237; *Tay District Fishery Board* v. *Robertson*, November 6, 1887, 15 R. 40, 25 S.L.R. 54. The Educational Endowments (Scotland) Act 1882, *cit. sup.*, section 46, contemplated endowments being dealt with in which school boards would have the same interest as here and yet thought it necessary to provide how they could sue. The inference from that was that otherwise the board would have had no title, and this inference was strengthened by the terms of the Education (Scotland) Act 1872 (35 and 36 Vict. cap. 62), section 47, and the Education (Scotland) Act 1908 (8 Edw. VII, cap. 63), section 3 (7). As to the argument that there must be some-one with a title to raise this question, they submitted that there was a remedy at the instance of the founder's representatives and of the Education Department.

At advising—

LORD PRESIDENT — I agree with the learned Sheriff in holding that the School Boards have here no title to sue. School Boards are statutory bodies, and admittedly no title to raise questions such as the present is given *eo nomine* to these bodies in the Education Acts. But this, I admit, does not conclude the matter, because there are cases in which, if a pursuer has an interest, a title will flow from that interest; and if I thought that the Boards had a sufficient interest here I would hold that they had a title to sue. But the Boards' interest in this matter is too shadowy and remote to support a title. If the bursaries were given to pupils attending the schools which are under these school boards there would, I think, be a sufficient interest; but the bursaries are not so given, and the only way in which the school boards are interested is that there is a condition in the scheme under which the bursaries are administered that candidates must have passed the qualifying examination of the Scots Code in one of the public schools in the parishes. It is said that parents might be attracted to the parishes and might send their children to the schools of the parishes, and that in this way a larger grant might be obtained from the Education Department, but this interest is too slender, in my opinion, to give the pursuers a title, and therefore I think we must adhere to the Sheriff's interlocutor dismissing the action.

LORD SALVESEN—I agree.

The LORD PRESIDENT intimated that LORD KINNEAR also concurred.

LORD JOHNSTON had been absent at the hearing.

The Court affirmed the interlocutor of the Sheriff dated 22nd November 1909, refused the appeal, with expenses.

Counsel for the Pursuers and Appellants —Blackburn, K.C.—J. M. Hunter. Agents —Macpherson & Mackay, S.S.C.

Counsel for the Defenders and Respondents — Munro, K.C. — W. T. Watson. Agents—J. Douglas Gardiner & Mill, S.S.C.

Saturday, July 16.

FIRST DIVISION.

(EXCHEQUER CAUSE).

TEBRAU (JOHORE) RUBBER SYNDICATE LIMITED (IN LIQUIDATION) *v.* FARMER (SURVEYOR OF TAXES).

Revenue—Income Tax—Profits or Gains—Sale by a Company of its Whole Undertaking to a New Company before Producing-Stage Reached — Property and Income Tax Act 1842 (5 *and* 6 *Vict. c.* 35), *Sched. D.*

A rubber syndicate, a limited company, included in its objects as set forth in its memorandum of association (*a*) the acquisition and development of rubber estates and the cultivation and manufacture of rubber, and (*b*) the sale of the whole or any part of the business or property of the company. It expended £29,500 in the purchase and development of estates, but finding its capital insufficient to develop the estates until they reached the producing stage it sold its whole undertaking to a new company at the price of £38,500, paid partly in money and partly in shares in the new company.

Held that the £9000, being the difference between the sums expended in purchase and development and the sale price, was not liable to tax.

The Tebrau (Johore) Rubber Syndicate Limited (in liquidation), being dissatisfied with a determination of the Commissioners for the General Purposes of the Income Tax Acts, and for executing the Acts relating to the Inhabited-House Duties for the county of Edinburgh, at a meeting held by them at Edinburgh on 10th June 1909 required the Commissioners to state a Case for the opinion of the Court of Session as the Court of Exchequer in Scotland.

The Case stated—"The Tebrau (Johore) Rubber Syndicate, Limited, now in liquidation (hereinafter referred to as the company) appealed against an assessment for the year ending 5th April 1909 on the sum of £9000 (duty £450) made upon it under the Income Tax Acts in respect of the profits derived by it from sale of rubber estates.

"The assessment was made under 5 and 6 Vict. c. 35, sec. 100, Schedule D, First Case; 16 and 17 Vict. c. 34, sec. 2, Schedule D; and 8 Edw. VII, c. 16, sec. 7.

"The following facts were admitted or proved:—The company was incorporated on 26th September 1907 under the Companies Acts as a company limited by shares. The capital of the company was £30,000 divided into 30,000 shares of £1 each. Under its memorandum of association the capital might be increased or reduced from time to time. The registered office of the company was at 5 St Andrew Square, Edinburgh.

"The objects of the company as set forth in the third article of its memorandum of association were, *inter alia*, as follows:—(1) To acquire and develop the estate of Tebrau, in the state of Johore in the Malay Peninsula. . . . (2) To acquire by purchase, lease, or otherwise, estates in the Malay Peninsula, or elsewhere in any part of the world, on which rubber trees have been planted, or which are regarded as suitable for the cultivation of rubber; and to carry on in any part of the world the business of planting and cultivating rubber trees, of trading in rubber, and of manufacturing rubber of every description and products from rubber, and of disposing thereof either wholesale or retail, and any other businesses or operations incidental thereto. (3) To pick, collect, gather, and crush the seed of the rubber trees, to prepare the same for market, and to sell and deal in the same and in the oil and other products manufactured therefrom. (4) To carry on any other business in any part of the world which in the opinion of the directors may advantageously be carried on by the company either in conjunction with the rubber business or independently. . . . (5) To purchase, take upon lease, or otherwise acquire in any part of the world any lands, buildings, machinery, plant, or other property, heritable or moveable, . . . and to sell, lease, mortgage, dispose of, or otherwise deal with and turn to account the property of the company. (6) To acquire by purchase or otherwise forest rights, timber, and wood of all kinds, and to cut, mill, and prepare for market, sell, and deal in timber and wood of all kinds and the products thereof. (7) To purchase, lease, or otherwise acquire any mines, mining rights, and metalliferous land in the Malay Peninsula, or elsewhere, or any interest therein, and explore, work, exercise, develop, and turn to account the same, . . . and generally to carry on any metallurgical operations which the directors may consider likely to prove advantageous to the company. . . . (12) To sell or otherwise dispose of, as a going concern or otherwise, the whole or any part of the business undertaking and property of the company, for such consideration as the company shall think fit, and in particular for the shares or obligations of any company or intended company in any part of the world having objects similar or in part similar to those of the company, and either on the terms that such shares or obligations shall he distributed in speeie among the members or otherwise. . . . (15) To borrow and raise money for the purposes of the company, to receive money on deposit, to issue at par, at a premium or discount, debentures, debenture stock (perpetual or otherwise), personal bonds, and other obligations of the company, either charged upon all or any of the property, heritable and moveable, present and future, and unpaid capital of the company, or otherwise to vest all or any of the said property and unpaid capital in the name of, or in the names of trustees for behoof of, any creditor or class or classes of creditors, and to redeem and repurchase such obligations. . . . (18) To promote or concur in promoting any company intended to be formed in any part of the world for the purpose of acquiring the whole or any part of the business, undertaking, and property of the company, or for any other purpose; and to pay all or any part of the expenses of and preliminary and incidental to the formation, establishment, and registration of such company, and all brokerage, commission, and other expenses that may from to time be deemed expedient for placing and guaranteeing the subscription of all or any of such company's shares and debentures, debenture stock, or other obligations.

"In pursuance of its business the company acquired two rubber estates at Tebrau, respectively known as 'Lama' and 'Bahru.'

"On 3rd October 1907 the company acquired, as from 1st May 1907, the estate of Lama at the price of £14,500, which was paid as to £12,500 in cash and as to £2000 in fully-paid shares of £1 each of the company. The estate consisted of 1501 acres, of which 627 acres were then planted with rubber.

"The company feeling that the original area of 1501 acres did not provide a sufficient reserve for future development, immediately endeavoured to acquire an additional block of desirable land. The company at first opened negotiations for the purchase of a small adjoining estate of about 600 acres, but did not succeed in effecting a purchase. Thereafter in November 1907 the company took advantage of an opportunity to acquire the Bahru estate of 2500 acres lying contiguous to the Lama estate at the price of 2000 fully-paid shares of £1 each of the company. By December 1908 the company had planted an additional area of 154 acres on Lama and 739 acres on Bahru with rubber plants. In ordinary course the estates would begin to yield a substantial quantity of rubber in the year 1911.

"The company's balance-sheet as at 30th April 1909 shows:—

(1) The paid-up capital to be . £29,897
(2) The expenditure, as from 1st May 1907, to be . . . 29,133
and (3) The cash due to the company to be 1,030

This balance-sheet does not include certain expenses abroad unascertained at 30th April 1909, but for the purposes of this case it is agreed that the total amount of the expenditure of the company in the purchase and development of the estates of Lama and Bahru and in home expenses shall be taken at £29,500, the amount of the assessment being open to adjustment, if necessary, when the exact amount of deductible expenses shall have been ascertained.

"As the original capital (£30,000) of the company was quite inadequate to develop 4001 acres, and as the company did not consider it desirable to increase its capital or to raise money by borrowing, the company decided on 9th January 1909 to sell, as from 1st January 1909, its whole undertaking to a

new company to be registered under the Companies Acts, with sufficient capital to purchase and fully develop both of the estates. The new company formed in March 1909 was incorporated under the name of the Tebrau Rubber Estates (1909), Limited (hereinafter referred to as the new company), with a capital of £150,000, divided into 150,000 shares of £1 each, and having its registered office at 5 St Andrew Square, Edinburgh.

"The company sold its whole undertaking to the new company at the price of £38,500, payable as to 2500 in cash, and as to £36,000 by the allotment to the company or its nominees of 36,000 shares of £1 each fully paid of the capital of the new company. The arrangement as regards the allotment of the 36,000 fully-paid shares was that the shareholders of the company should receive *six* shares of the new company for every *five* shares held by them in the company, all fractional parts being satisfied in cash; and any cash balance remaining after payment of the obligations of the company and expenses to be distributed among the shareholders. Of the 150,000 shares of the new company 36,000 fully-paid shares were allotted as aforesaid; 64,560 shares have been issued and 7s. 6d. per share paid thereon; and 49,440 remain unissued.

"No rubber was produced or sold by the company, as the plantations had not reached the producing stage.

"The company *contended*—(1) That the company had earned no income. (2) That the company was formed for the purpose of acquiring, developing, and cultivating a rubber estate, and had sufficient capital for so doing, and that it was not formed for the purpose of re-selling, although power to sell was inserted in its memorandum of association, as is usual in the memoranda of almost all companies incorporated of recent years under the Companies Acts. (3) That additional capital became necessary owing to the company having acquired a large adjoining estate. That but for the purchase of the additional estate the original estate could have been fully developed and cultivated with the capital of the company until the company was in a position to earn profits and pay dividends. The company not having been formed for the purchase and sale of property, the transaction in question was merely a realisation of investment. (4) The transaction was in substance a mere increase of capital by issuing new shares at a premium. It in truth involved no earning of profits by the company and no division of profits among its shareholders.

"The Surveyor of Taxes (Mr Richard Farmer) maintained—(1) That as the company was formed for the purpose, *inter alia*, of acquiring and re-selling rubber estates, any profits made on the re-sale of such estates, whether received in cash or in the shares of another company, were liable to income tax—*Scottish Investment Trust, Limited* v. *Inland Revenue*, 1893, 21 R. 262, 3 T.C. 231; *Californian Copper Syndicate, Limited and Reduced* v. *Inland Revenue*, 1904, 6 F. 894, 5 T.C. 159. (2) That from the evidence furnished by the prospectus, report, and balance-sheets of the company it is clear that the estates purchased by the company were acquired with the object of being re-sold at a profit. (3) That the transaction in question was a sale in the line of the company's business resulting in a profit liable to income tax, and not a mere increase of the company's capital or change in the mode of its investment; and (4) that although the company might have increased its capital for the purpose of developing and cultivating the estates, it did not do so, the capital being provided by and spent at the risk of the new company—which was in law a company separate and distinct from the company.

"The Commissioners, on consideration of the facts and arguments submitted to them, refused the appeal, and confirmed the assessment of £9000, representing the difference between the price (£38,500) received for the estates sold and the estimated cost price (£29,500)."

Argued for the appellants—The company was not an investment company to make profit by buying and selling investments. Accordingly the case was quite different from such cases as the *Scottish Investment Trust Company, Limited* v. *Inland Revenue*, December 12, 1893, 21 R. 262, 31 S.L.R. 219, 3 Tax Cas. 231. They admitted that the *Californian Copper Syndicate, Limited and Reduced*, July 1, 1904, 6 F. 894, 41 S.L.R. 691, 5 Tax Cas. 159, to some extent resembled the present, but that was a very narrow case, and was decided on the ground that the Court were satisfied that the company was formed solely for the purpose of buying certain mineral lands and re-selling them at a profit (especially Lord Trayner's opinion). Here, it was true, the company had power to sell, and had in fact sold, its property, but it had cultivated it to some extent, and might have continued to cultivate it. Accordingly it could not be said that its sole purpose was to sell itself. They also referred to *Stevens* v. *The Hudson Bay Company*, 1909, 25 T.L.R. 709. [Lord SALVESEN—That appears to be on the lines of the *Assets Company, Limited* v. *Inland Revenue*, February 23, 1897, 24 R. 578, 34 S.L.R. 486.]

Argued for the respondent—The company contemplated either cultivating, or selling itself at a profit (articles 2, 5, and 12). In fact it chose the latter alternative. They submitted that was "an operation of business in carrying out a scheme for profit-making," the test applied by the Lord Justice-Clerk in *Californian Copper Syndicate, Limited and Reduced, cit. sup.* That case ruled the present. They also referred to *Scottish Investment Trust Company, Limited* v. *Inland Revenue* (*cit. sup.*); *Northern Assurance Company, Limited* v. *Inland Revenue*, reported along with *Scottish Union and National Insurance Company* v. *Inland Revenue*, February 8, 1889, 16 R. 461, at p. 473, 26 S.L.R. 330, 2 Tax. Cas. 571.

At advising—

LORD SALVESEN—In this case I am of opinion that the determination of the Commissioners is wrong. I am unable to distinguish the position of the appellants from that of a person who acquires a property by way of investment and who realises it afterwards at a profit. It is well settled that in such a case the profit is not part of the person's annual income liable to be assessed for income tax but results from an appreciation of his capital. No doubt if it is part of his business to deal in land or investments, any profits which in the course of that business he realises form part of his income; but the mere fact that a person or company has invested funds in the purchase of an estate which has subsequently appreciated and so has realised a profit on his purchase does not make that profit liable to assessment. Here the appellant company was formed primarily to acquire and develop a certain estate mentioned in the memorandum and any other estates suitable for the cultivation of rubber, and to carry on the business of developing and cultivating the said estates. No doubt power was also taken to sell any part of the undertaking and property of the company, and I assume that the promoters of the syndicate had in view from the first that it might become expedient to do so, but I am unable to infer from this fact, taken along with the ultimate sale of the entire assets to a new company, that it was part of the trade of the syndicate to purchase and sell lands.

The fallacy of the view taken by the Commissioners is further apparent from the fact that the profit which ultimately results from an appreciation of value is not necessarily referable to the particular year in which it is realised. In the case before us it is no doubt true that the syndicate only existed a little more than a year, but that does not in the least affect the question whether the profits were made by way of annual income or resulted from appreciation of capital. Suppose the company had been in existence for ten years before it sold its whole property at a profit, how could it be said that the profit so made was income of the last year in which it existed?

The only difficulty arises from the decision in the *Californian Rubber Syndicate*, 6 F. 894. The facts in that case were not unlike those which occur here, but the grounds of the decision appear to me not to be applicable. Lord Trayner said—"I am satisfied the appellant company was formed in order to acquire certain mineral fields or workings—not to work the same themselves for the benefit of the company, but solely with the view and purpose of re-selling the same at a profit." I do not think a like inference can be drawn in the present case. The prospectus shows that while it was in contemplation that on the estate being sufficiently developed the syndicate might sell it as a going concern, it would be for the shareholders to determine whether that course should be adopted or whether the estate should be held and worked by the syndicate. There would have been ample capital for that purpose if only the Tebrau estate had been acquired, and no inference can be drawn from the fact that another estate was subsequently purchased, the price of which taken along with the amount spent on development substantially exhausted the assets at the disposal of the syndicate. In any event I cannot find sufficient evidence from this single transaction, which at the same time brought the syndicate to an end, that the profits so made are to be treated as income or gains made by trade, and I should hesitate to extend the decision in the *Californian Rubber Syndicate* beyond the facts of that case. The other case to which we were referred, of the *Scottish Investment Trust, Limited*, has no application, because it was part of the ordinary business of the company to make profits by the purchase and sale of investments; and accordingly the profits made in any particular year were assessable for income tax in whatever way the company chose to treat these profits in their books. The present case appears to me to fall within the principles enunciated in the *Assets Company*, 24 R. 578, and in *Steven* v. *The Hudson Bay Company*, 25 T.L.R. 709, in both of which the profits realised by the sale of the company's assets were not treated as income for the purpose of income tax. I am accordingly of opinion that we should reverse the determination of the Commissioners.

LORD DUNEDIN—I concur.

LORD JOHNSTON—I agree that this case is distinguishable from that of the *Californian Copper Syndicate*, 6 F. 894. The circumstances of the two cases seem to me to be very different. The transaction which raises the question in this case involved the winding up of the company, its property being realised, and each shareholder having his investment in the company realised through the company, and at a profit — at least at a profit on paper. I have a difficulty in seeing how a company that is wound up can be assessed in income tax. The nature of the transaction in the case of the *Californian Copper Syndicate* was quite different in its form and its sequel. Then from another point of view the original prospectus is different in the present case from that in the *Californian Copper Syndicate*. And although from the name of the company one might have a certain amount of suspicion that the real object of the company, whatever its ostensible object was, was merely to make the estate and turn it over at a profit to another company, its prospectus has been drawn in such terms as not to justify this conclusion without something more. For these terms are consistent expressly with the company commencing life as an ordinary rubber-producing company, and this is precisely what occurred. Both the prospectus and the history of the company, short as it was, in fact were materially different from those of the *Californian Copper Syndicate*.

For these reasons I concur with Lord Salvesen in thinking that the deliverance of the Commissioners is erroneous.

The LORD PRESIDENT intimated that LORD KINNEAR also concurred.

The Court reversed the determination of the Commissioners, and remitted to them to discharge the assessment, ordered repayment of the income tax paid on the sum of £9000, and decerned.

Counsel for the Appellants—Sandeman, K.C.—Spens. Agents—Skene, Edwards, & Garson, W.S.

Counsel for the Respondent—The Solicitor-General (Hunter, K.C.)—Umpherston. Agent—Philip J. Hamilton-Grierson, Solicitor of Inland Revenue.

Thursday, July 14.

FIRST DIVISION.

[Lord Cullen, Ordinary.

GRACIE *v.* GRACIE AND ANOTHER (ALEXANDER'S TRUSTEES) AND OTHERS.

Arrestment—Validity—Description of Debt—Arrestment of Trust Funds in the Hands of Trustees—Furthcoming.

Arrestments of trust funds were used in the hands of the two surviving trustees by delivering to each of them a schedule of arrestment, which bore to "lawfully fence and arrest in the hands of you, the said A B, as one of the surviving trustees under the trust-disposition and settlement of X Y, the sum of £350 sterling, more or less, due and addebted by you as trustee foresaid" to the common debtor. In an action of furthcoming at the instance of the creditor it was objected by the common debtor that the arrestments were inept, in respect that no sum was due by the individual trustee, even as trustee, to the common debtor, and that the description of the debt was therefore insufficient. *Held* (*rev.* judgment of Lord Cullen, Ordinary) that the debt was sufficiently described and that the arrestments were good.

Observations (*per* Lord Kinnear) on the method of arresting trust funds in the hands of trustees.

John Leburn Gracie, coal exporter, Newcastle-on-Tyne, raised an action of furthcoming against himself and Charles Archibald Gracie, surviving trustees under the trust-disposition and settlement of Miss Margaret Alexander, Springhill, Peebles, *arrestees*, and James Alexander Gracie and John Gill, S.S.C., assignee of the said James Alexander Gracie, under assignations dated 25th May and 1st June 1908, *defenders*, in which he sought to follow out certain arrestments which he had used in the hands of himself and his co-trustee of certain legacies due under Miss Alexander's will to the said James Alexander Gracie.

The schedule of arrestment for the pursuer bore that the messenger-at-arms, "by virtue of a summons containing warrant to arrest, signeted 16th May 1908, raised at the instance of John Leburn Gracie . . ., pursuer, against James Alexander Gracie . . ., defender," did "lawfully fence and arrest in the hands of you, the said John Leburn Gracie, as one of the surviving trustees under the trust-disposition and settlement of Miss Margaret Alexander, Springhill, Peebles, . . . the sum of Three hundred and fifty pounds sterling, more or less, due and addebted by you, as trustee foresaid, to the said James Alexander Gracie, defender, or to any other person or persons, for his use and behoof, . . .: Together also with all goods, gear, debts, sums of money, rents of lands and houses, and every other thing presently in your hands, custody, and keeping, as trustee foresaid, pertaining and belonging to the said James Alexander Gracie, defender, all to remain in your hands as trustee foresaid, under sure fence and arrestment, at the instance of you, the said pursuer. . . ."

The schedule of arrestment for Charles Archibald Gracie was in similar terms.

The principal debtor James Alexander Gracie lodged defences in which his assignee Mr John Gill, who was sisted as a defender, concurred by minute.

The defenders pleaded, *inter alia*—"(1) The arrestments founded on being invalid and ineffectual to attach, and not having attached, any part of the trust estate held by the said John Leburn Gracie and Charles Archibald Gracie as the surviving trustees of Miss Margaret Alexander and due to the said James Alexander Gracie, the defenders should be assoilzied with expenses. (2) There being no funds in the hands of either trustee due to the debtor at the date of the alleged arrestments, the arrestments did not attach anything, and the defenders should be assoilzied with expenses."

The *facts* of the case appear from the opinion of the Lord Ordinary (CULLEN), who on 15th January 1910 assoilzied the compearing defenders from the conclusions of the summons.

Opinion.—"The pursuer John L. Gracie is a creditor of James A. Gracie for the sums decerned due to him by the latter in an action in this Court raised on 16th May 1908.

"James A. Gracie is a beneficiary under the will of the deceased Miss Margaret Alexander, in terms of which he became entitled to two legacies of £100 each on the death of his mother, which occurred on 29th April 1908. The trustees under the will are the pursuer John L. Gracie and Charles Archibald Gracie.

"On 18th May 1908 the pursuer, on the dependence of the said action at his instance, executed arrestments in the hands of himself and the said Charles A. Gracie as trustees of Miss Alexander, and the present action of furthcoming has been