think, has been to persuade me that even without the assistance of the Act of 1916 one might have arrived at the conclusion, on the construction of the Act of 1915, that they were included. But with regard to the particular kind of business with which we are concerned in this case, a business, namely, which is included in Section 39 of the Act of 1915 as one which is not continuous, it is, in my judgment, much easier to say that upon the true construction of the Act of 1915 that kind of business was included, even if it had had no kind of commencement until after the war.

Now, of course, Sir William Finlay, in dealing with this part of the case, attached very great emphasis, and rightly attached very great emphasis, to the expressions in the Act of 1915 relating to a pre-war standard of profits, words which connoted that there must have been some kind of business carried on by which pre-war profits could have been earned. If the expression, however, be analysed and investigated it will be found that while, if that pre-war standard of profits is arrived at with reference to profits, the existence of a pre-war business is necessarily involved in the notion, yet if the pre-war standard of profit is, as it may be, arrived at with reference to what is called the percentage standard, there is no such necessity at all; because the percentage standard is arrived at without reference to profits earned by this business or that business; it is a certain rate of profit which is deemed to have been earned by any business in the period prior to the war. Accordingly the use of the words "pre-war standard of "profit" when applied to the percentage standard as distinct from the profits standard, does not in any way, as it seems to me,

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involve the necessity that the business should have continued at all or have been in existence at all before the war. When you get rid of that idea you do find in Section 39 of the Act of 1915 a definition of businesses to which the Act is to apply that is extraordinarily wide in its terms. And amongst other businesses to which the Act is so to apply is a business of the kind with which we are here concerned, namely a business which is said to be one not continuously carried on.

Now the argument of the Appellants involves this view that in order that a business not continuously carried on may be brought under charge by the Act of 1915, there must have been some non-continuous carrying on of that business at some period more or less remote from the passing of the Act, before the beginning of the war, and that a business non-continuously carried on is, under the Act of 1915, brought into charge by the accident of whether at some previous stage of its owner's existence he had carried on that non-continuous business or not.

Now, I myself should not have thought that that was the meaning of the phrase " whether continuously carried on or not," as found in Section 39 of the Act. It appears to me that that means a business non-continuously carried on during the period of charge, and has not necessarily or at all any reference to a pre-war existence. And if one had any doubt upon that subject on the Act as it stands, then it appears to me that the Legislature has resolved that doubt by Section 44 (3) of the Act of 1920 to which the Master of the Rolls has referred, because that Act, dealing it is true with persons who were engaged on working abroad for the Red Cross Society or the Order of St. John of Jerusalem or who were in the military service of the Crown or the Air Force or any service of a naval or military character in connection with the war, expressly provided that in the case of a non-continuous business carried on by them and commenced after the war they are to be subject to charge, and subject to the charge which is referred to in the Act of 1915 because they get a certain advantage in the sum of £500 being inserted in that Act for their benefit, instead of a sum of £200 which applies to everybody else. It appears to me, therefore, that so far as non-continuous businesses are concerned, with which at the moment we alone have to deal, you find a statutory assertion and recognition in the Act of 1920 that these businesses were always subject to the Act of 1915 even although they were for the first time commenced after the war.

Now that would be enough to dispose of this case having regard to the peculiar character of the business which is in question here, which Sir William Finlay has now recognised before us he must admit is a business within the meaning of the Act if in other respects it is brought within it. Therefore from my point of view I need not say more, and I agree that, if the

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business be of a continuous character, the construction of the Act of 1915, which is not in this respect assisted by the Act of 1920, is certainly not so clear. But I think when one looks to find what is the real difficulty which even as to these businesses stands in the way of the assertion that they are included in the Act of 1915, one finds that that difficulty is confined, in the last analysis, to the proviso which is to be found in the second paragraph of Section 40 which provides that " If " it be shown to the satisfaction of the Commissioners of Inland " Revenue that that amount "—that is the amount of the profits—" was less than the percentage standard as hereinafter " defined, the pre-war standard of profits shall be taken to be " the percentage standard."

Now that proviso is difficult to understand; I cannot myself as at present advised, give any very intelligible reason why it should have been inserted at all. It seems to mean, so far as words are concerned, that the subject, where his pre-war standard of profits exceeds the percentage standard, is by this proviso compelled to accept—I use the word advisedly—the standard which is worst for the Revenue, and it seems also to be designed to protect the Revenue from some supposed reluctance on the part of a subject to elect to take that standard which is best for himself. It certainly is a very strange proviso. But whatever it may mean it does seem undoubtedly to imply this, that there must have been a business in respect of which it was possible for the subject, the taxpayer, to prove that there was a certain sum in respect of pre-war profits, the accuracy of which he had to establish to the Commissioners. And if it stood there it would, I think, be difficult, as a mere matter of construction, to say that that did not necessarily imply that the business in question must have existed before the war.

But when you go to the Second Part of the Fourth Schedule, to which by the same section we are directed for the purpose of ascertaining the pre-war standard, then you find in paragraph 4 a provision applicable to businesses which have not existed for a year before the commencement of the war, which makes the statutory percentage the only pre-war standard, and which *ex necessitate* absolves the subject from the necessity of proving to the Commissioners that which under Section 40, Sub-section (2), he would, apart from that provision, be called upon to prove, and if the subject in that case is absolved from the necessity of proving any pre-war profits in the strict sense of the words, then it appears to me that it is no great stretch to say that where there has been no pre-war business at all the subject is equally entitled, if the words of the Act are sufficiently wide to cover him, to have the percentage standard applied to the profits of his business whensoever commenced. Accordingly it does seem to me that if you

take the whole of this Act together, applying it with regard to discontinuous businesses, the words seem to be reasonably plain that it does apply to such businesses commenced after the war. That reasonable plainness is emphasised and I think almost to demonstration, by the section from the Act of 1920 to which the Master of the Rolls has referred.

With regard to other businesses the question, I agree, is left in doubt, but it is left in such slight doubt that any subsequent statutory recognition of the opposite position would, I think, be sufficient to resolve it.

It appears to me that we do find in the different sections, which have been referred to by my Lord and the Lord Justice, sufficient statutory recognition of that point of view, and accordingly I am prepared, taking for this purpose the view of the learned Judge, to hold that even if the section of the Act of 1915 were itself less clear, with regard to particular businesses with which we are here concerned, that business would be directly brought into charge by virtue of the provisions in the subsequent Act.

I only desire to add this. I should be quite prepared, if it were necessary, to accept the view which has been expressed by Lord Justice Scrutton as to the effect of the Act of 1916 upon this case—I should be quite happy to arrive at the conclusion in the way in which he has arrived at, as well as by the way which I myself have chosen. Whichever may be selected it seems to me that the appeal must be dismissed.