No. 752.—HIGH COURT OF JUSTICE (KING'S BENCH DIVISION).—28TH AND 29TH JANUARY, AND 20TH MARCH, 1929.

COURT OF APPEAL.—24TH, 25TH AND 26TH JUNE, 1929.

HOUSE OF LORDS.—3RD, 6TH AND 7TH MARCH AND 4TH APRIL, 1930.

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(1) SALISBURY HOUSE ESTATE, LTD. *v.* FRY (H.M. INSPECTOR OF TAXES).(1)

(2) CITY OF LONDON REAL PROPERTY COMPANY, LTD. *v.* JONES (H.M. INSPECTOR OF TAXES).(2)

Income Tax, Schedule D—Profits from letting unfurnished rooms and premises with services—Estate company.

(1) *The Appellant Company was the rated occupier of a large block of buildings let to tenants by rooms and by suites of rooms as unfurnished offices. The Company had no other business except the letting out and management of the one property. Income Tax, Schedule A, in respect of the property as a whole was assessed upon the Company.*

In addition to the rents for the offices the Company derived profits from its tenants in connection with the provision of lighting, cleaning, caretaking and other services, and admitted that liability to Income Tax, Schedule D, arose with regard to such profits. The Crown contended that the Company was in respect of all its activities carrying on a trade and that accordingly in computing its profits for the purposes of assessment under Schedule D it was necessary to take into account all its receipts, including receipts from rents, an allowance being made for the amount of the assessments under Schedule A. Assessments under Schedule D were made upon the Company upon this basis.

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(1) Reported (C.A.) [1930] 1 K.B. 304 and (H.L.) [1930] A.C. 432.

(2) Reported (K.B.D.) 45 T.L.R. 360, (C.A.) 45 T.L.R. 573 and (H.L.) [1930] A.C. 432.

(2) *The Appellant Company was a company the main objects of which were the acquisition, development, management, leasing and letting of land and property. Its properties were for the most part shops and blocks of offices and of flats in London, let unfurnished to tenants. The larger blocks of offices, etc., contained lifts, the liftmen being provided by the Company. The Company also provided cleaning, heating, lighting and caretaking services in respect of which additional charges were made. They admitted that liability to Income Tax, Schedule D, arose in respect of profits arising from such additional charges.*

The Crown contended that the Company was carrying on a trade, namely, the letting of accommodation and provision of various services; that in addition to the profits assessed under Schedule A in respect of the property in the premises the Company made a further profit by the user of the premises as a commercial enterprise; and that the Company was accordingly assessable to Income Tax, Schedule D, upon the basis of the excess of its total receipts, including rents, over its expenses plus the amount of the Schedule A assessments.

Held, *that the Companies were not so assessable. Liability to tax in respect of the rents was covered by the Schedule A assessments, and the rents could not be brought into the computation of any liability under Schedule D.*

CASES.

(1) SALISBURY HOUSE ESTATE, LTD. *v.* FRY (H.M. INSPECTOR OF TAXES).

CASE

Stated by the Special Commissioners of Income Tax under the Income Tax Act, 1918, Section 149, for the opinion of the High Court.

At a meeting of the Commissioners for the Special Purposes of Income Tax held at York House, Kingsway, London, on 21st February, 1928, Salisbury House Estate Limited (hereinafter called " the Company ") appealed against assessments made upon it under Schedule D of the Income Tax Acts for the four years ended 5th April, 1928, in the sums of £16,822, £18,585, £20,344 and £20,453 respectively by the Additional Commissioners of Income Tax for the City of London.

1. The Company was incorporated on 7th January, 1902, to take over some land with a block of buildings upon it in the City of London, known as Salisbury House. Salisbury House was at the time in course of erection or had been recently completed, and the object for which the Company was formed was to hold the same and let it out as offices and turn it to account in any way which might be possible or expedient. Under its Memorandum and Articles of Association a copy of which is annexed to and forms part of this Case(1), the Company has wide powers conducive to this object.

2. The Company has since 1902 held, maintained, let out and managed Salisbury House as contemplated at its inception. It has not acquired, managed or dealt in any other property.

Salisbury House has a very large floor space and contains some 800 rooms, and these rooms have been let out by the Company to some 200 tenants as offices singly or in suites, which may or may not be self-contained. The building itself is of nine floors and contains seven lifts and several entrances. The Company provides and operates the lifts and also provides a uniformed staff of 25 men for this purpose and to act as porters and watch and protect the building. There is also a staff of 61 cleaners. The halls, corridors and staircases of the building are lighted and kept clean by the Company and the building is under the care of a housekeeper whose duty it is to supervise the staff, to prevent the intrusion of unauthorised persons, to take in letters for the tenants and distribute the same, and to see that the building is locked up and safe at night. There are a few radiators in the passages which are provided by the Company for heating purposes. The Company is rated as occupier. It has retained an office for its own use in the building. It has a board of directors, a secretary, and a clerical staff of three persons. It maintains a share register, holds meetings of directors and shareholders and management committees and distributes dividends in the manner usual in the case of a limited company.

3. At the time of the appeal the rooms in Salisbury House had been let out subject to the arrangements made by the Company as indicated above for the whole building, under 78 leases, generally for periods of from 3 to 21 years, 89 tenancy agreements for shorter periods, and 26 tenancies by letter. The Company does not usually grant leases for more than 21 years but it has granted one lease of a part of the premises for a term of 78 years and another for a term of 28 years. The rents agreed upon had been fixed in all cases by having regard to the accommodation provided according to a general scale which takes account of the floor space and situations of the offices let. In no case were offices let furnished. A standard form of lease or agreement, which permits of modifications in certain

(1) Not included in the present print.

respects as indicated hereunder has been used by the Company, and under this form additional rents or charges are made for services provided by the Company beyond the rent for the rooms themselves. For the purpose of this Case it is agreed that the following form sufficiently represents the ordinary tenancy so created :—

" THIS INDENTURE made the day of
" One thousand nine hundred and twenty- BETWEEN
" SALISBURY HOUSE ESTATE LIMITED whose registered office is
" Salisbury House Finsbury Circus in the City of London (herein-
" after called ' the Landlords ' which expression shall include the
" person or persons for the time being entitled to receive the rents
" hereinafter reserved) of the one part and of
" (hereinafter called ' the Tenant '
" which expression shall include where the
" context so admits) of the other part WITNESSETH THAT IT IS
" HEREBY AGREED between the parties hereto as follows :—

" (1) The Landlords will let and the Tenant will take ALL
" on the Floor of
" Salisbury House aforesaid numbered on the
" letting plan thereof and delineated on the plan annexed hereto
" and thereon coloured pink Together with the Landlords' fixtures
" and fittings (if any) thereto belonging (hereinafter called ' the
" ' said premises ') for at the rent at the rate of
" per annum clear of all deductions payable by
" equal quarterly payments on the four usual quarter days the
" first payment of rent to be paid on the day of
" One thousand nine hundred and twenty-
" and the last payment of rent to be made in advance one calendar
" month before the expiration of the said tenancy.

" And the Tenant hereby for and
" assigns agree with the Landlords as follows :—

" (2) To pay the said rent on the days and in manner aforesaid
" clear of all deductions whatsoever and also to pay on demand
" as additional rents the sum of one shilling and threepence per
" day for each fire lighted in the said premises hereby agreed to
" be let the sum of per week for the cleaning of
" the said premises (other than the work referred to in Clause (4)
" hereof) and the sum of per quarter towards the
" cost of lighting the halls corridors and staircases of Salisbury
" House aforesaid or such higher sums for firing and cleaning as
" may from time to time be charged to other tenants.

" (3) To keep the said premises internally in the same good
" and tenantable repair and condition in which they shall be at the
" commencement of the tenancy and in such repair and condition
" to deliver up the same together with all Landlords' fixtures and
" fittings at the expiration of the tenancy.

" (4) To thoroughly sweep and cleanse all chimneys and flues " and clean all the windows respectively belonging to the said " premises as need or occasion shall require.

" (5) To permit the Landlords and all persons authorised by " them at all reasonable times during the said term to enter upon " the said premises to repair the outside of the said building and " premises and to permit the Landlords or the ground or superior " Landlords for the time being and their respective Surveyors and " Agents with or without workmen from time to time and at all " reasonable times during the said tenancy to enter upon the said " premises to view the condition thereof.

" (6) Not to carry on or do or permit to be carried on or done " upon the said premises any hazardous trade or act whereby the " Landlords may be prevented from insuring the building of which " the said premises form part at the ordinary rate of premium or " whereby any insurance made by the Landlords may be invalidated " nor carry on use or permit the said premises or any part thereof " to be used for any noisy noisome offensive or dangerous trade " business or occupation nor use or permit to be used the said " premises or any part thereof otherwise than as offices of the " Tenant for the purposes of business, " but so nevertheless that the Tenant and assigns " or under-tenants or any of them shall not carry on or permit to " be carried on upon any part of the said premises the business " of a banker or bankers paying money over the counter nor do or " suffer to be done in the said premises any act or thing whatsoever " that may be or grow to be a nuisance damage annoyance or " inconvenience to the Landlords or the other tenants and occupiers " of the said building and premises or any of them or permit or " suffer any sale by auction to take place upon the said premises.

" (7) Not to block up darken obstruct or obscure any of the " passages windows or lights belonging to the said building and " premises or to the Landlords nor alter the construction or " arrangement of the said premises or make any alteration therein " without the consent in writing of the Landlords.

" (8) Not to affix any placard or sign upon the external walls nor " in the windows nor write paint or expose to view upon the said " building and premises any name title or sign except of such " dimensions in such manner and in such place (if any) as the " Landlords shall determine.

" (9) Not to require the use of the said premises on Sundays " nor permit the said premises or any part thereof to be used as a " dwelling or sleeping place.

" (10) To leave or cause the key or keys of the doors of the " said premises to be left with the Housekeeper every evening

" and to conform to all rules regulations and arrangements estab-
" lished and made by the Landlords now or hereafter for the proper
" management of Salisbury House aforesaid and particularly the
" opening and shutting of the entrance doors thereof. The
" Housekeeper of Salisbury House aforesaid who is authorised to
" receive letters parcels or other articles which may be sent to or
" delivered on the premises for the Tenant shall be deemed to be
" the agent or servant of the Tenant only and not to act as the
" agent of or so as to charge the Landlords in any way.

" (11) To procure the supply of all electric light or gas used by
" the Tenant upon the said premises from the Landlords or their
" assigns or the persons firms or corporations with whom they
" may from time to time enter into contracts for the supply of
" electric light or gas to Salisbury House aforesaid and that the
" amount of the electric light or gas used by the Tenant shall be
" ascertained by separate meters and the electric light shall be paid
" for by the Tenant at the current rate for the time being charged
" to the occupiers of Salisbury House aforesaid such rate however
" not to be in excess of the current rate charged by Electric
" Lighting Companies in the district in which Salisbury House
" aforesaid is situate.

" (12) Not without the previous licence in writing of the
" Landlords to assign underlet or part with the possession of the
" said premises or any part thereof for all or any part of the term
" hereby granted and to give notice in writing of every such
" assignment or underletting forthwith after the making thereof to
" the Landlords' Solicitors for registration and to pay to such
" Solicitors a fee of One guinea upon each such notice.

" (13) To permit the Landlords or their agents or workmen
" within three calendar months next before the expiration or sooner
" determination of the said tenancy to enter into the said premises
" and to put and place thereon a notice board or placard notifying
" that the said premises are to let and the Tenant shall preserve
" the said notice board or placard and permit every person requiring
" to view the said premises by order in writing from the Landlords
" or their agents to enter and view the same at all reasonable times
" in the daytime.

" (14) If the said rents hereby reserved or any part thereof shall
" be in arrear for the space of twenty-one days next after any of the
" days whereon the same ought to be paid as aforesaid whether
" the same shall or shall not have been legally demanded or if there
" shall be any breach or non-observance of any of the Tenant's
" Agreements hereinbefore contained or in case the Tenant
" or assigns or any of them shall become bankrupt
" insolvent or take proceedings for liquidation or composition with
" or make any assignment for the benefit of their or his creditors

" or suffer any execution to be levied upon the said premises or " being a limited company shall be wound up compulsorily or " voluntarily upon the ground of inability to meet any of its " liabilities or engagements then and in any of the said cases it shall " be lawful for the Landlords at any time thereafter into and upon " the said premises or any part thereof in the name of the whole " to re-enter and the same to have again repossess and enjoy as in " their former estate.

" And the Landlords hereby agree with the Tenant :—

" (15) That the Landlords will at all times pay all existing and " future rates taxes charges and assessments whatsoever parlia- " mentary parochial or otherwise charged or to be charged in " respect of the said premises whether as part of the said building " or otherwise with the exception of the electric light or gas " consumed by the Tenant the charge or rate for which it is hereby " agreed shall be paid by the Tenant according to consumption " thereof.

" And the Tenant hereby further agree with the Landlords :—

" (16) To pay the Landlords' Solicitors upon the signing hereof " the costs for the preparation of this Agreement and a duplicate " thereof in addition to the stamp duties payable thereon.

" (17) Any Notice given under or in respect of this Agreement " by the Landlords to the Tenant shall be deemed sufficiently given " and served if left for the Tenant upon any part of the said " premises.

" IN WITNESS."

4. The following notes are given in explanation of various paragraphs in the above form :—

(*a*) The lavatories in the building are, as appears from the form, let out and used in common.

(*b*) The " additional rent " of 1*s*. 3*d*. a day for each fire lighted is optional. Tenants are not required to have fires and if they choose they may supply (and in some cases have supplied) themselves with wood fires or electric heating.

(*c*) Though a charge is made for cleaning, this in practice is also optional and tenants may make their own arrangements to clean their own offices. They are not obliged to have their offices cleaned by the Company, and there are some who do not, but if a tenant requires his office cleaned the Company supplies the cleaners. No charge is made by the Company for cleaning if it does not do the cleaning.

(*d*) The " additional rent " for the cost of lighting the halls, corridors and staircases is a common charge apportioned as near as may be between the various tenants.

(*e*) With reference to the covenant by the tenant to procure electric light from the Company or its assigns it was stated that the entire supply of electric lighting for the premises is taken from one electric lighting company and that the Company receives from it a small commission on the price of the current consumed on the premises. This electric lighting company is the only company supplying the neighbourhood with current. The Company has never nominated the electric lighting company —it has had no choice in the matter. The tenants pay for electric current consumed by them (whether for light or heating) according to meters in their offices.

5. Although tenants are not required to keep their windows clean, the Company makes arrangements with a separate contractor to clean windows for those who so desire and it makes a profit out of so doing.

The Company does not provide heating apparatus for its tenants. Prior to the war, however, the Company did on one occasion provide a central heating installation for an important tenant, but the agreement under a special term of which this heating was installed became obsolete before the war.

The Company provides no tenant's fixtures. It is possible upon occasion that such fixtures as partitions or divisions of floor space and counters may have been left behind by previous tenants and included in subsequent lettings, but apart from these it has not supplied landlord's fixtures.

6. Salisbury House was assessed to Income Tax under Schedule A upon the gross value as appearing in the Valuation List, in accordance with the Valuation (Metropolis) Act, 1869, Section 45. The value so fixed in 1925, when the last valuation was made, was £47,786. The assessments in accordance with Schedule A No. VII., Rule 8 (*c*) have been made upon the Company as landlords and the tax due upon such assessments demanded and paid by the Company.

A part of the ground floor of the building had been let on terms that the tenants (a Bank) paid the rates in respect of the premises occupied by them rated gross at £3,131.

7. The Company admitted at the hearing that it is liable to be assessed under Schedule D of the Income Tax Act upon any profit which it derives from Salisbury House tenants outside the mere rents for the offices which are let to the tenants, so far as such profits may be described as resulting from a trade. In accordance

with its admission it put forward a computation, showing a profit amounting to £4,189 9*s.* 4*d.* for the year to 25th December, 1925, as follows :—

Salisbury House Estate Limited.

Schedule D.			1926-27.
	£ s. d.		£ s. d.
Net profit as per Profit and Loss Accounts for year ended 25th December, 1925 :—			
Interest	601 11 9		
Cleaning	2,225 10 9		
Firing	2,637 6 10		
Tenants' Sundries	266 8 7		
Commission	233 10 1		
Transfer fees	0 12 6		
	5,965 0 6		
Less : Lighting ...	122 15 3		
			5,842 5 3
Deduct : Proportion of General Expenditure and Bad Debts which the Trading Income bears to the Gross Income.			
$\frac{11659\ 18\ 4 \times (5842\ 5\ 3 + 7899\ 9\ 1)}{44426\ 16\ 3 + 44742\ 0\ 3 + 7899\ 9\ 1 - 122\ 15\ 3}$			
$= \frac{11660 \times 13742}{96946}$			1,652 15 11
			£4,189 9 4

The Company similarly admitted that its assessable profits under Schedule D for the two previous years arrived at on the same basis were £2,997 and £3,385 respectively.

A copy of the Company's accounts for the year to 25th December, 1925, is annexed to and forms part of this Case.(1)

8. For the purpose of the assessments appealed against the profits of the Company were computed by taking the total of its receipts from all sources including the rents received by it from the lettings of the rooms in Salisbury House and deducting therefrom its expenses and the amounts of the assessments under Schedule A made upon the Company in respect of the said premises.

(1) Not included in the present print.

9. On behalf of the Company it was contended :—

(1) That the receipts of rents of offices were receipts arising from the ownership of land;

(2) That receipts from lands were chargeable under Schedule A of the Income Tax Act and had been so charged in this case;

(3) That the Company could not be assessed under Schedule D for any amount by which the assessments under Schedule A might be insufficient to cover the rents received by it;

(4) That the rents received by the Company did not arise from any trade carried on by it;

(5) That the assessment should be discharged.

10. On behalf of the Crown it was contended (*inter alia*) :—

(1) That the Company was in respect of all its activities carrying on a trade in the United Kingdom;

(2) That accordingly in computing its profits for the purposes of Schedule D all its receipts, including the receipts from rents, and all expenses should be taken into account and an allowance given for tax assessed under Schedule A.

(3) That the assessments appealed against were correctly made and should be confirmed subject to some slight revision of the figures.

11. The assessments appealed against had been made in accordance with the Crown's contentions and the amounts thereof have (apart from the questions of principle involved) been agreed between the parties at the following amounts namely :— For the year ending the 5th April, 1925, £16,822, for the year ending 5th April, 1926, £19,461, for the year ending 5th April, 1927, £21,243, and for the year ending 5th April, 1928, £20,445.

12. We, the Commissioners who heard the appeal, felt bound, following a previous decision of the Special Commissioners and in deference to opinions expressed in the Court of Session in the case of the *Rosyth Building and Estates Company*(1), 1921 S.C. 372, and in the Court of Appeal in the recent case of the *Metropolitan Water Board*(2), to decide that the assessments under Schedule D were rightly made to include the amounts by which the total receipts of the Company (including its rents from offices) less expenses exceeded the Schedule A assessments. We accordingly

(1) The Rosyth Building and Estates Co., Ltd., *v.* Rogers 8 T.C. 11.
(2) Attorney-General *v.* The Metropolitan Water Board 13 T.C. 294.

confirmed the assessments appealed against in the amounts stated in Clause 11 hereof.

13. Immediately upon our so determining the appeal the Company 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 Income Tax Act, 1918, Section 149, which Case we have stated and do sign accordingly.

14. The sole question upon which the opinion of the Court is desired is whether the rents received by the Company on letting the offices in Salisbury House are properly to be included in the assessment as trade receipts of the Company for purposes of Case I of Schedule D, Income Tax Act, 1918.

W. J. BRAITHWAITE,
H. M. SANDERS,
} Commissioners for the Special Purposes of the Income Tax Acts.

York House,
23, Kingsway,
London, W.C.2.
20th August, 1928.

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(2) CITY OF LONDON REAL PROPERTY CO., LTD. *v.* JONES (H.M. INSPECTOR OF TAXES).

CASE.

Stated under the Income Tax Act, 1918, Section 149, 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 the 2nd May, 1928, for the purpose of hearing appeals, The City of London Real Property Company Ltd. (hereinafter called the Company) appealed against an assessment to Income Tax under the Income Tax Act, 1918, Schedule D, Case I in the sum of £350,000 for the year ending 5th April, 1928, made upon the Company under the provisions of the Income Tax Acts.

2. The Company was incorporated under the Companies Act, 1862, on 11th April, 1864.

The objects for which the Company was established are set out in paragraph 3 of the Company's Memorandum of Association and include (*inter alia*) :—

(1) To acquire by purchase lease or otherwise freehold copyhold leasehold and other property in the City of London and its neighbourhood and elsewhere.

(2) To develop and turn to account any land acquired by or in which the Company is interested and in particular by laying out and preparing the same for building purposes constructing altering pulling down decorating maintaining furnishing fitting up and improving buildings and by planting paving draining cultivating letting on building lease or letting Agreement and by advancing money to and entering into contracts or arrangements of all kinds with builders tenants and others.

(12) To sell improve manage develop exchange lease mortgage enfranchise dispose of turn to account or otherwise deal with all or any part of the property and rights of the Company.

A copy of the memorandum and articles of association of the Company is attached hereto (marked A) and forms part of this Case.(1)

3. The Company owns a large number of freehold and leasehold properties in London which it lets out to tenants on leases at yearly rentals.

The said properties consist for the most part of offices, shops and residential flats.

The Company was during the year 1927-28 assessed to Income Tax under Schedule A of the Income Tax Act, 1918, in respect of its property in the said freeholds and leaseholds so owned by them.

A list of the said properties owned by the Company showing the rental values and Schedule A assessments is attached hereto (marked B) and forms part of this Case.(1)

All the properties are within the Administrative County of London and are within the provisions of the Valuation (Metropolis) Acts.

4. The larger blocks of offices and flats contain lifts, which are run for the use of the tenants by the Company and the Company employs liftmen to work the said lifts.

The Company also provides cleaning, heating and lighting and the services of a caretaker who is employed by the Company. For such conveniences an extra charge is made.

(1) Not included in the present print.

A specimen copy of a lease under which the Company lets premises as offices is attached hereto (marked C) and forms part of this Case.(1)

All the properties of the Company are let unfurnished.

5. Mr. E. Innes, a Director of the Company and Chairman since 1916 was called as a witness before us and proved (*inter alia*) that :—

(*a*) The Company was formed originally to take over and manage properties held by his father in the City of London.

(*b*) Since incorporation the Company had from time to time acquired a number of new properties.

(*c*) The Company never bought properties with a view to resale.

(*d*) A few properties owned by the Company had been sold but such sales by the Company were rare.

6. Mr. J. A. Flatt, a member of the firm of Richard Ellis & Son, Valuers and Estate Agents, and a Fellow of the Surveyors Institute and sometime Rating Surveyor to the Corporation of the City of London, was called as a witness before us and we accepted his evidence.

Mr. Flatt gave evidence as to the method adopted by the rating authorities under the Valuation (Metropolis) Acts. He stated that in ascertaining the gross value of a hereditament regard was had to all the elements which went to constitute the hereditament. In the case of buildings such as those owned and let by the Appellant Company, the hereditament included not merely the actual rooms comprised in the demise, but the benefit of the lift and/or other means of access to rooms, the lavatory accommodation provided for the tenants in common, the facilities provided for the displaying in the hall of the names of the tenants, and in certain cases the services of the caretaker or housekeeper whose duties included the opening and closing of the premises : the gross value comprised everything that was inherent in the hereditament as a lettable subject matter.

Mr. Flatt also stated that the gross value was arrived at without regard to whether the hereditament was owned by a company or an individual.

Mr. William Selves Walker senior partner in the firm of S. Walker & Sons, Valuers, and a Fellow of the Surveyors Institute was also called as a witness before us and his evidence corroborated that of Mr. Flatt.

7. The Company's Accounts are made up annually to 12th April.

(1) Not included in the present print.

A copy of the Company's annual report and accounts for the year ending 12th April, 1927, are attached hereto (marked D) and form part of this Case.(1)

8. Since 1885 the Company has been assessed annually under Schedule A of the Income Tax Acts in respect of its property in the said freeholds and leaseholds owned by the Company and under Schedule D in respect of profits arising and accruing to the Company from conveniences provided by the Company to tenants, such as the heating, lighting and cleaning of the premises and the services of the caretaker.

A copy of the Company's return of their said profits from services, etc., for the year ending 12th April, 1927, is attached hereto (marked E) and forms part of this Case.(1)

9. The assessment under appeal was made upon the Company under Case I of Schedule D of the Income Tax Act, 1918, and purported to be in respect of profits from letting. The view of the law upon which the said assessment was made was that the Company was liable to assessment under Case I of Schedule D upon the excess of its total receipts from its properties, whether as rent or otherwise over its expenses plus the amount of the assessments made upon the Company under Schedule A.

10. So far as payments are made by its tenants to the company in respect of services or things which are not included in any hereditament as valued under the Valuation (Metropolis) Acts, the company admitted that the profits arising from such payments were not included in the assessments made under Schedule A of the Income Tax Act, 1918, and were liable to be assessed under Schedule D.

So far as the payments made to the Company by its tenants represent the rent of the hereditament itself as valued under the Valuation (Metropolis) Act, the Company contended that the receipts were receipts arising from the ownership of land and not from the carrying on of any trade, and were chargeable under Schedule A of the Income Tax Act, and not otherwise.

11. It was contended on behalf of the Respondent :—

(*a*) that the Company was carrying on a trade or business, namely, the letting of accommodation, and the provision of various services in connection therewith, and that this constitutes a trade within the definition contained in Section 237, Income Tax Act, 1918.

(*b*) That over and above the profits assessed under Schedule A in respect of its *property* in the aforesaid freehold and leasehold premises, the Company made a further profit by the user of those premises as a commercial enterprise; and that such further profit was not covered by the assessment under Schedule A.

(1) Not included in the present print.

(*c*) That the assessment under Case I of Schedule D was correct in principle, and should be so confirmed, leaving the correct figures thereof to be agreed between the parties.

12. The following cases, amongst others, were referred to :— *Commissioners of Inland Revenue* v. *Korean Syndicate Ltd.*(1), [1920] 1 K.B. 598; *Commissioners of Inland Revenue* v. *Westleigh Estates Co., Ltd.*(2); *Same* v. *South Behar Railway Co.*(3) [1923] 2 K.B. 514; [1925] A.C. 476; *Commissioners of Inland Revenue* v. *Birmingham Theatre & Ticket Co.*, 12 T.C. 580; *Rosyth Building & Estates Co.* v. *Rogers*, 1921 S.C. 372; 8 T.C. 11; *Back* v. *Daniels* [1925] 1 K.B. 526; 9 T.C. 183; *Kirby* v. *Hunslet Union* [1906] A.C. 43; *Coman* v. *The Rotunda Hospital*, [1921] 1 A.C. 1(4); *Wylie* v. *Eccott*, 1913 S.C. 16; 6 T.C. 128; *Rossdale* v. *Fryer*, [1922] 2 K.B. 303.

13. Having considered the arguments and evidence adduced before us, we found that the Company was carrying on a trade and was assessable to Income Tax under Case I of Schedule D of the Income Tax Act, 1918, on the basis indicated in paragraph 9 of this Case.

We accordingly confirmed the said assessments in principle and directed that the correct figures thereof should be agreed between the parties.

14. The Company 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 Income Tax Act, 1918, Section 149, which Case we have stated and do sign accordingly.

The correct figures have not yet been agreed, and in order to avoid delay we have stated this Case in order that the opinion of the High Court upon the question of principle may be obtained. If our determination is upheld it is respectfully requested that the case may be sent back to the Special Commissioners for the correct figures of liability to be ascertained.

The sole question for the opinion of the Court is whether or no the Company's contention as set out in the second paragraph of para. 10 hereof is correct.

N. ANDERSON,
MARK STURGIS,
} Commissioners for the Special Purposes of the Income Tax Acts.

York House,
23, Kingsway,
London, W.C.2.
8th December, 1928.

(1) 12 T.C. 181. (2) 12 T.C. 657. (3) 12 T.C. 657. (4) 7 T.C. 517.

(1) SALISBURY HOUSE ESTATE, LTD. *v.* FRY (H.M. INSPECTOR OF TAXES).

This case came before Rowlatt, *J.*, in the King's Bench Division on the 28th and 29th January, 1929, and on the latter date judgment was given in favour of the Crown, with costs.

Mr. A. M. Latter, K.C., Mr. R. W. Needham, K.C., and Mr. C. King appeared as Counsel for the Appellants, and the Solicitor-General (Sir F. Boyd Merriman, K.C.) and Mr. R. P. Hills for the Crown.

JUDGMENT.

Rowlatt, J.—This is a case of some importance, and, in my judgment, of a little difficulty and nicety. The Appellants are the owners of a very large block of buildings forming Salisbury House, which they let out in suites of offices, as described in the Case. They have been assessed under Schedule A as owners or landlords of the property as one subject-matter; that is, by virtue of the provision in the Statute, the assessment has been made pursuant to the Valuation (Metropolis) Act, 1869. It may throw some light upon the question, but I am not going to lay any stress upon the circumstance, that there is this one assessment and not a variety of assessments on the tenants of the separate offices.

Now, the question is whether their liability to taxation in respect of the rents which the tenants pay—I will put it in that way, it is not a completely accurate way of stating it—has been exhausted by the assessment under Schedule A save to the extent that they may make other and severable profits by rendering services, for charges, such as lighting, cleaning, and so on, to their tenants. Now, the tax under Schedule A is a tax upon the property regarded as a subject-matter which is capable of earning profits or income, or whatever it may be, by its use. It is a tax upon the property in the hereditament, that is to say, as Lord Atkinson said(1), upon its capacity to yield profit, and that liability to tax, as I understand it, is firmly immanent in the subject-matter. Real property is always liable to Schedule A, and under no circumstances can you take it out of Schedule A—discard Schedule A and throw it into a Schedule D account, and treat it under Schedule D. I regard the Schedule A tax as attaching to property just like Land Tax. You can deal with the property as an article of merchandise, buy it and sell it and carry on a business in land if you like, but all the time it is subject

(1) **The Governors of the Rotunda Hospital, Dublin *v.* Coman, 7 T.C. 517, at p. 588.**

(Rowlatt, J.)

to its Schedule A tax. You can, of course, hand on the capacity to derive profits from the hereditament; you can hand it on for a period by letting it; you merely hand it on, it still bears the Schedule A tax. If you do that in consideration of an enhanced rent, you are not taxed on that rent. As Lord Justice Scrutton clearly pointed out in the case which has been referred to, you are not taxed on that; you have merely handed on the property for a sum which represents it, subject to taxation. In that sense, Schedule A exhausts the taxable property of the hereditament; but, as Lord Atkinson (if I may humbly say so) very happily pointed out in the House of Lords, when you come to exploit that capacity, then you get a new subject-matter of taxation. If you are a farmer, or if you are an owner-farmer, in your capacity of farmer you take the land and the capacity to earn profits which are taxed under Schedule A, and you exploit that capacity, and try to make farming profits, and that is a new subject-matter of taxation which, at your option, can be taxed under Schedule D, but that option does not affect the question at all; or, if it is not agricultural land, you can take the hereditament and use it to house yourself while you carry on a trade in it, and it is elementary, of course, then that here you are developing the value of the property in one sense; you are actually occupying it, and you are carrying on a trade in it, which is a new thing altogether. That is quite clear and elementary.

Then you get the more difficult class of case which is this: where you do not merely inhabit the premises in the sense of housing yourself, or housing your merchandise or your staff in it while you carry on a trade; you may carry on an adventure by using the accommodation in the place as the subject-matter to some extent of your trade. That is what is done when a person keeps an hotel, or lets furnished lodgings, or lets unfurnished lodgings, as I should think. That seems to me to be what Lord Atkinson would have called developing the capacity of the place and carrying on a trade in it, although to a certain extent you are carrying on a trade with it, in the same sense that you are using its accommodation. A very good instance of it—it is complicated by a good many considerations—was the fundamental point at the bottom of the *Rotunda* case, in which Lord Atkinson made the observations to which I have referred.

Now, I think that in this case the question is, what is the case here? Is the Appellant Company merely handing on to its tenants, and dividing among them, the property with its inherent capacity to be profitable—I will use that phrase—which is taxed under Schedule A, or is it using the whole building as a means whereby it can carry on a trade analogous to the trade of an hotel-keeper or a lodging-house keeper?

(Rowlatt, J.)

The Solicitor-General did not dispute it, but I mention it to get it out of the way. It seems to me that if an individual or a company happens to own a number of parcels of property which are taxed under Schedule A, which he lets, and, as he has a number, has to apply a good deal of time to the management of his property, and the selection of his tenants, and getting the rents, and attending to the repairs which he has covenanted to do, and so on and so on, that does not make him carry on a trade—his ownership of the property. If he had covenanted with all the tenants on his estate to keep up a road which was not a public road, or to provide a pump or a water service, or clip the hedges, I am not saying that in time you could not come to a trade in that; but, on the other hand, it would not follow, merely because he had a lot of property and put labour into managing it all, that therefore he would have a trade superimposed upon his ownership.

Now, I have to consider the facts of this case and the findings of the Commissioners. The Commissioners treated themselves as bound by what was said in the Scotch case(1) and the case in the Court of Appeal(2), which has not been much referred to in the argument before me, and so decided. It is said that a decision of my own is a conclusion to the contrary. It was not before them, but their own decision was, which I affirmed—that is, the decision in the case of *Collyer* v. *Hoare*. Whether I decided that rightly or wrongly, the question there was whether you could bring into taxation the rent as opposed to the assessment of property which had been parted with and handed on. That was the case there—houses taken at a certain annual value and let at a rent, which was more right away, to a tenant. It was complicated, as those brewery cases always are, by other considerations, but that is what that case was. Here, what the Commissioners have held is this, as I understand it: they have upheld the contention of the Crown. The contention of the Crown was: " That the Company was in respect " of all its activities carrying on a trade in the United Kingdom ", and " that accordingly "—that is to say, on that ground—" in " computing its profits for the purposes of Schedule D all its " receipts, including the receipts from rents ", must be taken into account. That the Commissioners have affirmed. Therefore, I must find out whether that decision is wrong from the point of view of law. What are the broad facts? I do not think one ought to look at it by looking at technical considerations for this purpose of who could maintain an action for trespass or for possession of an office, and so on; nor do I lay stress on the circumstance that the walls were bare, although Lord Cave pointed out that the walls

(1) Rosyth Building and Estates Company, Ltd. *v.* Rogers, 8 T.C. 11.

(2) Attorney-General *v.* Metropolitan Water Board, 13 T.C. 294.

(Rowlatt, J.)

were not bare in the *Rotunda* case. I think I ought to look at the substance of the matter, and the substance of the matter seems to me to be this : This company is maintaining *de facto* the control of this building; it retains some of it in hand for its purposes; it lets out offices for a long time, and it is agreed it makes arrangements, which arrangements are to go on for a long time—that is all that comes to—but it requires its tenants every night to bring the keys to the office; it maintains lifts, with a staff of uniformed servants for the service of those lifts, and it has a variety of other branches of service which it offers to the tenants, and for which it collects payments outside the rents, and which in any view are taxable. Can I say it is wrong if that is treated as carrying on a business really analogous to the business of letting unfurnished rooms? They are not sleeping there—just the contrary : they are there during the day. Can I say that is wrong? I think I cannot. I think it may well be looked at, and I must take the Commissioners as having looked at it in that way, as a case of a company who have a block of buildings, which they then use by way of commercial trade in letting out to tenants under a system which involves far more than the handing on of the mere property taxed under Schedule A; it involves far more than that; it involves trading with the accommodation which they have got, and, therefore, that the rents must come in. As was pointed out in the Scotch case, I think that the accounts which they prepared in this case—I am not using the accounts against them in the sense that they are caught out by something that they have put on paper—although they severed them up for the purposes of their argument, well illustrate and put the truth of the matter, namely, that this is one adventure. Rents and extra payments on the one hand and services and accommodation on the other, are capable of being, and I think can properly be regarded as being, the carrying on of a trade. Therefore, I think that this appeal must be dismissed with costs.

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(2) CITY OF LONDON REAL PROPERTY CO., LTD. *v.* JONES (H.M. INSPECTOR OF TAXES).

This case came before Rowlatt, *J.*, in the King's Bench Division on the 20th March, 1929, when judgment was given in favour of the Crown, with costs.

Mr. R. W. Needham, K.C., and Mr. J. S. Scrimgeour appeared as Counsel for the Appellants, and the Solicitor-General (Sir F. Boyd Merriman, K.C.) and Mr. R. P. Hills for the Crown.

JUDGMENT.

Rowlatt, J.—I must say again that I regard this sort of case as one of very considerable difficulty, because one feels that there must be a line somewhere, and it is very difficult to say where it ought to be drawn. In this case the Company have a number of properties, many of which they let as tenements, not sleeping tenements, but rooms or chambers or sets of offices, and so on, with an undertaking on their part to supply heating, cleaning, lighting, and so on, and an undertaking on the tenants' part to pay certain sums for those services. In addition they have to provide lifts, they have to work the lifts, and they have to provide sundry facilities, and so on. They had been assessed in respect of all these properties under Schedule A, and there is evidence that the lighting of the staircase and lift, and so on, were taken into consideration when the rating value of the premises was considered for the purpose of fixing the rating figure under Schedule A. But there stands outside that, of course, the actual services which are paid for in the lighting, heating and cleaning of the rooms and passages outside. The Appellants say that they do not mind being taxed under Schedule D for the profit that they make between those expenses and those payments, but what the Crown contend for is that the whole of their receipts must be brought in, which includes, of course, the sum obtained for rents in excess of the amount named in Schedule A, out of which excess, of course, they would have to pay sundry other expenses, but those expenses are brought in.

Now I will not go through again what I said in the *Salisbury House* case (1), because of course I must abide by the principle that I there adopted. I am unable to see any distinction as regards these houses between this case and that. Here it is not one house, it is true; there is no office in the basement, it is true. On the other hand, it is quite clear that a control is kept over all these rooms, and it is to the advantage of every individual tenant that the landlord keeps control of the other tenants and takes part in what makes up the facilities of the place. The landlord not only supplies these services, such as lighting and heating, at a rate, but he is obliged to supply them at some rate. He cannot withdraw and say: "You must light yourselves, you must heat yourselves "and clean yourselves in the future." That is part of the tenancy, and then there are the clauses such as I have referred to. Under all the circumstances it seems to me that these people are just the same as the Salisbury House people were, that they are really letting all these houses and making what they can out of them by managing them, and that you cannot distinguish between what they charge for their services, which they admit must be taxed under Schedule D, and the margin of rent which they can get from their tenants, which

(1) See page 281 *ante*.

(Rowlatt, J.)

is intermixed, in my judgment, inextricably with the circumstance that it is a house in which you can get those other services. I think, therefore, that the whole thing must be brought into one, but I am bound to say I think the Company are entitled to relief as regards these other premises. I suppose it is not suggested that there is any difference in the cases, but I think there ought to be, and I shall so hold. They have other properties, as I understand it, in the latter part of Schedule B of Exhibit B. It is not, as far as this Company goes, which is a very big one, a considerable amount, but these are properties in respect of which the tenants pay out-goings, and with the exception of one, are self-contained shops or small buildings let as a whole. Now as I understand it, in all these cases there is nothing more, because we know here that this Company is the freeholder or leaseholder of these premises, and they let them to somebody else *simpliciter*, and *rebus sic stantibus* there is no room for any Schedule D tax in them—none. But what the Solicitor-General said was that as in respect of the greater part of this Company's activities, namely the other class to which I have been referring, you have a Schedule D trade, you must take the whole of the house enterprise, which includes these other houses, and take it together. I do not think for myself that is really quite right, for this reason. I agree that they are all part of the Company's undertaking and all part of their business as contemplated by their Memorandum of Association, but are they part of their Schedule D trade apart from the properties which they own under Schedule A? I do not think they are. I agree it is part of their speculation, it is part of their business which they are incorporated to carry on, but I think that part of their business is simply holding property and re-letting it, and doing nothing more. Therefore I think the Commissioners, when this case goes back to them in order that the figures may be fixed according to my decision, ought to exclude the profit rentals, if I may use that expression, of properties such as those mentioned in Schedule B of Exhibit B. There is not very much in it, and under those circumstances I do not think I can make any difference in the costs—can I, Mr. Needham?

Mr. Needham.—We do succeed, at all events, on our appeal. It may not be completely, but we do succeed. It is a little hard if we do not have our costs.

Rowlatt, J.—What do you say, Mr. Solicitor?

The Solicitor-General.—I do not remember that it is really part of the Appellant's case.

Rowlatt, J.—I do not think it was.

The Solicitor-General.—I called your Lordship's attention to it as part of the argument.

Rowlatt, J.—I knew it was so because it is stated, but it is not raised.

The Solicitor-General.—It is manifest on the figures that there can be practically nothing in it.

Rowlatt, J.—I do not think I can allow it to affect the costs. You have got something, but I think it was rather a stroke of luck. I think the appeal must be dismissed with costs. It must go back to the Commissioners, as they request, but with an intimation that they must cut out those houses.

The Solicitor-General.—My Lord, we are very anxious that it should go back at once, notwithstanding any appeal. Your Lordship has power to direct that, the point being that this appeal was heard by the Commissioners in May last and they directed that the figures should be agreed, but unfortunately they have not been agreed. It is very desirable that so far as the figures are concerned they should be settled.

Rowlatt, J.—Let it go back. You may both appeal, for aught I know.

The Solicitor-General.—Let it go back, notwithstanding any appeal ?

Rowlatt, J.—Yes.

The Solicitor-General.—If your Lordship pleases.

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(1) SALISBURY HOUSE ESTATE, LTD. *v.* FRY (H.M. INSPECTOR OF TAXES).

The Company having appealed against the decision in the King's Bench Division, this case came before the Court of Appeal (Lord Hanworth, *M.R.*, and Lawrence and Slesser, *L.JJ.*) on the 24th, 25th and 26th June, 1929, and on the last date judgment was given unanimously against the Crown, with costs, reversing the decision of the Court below.

Mr. A. M. Latter, K.C., Mr. R. W. Needham, K.C., and Mr. A. M. Bremner appeared as Counsel for the Company, and the Attorney-General (Sir W. Jowitt, K.C.) and Mr. R. P. Hills for the Crown.

JUDGMENT.

Lord Hanworth, M.R.—We need not trouble you, Mr. Latter. In these circumstances I do not think it is necessary to wait to hear the other case. If this decision is in favour of the Appellant

(Lord Hanworth, M.R.)

it may be of some assistance to Mr. Montgomery; he will have another authority with which he may be able to support his appeal.

This appeal must be allowed. It is a case which, to my mind, is plain. I agree with the law laid down by Mr. Justice Rowlatt. He is a master of this law, and he seems, to my mind, to lay down the right principles of law in clear and unequivocal terms; he has, however, to my mind, applied that law to a set of facts other than those with which he was presented by the Commissioners, and apparently he felt the case to be one of some little difficulty and nicety. At the same time I am grateful to him for a very clear exposition of the law which I intend to follow. That brings me to the necessity of stating what the facts of this case are, and I will do so in as short a form as conveniently can be adopted.

This Company is a company which owns a block of buildings in the City of London, known as Salisbury House, and for some number of years it has held and maintained, let out and managed Salisbury House as was contemplated at its inception, and that, as indicated in the Memorandum of Association, is that it is to acquire land and buildings and so on, and, in particular, to alter, improve, maintain and construct and let out various flats and so on; and this Salisbury House is a place in which there are a great number of tenants. Now the Company does let out these premises. There are no less than seventy-eight leases which are for terms of from three to twenty-one years; there are eighty-nine tenancy agreements for shorter periods, and there are twenty-six tenancies which are created by letter and not by any formal agreement; it has in one case granted a lease for a term of seventy-eight years, and in another case a lease for twenty-eight years. The rents are all agreed on the basis of the accommodation provided, according to a scale which takes account of a four-floor space and the situations of the offices let. All the offices are unfurnished. We have the standard agreement or deed under which the tenancies are created before us. That form contains the usual provisions. The Company, as landlords, are to let; the tenant is to take; the tenant gets the exclusive possession of the premises; he pays a rent; and so on. He is not to carry on a hazardous trade and the like; the landlords are to keep the outside of the premises in repair, and painted, and are to pay all the existing and future rates, taxes, charges, and so on. The tenant, on the other hand, is to pay for certain advantages which he may receive and which are maintained by the Company, such as, he has to pay for electric heating, for coals if he uses fires, for the current consumed by him for either lighting or heating; and the landlords have a right to re-enter for non-payment of rent, and there is the usual provision that during the last three months of the tenancy the landlord may go in for the purpose of putting a notice-board or placard up.

(Lord Hanworth, M.R.)

Now I have dealt at perhaps unnecessary length with the terms of this form of lease, but to emphasize the fact that a tenancy is created, a demise of the premises is granted on terms which prevent the landlord having a right to go in and give the tenant the exclusive possession of them. One or two points are taken as militating against that view, such as that the keys of the premises are to be left each night with the caretaker. That, I suppose, is for a very sensible reason, namely, that if you get a burst water pipe up above or a fire or the like it may be possible to go in for the purpose of the safety of the premises below, or for some other useful purpose. The mere fact that those keys are surrendered does not at all, to my mind, detract from the exclusive possession which is given during the term created, whether by the lease and the deed or the agreement for a short period of years. Now, access to these premises is provided by means of a common staircase, and there are also lavatories in the building which are used in common. I cannot see that that feature in any way detracts from the exclusiveness of the tenure of the tenants. In respect of the services rendered by the landlord for cleaning the premises, the firing supply, the electric light, and the like, a considerable sum is collected by the Salisbury House Company, and they make some profit upon those services—a profit which must be in the nature of a trade. They are assessed and are ready to pay upon that trade, which they so carry on, the trade of supplying services to the tenants of the chambers in Salisbury House—the business of rendering services to the tenants in Salisbury House.

Now it is said by the Crown, and Mr. Justice Rowlatt has acceded to that contention, that the whole business that is carried on by the Salisbury House Company may be likened to or ought to be treated as one single business, and Mr. Justice Rowlatt has accepted that view in this sense, that he thinks that the Company are, so to speak, carrying on a hotel, and apparently he thinks that the Commissioners so found; he is reluctant to disagree with the finding of the Commissioners, but at any rate his view of the facts is that these facts show that a business akin to that of a hotel-keeper or to the business which was carried on in the *Rotunda* case(1) was being carried on by the Salisbury House Company. I cannot accept that view of the facts which are stated to us by the Commissioners. The Commissioners say this: " We, the Com- " missioners who heard the appeal, felt bound, following a previous " decision of the Special Commissioners and in deference to " opinions expressed in the Court of Session in the case of the " *Rosyth Building and Estates Company*(2) and in the Court of " Appeal in the recent case of the *Metropolitan Water Board*(3),

(1) The Governors of the Rotunda Hospital, Dublin *v.* Coman, 7 T.C. 517.
(2) Rosyth Building and Estates Company, Limited *v.* Rogers, 8 T.C. 11.
(3) Attorney-General *v.* Metropolitan Water Board, 13 T.C. 294.

(Lord Hanworth, M.R.)

" to decide that the assessments under Schedule D were rightly " made to include the amounts by which the total receipts of the " Company (including its rents from offices) less expenses exceeded " the Schedule A assessments. We accordingly confirm the assess- " ments appealed against in the amounts stated in Clause 11 " hereof." Now what were those sums? Those were assessments arrived at by treating the whole of the business as one trade and the Schedule A assessments as only assessments *pro tanto*. The total profit rentals exceeded the Schedule A assessments, and it was said therefore that the whole of the profits were to be treated as profits of the trade, and assessed accordingly, an allowance being made in respect of what had been paid under Schedule A. In paragraph 14 the Commissioners go on to say : " The sole question " upon which the opinion of the Court is desired is whether " the rents received by the Company on letting the offices in " Salisbury House are properly to be included in the assessments " as trade receipts of the Company for the purposes of Case I " of Schedule D, Income Tax Act, 1918." I hold that question to be whether or not the Commissioners were right in holding themselves bound by the decision in the Court of Session in the *Rosyth Building and Estates Company* case. In that case there was an assessment under Schedule D, and because the decision of the Court of Session was that Schedule D was the right Schedule the Commissioners followed it. Mr. Justice Rowlatt has stated the law in terms which, to my mind, are not consistent with what was stated in the Court of Session, but he has concluded the matter in accordance with the decision of the Commissioners, because he found as a fact that the totality of these activities of Salisbury House was a trade. Now I have some difficulty in following the principles which have been adopted by the Commissioners, I think, somewhat unwillingly.

Income Tax is imposed by Section 1 of the Act of 1918 if and when there is an annual Act bringing that Section into operation. Its terms are : " Where any Act enacts that income tax shall be " charged for any year at any rate, the tax at that rate shall be " charged for that year in respect of all property, profits, or gains " respectively described or comprised in the Schedules marked A, " B, C, D, and E, and contained in the First Schedule to this Act " and in accordance with the Rules respectively applicable to those " Schedules." The reason for splitting up the tax into various Schedules is to disintegrate, as was said by Lord Shaw in the House of Lords a little time ago, the nature of the property and profits from which profits and gains are obtained. Now Schedule A is the Schedule which deals with land, and that says that " Tax " under Schedule A shall be 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 ",

(Lord Hanworth, M.R.)

and under Rule I, the " General Rule for estimating the annual " value of lands . . . . (2) If they are not let at a rackrent so " fixed, then the rackrent at which they are worth to be let by the " year." Finally, under Schedule A, No. VII, Rule 4, it is laid down, " Tax under this Schedule shall be charged on all lands, " tenements and hereditaments. . . . ." and that imposes, under a Rule which under the Section which I have read has definitely to be followed, a clear direction that the tax under Schedule A is to be charged on all lands, tenements and hereditaments.

Now, it appears to me that in respect of this property which is owned by the Salisbury House Company, and which is demised by them to their tenants, the clear direction of the Income Tax Act applies, and that the tax must be applied under Schedule A. It is somehow said that if Schedule D is applied there can be some deduction made in respect of tax which has been paid under Schedule A. To my mind that is a confusion. Property must either be taxed under Schedule A as charged on lands, tenements or hereditaments, or it must be charged as on the business which is carried on by the Company, as a totality. It was said a long time ago now, but in a judgment which holds its sway still, the judgment of Lord Macnaghten in the *Attorney-General* v. *London County Council* when speaking of these various Schedules, that whether it be under Schedule A or any of the other Schedules (I read at page 36 in [1901] A.C.)(1), " In every case the tax is a " tax on income, whatever may be the standard by which the " income is measured. It is a tax on ' profits or gains ' in the " case of duties chargeable under Schedule A and everything " coming under that Schedule—the annual value of lands capable " of actual occupation as well as the earnings of railway companies " and other concerns connected with land—just as much as it is " in the case of the other Schedules of charge." Now with the light which that judgment throws upon the clear words of the Statute, it appears to me that on the facts as found by the Commissioners there is a clear direction necessarily to be followed that the Income Tax falls to be estimated under Schedule A, and that what is estimated is the tax upon the profits and gains and the lands and tenements which are owned and let by this Company, and that it is wrong to say that you can tax the Company in part under Schedule A, and then, not satisfied with that, tax again the totality under Schedule D, and without any authority at all make a deduction for so much as has been paid under Schedule A, and you thus arrive at a conclusion. There is one Rule and one Rule only which enables you to make a deduction of the Schedule A tax; that is in Schedule D under the Rules applicable to Cases I and II. You are entitled and indeed compelled to deduct from the

(1) 4 T.C. 265, at p. 294.

(Lord Hanworth, M.R.)

profits which are subjected to tax under Schedule D, a sum which has been charged in respect of the premises where those profits are earned. Rule 5 says: "The computation of tax shall be made "exclusive of the profits or gains arising from lands, tenements, "hereditaments . . . . occupied for the purpose of the trade or "profession." In the present case some method of deduction is adopted quite independently of any authority so to do, and in view of the confusion that has arisen a plan has been followed for which, in my opinion, there is no warrant.

Now there are cases, and many of them, in which there are two businesses carried on. You may have, as was suggested in the case of *Back* v. *Daniels* (1), the sale of certain produce of the land. In that case it was held that the Respondents were assessable upon the profits arising from the occupation of land under Schedule B, but having suffered tax under Schedule B they could not be taxed under Schedule D. Lord Justice Scrutton points out that (2) "When there is a separate and distinct operation unconnected "with the occupation of the land, such as a cheese factory dealing "with the milk of a dairy farm, or a butcher's shop dealing with "the beasts of a cattle farm, I can understand a separate assess-"ment of that operation", and here the illustration of a separate operation is followed, because in respect of the service rendered there are profits which fall to be assessed under Schedule D, but Mr. Justice Rowlatt has put it in this way in this case. He says: (3) "It is a tax upon the property in the hereditament, that "is to say, as Lord Atkinson said, upon its capacity to yield profit, "and that liability to tax, as I understand it, is firmly immanent "in the subject-matter. Real property is always liable to "Schedule A, and under no circumstances can you take it out of "Schedule A—discard Schedule A and throw it into Schedule D "account, and treat it under Schedule D. I regard the Schedule A "tax as attaching to property just like Land Tax." In my judg-ment, that is quite accurate. You have got to tax real property under Schedule A, and unless you find that there is a business carried on you cannot tax under Schedule D.

Now in the present case we have got a clear authority as to what is the nature of this letting at present undertaken by the Salisbury House Company. In the case of *The Queen* v. *St. George's Union*, 7 Q.B. 90, there is a decision that the various hereditaments or set of rooms occupied by the tenant is a separate rateable hereditament, and ought to be separately assessed. That decision, to my mind, makes it quite plain that you cannot hold, as Mr. Justice Rowlatt appeared to hold, that the business that is being carried on at Salisbury House is the business of a hotel proprietor. Again, in one or two other cases

(1) 9 T.C. 183. (2) *Ibid.* at p. 203. (3) See page 281 *ante.*

(Lord Hanworth, M.R.)

to which I will refer, if this matter falls to be dealt with under Schedule A, I think it is excluded from Schedule D, as Mr. Justice Hamilton said in *Hill* v. *Gregory*, [1912] 2 K.B. 61, at page 70 : (1) " The very terms which define the subject-matter of Schedule D " exclude from it the subject-matters which fall within Schedule " A." It seems to me, therefore, that we have got here a plain case to which Schedule A applies and not Schedule D, except in the matter of the business and the supply which I have already referred to.

Now the authority which is relied upon by the Crown is the *Rosyth Building and Estates Company* case, 8 T.C. 11. I wish to speak, of course, with full respect to that case, but I confess that I am not sure that I follow it. The point that had to be considered was whether or not that company had brought itself within the definition which justified the deduction which is now given under Section 33 of the Income Tax Act. That is the point which was for decision. But the Lord President said on page 15 : " It is " well settled that it is for the Crown to choose in which capacity " the company shall be charged, as property or investment owner " on the one hand, or as trader conducting a business on the other " hand." Now, if those words are to be taken *simpliciter* I confess I do not agree with them, but I feel sure that I must have misunderstood them. I have asked the Attorney-General for the authority which justifies the statement that the Crown can select under which Schedule they will tax the subject. He has not produced any such authority, but, at the same time, he relied upon those words as saying that it was possible for the Crown to choose whether they should tax under Schedule A or Schedule D and that, to my mind, in defiance of the plain terms of the Schedule and the Rule to which I have referred. But in that case there was some question as to whether or not there was merely a profit derived from land and hereditaments, or whether there was a business being carried on, and on page 17 we find it stated by the Lord President : " It may in the ordinary case be difficult to determine the point at " which mere ownership of heritage passes into the commercial " administration by an owning trader, but that is a question of " fact of a kind which is not infrequently met with under the " Income Tax Acts, and it is solved in the present case in favour " of the Crown because it is common ground that the Appellants' " Company is a business." That may explain some of the observations made in the case, but I find it quite impossible to accept it as an authority for saying that the Crown have a right at their own volition to say whether they will tax the subject under Schedule A or Schedule D. At the present moment, it appears to me that the facts as found by the Commissioners do not amount

(1) 6 T.C. 39, at p. 47.

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to the totality of the business in selling land or the like, and the facts clearly indicate a subject for assessment in respect of its profits and gains under Schedule A. Once that is so determined upon the facts, Schedule A applies and no more, and you cannot superimpose upon something that is taxed under Schedule A a tax upon a margin which you would like to recover if you were entitled to tax under Schedule D.

Now I will add a word or two upon two cases which, to my mind, are illustrative of a different point. The *St. Andrew's Hospital* case (1) was a case where a hospital carried on a business of receiving paying patients and were held liable to pay in respect of the profits so made. Once again in that case an effort was made to make use of the mode and disposition of the profits as an argument giving immunity from tax. That was held not valid as it must be in accordance with the *Mersey Docks* case (2), but it was a case in which a hospital and a charity did carry on a separate and integral business apart from the business of the hospital. So, also, in the *Rotunda* case a separate business was there carried on, a business quite separate, namely, the business of letting out rooms, the business of carrying on the letting of entertainment chambers, and in that case, I think Lord Finlay puts the case which was to be dealt with quite clearly. On page 18 of [1921] 1 A.C. he says :(3) " The profits fall under Schedule D, and to such profits " the allowance in question has no application, as they cannot be " described as rents or profits of lands, tenements, hereditaments " or heritages. They are the proceeds of a concern in the nature " of a trade which is carried on by the Governors and consists in " finding tenants and having the rooms so equipped as to be suitable " for letting." Lord Shaw, in a word or two at the end of his judgment, says this :(4) " If these views be sound, it follows that " the profits of the entertaining business, to put the matter thus " briefly, do not escape taxation under Schedule D because they " are earned by a taxpayer who is the owner and occupant of " buildings taxed under Schedule A." The divergence and distinction between what falls under Schedule A and Schedule D are, to my mind, made abundantly plain in that case.

Now here we have got facts which show that the Salisbury House Company is a property-owner. Being a property-owner it must be taxed under Schedule A in respect of its profits and gains. Being taxable as a property-owner under Schedule A, it cannot have superimposed a further liability under another Schedule, but if and so far as independently of that activity as a property-owner it carried on a separate and integral business, as it does in the matter

(1) St. Andrew's Hospital, Northampton *v.* Shearsmith, 2 T.C. 219.
(2) The Mersey Docks and Harbour Board *v.* Lucas, 1 T.C. 385 and 2 T.C. 25.
(3) 7 T.C., at p. 582. (4) 7 T.C., at p. 594.

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of the cleaning and supplying electricity and the like, that does fall under Schedule D and following the analogy which is to be found in the *Rotunda* case, in the *Grove* case(1), and in the *Religious Tract Society* case(2), there is a separate business and in respect of that it must pay tax under Schedule D as it has agreed to do. I have followed the rule of law which has been given by Mr. Justice Rowlatt; I do not dissent from him in any way, but I am quite unable to find on the facts presented to this Court that he was justified in holding that the business was not one of owning property which fell under Schedule A, but a business of a hotel proprietor which would fall under a different Schedule.

For these reasons, the appeal must be allowed with costs.

Lawrence, L.J.—I agree. The sole question which the Commissioners have submitted for the consideration of the Court is whether the rents received by the Company on letting the offices in Salisbury House are properly to be included in the assessment as trade receipts of the Company for the purposes of Case I of Schedule D of the Income Tax Act, 1918. The Commissioners have considered themselves compelled to hold that the rents so received ought to be included as trade receipts on the authority of the *Rosyth* case(3) and of the *Metropolitan Water Board* case(4). Now, as regards the *Rosyth* case, the question which was there determined was one which arose under Section 14 of the Finance Act, 1915, which is now replaced by Section 33 of the Income Tax Act, 1918, for relief in respect of expenses of management disbursed by the company in that case as an investment company. The business of the company there consisted of owning property and erecting houses upon it, and it was held by the Court of Session to be an investment company coming within the provisions of that Section. For the purposes of determining whether the company was entitled to relief, the question was considered whether the investment business conducted by the company was a trade or concern in the nature of trade falling within Case I of Schedule D, or possibly whether the profits or gains derived by the Company fall to be assessed under Case VI of that Schedule. Now, I agree with the Master of the Rolls that the grounds upon which that case was decided seem to involve an erroneous view of the effect of the Income Tax Acts in a case where tax has been imposed under Schedule A in respect of the ownership of property, and where the land-owner has at the same time become chargeable to Income Tax under Schedule D in respect of a separate trade carried on by him. The Lord President stated on page 15 of 8 T.C.

(1) Grove *v.* Young Men's Christian Association, 4 T.C. 613.
(2) The Religious Tract and Book Society of Scotland *v.* Forbes, 3 T.C. 415.
(3) Rosyth Building and Estates Company, Limited *v.* Rogers, 8 T.C. 11.
(4) Attorney-General *v.* Metropolitan Water Board, 13 T.C. 294.

(Lawrence, L.J.)

that it is well settled that it is for the Crown to choose in which capacity the company shall be charged, as property or investment owner on the one hand, or as a trader conducting a business on the other hand, and the view of the Lord President was that the Crown had an option on the one hand to tax such a company as the owner of the property occupied by it under Schedule A, and then to tax the company in respect of the profits or interests of the separate business carried on by it under Schedule D, or on the other hand to tax the company entirely under Schedule D in respect of the whole of its undertaking as a trader carrying on a business in which the annual rents and profits arising from the property should be included in his profits and gains arising in respect of his trade and should accordingly be brought into charge under Schedule D. It seems to me that that view is erroneous. The same reasoning was applied by Lord Mackenzie, and indeed in reading his judgment it seems to me that he considered that in such a case the true view was that the rents and profits fell to be charged wholly under Schedule D. Lord Skerrington stated in plain terms that in order to sustain the Crown's contention in that case it was essential that the Crown should demonstrate that it would be entitled to make an assessment to Income Tax in respect of the rents and profits of the property under Schedule D if they so wished. It is obvious from what I have said that the actual decision in that case has nothing to do with the point which we have to decide here, but the observations made in the course of the judgments to which I have referred do in my opinion afford valid ground for the Commissioners' determination in the present case. Now, disagreeing, as I do, with the reasoning of the Court of Session in that case, I think that the Commissioners were wrong in coming to the conclusion at which they arrived. Mr. Justice Rowlatt, whilst recognising the distinction between the case of a landowner deriving profit from letting his land at a higher rent than the annual value (which assessed value is treated as the measure of the tax under Schedule A) and the case of a landowner who is in occupation of his property and derives profits from the use of that property without parting with the legal ownership (such as an hotel proprietor or lodging-house keeper), has held that the present case falls within the latter and not the former category. I have the misfortune to differ from the learned Judge in that respect. The Crown in the present case has taken a somewhat different line of argument. The Attorney-General has boldly contended that if a landowner lets his land in numerous parcels so as to make a business of such letting, and especially if at the same time he makes a profit out of his tenants by supplying them with conveniences such as lavatories, firing, lighting, etc., he is chargeable wholly under Schedule D both in respect of the rents which he receives and of the profits he derives from the supply

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of conveniences, and that if, as must be the case by virtue of Rule 4 of No. VII of Schedule A, he has been taxed under Schedule A in respect of the land he owns the Crown would naturally not seek to impose a double taxation, but would allow the tax charged under Schedule A to be deducted from the tax payable under Schedule D. I cannot find any warrant in any authority binding upon this Court or in the Act for this contention. The Attorney-General relied on two cases as supporting his proposition, viz :—the *Rotunda* case(1) and *Usher's* case(2). Now, the *Rotunda* case, [1921] 1 A.C. 1, seems to me to draw a clear distinction between a landowner who leases or lets his land to tenants and derives a profit from the rents which he receives from them and the landowner who utilises his land while retaining possession of it by hiring it out to be used by persons who do not take any estate or interest in the land itself. In the *Rotunda* case concert and ball rooms were hired out to persons desirous of utilising them for the purposes of musical or dancing entertainments and the owners had equipped the rooms so as to make them available for those purposes. The owners in that case did not part with any estate in the land and the real reason for the decision was that the services which the owners had rendered could not be regarded as mere incidents attached to the letting of the rooms themselves. Lord Atkinson, in [1921] 1 A.C. at page 35, said, "I do not think the services thus rendered can be regarded as "mere incidents attached to the letting of the rooms themselves. "What is let, paid for and used is the room plus the services as "constituting one composite whole, for which money is paid, and "is obtained from the general public. In my opinion this letting "is an 'adventure or concern in the nature of trade' within "Case 1, Rule 1, Schedule D, but, even if not, the profits and gains "derived from it are assessable under Case VI of that Schedule."

Now what are the facts in the present case? The Company owns a large building known as Salisbury House. According to the finding of the Commissioners it lets out offices in that building. Some of these offices are let on lease for terms of years varying from three to twenty-one years. In addition to that, there are eighty-nine tenancy agreements for shorter periods, and twenty-six tenancies by letter, but in each case the Company parts with some estate in the property itself and is playing the true part of a landowner by constituting the legal relationship of landlord and tenant. In these circumstances I think it is erroneous to say merely because there are such a number of leases and lettings that therefore the character of the undertaking of the Company changes from one of a landowner deriving his profit from letting his land to one of a

(1) The Governors of the Rotunda Hospital, Dublin *v.* Coman, 7 T.C. 517.
(2) Usher's Wiltshire Brewery, Limited *v.* Bruce, 6 T.C. 399.

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trader making a trade profit consisting of the excess of the rents over the annual value of the property as ascertained under Schedule A. Then does it make any difference because besides owning and letting the land the Company does that which under the Income Tax Acts is considered as the carrying on of a trade or an adventure in the nature of a trade, or something *ejusdem generis* with a trade or such an adventure so as to come under Case VI if it failed to come under Case I? In the present case the activities of the Company consist of providing cleaning facilities and fuel for firing, and rendering other services to the tenants who occupy the various offices which are let to them. The services so rendered result in a profit of over £4000 a year; but these services are separate from the land-owning part of the Company's business, in which, as I have already stated, the relationship of landlord and tenant is created. It cannot be denied that under the leases which the Company has granted, and although I have not seen the tenancy agreements and the terms of the tenancies created by letters, I take it that the same applies to them, the Company would be committing a trespass by entering upon the property of their tenants except under the provisions of the leases or agreements. In certain events the Company has reserved to itself the right to enter upon the tenants' property; but, apart from that, the Company has parted with an estate or interest in the land and has vested the exclusive ownership during the term in the tenant.

Now in the case of the *Usher Brewery Company* there were special facts which led the Court to come to the conclusion that the land-owning part of the company's business was a mere incident to the trade which the brewery company was carrying on. That cannot, in my judgment, be said of the present case. The trade there in respect of which the profits or gains were being taxed under Schedule D was that of manufacturing and selling beer, and the evidence showed that the ownership of the tied houses and the letting of them at uneconomic rents was an incident of the company's business in selling and marketing its beer. The facts there although special in one sense were usual in the trade of a brewery company, in that it was a mere incident to such a trade that properties consisting of public houses were acquired, held, sold and let. The same cannot be said of the present case. The Company here is a land-owning company and it derives its profits from leases granted to tenants, a position which every landowner holds, and I do not think that because the Company was formed for the purpose of acquiring and letting property and because the lettings were numerous, therefore it becomes a company carrying on a trade in respect of such lettings and the rents derived from such lettings are taxable under Schedule D. I agree with the Master of the Rolls that if a landowner is taxed under Schedule A in respect of the property which he owns, and pays that tax on the annual value,

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there is no authority which justifies his being taxed in respect of the receipts, in the shape of rents which he receives, under any other Schedule, even though he may be a person who acquires the land for the purpose of letting it at a profit rental.

For these reasons I have come to the conclusion that the decision of the learned Judge and also the determination of the Commissioners were erroneous, and that the appeal ought to be allowed.

Slesser, L.J.—In this case the sole question for the opinion of the Court, as is stated in paragraph 14 of the Case of the Commissioners, " is whether the rents received by the Company on letting " the offices in Salisbury House are properly to be included in the " assessment as trade receipts of the Company " and in paragraph 12 the Commissioners say that " following a previous " decision of the Special Commissioners and in deference to " opinions expressed in the Court of Session in the case of the " *Rosyth Building and Estates Company* (1) and in the Court of " Appeal in the recent case of the *Metropolitan Water Board* " (2) they confirm the assessments. That is the only reason which is stated in the Case by the Commissioners for confirming the assessments appealed against.

Now in this case it was contended on behalf of the Company substantially " that the receipts of rents of offices were receipts " arising from the ownership of land; " and on behalf of the Crown, " that the Company was in respect of all its activities carrying on " a trade in the United Kingdom."

When we look at the nature of the actual transaction as set out in the Case of the Commissioners it appears clear, in my judgment, that the transaction here was no more, and no less, than an ordinary tenancy agreement. There are certain provisions with regard to the use of and leaving the keys, and the provision of porters, and so forth, which are quite normal and usual, and which do nothing to prevent the property demised from being a separate tenement, as was held in the case of *The Queen* v. *St. George's Union*, 7 Q.B. 90. There also what were almost called the normal provisions with regard to the keys, the custody of them and the lighting of the corridors, and that sort of thing, were present, and it was held that it was a separate tenement, separately rateable, and were the matter to stand there I do not think that any question could arise but that this was an ordinary agreement of landlord and tenant. I will go further and say that were that the case it would be unarguable in the Court, and it would be unarguable on appeal that if this were an ordinary case of landlord and tenant it would not all fall to be taxable in the usual way under Schedule A. I do not

(1) Rosyth Building and Estates Company, Limited *v.* Rogers, 8 T.C. 11.
(2) Attorney-General *v.* Metropolitan Water Board, 13 T.C. 294.

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propose to repeat the provisions of Schedule A, but it is abundantly clear that where you have an ordinary tenancy the tax is charged on property in all lands and tenements, but the way it is put for the Crown here, as I understand it, is that this case should be distinguished from an ordinary liability to taxation under Schedule A. First of all, it is said that this agreement is not an ordinary tenancy agreement, but contains certain provisions which take it out of the category of an ordinary agreement between landlord and tenant, on which the profits and gains of the landlord would normally fall taxable under Schedule A. Then, secondly, it is said that by reason of the decisions in the *Rosyth Building and Estates Company* case, whatever otherwise might be the view, the Court ought to follow what was decided in that case. With regard to the first point, on the facts it is important to distinguish between those mere incidents of the ordinary tenancy, such as the provision of the keys and the provision of the porters, and so on, and those additions to the tenancy which are set out in paragraph 4 of the Case, whereby the landlord was able to, and did in fact, earn certain profits from the tenants with regard to charges for cleaning, lighting, and the like. As regards that second class, which are not normally incidental to the tenancy, but are clearly severable from it and in no sense alter the legal relation of landlord and tenant, it is said in paragraph 4 that these are optional. I quote from paragraph 4 (*b*): "The " ' additional rent ' of 1*s*. 3*d*. a day for each fire lighted is optional. " Tenants are not required to have fires and if they choose they " may supply (and in some cases have supplied) themselves with " wood fires or electric heating", and, similarly with regard to 4 (*c*), " Though a charge is made for cleaning, this in practice is also " optional and tenants may make their own arrangements to clean " their own offices "; in other words, being in the relation of tenant to landlord they may, if they please, make additional and separate contracts for these particular purposes. Some of them have made such agreements and certain profits have been earned in respect thereof, and on those profits the Company are paying the usual tax as gains under Schedule D, and for that limited purpose are carrying on a trade. Now it is argued by the Attorney-General, as I understand his contention, or one of his arguments is, that because that limited purpose of carrying on a trade is in some way necessarily connected with there being a pre-existing tenancy, therefore the whole occupation, the whole undertaking of the Company, is in the nature of trade. I am unable to accept that view at all. In so far as there is a trade of lighting and heating, and the like, it is a separate matter; it need not be done at all; and we come back to this position that when the matter is correctly and properly examined in all its aspects, we have here the ordinary agreement of landlord and tenant. Therefore, so far as the facts of landlord and tenant are

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concerned, there is nothing to distinguish this from the normal liability to pay tax under Schedule A. But then it is said, as I understand it, " But here you are carrying on a business of letting " property." I cannot understand that contention. As it seems to me, every landlord who lets out habitually more than one house, or part of a house, may be said to be carrying on a business, and I would rely upon what Lord Loreburn said in the case of *Smith* v. *Lion Brewery Company, Limited*, [1911] A.C. 150 at page 155—this passage which stands, whatever disagreement there may have been among their Lordships as to the general conclusions in that case: (1) " You cannot, by saying that a man carries on the " business of owning house property, shift the method of assessing " that property for Income Tax from Schedule A to Schedule D." So much, therefore, for this case, were it not for the decision in the *Rosyth* case. It is quite clear that the *Rosyth Building and Estates Company's* case can be differentiated from this case in several particulars. First of all, the question as to whether the tax should fall under Schedule A or Schedule D only arose in connection with a claim for repayment, and the applicability of the Rules of Schedule D in that respect. Secondly, as my Lord has already pointed out, it is stated on page 17 of that report (2) by the Lord President that it was common ground in that case that the Appellant Company is a business and land investment concern, so that if that was common ground there, really that fact that may be important in the consideration of these cases did not arise. I do not want to say anything more about that case than is necessary for this purpose. I will only say that as it appears to me, we should not here be so influenced by that case as to hold that what is, in my view, an ordinary landlord and tenant agreement, a separate tenancy for each of these rooms, should be taxed otherwise than under Schedule A, because of anything that is said in the *Rosyth* case.

Finally, we were referred by the Attorney-General at some length to the case of *Governors of the Rotunda Hospital* v. *Coman*(3). Now that was a case where admittedly bare rooms were not let, as here, under an ordinary tenancy agreement. The rooms were let for the express purpose of carrying on entertainments, and revenue was derived therefrom. The Governors of the Hospital let out certain rooms contiguous to the Hospital for entertainments for various periods, and when we come to examine the speeches of the noble Lords in that case, so far from supporting the view which the Crown have here urged, they seem to me to support the view which is urged on behalf of the Company in this case, that were those particular provisions for entertainment absent, then in that case you would have an ordinary tenancy agreement, and

(1) 5 T.C. 568, at p. 590. (2) i.e. 8 T.C. at p. 17. (3) 7 T.C. 517.

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different considerations would apply. For example, Lord Finlay, at page 18 of [1921] A.C., says: "The subject which is hired out "here is a complex one. The mere tenement as it stands, without "furniture, etc., would be almost useless for entertainments. The "business of the Governors in respect of these entertainments is "to have the hall properly fitted and prepared for being hired out "for such uses. The profits fall under Schedule D." I find nothing in those observations to suggest that were the mere tenement to be let out without furniture, which was not the case in *The Rotunda Hospital* v. *Coman*, the profits derived from the mere letting apart from the entertainment would have been assessable under Schedule D. Again, in the speech of Lord Shaw the same conclusion is reached. If there be any conflict of opinion with regard to the *Rosyth* case and the present case, I think that the observation which I quoted from Lord Loreburn and the whole treatment of the case in the House of Lords of *The Rotunda Hospital* v. *Coman*, relying on the fact, as they did there, that the entertainment was a special and peculiar profit-making concern of its own, all goes to show that where you have, as here, a mere case of a company letting out a property to tenants, the company being a landlord, in that case the tax falls properly under Schedule A. For those reasons I agree that this appeal should be allowed.

Mr. Latter.—Your Lordships' Order covers the costs of the Court below?

Lord Hanworth, M.R.—Yes. Then the case must be remitted for the assessment to be made on the lines that we have indicated; it must go back to the Commissioners.

Mr. Latter.—Yes. I do not think the figures in paragraph 7 are agreed in any way. I am told they were agreed, but it goes back for further consideration and they can fix it.

Lord Hanworth, M.R.—Yes. It must go back for the assessment.

Mr. Latter.—They were agreed, I believe.

Lord Hanworth, M.R.—Yes.

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(2) CITY OF LONDON REAL PROPERTY CO., LTD. *v.* JONES (H.M. INSPECTOR OF TAXES).

The Company having appealed on one point against the decision in the King's Bench Division and the Crown having appealed on another point, this case came before the Court of Appeal (Lord

Hanworth, *M.R.*, and Lawrence and Slesser, *L.JJ.*) on the 26th June, 1929, immediately after the case of *Salisbury House Estate, Ltd.* v. *Fry*.

In view of the decision in that case no argument was offered on behalf of the Crown on either point in the present case and judgment was accordingly given against the Crown, with costs.

Mr. R. M. Montgomery, K.C., Mr. R. W. Needham, K.C., and Mr. A. M. Bremner appeared as Counsel for the Company, and the Attorney-General (Sir W. Jowitt, K.C.) and Mr. R. P. Hills for the Crown.

[*After Counsel for the Appellants had read the Case Stated and the judgment of Mr. Justice Rowlatt.*]

Mr. Hills.—I do not know if it is any convenience to your Lordships that I should say that now that your Lordships have heard this Case read, having regard to your Lordships' judgment just delivered(1), neither my learned leader nor myself feel that we can distinguish the case satisfactorily. We wish to keep all matters open in case it should be decided to take this case further.

Lord Hanworth, M.R.—That is very fair. That is just what I should have supposed you would do. I do not think there is a distinction.

Mr. Hills.—I thought your Lordship would wish to have the facts before you. I just want to say one thing. We do not agree that the sole effect and object of the attempt here, or in the other case, was to meet what my learned friend said it was intended to meet—an increase in the annual value.

Lord Hanworth, M.R.—We will not impute motives.

Mr. Montgomery.—I was not going to say that was the sole object. Your Lordship stopped me; I was going to say there were two other items which made the difference.

Lord Hanworth, M.R.—I think that is the right course, Mr. Montgomery. It appears to us that this case must follow the decision which we gave in the *Salisbury House* case. I should like to say this though, that I think Mr. Justice Rowlatt's decision points out one of the difficulties which arises in this and in every other case of the like nature, because he has suggested in his judgment that with regard to those properties in Schedule B(2), which must be treated as an integral part of the business, they are no less a part of the business—if business it be under Schedule D—than any other part of the business, but he has in his judgment

(1) Salisbury House Estate, Limited *v.* Fry. See page 287 *ante*.
(2) Schedule B of Exhibit B.

(Lord Hanworth, M.R.)
said that so far as the properties contained in Schedule B are concerned, they are to be taxed under Schedule A and excluded from the consideration of the assessment under Schedule D. That emphasises, or gives an illustration of, the difficulty in which you get if you attempt to apply Schedule A and Schedule D, particularly where you have no system of adjustment as between the two Schedules, and where, as I pointed out in my previous judgment(1), the only adjustment that can be made is in respect of the deduction which is allowed in respect of the charge where the premises are carried on under Rule 5, to which I referred in the previous judgment. It appears to me that the result in this case must follow upon the judgment that we have given in the last case and, therefore, that this appeal also must be allowed with costs both here and below. Then there is a cross-appeal, I understand, Mr. Montgomery.

Mr. Montgomery.—Yes, that is the appeal of the Crown with regard to the properties your Lordship has just mentioned, as to which Mr. Justice Rowlatt decided in our favour.

Mr. Hills.—I have to admit similarly that that cross-appeal must now be dismissed, having regard to the judgment your Lordship has just delivered, reserving, of course, our rights hereafter.

Lord Hanworth, M.R.—Both the Crown and everybody admit that (I was going to say) what is sauce for the goose must be sauce for the gander; but one sort of property must be brought in as much as the other. That is what it comes to. In those circumstances the cross-appeal must be dismissed with costs also.

Mr. Montgomery.—Your Lordship allows the Company's appeal with costs here and below, and dismisses the cross-appeal of the Crown with costs?

Lord Hanworth, M.R.—That is what I meant by saying "with "costs also." We will say also in this case that the case must be remitted to the Commissioners for the purposes of the assessment.

Mr. Montgomery.—Yes, my Lord; I think that is so.

Lord Hanworth, M.R.—It ought to be technically; I am sure it ought to be.

Mr. Montgomery.—Yes, I think it must. I think we have not agreed the other figures.

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(1) Salisbury House Estate, Ltd. *v.* Fry. See page 291 *ante*.

(1) SALISBURY HOUSE ESTATE, LTD. *v.* FRY (H.M. INSPECTOR OF TAXES).

(2) CITY OF LONDON REAL PROPERTY CO., LTD. *v.* JONES (H.M. INSPECTOR OF TAXES).

The Crown having appealed against these decisions of the Court of Appeal, the cases came before the House of Lords (Viscount Dunedin and Lords Warrington of Clyffe, Atkin, Tomlin and Macmillan) on the 3rd, 6th and 7th March, 1930, and on the 7th March, 1930, respectively, when judgment was reserved. On the 4th April, 1930, judgment was given unanimously against the Crown, with costs, confirming the decision of the Court below.

The Attorney-General (Sir W. Jowitt, K.C.) and Mr. R. P. Hills appeared as Counsel for the Crown : Mr. A. M. Latter, K.C., and Mr. C. King for the Company in the first case and Mr. W. A. Greene, K.C., Mr. R. W. Needham, K.C., and Mr. A. M. Bremner for the Company in the second case.

JUDGMENT.

Viscount Dunedin.—My Lords, this is an important case with probably far-reaching consequences, and we had the benefit of a very full and able argument from the Attorney-General on behalf of the Crown, but in the end I have come to the conclusion, though not without difficulty, that the judgment appealed from is right and should be affirmed.

The facts which give rise to the question are as follows. Salisbury House is a building of considerable size in the City of London and is owned by a limited company which was formed for the express purpose of acquiring the property known as Salisbury House, and utilising it. The house contains about eight hundred rooms. These rooms are let to tenants as offices. There is no residential occupation. No furnishings are provided. The Company maintain a staff of servants to operate the lifts and act as porters and look after the building, and there is also a large staff of cleaners all under the orders of a housekeeper paid by the Company. The tenants have the exclusive use of the rooms let, but are bound to leave the keys at night with the housekeeper so as to allow access in the case of fire breaking out. The Company retain certain rooms as an office. By the terms of the leases the Company have to pay all rates and taxes. The Company were assessed to Income Tax under Schedule A upon the gross value of the premises as appearing in the Valuation Roll in accordance with the Valuation (Metropolis) Act, 1869.

(Viscount Dunedin.)

This assessment was imposed on the Company as landlords, instead of on the various individual tenants who are the occupiers, in accordance with Rule 8 (*c*) of No. VII of Schedule A of the Income Tax Act, 1918, which provides for the assessment of landlords instead of tenants in the case of any house or building let in different apartments and tenements and occupied by different persons severally, and the amount of the assessment was duly paid by the Company. The Inspector of Taxes then served on the Company a notice of assessment under Schedule D. He arrived at the assessment by calculating the amount of profit as brought out in the profit and loss account of the Company, after deducting expenses of management and upkeep, and then he proposed to deduct from the assessment so brought out the amount of assessment already paid under Schedule A. The Company admitted that they had to pay under Schedule D upon the amount of profits which they made from the cleaning and other services, but contended that, so far as the proceeds of the property were concerned, that had already been taxed under Schedule A and could not again be brought *in computo* under Schedule D, and demanded a Case. A Case was stated by the Commissioners which sets out the above facts. The figures, apart from the question of principle, have been agreed on.

Mr. Justice Rowlatt took the view that the Commissioners had decided the case rightly and dismissed the appeal. He thought the case was ruled by the judgment of the Court of Session, given in the case of *Rosyth Building Company* v. *Rogers* (1), 1921 S.C. 372. The appeal being taken to the Court of Appeal, that Court unanimously reversed the judgment, and the Crown now appeals to your Lordships.

My Lords, this is one of those cases which may be approached, so to speak, from very different angles, and according as you approach it from one angle or another a different conclusion may seem to be the one that is right to follow. I can only say that, after the best consideration I could give it, my opinion is that the angle from which I now approach it is the right one. Now, the cardinal consideration in my judgment is that the Income Tax is only one tax, a tax on the income of the person whom it is sought to assess, and that the different Schedules are the modes in which the Statute directs this to be levied. In other words, there are not five taxes which you might call Income Tax A, B, C, D, and E, but only one tax. That tax is to be levied on the income of the individual whom it is proposed to assess, but then you have to consider the nature, the constituent parts, of his income to see which Schedule you are to apply. Now, if the income of the assessee consists in part of real property you are, under the Statute, bound to apply Schedule A.

(1) 8 T.C. 11.

(Viscount Dunedin.)

Schedule A may, so to speak, get in touch with the assessee in different ways according to the condition of affairs. It may touch property in occupation which actually brings in no money return. A good example will be found in the case decided within the last few weeks in this House in the case of *Lady Miller* (1). There a lady enjoyed the use of a mansion house under the provisions of the will of her deceased husband which was feudally vested in trustees. The mansion house brought her in no money but she was reckoned as for Income Tax, in order to arrive at Super-tax, on the yearly value of the house. In this matter it differs from all the other Schedules, all of which only deal with actual return. When, as in the present case, a subject is let, the rent, if it represents a fair bargain, is taken as the measure of that part of the income of the lessor, and he suffers the tax by way of deduction by his tenant from the rent due or, as in the present case, by paying it himself. The result is that by the operation of the assessment under Schedule A which is made imperative by the Statute, and was in fact applied here, the income of the assessee is so far dealt with and cannot be dealt with again. Of course that does not mean that the assessee may not be liable in respect of other income under other Schedules. He might be liable under Schedule B, which says in terms that the amount there is to be in addition to the assessment made under Schedule A, though the underlying subject is the same. But he might be liable under any of the other Schedules if he has income to which they apply, and in particular he might be liable under Schedule D. It is a mere commonplace to remark that a man who possesses real property and is assessed under Schedule A may also have investments and other forms of property which will be assessed under Schedule D.

Now, turning to this case. The income of the Respondents, as represented by rents, is admittedly assessed, and properly assessed, under Schedule A. "But then" says the Appellant, "you are "carrying on a business, and a business falls to be assessed under "Schedule D." To which the Respondent replies "Quite so, and "I am willing to pay on the profits which I make on the cleaning "and other services." To this the Appellant replies, "No, that is "not enough. Your business is one business, not a congeries of "businesses, and if I estimate your profits from your own profit "and loss account, I will get the higher figure which I ask." The answer to that is: "You cannot bring out that balance of profit "without taking the rents I receive *in computo*. Now these rents "are also part of my income or property and the Statute says that "any income which represents the value of real property is to be "assessed in the manner directed under Schedule A." My Lords,

(1) Lady Miller *v.* Commissioners of Inland Revenue. See page 25 *ante*.

(Viscount Dunedin.)

I think the final answer is good. The rents, having been assessed under Schedule A, are, so to speak, exhausted as a source of income, and the so-called concession made by the Appellant that there should not be double taxation, and that therefore he would be willing to allow deduction of the sum paid under Schedule A, is a concession which is beside the mark. It is a concession to avoid double taxation, but the concession cannot come into being where double taxation does not exist, and here it does not exist because it being imperative to deal with the rents under Schedule A there is no possibility of subsequently dealing with them under Schedule D.

My Lords, I have preferred to consider this question on the Statute alone, without reference to authority, but I am far from anxious to put my judgment on a mere *ipse dixit*, and I will therefore analyse my own argument to see if it is supported by authority. Now, the cardinal proposition is that Income Tax is one tax, and the Schedules merely the different means of collecting it, and that there are not so many taxes as there are Schedules. This point was raised in the most distinct manner in the case of the *London County Council* v. *The Attorney-General* (1), [1901] A.C. 26. I quote from the argument of the taxpayer: "There is no ground for the distinction "made by the Court of Appeal between Schedule A and Schedule D. "There is only one tax, and the Schedules constitute not separate "imposts but one tax under several heads." And now I quote from the language of the Counsel for the Crown: "It is not correct "to say that there is one tax only, the income tax. The Act of 1842 "speaks in the preamble of 'the several rates and duties mentioned "'in the several schedules contained in this Act and marked "'respectively, A, B, C, D, and E.' The separation is maintained "throughout the Act. . . . There are thus five different taxes." This view of the case had been upheld by the Court of Appeal, but it was rejected by this House. Lord Macnaghten, who delivered the leading judgment, says among other things (2) "It"—income tax—"is one tax, not a collection of taxes essentially distinct. . . . . "In every case the tax is a tax on income, whatever may be the "standard by which the income is measured . . . . the expression "'profits or gains' . . . . is constantly applied without distinction "to the subjects of charge under all the Schedules." And then, commenting on the Court of Appeal's judgment, he quotes from it: "The tax under Schedule D is a tax upon 'profits and gains', an "entirely different tax from the tax under Schedule A", on which he says, "With all deference, I do not think that that is a sound view "of the Income Tax Acts". The other members of your Lordships' House agreed with him.

The next proposition is that when income is dealt with in the proper Schedule the same income cannot be dealt with again under

(1) 4 T.C. 265. (2) *Ibid.* at pp. 293 and 294.

(Viscount Dunedin.)

another Schedule. There is no stronger foundation for this proposition than may be found in the fact of the option given, not to the Crown, but to the taxpayer who is assessed under Schedule B to be assessed under Schedule D. This obviously points to the fact that, once assigned to its appropriate Schedule, the same income cannot be attributed to another Schedule. The same may be gathered from various decisions. There are the general words of Mr. Justice Hamilton, as he then was, in *Hill* v. *Gregory*, [1912] 2 K.B. 61, at page 70 (1), quoted in this case by the Master of the Rolls: "The "very terms which define the subject-matter of Schedule D exclude "from it the subject-matters which fall within Schedule A." Then there is the case of *Back* v. *Daniels* (2). Daniels were wholesale potato merchants and were assessed under Schedule D for the profits of the business. Part of the said profits consisted of profits made by the sale of potatoes on lands held by them under special agreements with the farmers who were in possession of the lands. It was held that the profits from these sales fell to be reckoned in the question of a Schedule B assessment in respect of the lands under the agreements, and could not be included in the amounts under Schedule D. Lord Justice Scrutton put the matter thus (3): "When there is a separate and distinct operation unconnected "with the occupation of the land, such as a cheese factory dealing "with the milk of a dairy farm, or a butcher's shop dealing with the "beasts of a cattle farm, I can understand a separate assessment "of that operation, but I do not think that the fact that the farmer "sells his produce either on the farm or at the local market, or at "Mark Lane, or even if he sells it in a shop, justifies an assessment "under Schedule D as well as or in substitution for Schedule B".

In this connection it would be desirable to deal with the *Rotunda* case (4) [1921] 1 A.C. 1. This case had the peculiarity of being claimed by learned Counsel on both sides as authority. The facts were these. The Rotunda Hospital in Dublin was a charity and it owned buildings. Part of the building which was not actually used as a hospital was permitted to be used on occasions by various persons for entertainment purposes in return for a money payment. Now, the exemption from tax in respect of charitable institutions is different under Schedule A and Schedule D. It therefore became necessary, as Lord Birkenhead pointed out, to analyse the particular income in question to see whether it fell within Schedule A or Schedule D. But the rooms were not let to anyone. There was no question of including the rents of the rooms in the profits which were calculated under Schedule D; the hospital was held to be in occupation of the whole premises. What was done in that case

(1) 6 T.C. 39 at p. 47. (2) 9 T.C. 183. (3) *Ibid.* at p. 203.
(4) Governors of the Rotunda Hospital, Dublin *v.* Coman, 7 T.C. 517.

(Viscount Dunedin.)

was this: the total profits made out of the fees were calculated under Schedule D, and then the calculated assessable value of the premises under Schedule A was deducted. (There had been no actual assessment made under Schedule A because it had been assumed that the premises were occupied by a charity.) This was done because there was in the Irish Act a Rule corresponding to Rule 5 in Cases I and II of Schedule D of the 1918 Act, which exempts from taxation under Schedule D the profits or gains arising from annual value of the premises occupied for the purposes of the business.

Now that was a perfectly different operation from what is proposed here. If that case had been treated as the Crown wish to treat this one, the assessable value of the premises ought to have been added to the receipts in making up the trade profits, and then from the tax so brought out, not the value of the premises, but the tax calculated as under Schedule A on the premises, ought to have been deducted.

To resume the general argument in favour of the distinction between the Schedules. There is the phraseology of Section 208: "The provisions in this Act contained which are applied to the tax "under any particular Schedule shall, if also applicable to the "tax under any other Schedule and not repugnant to the pro-"visions for ascertaining, charging or levying the tax under such "other Schedule, be applied in ascertaining, charging and levying "tax under that Schedule, as if the application of those provisions "thereto had been expressly and particularly directed", which points very clearly to the different Schedules being distinctly applicable to only one class of property. Now, it is obvious that, although land must be assessed under Schedule A, there may be activities connected with the land which will fall under another Schedule. Schedule B gives the simplest example, but then there are also activities which fall under Schedule D. It would be rash indeed for anyone to say that he had in his mind all the cases decided in regard to the Income Tax Acts, but at any rate no case was produced by Crown Counsel here, in which in computing profits under Schedule D the rents of lands, which had been let and were not in the occupation of the assessee under Schedule D, are taken *in computo*. It is therefore of no use to cite cases of which the *Silloth Golf Club* case [1], [1913] 3 K.B. 75, is an instance, where profits arising from the use of land were taxed under Schedule D, but where the assessee was not the person liable under Schedule A in respect of those lands. There are *dicta* against doing so. Lord Loreburn, in *Smith* v. *Lion Brewery Co.*, [1911] A.C. 150, at page 155, said [2]: "You cannot, by saying that a man carries on the business "of owning house property, shift the method of assessing that

[1] Carlisle and Silloth Golf Club *v.* Smith, 6 T.C. 48 and 198.
[2] 5 T.C. 568, at p. 590.

(Viscount Dunedin.)

" property for Income Tax from Schedule A to Schedule D." It is true that Lord Loreburn was there delivering a dissenting judgment, but the point on which he differed, viz., the question of the right to a deduction in assessing the profits under Schedule D, does not affect the *dictum* above quoted. In this very case Mr. Justice Rowlatt states the law generally to this effect (1): " Real property is always " liable to Schedule A, and under no circumstances can you take " it out of Schedule A—discard Schedule A and throw it into a " Schedule D account, and treat it under Schedule D." I confess I cannot reconcile this with his judgment except upon the view that he considered himself bound by the *Rosyth* case (2). There is a very instructive passage in the judgment of Lord Maclaren in a Scotch case, *Edinburgh Southern Cemetery Co.* v. *Kinmont* (3), 17 R. 154. That was a case of a cemetery company which rented a piece of land, which they utilised as a cemetery by selling lairs to persons to be used for burial purposes and to belong to them in perpetuity. The actual decision was that this was a concern of the like nature to the enumerated properties in Rule 3 of Schedule A of the Act of 1842 and so fell to be assessed under that Schedule in the way there stated. Lord Maclaren at page 165 seems almost to anticipate the present case. He says (4): " It is certainly not " sufficient to bring a particular use of land within the scope of " Rule 3 that the proprietor of land is using it in connection 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 the 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 manu- " facture carried on within the heritable subjects."

I now come to the case which is undoubtedly to the opposite effect, the *Rosyth* case. That case does not contradict my general assertion as to no case having been produced in which the Crown had done what they here propose to do. But notionally for the purpose of deciding as to repayment of part of an assessment it was done, and it is a direct authority in point. The Master of the Rolls and the other Judges of the Court of Appeal were, I think, affected with too great politeness to the Court of Session and dealt with this case by saying it was a Scotch case and they could not quite understand it. There is no question of Scotch, as discriminated from English, law involved in it, but in any case I am afraid I could not shield myself under the same excuse. I say directly it was wrong.

(1) See page 281 *ante*.
(2) Rosyth Building and Estates Company, Ltd. *v* Rogers, 8 T.C. 11.
(3) 2 T.C. 516. (4) *Ibid.* at p. 530.

(Viscount Dunedin.)

Nor do I think it is at all difficult to see why it was wrong; and it is just here I touch what I have always felt to be the difficulty in this case. The Company there had duly been assessed under Schedule A, but the point was, might it have been assessed under Schedule D instead of under Schedule A. The Lord President says (1): "It is "settled that it is for the Crown to choose in which capacity the "Company shall be charged, as property or investment owner on "the one hand, or as trader conducting a business on the other. . . . . "The house property in this case is not occupied for the purposes "of the Company's business; it is occupied by tenants to whom the "Company lets it. Accordingly I think the Crown is alternatively "entitled to treat the rents either as chargeable in respect of the "Company's property under Schedule A, or as constituents of the "profits arising or accruing to the Company from its business "chargeable under Schedule D." Now that that settles the point I do not think can be doubted. But when one comes to look at the cases which were cited, and on the effect of which the Lord President says, "It is settled, etc.", it will be found that they are all cases not of choice between Schedule and Schedule but between the various Cases in Schedule D. It had been settled long ago that in the case of insurance companies who held large investments the Crown might proceed to reckon under either Case I in Schedule D or under any of the other Cases which may be found to apply. I myself said it in the case of *Revell* v. *Edinburgh Life Insurance Company* (2), and what I said was approved and adopted by Lord Cozens Hardy, *M.R.*, in *Liverpool and London and Globe Insurance Company* v. *Bennett* (3), [1912] 2 K.B. 41. From this the Lord President has without authority deduced the view that as there is an option between Cases so there must be an option between Schedules, and he bases this in argument on the possibility of an insurance company having securities which would fall under Schedule C and others falling under Schedule D. My Lords, I confess this has been the difficult part of the case to me. It is very obvious to suggest that if the Crown can opt as between Cases why should it not opt as between Schedules. And that the Company is carrying on a business I do not doubt. The Memorandum of Association shows that it is. But I think the answer is that an option between Cases does not in any way disturb the general scheme of the Act: an option between Schedules would. I think on a general survey of the history and policy of the Income Tax Acts one finds the great distinction that there is between Schedules A and B on the one hand and the other three Schedules on the other. I think it would upset the whole scheme of taxation if you were in the case of real property to be allowed to ignore Schedules A and B. There is no conflict between Schedules C and D if, as is the hypothesis put by

(1) 8 T.C. 11, at pp. 15, 16 and 17. (2) 5 T.C. 221. (3) 6 T.C. 327.

(Viscount Dunedin.)

the Lord President, the Crown elects to charge in Schedule D on Cases other than Case I. Schedule C is not, so to speak, upset. On the contrary the charge on the particular form of investment under Schedule C fits in with the charge on other investments made under, say, Case III of Schedule D. But in the case of real property, if you do what is here asked Schedule A is upset altogether. With great respect to the learned judges in the Court of Session I think it was only Lord Skerrington who saw that by a side wind they were asked to introduce a great novelty. Lord Skerrington says (1): "The Inland Revenue do not seek to assess the appellant Company "according to the rules under the First Case in Schedule D, but it is "essential to their success in this litigation to demonstrate that "they would have been entitled to make such an assessment if "they had so wished. . . . . I should have listened to the argument "with more satisfaction if, at the outset, we had been informed "that a company in the position of the appellant Company had "never, so far as known, been assessed according to the rules "under the First Case in Schedule D, and if we had been invited "to attend to the provisions of the Income Tax Acts for the purpose "of considering whether there was any good reason why such an assess-"ment should not now be imposed for the first time." I think this shows that the immense importance of the case had not been before the Court, and that no argument as to the imperative character of Schedule A as to real property had been presented.

As I have said, I recognise the case to be full of difficulty, but on the whole I have come to the conclusion that the decision of the Court of Appeal is right. What are known as the brewery cases have I think no application to the question in hand. I move that the appeal be dismissed with costs.

As regards the other case that is called on, it absolutely follows this, and of course, the judgment in the first case rules the judgment in the second.

Lord Warrington of Clyffe (read by Lord Macmillan).—

My Lords, the Respondents are a company incorporated under the Companies Acts. They are the owners of a large building in the City of London known as Salisbury House. This building contains some eight hundred rooms which have been let by the Company to some two hundred tenants as offices singly or in suites, at rents varying according to the accommodation provided, the situation of the several rooms and so forth. The Company provides a staff of porters and cleaners who perform certain services for the tenants for which additional rents and charges are made by the Company.

(1) Rosyth Building and Estates Company, Ltd., *v.* Rogers, 8 T.C. 11 at pp. 18 and 19.

(Lord Warrington of Clyffe.)

The question in this appeal is whether the Company in thus letting the premises owned by it is carrying on a trade within the meaning of the Rule applicable to Case I of Schedule D of the Income Tax Act, 1918, and is therefore liable to be charged under that Schedule in respect of the gains and profits of that trade, the Crown contending that in that case they would be liable to bring into account as part of their gross receipts the amount of the rents received by them from the tenants of the several rooms and offices so let by them as hereinbefore mentioned.

The Company is already charged as landlord, under Rule 8 of No. VII of the Rules applicable to Schedule A, in respect of the annual value of Salisbury House as appearing in the Valuation List under the Valuation (Metropolis) Act, 1869, which is by that Act made conclusive for the purposes of Income Tax in the case of hereditaments within the Administrative County of London. This annual value is considerably less than the amount of the rents payable by the several tenants. The Crown admits that if the Company were charged under Schedule D in respect of the gross amount of rents received as well as under Schedule A in respect of the annual value it would be taxed twice over in respect of the same subject matter, and concedes that if they are right in their contention that the Company should be assessed under Schedule D the amount of the assessment under Schedule A must be deducted from the total receipts of the Company, including rents less expenses.

The Company on the other hand admits that it is liable to be assessed under Schedule D upon any profit which it derives from tenants outside the rents themselves, so far as such profits may be described as resulting from a trade, but insists that as a landowner letting the hereditaments of which it is owner it is not carrying on a trade and is liable only to be assessed under Schedule A in respect of the annual value of the hereditaments.

The Company having been assessed in accordance with the contentions of the Crown for the four years ended the 5th April, 1928, appealed to the Commissioners who confirmed the assessments. They were required to state a Case. By that Case they stated in full detail the facts summarised above and concluded that they were bound by authority to decide that the assessments under Schedule D were rightly made to include the amounts by which the total receipts of the Company (including its rents from offices) less expenses exceeded the Schedule A assessments. They further state that the sole question upon which the opinion of the Court is desired is whether the rents received by the Company on letting the offices in Salisbury House are properly to be included in the assessment as trade receipts of the Company for purposes of Case I of Schedule D of the Income Tax Act, 1918.

(Lord Warrington of Clyffe.)

The case came before Mr. Justice Rowlatt, who confirmed the view of the Commissioners, but on appeal to the Court of Appeal his Order was reversed and the case was remitted to the Commissioners to amend the assessments. The Crown appeals to this House.

It is well settled that though the tax under Schedule A is a tax on income, like that under all the other Schedules, it is not a tax upon rents. It is assessed upon annual value, which in the present case is fixed by the Valuation List above referred to. The latest case on this subject is *Miller's* case (1) before this House, at present unreported, in which it was held that a person in actual enjoyment of and occupying lands is liable to the tax although he is not in receipt of rent therefrom nor even, by reason of the nature of his tenure, capable of converting his enjoyment into rent. Now the effect of the Crown's contention, if it be correct, would be indirectly to convert this tax on annual value to a tax on rents, and therefore it seems to me that a heavy burden is cast upon the Crown before its contention can succeed.

The first question to be determined is whether in its capacity as landowner deriving rents from its land the Company is carrying on a trade within the meaning of Schedule D and the Rules thereunder, and if this question is answered in the negative the further questions raised and argued in this House do not arise.

Now in the first place the Commissioners have not in my judgment decided this question as one of fact, and it is therefore open to the House now to express their own views thereon. The Commissioners have contented themselves with stating the facts as to the mode in which the Company deals with the property of which it is the owner, and then express the opinion that the assessments under Schedule D were rightly made to include the amounts by which the total receipts of the Company, including rents from offices less expenses, exceeded the Schedule A assessments, and state that the sole question is whether the rents are properly included as trade receipts. That is to say whether, assuming the Company is liable to be assessed under Schedule D as a trader, the rents are properly included in the gross receipts.

There is nothing in the facts stated in the Case which would properly lead to the conclusion that in dealing with the property the Company is acting otherwise than an ordinary landowner would act in turning to profitable account the land of which he is the owner. It would in my opinion be impossible to hold that in such a case the landowner is carrying on a trade. Such a person would, I think, clearly be assessable under Schedule A only, and his taxable income

(1) Lady Miller *v.* Commissioners of Inland Revenue. See page 25 *ante*.

(Lord Warrington of Clyffe.)

would be measured by the conventional annual value and not by the amounts of the rents he actually received.

But the Crown contends that the fact that the taxpayer is a limited company may distinguish its operations from those of an individual. Assuming the Memorandum of Association allows it, and in this case it unquestionably does, a Company is just as capable as an individual of being a landowner, and as such deriving rents and profits from its land, without thereby becoming a trader, and in my opinion it is the nature of its operations, and not its own capacity, which must determine whether it is carrying on a trade or not. Nor do I see any reason why, as in the present case, some of its operations under the wide powers conferred by the Memorandum should not be operations of trade, whereas others are not.

Many cases have been cited in argument but they do not in my opinion touch the present point. That which comes nearest is I think the *Rosyth Company's* case, 1921 S.C. 372, but when that case is examined it will be found that the fact that the company was carrying on a trade was assumed as common ground. The Lord President in his judgment (p. 379) says (1): "It may sometimes "be difficult to draw the line between land ownership and commercial "enterprise in land; but that is a question of fact of a kind which "is not infrequently met with under the Income Tax Acts, and it "is solved in the present case in favour of the Crown, because it is "common ground that the Appellant Company is a land investment "concern." In this case the point is open.

The brewery cases seem to me not to be in point. The last one, *Ushers' Wiltshire Brewery, Limited* v. *Bruce* (2), [1915] A.C. 433, is, if it be relevant at all, in the Plaintiffs' favour, for though the taxpayer there was a company trading as a brewery company the rents received from its tied houses were not regarded as receipts from the brewery business, except only to this extent, that inasmuch as the company was claiming as a deduction from gross receipts sums expended in repairs to tied houses, it could only make good its claim to deduct the net sum so expended and therefore must allow against the cost of repairs such sums as were received by way of rent from the houses repaired.

I come then to the conclusion that the Crown fails to make good the ground on which its claim to have a right to assess the Company under Schedule D is based, except of course to the limited extent to which it is admitted, and that the question asked by the Commissioners was properly answered in the negative by the Court of Appeal.

For the reason given above I express no opinion upon the further points raised in argument, and in particular upon the correctness

(1) 8 T.C. 11, at p. 17. (2) 6 T.C. 399.

(Lord Warrington of Clyffe.)

or otherwise of the decision in the *Rosyth Company's* case or of the views expressed by the learned Judges in that case, but in saying this I must not be taken to dissent from the views expressed by my noble and learned friend on the Woolsack whose opinion I have read.

The appeal in my opinion fails and should be dismissed with costs.

It is admitted that there is no distinction favourable to the Crown between this case and that of the *City of London Real Property Company*, and the appeal in that case also should be dismissed with costs.

Lord Atkin (read by Lord Tomlin).—My Lords, the Respondents are a limited company who own hereditaments in the City of London consisting of a large building known as Salisbury House, which they let out to tenants as unfurnished offices. They have been assessed to Income Tax in respect of property in the hereditaments upon the annual value thereof under Schedule A. The assessment and charge has been made upon the owners direct under the provisions of Schedule A, No. VII, Rule 8 (*c*), relating to any house or building let in different apartments or tenements and occupied by two or more persons severally. They have also been assessed under Schedule D in respect of the profits or gains of the trade said to be carried on by them in letting the offices and providing services for the tenants. The assessments under Schedule D are made upon the footing of including in the gross receipts of the trade the actual rents received from the tenants and deducting the cost of earning them. It is admitted that if the Respondents are taxed upon their full profits and gains on this footing they would be doubly taxed to Income Tax in so far as the annual value under Schedule A represents rents received. From the gross receipts therefore, is also deducted the annual value upon which the Respondents have already paid Income Tax under Schedule A. By this adjustment they are assessed under Schedule D upon so much of the profits and gains received from rents as exceeds the annual value of property assessed under Schedule A. The Respondents admit that they are liable to assessment under Schedule D in respect of the profits they make for services rendered to tenants which appear to consist of cleaning offices and providing fuel. They contend, however, that in respect of the profits and gains they make from letting the offices the assessment can only be made under Schedule A, whether the rents exceed the annual value or not. The Inland Revenue on the other hand contend that they have an option to charge under whatever Schedule is more advantageous to them, always making an adjustment against double taxation. They say that the Respondents carry on a trade, and for the full profits and gains of such trade they are chargeable whether the income is derived from property in land or not.

(Lord Atkin.)

The sum in dispute is considerable. Except in London the question would hardly arise. Annual value under Schedule A as measured by Rule 1 is the actual rent if the hereditaments were let at a rack-rent within seven years of the assessment, or if not, the rack-rent which they are actually worth subject to the statutory allowances. The Inland Revenue can hardly lose and may gain on this computation of income. But in the Administrative County of London, as provided by the terms of Schedule A, the annual value is to be the annual value as fixed under the Valuation (Metropolis) Act, 1869. It therefore may happen that the fact that the valuation is made quinquennially, that an allowance is made for empties, and that the actual cost of repairs in any year or three years may be less than the statutory allowances, will cause the profits calculated under Schedule D to be greater than the annual value. Of course the opposite result may follow, and in such case the tax-gatherer would doubtless exercise his option for Schedule A.

My Lords, I think that this case should be decided in favour of the Respondents upon the simple ground that annual income derived from the ownership of lands, tenements and hereditaments can only be assessed under Schedule A and in accordance with the Rules of that Schedule. In my opinion it makes no difference that the income so derived forms part of the annual profits of a trading concern. For the purpose of assessing such profits for the purpose of Schedule D the income so derived is not to be brought into account. The option of the Revenue Authorities to assess under whichever Schedule they prefer in my opinion does not exist and is inconsistent with the provisions of the Income Tax Acts throughout their history.

The scheme of the Income Tax Acts is and always throughout to provide for the taxation of specific properties under Schedules appropriated to them and under a general Schedule D to provide for the taxation of income not dealt with specifically. Schedule A provides for the taxation of income derived from property in land; B for income derived from the occupation of land; C for income derived from government securities; E for income derived from employment in public service. It is unnecessary to go further back than the Income Tax Act of 1842, the provisions of which were incorporated in every Customs and Inland Revenue or Finance Act up to 1918, when the present Consolidation Act was passed. I need not repeat the familiar Schedules altered and extended by the Act of 1853. It is only necessary to refer to Section 100 of the Act of 1842 which defined the tax to be imposed under Schedule D. "The duties hereby granted, contained in the Schedule marked D, "shall be assessed and charged under the following rules, which rules "shall be deemed and construed to be a part of this Act, and to

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" refer to the said last-mentioned duties, as if the same had been " inserted under a special enactment. *Schedule D.* The said last- " mentioned duties shall extend to every description of property " or profits which shall not be contained in either of the said " Schedules A, B, or C, and to every description of employment " of profit not contained in Schedule E."

My Lords, nothing could be clearer to indicate that the Schedules are mutually exclusive; that the specific income must be assessed under the specific Schedule; and that D is a residual Schedule so drawn that its various Cases may carry out the object so far as possible of sweeping in profits not otherwise taxed. For this reason no doubt the actual Schedule was drawn in the widest terms. " For " and in respect of the annual profits or gains arising or accruing " to any person residing in the United Kingdom from any kind " of property whatever, whether situate in the United Kingdom or " elsewhere," etc. Such language covers income from land in Schedule A and from government securities in Schedule C. Its true meaning is made apparent by Section 100. Moreover, the dominance of each Schedule A, B, C, and E over its own subject matter is confirmed by reference to the Sections and Rules which respectively regulate them in the Act of 1842. They afford a complete code for each class of income, dealing with allowances and exemptions, with the mode of assessment, and with the officials whose duty it is to make the assessments. Thus under A and B the assessment and collection is regulated by the General Commissioners; under C the assessment is by Commissioners specially appointed for the purpose; under E the assessment and collection is made in the departments or by the officers of the public corporations concerned; while under D the assessment is regulated by Additional Commissioners. I find it impossible to conceive that these various commissioners had an option to encroach upon the duties of one another; or that the taxpayer was exposed to having his income freed from the restrictions and exemptions imposed by statute under one Schedule in order to be subject to a different set of restrictions and exemptions imposed by statute under another Schedule. To take a concrete instance which has been before the courts, it seems to me impossible that the Legislature intended that a farmer taxed for profits of his occupation under Schedule B might at the option of the authorities after a successful year or term of years be taxed on his profits under Schedule D. The point was decided by the Court of Appeal in *Back* v. *Daniels*(1), [1925] 1 K.B. 526. It was argued that this decision turned on the express option given to the occupier to be assessed under Schedule D, which therefore negatived an implied option in

(1) 9 T.C. 183.

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the authorities to assess him under that Schedule. The express option to the occupier was not given until 1887 by the Customs and Inland Revenue Act of that year. I confess I fail to see why an option given to the taxpayer should negative the existence of an option in the tax-gatherer; still less how an option given for the first time in 1887 should destroy an option in the tax-gatherer which on the hypothesis had been in existence since 1842. The judgments do not support any such contention. Similarly I am of opinion that income derived by a trading company from investments of its funds, whether temporary or permanent, in government securities must be taxed under Schedule C, and cannot for the purposes of assessment under Schedule D be brought into account. I am clearly of opinion that the Act of 1918, which is expressed to be a consolidation Act, did not alter the law so as to give to the authorities an option they did not possess before. It is true that the words of Schedule D and the Cases are wide as before; the words as to annual profits or gains arising to any person residing in the United Kingdom from any kind of property whatever are repeated. But they must be cut down as they were before. I may refer to one expression in the Rule applicable to Case III, 1 (*a*) where it is provided that the tax shall extend to "any . . . other annual payment, "whether . . . payable . . . as a personal debt . . . by virtue of "any contract, or . . . received or payable half-yearly or at any shorter . . . periods". This would include rent under a lease, but it is obviously not intended to cover cases under Schedule A. I attach no importance to the express exception in some of the Rules under D of income coming within named other Schedules. They are inserted *ex majori cautela* and similar instances can be found in the Rules under the former Act where, as I have stated, the position was clearly expressed by Section 100. Believing as I do that the specific Schedules A, B, C, and E, and the Rules thereunder, contain definite codes applying exclusively to their respective defined subject matters, I find no ground for assessing the taxpayer under Schedule D for any property or gains which are the subject matter of the other specific Schedules. In the present case the income from the offices should be and has been assessed under Schedule A on the annual value as prescribed by Statute. It therefore is not the subject matter of assessment under D. I should add that if there had been an option to assess under A or D I cannot conceive a more conclusive election under the option than the assessment and receipt of payment under Schedule A, but this point need not be determined.

The *Rotunda* case, *Governors of the Rotunda Hospital, Dublin*, v. *Coman*(1), [1921], 1 A.C. 1, much relied on by the Appellants,

(1) 7 T.C. 517.

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appears to me to afford them no help. In that case Lord Birkenhead expressed the view that the letters were not such as to constitute the relation of landlord and tenant but the possession and occupation of the rooms remained with the respondent. Lord Cave (pp. 23, 24) expressly held(1) that the profits in question were not assessable under Schedule A and accordingly fell to be assessed under Schedule D. Lord Finlay appears to have been of the same opinion. The case merely decided that the Respondents, the governors of the Hospital, used their own premises of which they were in occupation for the purpose of carrying on a profitable trade, and that they were liable to be assessed under Schedule D for those profits with the statutory deduction of the annual value assessed under Schedule A. The case entirely differs in its facts and appears to throw little light on the law in question before this House.

The *Rosyth* case(2) so far as it decided that the Inland Revenue authorities have an option to select which Schedule they prefer, must, I think, be held to be wrongly decided. The actual decision may possibly be supported on the view that for the purpose of the particular claim for exemption the whole profits must be calculated under a notional Schedule D which would pay no regard to the other Schedules. It is unnecessary in the present case to discuss that matter.

I desire to add that I do not desire to throw any doubt upon decisions which indicate that the Inland Revenue authorities may have an option as to the several Cases of any given Schedule upon which they may determine to assess the taxpayer. An option within a Schedule is not the same thing as an option to select Schedules.

My Lords, it may well be that another mode of expressing the result I have stated is to hold that a person capable of being assessed under Schedule A cannot be said in respect of his income from land to be earning profits from " trade ". This view appears to commend itself to some of your Lordships. I do not dissent from it; but I view it with some misgiving. I find it difficult to say that companies which acquire and let houses for the purposes of their trade, such as breweries in respect of their tied tenants, and collieries and other large employers of labour in respect of their employees, do not let the premises as part of their operation of trading. Personally I prefer to say that even if they do trade in letting houses their income so far as it is derived from that part of their trading must be taxed under Schedule A and not Schedule D. I agree that this appeal should be dismissed.

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(1) 7 T.C. at p. 585.
(2) Rosyth Building and Estates Company, Ltd., *v.* Rogers, 8 T.C. 11.

Lord Tomlin.—My Lords, this is an appeal by H.M. Inspector of Taxes against an order of the Court of Appeal dated the 26th June, 1929, reversing a decision of Mr. Justice Rowlatt. That learned judge had dismissed the Respondents' appeal from a decision of the Commissioners for the Special Purposes of the Income Tax Acts confirming assessments to Income Tax made upon the Respondents under Schedule D for the four years ending 5th April, 1928.

The Respondents are a limited company formed in 1902 to acquire a large block of buildings known as Salisbury House and to let out as offices the rooms contained in the block.

Since their incorporation the Respondents have held, let and managed Salisbury House. They have not acquired, managed or dealt in any other property.

Salisbury House contains some eight hundred rooms let to two hundred tenants or thereabouts. The lettings are all unfurnished lettings of single rooms or suites.

The Respondents maintain and operate the lifts in the building, and for this purpose and for the purpose of keeping clean the halls, corridors and staircases provide a staff of some eighty to ninety persons under the supervision of a housekeeper.

Under the Respondents' standard form of lease certain sums are payable by the tenants by way of additional rents. These sums represent contributions by the tenants towards the cost of lighting the halls, corridors and staircases and like matters. Some of the tenants also pay to the Respondents remuneration for certain cleaning and other services rendered to them.

The Respondents have throughout in respect of Salisbury House been directly assessed to Income Tax on the whole building under Schedule A, No. VII, 8 (*c*) of the Income Tax Act, 1918. As the property is situate within the Administrative County of London the annual value with respect to Schedule A is by Section 45 of the Metropolis (Valuation) Act, 1869, deemed to mean the gross value stated in the Valuation List under that Act. By Section 4 of the same Act gross value means the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for a hereditament.

The rents actually received during the years of assessment exceeded by a substantial amount the assessed value for the purposes of Schedule A.

From the Case Stated it appears that at the hearing before the Commissioners the Respondents admitted that they were liable to be assessed under Schedule D upon any profit which they derived from Salisbury House tenants outside the mere rents for the offices so far as such profits might be described as resulting from a trade.