HIGH COURT OF JUSTICE (CHANCERY DIVISION)—8TH, 9TH AND 10TH MAY, 1956

COURT OF APPEAL—4TH, 5TH AND 6TH DECEMBER, 1956

HOUSE OF LORDS—3RD AND 4TH MARCH, AND 24TH APRIL, 1958

London Investment & Mortgage Co., Ltd.

v

Worthington (H.M. Inspector of Taxes)

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v.

London Investment & Mortgage Co., Ltd.

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v.

Commissioners of Inland Revenue

Commissioners of Inland Revenue

v.

London Investment & Mortgage Co., Ltd.[1]

Income Tax, Schedule D—Property dealing company—Value payments received under War Damage Act, 1943*—Whether trading receipts.*

The Company carried on the trade of property dealing. During the war some of the Company's properties were damaged or destroyed by enemy action, and the Company subsequently received value payments in respect of these properties under the provisions of the War Damage Act, 1943. *These payments were placed in a suspense account, and any money spent in making good war damage to a property for which a value payment had been received was charged against this account.*

The Company was assessed to Income Tax, Schedule D, for the years 1948–49 *and* 1949–50 *and to Profits Tax for chargeable accounting periods ending on* 31*st March,* 1948, *and* 31*st March,* 1949, *on the footing that value payments received were trading receipts. On appeal to the Special Commissioners against these assessments the Company contended that it was implied by Sections* 66 *and* 113, *War Damage Act,* 1943 (*which refer respectively to the capital nature of contributions under the Act and to the inadmissibility for tax purposes of certain expenditure on repairs so far as there is a title to a payment in respect of damage*), *that the value payments were receipts of a capital nature which ought not to be included as trading receipts. The Special Commissioners held that the value payments were* prima facie *trading receipts and should in general be included as such, but that*

[1] Reported (Ch. D.) [1956] 1 W.L.R. 858; 100 S.J. 510; [1956] 2 All E.R. 613; 221 L.T. Jo. 328; (C.A.) [1957] 1 W.L.R. 116; 101 S.J. 61; [1957] 1 All E.R. 277; 223 L.T. Jo. 48; (H.L.) [1958] 2 W.L.R. 842; 102 S.J. 346; [1958] 2 All E.R. 230; 225 L.T. Jo. 259.

where a property had been, was being, or was intended to be repaired or rebuilt, the payments should not be treated as trading receipts but should be deducted from the amount expended on rebuilding. Both parties demanded Cases.

Held, *that sums received as compensation for the loss of circulating capital or stock-in-trade were* prima facie *trading receipts, and that there was nothing in the provisions relating to war damage upon which reliance was placed that took the value payments out of the category of trading receipts.*

CASES

(1) *London Investment & Mortgage Co., Ltd.* v. *Worthington (H.M. Inspector of Taxes)*

Worthington (H.M. Inspector of Taxes) v. *London Investment & Mortgage Co., Ltd.*

CASE

Stated under the Income Tax Act, 1952, Section 64, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the High Court of Justice.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 3rd December, 1952, the London Investment and Mortgage Co., Ltd. (hereinafter called " the Appellant Company ") appealed against assessments to Income Tax under Schedule D made upon it in the sum of £30,000 for each of the years 1948–49 and 1949–50.

2. The question for determination in this appeal is whether value payments arising under the provisions of the War Damage Acts, 1941 and 1943, and paid to the Appellant Company, who carry on the trade of property dealing, are receipts of the Appellant Company's trade to be brought into account in computing the balance of profits and gains of the Appellant Company for taxation purposes, and, if this is so, to which of the Appellant Company's trading years should these payments be properly assigned.

3. Copies of the accounts of the Appellant Company for the years ending 31st March, 1947 and 1948, were produced and admitted or proved at the hearing of the appeal.

The aforementioned accounts are not attached to and do not form part of this case but are available for the use of the High Court.

Oral evidence was given by Mr. Francis George Collier, secretary of the Appellant Company.

The facts as found by us are contained in paragraphs 4 to 6 inclusive.

4. The Appellant Company is a property dealing company. During the war certain of the properties belonging to the Appellant Company sustained war damage. Under the provisions of the War Damage Acts, 1941 and 1943, the Appellant Company has received value payments from the War Damage Commission in respect of a number of these properties. The amount of a value payment, by Section 10 (1), War Damage Act, 1943,

> " shall be an amount equal to the amount of the depreciation in the value of the hereditament caused by the war damage, that is to say, the amount by which the value of the hereditament in the state in which it was immediately after the occurrence of the damage is less than its value in the state in which it was immediately before the occurrence of the damage."

5. Subsequent to the receipt of the value payments certain of these damaged properties, both freehold and leasehold, have been disposed of by the Appellant Company. The remainder continue to be part of its stock and are either being rebuilt or are to be rebuilt.

Four specimen documents showing particulars of damaged freehold and leasehold properties disposed of or retained by the Appellant Company after receipt of value payments in respect thereof were exhibited to us, marked "A" to "D" respectively, and are attached hereto and form part of this Case(1).

It has been the practice of the Appellant Company to place any value payment received in a suspense account called the value payment account. Any money spent in making good war damage to properties for which a value payment has been received is charged against this value payment account.

6. By Section 66 (1), War Damage Act, 1943, war damage contributions are to be treated for all purposes as outgoings of a capital nature.

Section 113, War Damage Act, 1943, provides that expenditure on repairing or otherwise making good war damage in so far as a person is entitled to a payment in respect of the damage is not to be deducted in computing the profits of any person for the purposes of the Income Tax Acts or the profits of any person for the purposes of the National Defence Contribution.

The War Damage Acts do not specifically mention the treatment of value payments for the purposes of the Income Tax Acts.

7. It is contended on behalf of the Appellant Company that value payments received from the War Damage Commission are, by implication from the provisions of Sections 66 and 113, War Damage Act, 1943, as applied to the Appellant Company, receipts of a capital nature which ought not to be brought into the accounts of the Appellant Company as trading receipts and that the appeal should succeed.

8. It is contended on behalf of H.M. Inspector of Taxes that the sums received by the Appellant Company by way of value payments are ordinary trade receipts and the fact that Section 66, War Damage Act, 1943, prohibits any deduction of war damage contributions makes no difference to the nature of the value payments which represent stock-in-trade of the Appellant Company converted into cash and that the appeal should be dismissed.

9. The following cases were referred to:

Commissioners of Inland Revenue v. *Newcastle Breweries, Ltd.*, 12 T.C. 927.

Green v. *J. Gliksten & Son, Ltd.*, 14 T.C. 364.

Neumann v. *Commissioners of Inland Revenue*, 18 T.C. 332.

Commissioners of Inland Revenue v. *Cull*, 22 T.C. 603.

Johnson v. *W. S. Try, Ltd.*, 27 T.C. 167.

10. We, the Commissioners who heard this appeal, having considered all the evidence and the arguments addressed to us, gave our decision in writing on 31st July, 1953, as follows:

1. We hold that where the Appellant Company has received payments under the War Damage Act, 1943, in respect of properties which have been damaged or destroyed such payments are *prima facie* to be brought in as receipts of its trade. The properties form part of its stock-in-trade,

(1) Not included in the present print.

and on well-known principles any sum received as compensation for their loss is a trading receipt: see *Green* v. *J. Gliksten & Son, Ltd.*, 14 T.C. 364, and *Commissioners of Inland Revenue* v. *Newcastle Breweries, Ltd.*, 12 T.C. 927. We do not consider that Section 66 (1) of the War Damage Act, 1943 (which provides that contributions made under that Act are to be treated for all purposes as outgoings of a capital nature) contains any sufficient implication to the contrary.

2. Where, however, the Company expends money on repairing or rebuilding properties which have been damaged or destroyed, Section 113 of the War Damage Act, 1943, provides in effect that such expenditure is not to be deducted in computing the profits of the Company's trade to the extent that it is recouped by payments received under the Act. If in addition to deducting the payments received from its expenditure the Company had to include such receipts on the credit side of its accounts they would be included twice, and we hold that Section 113 clearly implies that such a result is not to follow.

3. In the result we hold that the Company should in general include payments received under the War Damage Act but that, where a property has been, is being, or is intended to be repaired or rebuilt, sums received in respect of it should not be included as receipts but should be deducted from the amount expended on rebuilding.

4. We leave figures to be agreed, but we recognise that the application of our decision to properties not yet repaired may give rise to questions upon which the parties have not yet had an opportunity of addressing arguments to us, and we will re-list the case for argument upon this point if requested either by the Appellants or the Crown.

11. Subsequently, at a further meeting held on 15th June, 1954, the figures were agreed by the parties following our decision in principle, and we determined the assessments for the said years in the following amounts:

1948–49: Assessment increased to £76,499 less capital allowances £836.

1949–50: Assessment increased to £54,216 less capital allowances £1,373.

12. Both parties immediately after 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, 1952, Section 64, which Case we have stated and do sign accordingly.

13. The question of law for the opinion of the High Court is whether or not our decision set out in paragraph 10 above is correct.

H. G. Watson
B. Todd-Jones } Commissioners for the Special Purposes of the Income Tax Acts.

Turnstile House,
94-99, High Holborn,
London, W.C.1.

29th April, 1955.

(2) *London Investment & Mortgage Co., Ltd.* v. *Commissioners of Inland Revenue*

Commissioners of Inland Revenue v. *London Investment & Mortgage Co., Ltd.*

These cases related to assessments to Profits Tax for the chargeable accounting periods 1st April, 1947, to 31st March, 1948, and 1st April, 1948, to 31st March, 1949.

The facts, the contentions of the parties and the decisions of the Commissioners were the same as those in the Income Tax cases.

The cases came before Upjohn, J., in the Chancery Division on 8th, 9th and 10th May, 1956, when judgment was given against the Crown, with costs.

Mr. John Senter, Q.C., and Mr. Desmond Miller appeared as Counsel for the Company, and Mr. Geoffrey Cross, Q.C., and Sir Reginald Hills for the Crown.

Upjohn, J.—I have four appeals before me. Two are by the taxpayer, London Investment & Mortgage Co., Ltd., from decisions of the Special Commissioners, in relation to assessments on them for the years 1948–49 and 1949–50 for Income Tax and Profits Tax respectively. Those are appeals against the whole of the Special Commissioners' decision. The other two appeals are cross-appeals by the Inspector of Taxes and the Commissioners of Inland Revenue respectively in respect of the same assessments to Income Tax and Profits Tax, and those appeals are against part only of the decision of the Special Commissioners. It is common ground that for relevant purposes the same principles have to be applied for the purposes of computing liability to Profits Tax as to Income Tax, and the same point arises in all these appeals, and I need not further distinguish between them.

The facts in this case and the question which I have to consider can be stated in one sentence. The Company carries on the trade of property dealing, and during the war some of their properties were damaged and destroyed by enemy action, and they have received value payments under the provisions of the War Damage Act, 1943; the question is whether those payments ought to be brought into account in computing the balance of profits against the Company under Case I of Schedule D of the Income Tax Act, 1918. I had better refer straight away to those provisions, which, so far as relevant, are in these terms:

> "Tax under this Schedule shall be charged in respect of—(*a*) the annual profits or gains arising or accruing . . . (iii) to any person . . . from any trade . . . exercised within the United Kingdom".

The whole question is whether these payments are such profits or gains.

Before I deal with the respective contentions of the parties, some reference to the War Damage Act, 1943, is necessary. The Act was passed in 1943, but under Section 127 it had retrospective effect as though it had come into operation at the time of the War Damage Act, 1941. Section 1 lays down the cardinal purpose and object of the Act:

> "There shall be made, subject to and in accordance with the provisions of Part I of this Act,—(*a*) payments by the War Damage Commission out of moneys provided by Parliament in respect of war damage to land occurring during the risk period",

which I need not further define,

> "and (*b*) contributions by persons interested in land towards the expense of making such payments."

Then in Sections 6 and 7 and the succeeding Sections provision was made for cost of work payments (that is to say, payments based on an estimated cost of works on reinstating the property where it was damaged) and value payments, which were granted where the property was wholly destroyed, the value payments being the difference between the value of the hereditament immediately before war damage and its value immediately after it. I am in this case only concerned with value payments, although, so far as I know, no different principles would be applicable had they been cost of works payments.

Under Section 10, interest is payable on these value payments from the time of the war damage until payment. Under Section 11 there is power to increase the amount of the value payments, and in fact in this case there was under a Statutory Instrument an increase of 45 per cent. described in the horrible Civil Service jargon as "45 per cent. escalation". Under Section 23, the right to payments under the Act can be assigned with the consent of the Commission.

Section 36 is important, and I must read it:

> "(1) The contributions to be made towards the expense of making payments under this Part of this Act in respect of war damage shall, subject to the provisions of this Part of this Act, be made in respect of the properties, being units for the purposes of Schedule A or for rating valuations, which are specified in section thirty-nine of this Act; and a property in respect of which such a contribution is to be made is in this Act referred to as a 'contributory property'. (2) The said contributions shall be made by the payment of five instalments, falling due on the first day of July in the year nineteen hundred and forty-one and each of the four following years. (3) The amount of an instalment shall, subject to the provisions of this Part of this Act, be computed as mentioned in sections forty to forty-three of this Act by reference to the assessment of the contributory property for the purposes of Schedule A or the annual value of the property shown in a valuation list in force for rating purposes; and the value by reference to which an instalment is computed is in this Act referred to as the 'contributory value' of the property."

The amount of each instalment was 2*s.* in the pound. The next Section which I think I need read is Section 66:

> "(1) Contributions made and indemnities given under this Part of this Act shall be treated for all purposes as outgoings of a capital nature."

I think that is all I need read there. Then Section 79 (1) provides:

> "Payments by the Commission in respect of war damage, and payments of interest on value payments and on payments to be made under section eighteen of this Act, shall be made out of moneys provided by Parliament."

That has since been amended. Part II deals with the insurance of goods against war damage. This much is common ground, that in fact the goods insured under that Part of the Act were what I may call briefly, and I hope reasonably accurately, capital goods—plant, machinery, tools, and so forth. Goods in the nature of stock-in-trade, and so forth, were insured under another

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Act known as the War Risks Insurance Act, 1939. Save in respect of goods below a certain value, the insurance of goods was compulsory, and was provided for by " premiums ", as they were described, in relation to goods. Section 96 provided that such " premiums " were to be treated for all purposes as being " of a capital nature ".

Then follows an important Section, Section 113. That has in fact been amended and retrospectively re-enacted in the War Damage (Public Utility Undertakings, &c.) Act, 1949. It is Section 28 in that Act. Sub-section (1) is in these terms:

> " In computing the amount of the profits or gains, or of the income from any source, of any person for any purpose of the Income Tax Acts, or the amount of the profits of any person for the purposes of the profits tax or for the purposes of excess profits tax, no sum shall be deducted in respect of any payment or expenditure to which this section applies."

Then Sub-section (2) deals with payments. Then Sub-section (3) (*a*) relates to payments made

> " in or towards discharge of a liability imposed by or under any provision of Part I of the principal Act ".

That is defined as the War Damage Act, 1943. In a sense that was redundant because it had already been made quite plain by Section 66 that all contributions made under the Act were capital. Then paragraph (*b*) of Sub-section (3) repeats again in effect Section 96 in relation to the premiums payable under Part II of the War Damage Act. Then paragraph (*c*) deals with

> " any payment made in or towards discharge of a liability imposed by or under any provision of this Act."

Then Sub-section (4) says:

> " Expenditure to which this section applies is—(*a*) any expenditure on repairing or otherwise making good war damage to land in so far as any person has received or is entitled to a payment in respect of the damage by virtue of any of the provisions of the principal Act (whether alone or as applied or modified by or under any provision of this Act), and any expenditure on making good detriment to an interest in goods caused by war damage in so far as any person has received or is entitled to a payment in respect of the detriment by virtue of any of those provisions or of a policy issued under either of the schemes operated under Part II of the principal Act or by virtue of section ten of this Act; and (*b*) any expenditure on repairing or otherwise making good war damage being damage of a class mentioned in any of paragraphs (*a*) to (*d*) of subsection (1) of section one of this Act, or on measures for meeting the circumstances created by any such obstruction as is mentioned in section eighteen of this Act."

The finding of the Commissioners was in these terms:

> " 1. We hold that where the Appellant Company has received payments under the War Damage Act, 1943, in respect of properties which have been damaged or destroyed such payments are *prima facie* to be brought in as receipts of its trade. The properties form part of its stock-in-trade, and on well-known principles any sum received as compensation for their loss is a trading receipt: see *Green* v. *J. Gliksten & Son, Ltd.*, 14 T.C. 364, and *Commissioners of Inland Revenue* v. *Newcastle Breweries, Ltd.*, 12 T.C. 927. We do not consider that Section 66 (1) of the War Damage Act, 1943 (which provides that contributions made under that Act are to be treated for all purposes as outgoings of a capital nature) contains any sufficient implication to the contrary."

That principal finding is challenged by the taxpayer, the Company. Then they proceed in paragraph 2:

> " Where, however, the Company expends money on repairing or rebuilding properties which have been damaged or destroyed, Section 113 of the War Damage Act, 1943, provides in effect that such expenditure is not to be deducted in computing the profits of the Company's trade to the extent that it is recouped

by payments received under the Act. If in addition to deducting the payments received from its expenditure the Company had to include such receipts on the credit side of its accounts they would be included twice, and we hold that Section 113 clearly implies that such a result is not to follow."

The reference to Section 113 is plainly *per incuriam*. It should be Section 28 of the Act of 1949 which I have just read. The second sentence of that paragraph, if read literally, is meaningless, and it is most unfortunate that the Special Commissioners have not expressed themselves more intelligibly. However, it has been agreed before me that the second sentence should read in this way: If in addition to not being allowed to deduct the expenditure on repairs up to the amount of the value payment the Company had to include the whole of the value payment, such receipts on the credit side in its accounts would be included twice, and we hold that Section 113 clearly implies that such a result is not to follow. Then paragraph 3 is:

> "In the result we hold that the Company should in general include payments received under the War Damage Act but that, where a property has been, is being, or is intended to be repaired or rebuilt, sums received in respect of it should not be included as receipts but should be deducted from the amount expended on rebuilding."

It was that part of the finding of the Commissioners which the Crown challenged. Before the Commissioners the Crown maintained that nothing expended on rebuilding could be recovered for the purposes of tax. However, before me they have submitted a more benevolent construction of Section 28 with which I must deal later.

Mr. Senter, for the Company, puts his submissions in this way. He says the purpose of the legislation was to create a national fund to be used to make good war damage to land. It was compulsory upon the owners of all land in England and Wales. A contribution had to be made, and that contribution, it is clear under the provisions of the Act, was one contribution of a capital nature payable by five instalments. If war damage unhappily ensued, he submits that it is quite plain on Section 28 of the Act of 1949 that the sum received must be a capital receipt, for he is not entitled to bring into account for the purposes of tax any part expended by him upon restoring the property. He says that is the plain construction of Section 28. He also says that this contribution is made and the payment received by the Company, not as part of its trading operations at all, but solely in its capacity as a Company, the proprietor of an interest in land, and it has nothing to do with its trading activities. Mr. Senter points out the hardship which will arise on what he submits is the plain construction of Section 28, for, if, having received a value payment, the Company expends that in restoring its stock-in-trade, that is to say, its destroyed building, it is plain that it cannot deduct that when the property is realised and its profits and gains come to be computed. He says that will be most unjust if the Crown's contention is right, for this reason. If it has to pay tax on what it gets, it will have that much less to expend on the property. When it comes to sell it cannot, at any rate up to the limit of what it has received, deduct that before it realises its profit. That would manifestly have an unjust effect.

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On the other hand, going forward to Mr. Cross's argument for the Crown for a moment, he points out that an equally anomalous effect would arise if the site is sold without restoration and if the Company's contention is right, for the Company would then get a tax-free payment from the War Damage Commission ; but they might make a very nice loss on the sale of their site and that loss would be available to be set off upon the profits made on other transactions and that that would be, so to speak, unfair to the Revenue because they would be missing some tax. That shows that to regard hardships and anomalies when you are considering tax matters is no sure ground on which to ascertain the principle. Tax sometimes bears hardly on a section of people, and sometimes it allows another section to escape altogether. No guidance, at all events no sure guidance, is to be gained by considering hardships and anomalies.

Mr. Senter referred in support of his argument to *Seaham Harbour Dock Co.* v. *Crook*, 16 T.C. 333. That was a different case. What happened there was that the Seaham Harbour Dock Co. received unemployment grants and other financial assistance for the purpose of extending the Seaham Harbour dock, and it was held that those payments were not annual profits or gains liable to Income Tax. Lord Buckmaster, at page 353, said this:

> "Now I do not myself think that the matter can be put more succinctly than it was put by Mr. Hills when he said: 'Was this a trade receipt?', and my answer is most unhesitatingly: No. It appears to me that it was nothing whatever of the kind. It was a grant which was made by a government department with the idea that by its use men might be kept in employment, and it was paid to and received by the Dock Company without any special allocation to any particular part of their property, either capital or revenue, and was simply to enable them to carry out the work upon which they were engaged, with the idea that by so doing people might be employed. I find myself quite unable to see that it was a trade receipt, or that it bore any resemblance to a trade receipt."

Lord Atkin, in the course of his speech, said this (in the middle of page 353) :

> "It would appear to me to be a remarkable proposition that Parliament assented to that sum being appropriated for that purpose, but intended, in certain events at any rate, only fifteen shillings in the pound to be appropriated for that purpose, five shillings in the pound of the full amount coming back in the way of Income Tax. I do not think that that was the effect. It appears to me that when these sums were granted and when they were received, they were received by the appropriate body not as part of their profits or gains or as a sum which went to make up the profits or gains of their trade. It is a receipt which is given for the express purpose which is named, and it has nothing to do with their trade in the sense in which you are considering the profits or gains of the trade."

As I have said, that was a very different case, but Mr. Senter naturally points out that it is a remarkable proposition that Parliament was to give you money to restore your building, but in doing so take away at the relevant time not merely 5*s.* in the pound but 10*s.* in the pound. He says that would be a most unusual result to have been intended by Parliament.

In support of his argument as to the capacity in which the Company pays, being its capacity of proprietor of an interest in land and not in its capacity as a trader, he referred me to *Smith's Potato Crisps* (1929), *Ltd.* v. *Commissioners of Inland Revenue*, 30 T.C. 267, and *Rushden Heel Co., Ltd.* v. *Commissioners of Inland Revenue*, 30 T.C. 298. He has also referred me to the well-known case of *Strong and Co. of Romsey, Ltd.* v. *Woodifield*, 5 T.C. 215 ; but I think that the facts and principle decided in that case are sufficiently set out in a passage to which I am going to refer in Lord Greene, M.R.'s judgment in the *Rushden Heel* case. In considering those cases, I must bear in mind that they were dealing with deductions and not with profits and gains,

deductions being dealt with by Rule 3 of the Rules applicable to Cases I and II of Schedule D. Nevertheless, I think they are of assistance. In the *Rushden Heel* case(1) the question was whether the costs of litigating about taxes should be deducted as part of the expenses of the business. The Master of the Rolls said this, on page 316 :

> " In answering the question raised I do not obtain any assistance from the cases that have been cited to us other than three to which I will now refer. Special reliance is placed by the Crown on the well-known dicta of Lord Davey in *Strong and Company of Romsey, Ltd.* v. *Woodifield*, 5 T.C. 215. The deduction there claimed was in respect of the damages and costs awarded against the appellants (who were brewers) to a visitor at one of their licensed houses who was injured by the fall of a chimney. The only decision by the Commissioners was that the deduction claimed was not allowable. Lord Davey (at page 220) expressed the view that the words ' for the purpose of the trade ' mean ' for the purpose of enabling a person to carry on and earn profits in the trade. . . . It is not enough that the disbursement is made in the course of, or arises out of, or is connected with, the trade or is made out of the profits of the trade. It must be made for the purpose of earning the profits.' I do not myself find in these dicta a completely satisfactory answer to the present problem. The language that we have to construe is the language of the Rule, and there is always the risk of finding oneself construing not the Rule but a paraphrase of the Rule expressed in a previous judgment. I should have thought that in *Strong and Company's* case it might have been said that an innkeeper who did not compensate a guest when the chimney of the inn fell upon him and injured him would be likely to suffer in his trade. But the House did not accept this argument. Lord Davey's formula, however, at once confronts us with the question: What is the meaning of the phrase ' for the purpose of enabling a person to carry on and earn profits in the trade ' as applied to the present case? It is said, and said, I think, with some force (and Atkinson, J., agreed) that the ascertainment of a trader's liabilities is essential for the successful carrying on of his trade, whether they be trading liabilities in the strict sense or tax liabilities imposed upon him as a trader in respect of his trade. I find, however, in *Strong and Company's* case what appears to me to be a clear answer to the present appeal. It is, I think, a matter not of dictum but of decision in that case that an expense is not deductible if it falls on a trader in some character other than that of a trader. This was the ground of the opinion of Lord Loreburn, L.C., with which Lords Macnaghten and Atkinson agreed."

So, says Mr. Senter, in this case the capacity in which the payment is made and the payment is received has nothing to do with the trading operations.

On the other side, Mr. Cross, for the Crown, says that the cardinal question to be asked, and in that I think he is right, is : Is this payment when received a profit or gain of a trade? You have to see whether it is. If it is such a profit or gain it does not matter that the contribution was made because the taxpayer was the owner of the property. It does not matter that the payment is received because he is the owner of property which has been destroyed.

He relied upon two cases to support his view that this was in fact a profit or gain. The first one was *J. Gliksten & Son, Ltd.* v. *Green*(2), [1929] A.C. 381. In that case the appellants, who were timber merchants, owned a very large quantity of timber (which at that time was very high in price) which had been destroyed. They received no less than £477,000 from the insurance company

(1) 30 T.C. 298. (2) 14 T.C. 364.

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under their policies of indemnity against fire. The timber stood in their books at a sum of only £160,000. The question was whether they had to bring in out of the receipts from the insurance £160,000—that was admitted by the appellants—or the whole sum of £477,000. I think I can go straight to the speech of Lord Dunedin, at page 385. He says(1):

> "My Lords, I agree. In these income tax cases one has to try, as far as possible, to tread a narrow path, because there are quagmires on either side into which one can easily be led, and I think into one of these quagmires we were tempted to be led when the argument turned upon the question of what you were entitled to debit or not. I do not think this case has anything to do with debiting losses. The whole point is that the business of the company is to buy timber and to sell timber, and when they sell timber they turn it into money. This particular timber was turned into money, not because it was sold, but because it was burned and they had an insurance policy over it. The whole question comes to be whether that is a turnover in the ordinary course of their business. I think it was. They had that amount of timber, which they got rid of and for which they got a certain price, and then they could begin again. The more times you have a turnover—that is to say, the more sales you can get, provided that you are carrying on business at remunerative prices—the better for you. The result of this fire was that they got rid of so much timber and got the insurance money at that figure, and that seems to me precisely in the same position as if they got rid of it by giving it to a customer. If that is so, that is exactly the view of Rowlatt, J., and I think he arrived at the right result."

So here, says Mr. Cross, the stock-in-trade is property. The Appellants' business is to sell property. If it is realised otherwise than by sale through the misfortune of enemy action and they receive the money, it is just as though the property had been insured against such risks and they had received the insurance money. He says they had that amount not of timber but of houses which they got rid of and for which they got a certain price, and then they could begin again. He says these particular houses were turned into money, not because they were sold, but because they were destroyed by enemy action. There is no doubt that, had it been possible for them to have had a policy of insurance against enemy action, this case of *J. Gliksten & Son, Ltd.* v. *Green*(2) would exactly cover this case, but they did not have a policy of insurance as such a thing was impossible in the circumstances.

The next case is the well-known case of *Commissioners of Inland Revenue* v. *Newcastle Breweries, Ltd.*, 12 T.C. 927, which was strongly relied upon by the Crown. In that case certain stocks of untreated rum belonging to the Newcastle Breweries had been requisitioned by the Admiralty who had finished its treatment and had paid a price as compensation. Lord Cave, L.C., said this, at page 953:

> "Two points are made on behalf of the Appellants. First, it is said that the £5,300 is not a profit from the Appellants' business at all, but is a sum payable by way of compensation for the compulsory taking by the Crown of a part of the Appellants' capital. I cannot agree with that contention. It is true that the rum taken by the Crown had not been refined or blended and was not, therefore, in the state in which rum was usually sold by the Appellants; but it was rum which they had bought for the purposes of their business, and the cost of the rum was no doubt treated as an outgoing of the business. If the raw rum had been voluntarily sold to other traders, the price must clearly have come into the computation of the Appellants' profits, and the circumstance that the sale was compulsory and was to the Crown makes no difference in principle. Both the sums received for the rum—the £10,300 and the £5,300—were in fact brought into the Appellants' books under the heading 'Sales of Rum'; and although that entry may not be binding upon the Appellants, it seems to me to have been correct. The transaction was a sale in the business, and although no doubt it affected the circulating capital of the Appellants it was none the less proper to be brought into their profit and loss account."

(1) 14 T.C., at pp. 384-5. (2) 14 T.C. 364.

So here, although this was a compulsory transaction, in the sense that everyone had to make a contribution, the payment when received was part of the trading profits, and ought, accordingly, to be brought into computation. That is how the argument runs.

Mr. Cross submits that the result of those authorities and of *Smart* v. *Lincolnshire Sugar Co., Ltd.*, 20 T.C. 643, which was cited to me by Mr. Senter, is to establish this. First, the fact that a payment is received under a Statute does not matter. Secondly, the fact that the transaction is a compulsory one also does not affect the matter. Mr. Cross put his argument in this way. Here is a realisation in course of trade. It is perfectly true you cannot deduct the expenses of a contribution, but that is because there is an express provision in the Act of Parliament preventing you from doing so. He said there is nothing really surprising in it, for the converse is frequently true in this sense, that a man who insures his factory against fire or flood is allowed the expense of the premiums in his annual accounts, but if a disaster befalls him and he receives a payment, it is not in dispute that that would be a capital receipt.

He also relies on *Usher's Wiltshire Brewery, Ltd.* v. *Bruce*, 6 T.C. 399. I do not think I need read the headnote, but I can turn straight to Lord Atkinson's speech at page 422:

> "One must look, therefore, for the *ratio decidendi*, the doctrine on which the Judgment of the House was founded, to the Judgments of those members of the House who voted in the negative on the question put to the House, 'that the Judgment appealed from be reversed.' Stated broadly, I think that that doctrine amounts to this, that where a trader *bona fide* creates in himself or acquires a particular estate or interest in premises wholly and exclusively for the purposes of using that interest to secure a better market for the commodities which it is part of his trade to vend, the money devoted by him to discharge a liability imposed by Statute on that estate or interest, or upon him as the owner of it, should be taken to have been expended by him wholly and exclusively for the purposes of his trade. I use the word creates advisedly, in order to meet the case of a trader who lets premises he has for instance inherited, to a tenant who covenants to vend his goods in them and buy from him and none other the goods vended. The trader in such a case by the letting creates in himself the estate or interest of a lessor wholly and entirely for the purposes of his trade, namely, to provide a better market for his goods."

Mr. Cross summarised his argument on this part of the case in this way. He said that the authorities establish this proposition. Where a trader's stock-in-trade is turned into money, that money is a trade receipt, even although the turning into money was not in the ordinary course of business and was involuntary and against the wishes of the trade.

Upon Section 28, Mr. Cross's argument is this. He invites me to give what he called an equitable or benevolent construction to that Section, and he invites me to read in some such words as these, if I may go again to Section 28 (4) (*a*):

> "Expenditure to which this section applies is—(*a*) any expenditure on repairing or otherwise making good war damage to land in so far as any person has received or is entitled to a payment in respect of the damage".

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and then add in the words " which does not of itself fall to be included among trade receipts ". He says if that construction be given to it, it is quite sensible because the root of his submission is this, that there was really a *casus omissus* and the Legislature overlooked the case that there are, as is the Company in this case, a number of people who are engaged in the trade of property dealing. He submitted that the Legislature forgot to deal with that class. But if some such words are read into Sub-section (4), it would mean that if and so far as the trader does expend the money he has received in restoring the property, he can bring that into account when the property is ultimately realised in computing his profits and gains. He says that is a just effect. He further says that, if it is impossible to give that construction to the Section, the Crown, by way of concession, is prepared in fact to give it that construction ; but that concession cannot affect the true construction of the Act.

In reply, Mr. Senter submitted that he could distinguish the *Gliksten* and *Newcastle Breweries*[1] cases. If you look at the report of the *Gliksten* case, 14 T.C. 364, you find (he said) that nearly all the judgments pointed out that it was part of the business to insure the goods, the timber, against fire. That appears very clearly in the decision of Rowlatt, J., at page 375. The learned Judge, having dealt with Sir John Simon's argument, continued :

> " That may be a very attractive way of stating the Respondents' contention, but the fact is that the Respondents' business is to buy, hold and sell timber, and it is part of their business to insure timber while they have it, in order that if the timber is destroyed they may have the insurance money instead of the timber and, in my judgment, they must treat that money in the same way as they would have treated the timber, namely, as an item in their trading account."

Similar observations are to be found in the judgment of Sargant, L.J., at page 380, where he says :

> " The Company, trading as a timber company, in the ordinary course of business insured its timber against loss or damage by fire. That was an ordinary trade outgoing allowed for, of course, in the trading account. Fire is an event which has to be taken into account as an ordinary risk of a company of this kind, and in consequence of the insurance this very large sum was recovered."

At the top of page 384 Lord Buckmaster said this:

> " It is quite true it has been converted into cash through the operation of the fire, which is no part of their trade, but loss due to it is protected through the usual trade insurances, and the timber has thus been realised."

That, Mr. Senter says, is decisive of the distinction between the *Gliksten* case and this case, for it was no part of the Company's trading business to make the contribution.

With regard to the *Newcastle Breweries* case, he says that there again, if the judgments are studied carefully, the case establishes this, that it was, at all events, treated as a sale, although a compulsory sale. I think Lord Reid in the more recent case in the House of Lords of *John Hudson & Co., Ltd.* v. *Kirkness*[2] did not quite take that view of the case ; but, nevertheless, it is quite true that in the *Newcastle Breweries* case it did proceed upon the footing that there was a sale, and, although it was a compulsory sale, the sums received for the rum had to be taken into account in computing the profits of the company.

If I may be allowed to say so, these concise and admirable arguments have much force on either side, and I have to consider which is correct. I first have to consider whether I can give to Section 28 the construction sought for by Mr. Cross. I have to remember the principles to be applied in taxation

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(1) 12 T.C. 927. (2) 36 T.C. 28.

cases. They are set out in a well-known passage by Rowlatt, J.[1], which was quoted with approval by Lord Simon in the House of Lords in *Canadian Eagle Oil Co., Ltd.* v. *The King,* 27 T.C. 205, at page 248:

> " In the words of the late Rowlatt, J., whose outstanding knowledge of this subject was coupled with a happy conciseness of phrase: ' In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used ' ".

Applying that principle to the construction of Section 28 (4), it seems quite clear that I cannot give to it the benevolent construction for which Mr. Cross seeks. Nor do I think I can speculate as to whether there was here a *casus omissus,* and that the Legislature merely forgot to make provision for traders in property. I have to consider the Act as it stands. I have to consider its scheme and its provisions in detail, and then see whether the payment received under it is indeed a trading receipt.

It seems to me, with all respect to Mr. Cross's argument, that his broad proposition that whenever trading stock is turned into money it is a trading receipt is too wide. In each case, one must take account of the circumstances. The question to be answered is whether the particular receipt has to be brought into account in computing the profits or gains. There is no doubt that the value payment is in a sense a realisation, and the case no doubt bears a marked resemblance to the *Gliksten*[2] and *Newcastle Breweries*[3] cases.

But, as I say, I have to consider the nature of the receipt having regard to the War Damage Act. We start, then, with this. There is nothing in the nature of a premium here. A capital payment has to be made in five instalments, and it is to be made by the owner of every acre of land in England and Wales. It seems to me quite clear on the construction of Section 28 that, if and when a payment is received, no part of that payment, even if it be expended in restoring the property to its former state, can be brought into account when the property is sold and the net profit is realised as it otherwise admittedly would have been apart from the Section. I think those two factors are indications that the Legislature was not considering the trading aspect of the matter at all but was imposing on an owner of land throughout the country the obligation to contribute, with the corresponding benefit, if disaster happened, of receiving a sum of money, a value payment. I think the Legislature considered that that would be altogether outside the area of trading operations. It would be very remarkable, as Lord Atkin pointed out in the *Seaham Harbour* case[4], if half of this money, which was plainly intended to be applied in rehabilitating the property—although it did not have to be so applied, that was the intention—should be instantly taken away in tax. I think Parliament did not intend that result.

Upon the whole, I have come to the conclusion, although I think the case is a very difficult one, that this is not a trading receipt. It was a contribution made and a payment received by the taxpayer, not as a part of his

(1) Cape Brandy Syndicate *v.* Commissioners of Inland Revenue, 12 T.C. 358, at p. 366.
(2) 14 T.C. 364. (3) 12 T.C. 927. (4) 16 T.C. 333.

(Upjohn, J.)

trading operations at all, but because he was compelled under the war damage scheme to make payments with the corresponding right of getting the benefit in his capacity, not as a trader, but as an owner of the land. I do not think it is proper to regard that receipt as a trading profit.

Accordingly, I must allow the appeals and the matter must be sent back to the Commissioners to adjust the figure. The Appellant Company must have the costs of the appeal, and of the cross-appeals. I allow the Company's appeals and I dismiss the Crown's appeals, with costs.

Mr. John Senter.—If your Lordship pleases.

The Crown having appealed against the above decision, the cases came before the Court of Appeal (Lord Evershed, M.R., and Birkett and Romer, L.JJ.) on 4th, 5th and 6th December, 1956, when judgment was given unanimously in favour of the Crown, with costs.

Mr. Geoffrey Cross, Q.C., and Sir Reginald Hills appeared as Counsel for the Crown, and Mr. John Senter, Q.C., and Mr. Desmond Miller for the Company.

Lord Evershed, M.R.—These four cases have raised a single point for our consideration, which may be stated as follows. Where a company which carries on the trade or business of property dealing receives from the War Damage Commission a value payment in respect of a property held by the company in the course of its trade, is that value payment to be treated as part of the company's annual profits or gains arising to it from its business within the meaning of Schedule D, now incorporated into Section 122 of the Income Tax Act, 1952? There is also raised in each case a question as regards Profits Tax, but we were informed that the answer to the question as it is related to Income Tax necessarily involves also the answer as it relates to Profits Tax. I shall therefore follow the learned Judge, Upjohn, J., in delivering a single judgment in all four cases, and I shall confine my observations to the impact of the Income Tax Acts upon this value payment.

I confess that the case has been for me one of very great difficulty. One reason is that on either view of it the conclusion inevitably produces, or is capable of producing, anomalies. If, for example, the view of the Crown is correct, then the following might be the consequence. Suppose a case in which a property owned by a property company and of a value of £5,000 is wholly destroyed by enemy action. Suppose that the sum of £5,000 is in due course paid by the War Damage Commission as a value payment in respect of that property. Suppose, finally, that the company, though it is under no obligation so to do in the case of value payments, elects to reconstruct or rebuild the premises and spends £5,000 in doing so. As Mr. Senter, for the Company, demonstrated, the result of the various relevant provisions of the War Damage Acts, and again on the hypothesis that the Crown's argument should prevail, would be that the company on the one hand could not deduct as a legitimate expense for Income Tax purposes the £5,000 expended by it on reconstruction, but yet it would have to pay Income Tax in respect of the £5,000 which it received from the Commission. Thus, assuming for simplicity that Income Tax be taken as 10*s.* in the £, the entire sum received from the War Damage Commission in effect would have to be repaid by way of tax. Mr. Senter, not unnaturally, stressed the obvious injustice, for I think

it might be so described, of such a result—which he described as being really a matter of double taxation, though I am not sure that, with all respect to him, strictly it ought to be so described. On the other side, if the example be taken that I have already stated but with the distinction that there is no rebuilding or reconstruction, the company (let it be assumed) sells the vacant site. In that case the £5,000 remains, so far as can be seen, perpetually franked from any possible impost in the way of Income Tax. Although I think it could not be suggested that that £5,000 became part of the company's fixed capital, yet it would not be liable ever to be brought into account for tax purposes. That again would appear to be anomalous.

One other matter of fact I will mention now because to my mind it has an important bearing on the proper result to be reached in this case. Let me repeat that we are here dealing with a company whose trade or business is that of property dealing, so that property, be it freehold or leasehold property, will be the circulating capital, or the stock-in-trade, in common parlance, of the company's trading operations. According to ordinary accounting practice, if I correctly apprehend it, there would at the beginning of each year be brought into account the value of the stock-in-trade on hand. After items giving sales and purchases there would be a corresponding item on the other side of the account showing at the end of the accounting period what remained in hand. If that is right it would appear to follow that in the case of a property (and I will adhere to my hypothetical figure) worth originally £5,000, which was destroyed and reduced to a value, say, of £500 as a result of enemy action, that property for accounting and therefore for tax purposes would be reduced in the accounts from its figure of £5,000 to its figure of £500 and in respect of that property there would have been a loss in value of the stock-in-trade which would be reflected in the final liability to Income Tax.

As I have referred to value payments it would perhaps also be relevant to mention, though the matter is not directly before us, the case of cost of works payments. The scheme of the war damage legislation, particularly to be found in Sections 6 and 7 of the War Damage Act, 1943, provides on the one hand that value payments are appropriate in cases of total loss, and I have already indicated that they do not proceed upon the footing that the payee, the recipient, will rebuild or reconstruct the damaged property. In the case, however, of cost of works payments, which are payable in cases other than those of total loss, the payments are made in practice, and are contemplated plainly by the language of the Statute as payable, only when work of reconstructing is done and by way, so far as they go, of recoupment of cost. It was a point made by Mr. Senter that if the Crown is right in its contention it would appear also to follow that cost of works payments would be liable to tax. For my part I am inclined to think that the answer to that particular criticism is to be found in the illustrative figures which Mr. Cross gave us, showing what in practice would happen in such a case. Without undue elaboration those figures indicate that the cost of repair, which as I have already said cannot be deducted, as such, for the purposes of Income Tax liability, would be offset by the cost of

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works payment received, so that the latter in effect eliminated the former, and no question on either side of the account in such a case would arise.

Be that as it may, the problem with which we are concerned is that of a value payment, and I propose to confine myself strictly to that problem. I say that, perhaps, with added emphasis because when the matter was before the Special Commissioners they, in an attempt to mitigate the hardship of the type of instance which I have earlier stated, made a qualification upon their determination in favour of the Crown. The qualification is expressed in these words:

> "... we hold that the Company should in general include payments received under the War Damage Act but that, where a property has been, is being, or is intended to be repaired or rebuilt, sums received in respect of it should not be included as receipts but should be deducted from the amount expended on rebuilding."

That form of words, if I correctly follow it, supposes that in an account the war damage value payment would be treated in the way which I have tried to describe in the case of a cost of works payment; but Mr. Cross has observed that the laudable attempt of the Special Commissioners to achieve a just conclusion involves unfortunately certain grave administrative difficulties. Not thereby discouraged, Mr. Cross, for the Crown, at an earlier stage suggested what I might call a means of gilding the philosophic pill which, no less than the method adopted by the Special Commissioners, would, as I see it, if we adopted it, inevitably involve judicial legislation. It seems to me that the Court cannot properly indulge in those exercises, however much they may be tempted so to do. We must in this case, I think, decide, for better or worse, wholly in favour of the Crown or wholly in favour of the Company. Legislation to gild the pill is a matter for Parliament.

Upjohn, J., in his very full and careful judgment clearly indicated his own difficulty in the matter. He concluded at the end, contrary to the determination of the Special Commissioners, that these value payments ought to be treated, by the necessary implication of the war damage legislation, as exempt in the hands of the recipient in any capacity (as I think it follows) from liability to computation for Income Tax purposes.

I shall come back presently to refer more fully to the judgment, but I think it right that I should say at once that for my part I have reached the contrary conclusion. I confess that I do so not only with diffidence, because I part company from Upjohn, J., but also with some reluctance because, although there are undoubtedly anomalies either way, I think the hardship of the decision to which I have felt compelled to come is the greater of the two anomalies. That again, however, must be a matter for legislation—subject only to this, that in assessing this Company and other companies similarly placed no doubt the Revenue authorities can properly exercise a certain discretion.

I return to the basis of the arguments put forward on both sides, which proceed from this. Since there is here a property company and since its properties are its liquid or circulating capital or its stock-in-trade, then, as is urged strongly by Mr. Cross, *prima facie* a sum of money received by way of compensation for the loss or destruction of part of the circulating capital or of the stock-in-trade is something received by the company which comes to it, arises to it, from its trade.

Mr. Senter at the end of it all, I think, was not really disposed to quarrel with that as a general proposition. I asked him a number of

questions at the beginning of his argument, and, having regard to the authority of *Green* v. *J. Gliksten & Son, Ltd.*(1), and of *Commissioners of Inland Revenue* v. *Newcastle Breweries, Ltd.*(2), I think he was disposed to concede that *prima facie* that might well be the result, though I do not forget that in some respects he qualified the general implications of those cases; but he did say, and if I may say so with due respect to his argument, I think he said rightly, that the decision in this case must really depend upon the effect of the war damage legislation. Put another way, his argument can be posed thus: the war damage legislation properly construed gives, and was intended by Parliament to give, a particular characteristic, relevant for present purposes, to value payments paid to contributors under the Acts; and that conclusion he founds on the language of the war damage legislation itself. It is upon that part of his argument that I have felt compelled to a different view. It may be that the war damage legislation in this respect failed to be exhaustive. Whether it is fair to describe the result as a *casus omissus* is neither here nor there. But I have felt forced to the conclusion that the implications of the Acts, as they are expressed, have not been in this respect fully apprehended by Parliament, if they wished to avoid the conclusion for which the Crown is arguing.

The *Gliksten* case [1929] A.C. 381,—I think it is unnecessary for me to refer to it at great length—was a case in which a trader was trading in timber. Certain of his stock-in-trade, that is, certain of his timber, was destroyed by fire. But since it had been insured the trader received from the insurers a substantial sum of money for compensation for the loss of the timber, a sum which in fact, having regard to the current increases in timber values, was very largely in excess of the book value of the timber destroyed. It was held by the House of Lords that, since the trader's business operations in essence consisted of the purchase and subsequent resale or turning into money of timber with a view to making profits out of such transactions, the effect of what had happened must be treated in all relevant respects as any other case in which timber had been replaced by cash, as was the intended result of sales. It is quite true, as Mr. Senter has pointed out, that in a number of passages in the judgments in the Court of Appeal as well as in the speeches in the House it is observed that the insurance of these stocks would be itself a natural business operation; but I do not think that that circumstance is vital to the principle of the conclusion.

That much I think is shown clearly enough from the case of the *Newcastle Breweries*. In that case the stock-in-trade in question consisted of rum, and under wartime legislation the Admiralty compulsorily acquired stocks of rum for which, after a good deal of protracted battling, a considerable sum of compensation was paid. Again I think Mr. Senter is justly entitled to say that the sum of money was received as though it had been the proceeds of a sale. The compulsory acquisition was treated for the purposes in hand as analogous to a sale. But the point of my reference to

(1) 14 T.C. 364. (2) 12 T.C. 927.

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the *Newcastle Breweries*[1] case is to show that the circumstances in the *Gliksten* case[2] that insurance was a natural business operation cannot have been vital, since it could not possibly be suggested that the result of Government compulsory acquisition of your stock-in-trade could have been part of the contemplated business transactions of Newcastle Breweries, Ltd.

It seems to me that the effect of the two cases I have mentioned supports the view which has been fundamental to the Crown's argument, namely, that where a trader is dealing in any kind of commodity and where for any reason part of that stock-in-trade, part of the commodity, disappears or is compulsorily taken or is lost, and is replaced by a sum of cash by way of price or compensation, then *prima facie* that sum of cash will be, and should be, taken into the account of profits or gains arising or accruing to the trader from his trade.

So far I have not departed at all from the conclusion of Upjohn, J. In the course of his judgment he recited passages from the cases which I have mentioned, and, indeed, from other cases; and I think there is nothing in what I have said which in any way runs counter to the views which the learned Judge expressed. But he then said this[3]:

> "It seems to me, with all respect to Mr. Cross's argument, that his broad proposition that whenever trading stock is turned into money it is a trading receipt is too wide. In each case, one must take account of the circumstances. The question to be answered is whether the particular receipt has to be brought into account in computing the profits or gains. There is no doubt that the value payment is in a sense a realisation, and the case no doubt bears a marked resemblance to the *Gliksten* and *Newcastle Breweries* cases."

I agree that, although as a general rule, *prima facie,* the result is as I have tried to state it, it would be too wide to say that if in respect of his business property a trader receives any money that is necessarily a trading receipt. That may well be too wide.

In his reply Mr. Senter referred us to what was said by Lord Warrington of Clyffe in the House of Lords in *Commissioners of Inland Revenue* v. *Scottish Central Electric Power Co.* (*No.* 2), 15 T.C. 761, at page 780:

> "It is, I think, clear that not every sum expended by an owner of land occupied by him for the purposes of his trade can be regarded as wholly and exclusively laid out for such purposes. . . . Moreover, the recent decision in this House in *Fry* v. *Salisbury House Estate, Ltd.*[4], throws considerable light on the question. In that case receipts consisting of rents received by a company, owner of a large building of flats, were excluded from the computation of profits and gains of a business carried on in connection with the same premises on the ground that they were received by the company in their capacity as landowners and not as traders."

Since the adjournment I have had an opportunity of looking again at *Fry* v. *Salisbury House Estate, Ltd.*, and, as I understand it, the facts so far as material were these. The taxpayer company owned the considerable edifice known as Salisbury House. They carried on, upon and in respect of those premises, a trade or business of providing services to the people to whom they sub-let parts of the building, and out of the supply of those services they made profits for which they were taxed under Schedule D. But as regards the premises themselves they were taxed or had been taxed under Schedule A. Their lettings of the rooms or offices in the building were not part of their business. That is to say, they were not carrying on the business of letting and managing flats. The Crown sought to tax them under Schedule D in respect

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(1) 12 T.C. 927. (2) 14 T.C. 364. (3) *See* page 99 *ante*. (4) 15 T.C. 266.

of the profits made from such lettings, submitting to deduct what the taxpayer company had paid, or what they were liable to pay, under Schedule A. The Crown's claim failed on the ground that the business for which they were taxed under Schedule D did not comprehend the business or trade of letting flats so as to justify an assessment in respect of that business under Schedule D. So much I think appears quite plainly from the speech (which I take for example) of Lord Tomlin, 46 T.L.R. 336, at pages 343–4[1]:

> " The sole question ",

said he,

> " upon which the opinion of the Court was desired by the Special Commissioners was whether the rents received by the respondents on letting the offices in Salisbury House were properly to be included in the assessments as trade receipts of the respondents for the purposes of Case I. of Schedule D of the Income Tax Act, 1918. Mr. Justice Rowlatt apparently took the view that the respondents were carrying on a trade in the nature of a hotel business and that the assessments were rightly made. The Court of Appeal however rejected this view of the case and in substance held that a landowner who happens to make taxable profits by rendering certain services to his tenants "

—that is, by providing them with services, heating, lifts and the rest of it—

> " cannot for that reason be treated as carrying on a trade in respect of the receipt of rents so as to be chargeable with income-tax under Schedule D upon the excess of the actual rents over the annual assessments to tax under Schedule A."

We were referred in the course of the very interesting arguments to the well-known case of *Seaham Harbour Dock Co.* v. *Crook*[2]; and I can quite well conceive that if the Government were to make to all landowners certain payments for the purpose of their being used for some specific purpose, say to make some particular construction in relief of unemployment, it would by no means necessarily follow that, because the premises of A were A's stock-in-trade, therefore the payments in the case I am supposing were to be brought into account as part of the profits of that trade. In other words, I am content to accept from Mr. Senter the proposition that it is not a necessary conclusion in every case that one who is a landowner and carries on property dealings with the property he owns is necessarily and inevitably to be required to bring into account for tax purposes under Schedule D every sum of money which he may receive as landowner.

But I have already indicated that it is with the conclusion from that premise that I find myself at variance with the learned Judge and the argument of Mr. Senter. I go back at this stage to what the learned Judge says, and I pick up the judgment where I left it[3]:

> " But, as I say, I have to consider the nature of the receipt having regard to the War Damage Act. We start, then, with this. There is nothing in the nature of a premium here. A capital payment has to be made in five instalments, and it is to be made by the owner of every acre of land in England and Wales. It seems to me quite clear on the construction of Section 28 that, if and when a payment is received, no part of that payment, even if it be expended in restoring the property to its former state, can be brought into account when the property is sold and the net profit is realised as it otherwise

(1) 15 T.C. 266, at p. 323. (2) 16 T.C. 333. (3) *See* page 99 *ante*.

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> admittedly would have been apart from the Section. I think those two factors are indications that the Legislature was not considering the trading aspect of the matter at all but was imposing on an owner of land throughout the country the obligation to contribute, with the corresponding benefit, if disaster happened, of receiving a sum of money, a value payment. I think the Legislature considered that that would be altogether outside the area of trading operations. It would be very remarkable, as Lord Atkin pointed out in the *Seaham Harbour* case(1), if half of this money, which was plainly intended to be applied in rehabilitating the property"

—an observation which, with all respect, I venture to doubt—

> ". . . should be instantly taken away in tax. I think Parliament did not intend that result."

It will be apparent from the passage which I have read that the learned Judge reached his conclusion from the effect which he got from the war damage legislation. So far, as a general matter, I do not at all disagree. Apart from the Acts, the learned Judge is saying that the result would no doubt be otherwise; but the import of the Acts gives this stamp to the war damage value payments in the hands of the recipient. I must therefore now turn to the war damage legislation itself, but I preface with this general observation what I shall say about it. It is, of course, quite true, as Mr. Senter says, and the argument is echoed by the Judge, that a company contributed to the war damage scheme *qua* landowner and received the value payment as landowner; but to say that is not at all, as I venture to think, to answer the question. I quite agree that the persons to whom the payments are to be made are landowners. The question on what terms and in what capacity they hold it when they have got it is a matter *prima facie* with which the War Damage Commission is in no way concerned.

During the course of the argument illustrations were taken of cases where the landowners were trustees. The obligations of trustees in regard to value payments, when they receive them, would depend not at all upon the war damage legislation but upon the terms of the trusts under which the trustees held. But still it is no doubt plainly competent for Parliament in the legislation to provide that for all purposes these sums are capital, whatever the ordinary implications of the landowners' circumstances might otherwise be.

The principal Act for the present purpose is the War Damage Act, 1943. I shall not traverse it at any length. Our attention was directed to a number of Sections, but it will suffice for present purposes (though I hope it will not be assumed that I have wholly neglected to apprehend the points made upon the other Sections) just to refer to Section 66 (1), which says:

> "Contributions made and indemnities given under this Part of this Act shall be treated for all purposes as outgoings of a capital nature";

from which it follows, as I fully agree and as the Judge said, that the contributions paid over a period of years were capital outgoings so far as the Company was concerned and had to be treated as such in its accounts.

Section 113 of the Act of 1943 dealt with expenses and other matters, but it has been replaced by Section 28 of the War Damage Act, 1949, upon which, as will be recalled from the judgment of Upjohn, J., the real basis of the argument for the taxpayer is founded. I turn, therefore, to Section 28 of the Act of 1949. Sub-section (1) says:

> "In computing the amount of the profits or gains, or of the income from any source, of any person for any purpose of the Income Tax Acts . . ."

(1) 16 T.C. 333.

—and then there is a reference to Profits Tax—

> " . . . no sum shall be deducted in respect of any payment or expenditure to which this section applies."

Sub-section (4) :

> " Expenditure to which this section applies is—(*a*) any expenditure on repairing or otherwise making good war damage to land in so far as any person has received or is entitled to a payment in respect of the damage by virtue of any of the provisions of the principal Act "

—that is the War Damage Act, 1943—

> " (whether alone or as applied or modified by or under any provision of this Act) ",

and then there follows certain language relating to goods damaged by enemy action. Sub-section (5) makes the preceding provisions of the Section retrospective. Sub-section (6) :

> " Where before the passing of this Act the liability of any person in respect of income tax or excess profits tax or in respect of profits tax . . . has been reduced, or any person has been repaid any amount in respect thereof, by reason of the deduction or inclusion of any sum which under the provisions of subsection (1) . . . of this section would not have fallen to be deducted or included, the amount by which his liability has been so reduced . . . shall be recoverable ".

Now it is, I think, tolerably plain that the compendious terms of the Section or of the Sub-sections which I have read apply, and in terms are intended to apply, not only to private persons who might be affected as regards their liability under Schedule A but also to traders ; and I think it is plain that Sub-section (4) is expressly so phrased as to apply, at least among other cases, to property dealers.

That has been strongly relied upon by Mr. Senter in this fashion. He says that first of all Section 66 of the Act of 1943 had made what one might call a " premium payment " capital. This Section, Section 28 of the 1949 Act, comes in to prevent the recipient, the contributor, including the property dealer, who has received a war damage payment whether by way of a cost of works or value payment, from making any deduction for Income Tax purposes for the expense of restoration to the extent that he receives war damage payments in respect of the property restored. So is produced undoubtedly, on the Crown's view, the anomalous, if not unjust, result which I mentioned at the beginning of this judgment. And, says Mr. Senter, it is impossible sensibly to read this provision save on the assumption that Parliament is treating throughout all the payments made either into or out of the war damage fund as capital payments from whomsoever or into the hands of whomsoever they come. That of course is a forcible argument, and it is at the very least tempting to suppose that Parliament, if it gave its mind to this matter at all, was assuming that in the hands of the recipient, whatever his circumstances might be, whether he was a private owner, whether he was a manufacturer whose principal capital asset, a factory, was damaged, or whether he was a property dealer, in every case the sums received would be capital sums. My difficulty is that Parliament has not said so.

(Lord Evershed, M.R.)

What is worse to my mind is that this Section which I have read, as Sir Reginald Hills observed in the course of his address to the Court and as Mr. Cross emphasised in his reply, is a Section which is in terms directed to a modification of the ordinary fiscal results which would otherwise be applicable to these war damage contributions and payments. The Section is, as Sir Reginald pointed out, in effect an addition or a modification to the fiscal code. By providing that the expenditure mentioned in Sub-section (4) should not be deducted for Income Tax purposes, it is accepting the proposition that, were it not for the Sub-section, such would be an ordinary fiscal consequence in such a case as that with which we are dealing. Parliament has said that notwithstanding the *prima facie* result this other result will apply. But unhappily it has forborne to go on to say: and any sums received by a property dealer or by any trader in respect of loss of stock shall in his hands not be brought in as part of his profits or gains but shall be capital. Where Parliament has directed its attention expressly and specifically to the fiscal results of the legislation but has made no provision for dealing with the ordinary *prima facie* results in any particular respect, then it seems to me that the Court cannot proceed to say that it intended so to do or that the implication of the Act is such that we must interpret it as though it did.

I earlier said that I felt compelled to this conclusion with some reluctance, but once the proposition is accepted that *prima facie* receipts of this kind, which represent what has been lost by destruction of stock-in-trade, are themselves properly profits or gains arising to the trader from his business, then, unless there is something in the Act with which we are here concerned which impresses those payments with some other characteristic, I think the Court is unable to do so by way of implication.

I said earlier on, and I venture to repeat, that if this was an ordinary insurance case it could not be doubted that the sums received from the insurers by way of compensation for the loss of the property insured would be annual profits or gains. The general character of the war damage legislation is to provide through the State, and by a scheme for which the Act has provided, the equivalent of insurance money; and, although it has in certain respects expressly and specifically modified what would otherwise be the fiscal conclusions of the scheme, it has upon this matter remained silent. I have felt accordingly for my part unable to extract from Section 28 in particular and from the legislation in general so extensive an implication as that which appealed to the learned Judge.

For these reasons I think this appeal must be allowed.

Birkett, L.J.—I am of the same opinion. I must say I feel a little diffident in adding anything at all to the judgment which has just been delivered by the Master of the Rolls, but in view of the argument which has been presented to us in this Court, and the decision of Upjohn, J., perhaps I might add a very few words of my own.

My Lord has dealt with all the facts which it is necessary to consider. He has dealt with all the Statutes and the case law, and he has also dealt with many of the arguments which were employed both by Mr. Senter and by Mr. Cross and Sir Reginald Hills in this case.

This happens to be one of those cases where, whatever the decision may be, someone will be entitled to say that it causes an injustice in this particular direction or the other. It is not always possible to arrive at a result which wipes out all anomalies, particularly in matters relating to

taxation. But my Lord has dealt with the anomalies which arise and the arguments which have been addressed to us both by Mr. Cross and by Mr. Senter on that topic.

I think the essential point always to be kept in mind is that the Company in this case, the London Investment & Mortgage Co., Ltd., were dealers in property. In the Case Stated it is put in this way: "The Appellant Company is a property dealing company". Then it goes on to relate certain of their trade transactions during the war, and the receipt of the value payments to which my Lord, the Master of the Rolls, has already referred and to which I need not refer again.

This is also stated quite plainly in the Case Stated:

> "The question for determination in this appeal is whether value payments arising under the provisions of the War Damage Act, 1941 and 1943, and paid to the Appellant Company, who carry on the trade of property dealing, are receipts of the Appellant Company's trade to be brought into account in computing the balance of profits and gains of the Appellant Company for taxation purposes".

During the last few days the whole of the controversy has ranged round that point. Upjohn, J., in his most careful judgment, reviewing all the arguments and the cases, put the whole matter in one simple, single sentence when he said of the value payment(1):

> "It was a contribution made and a payment received by the taxpayer, not as a part of his trading operations at all, but because he was compelled under the war damage scheme to make payments with the corresponding right of getting the benefit in his capacity, not as a trader, but as an owner of the land."

Whilst it would not be right to say that Mr. Senter had concentrated wholly on this one point, because he had many, it is perfectly plain that this was the most important point. "I cannot deny", said Mr. Senter, "that my Company trades in properties. It is plain on the face of it; but merely because it does that, and merely because it receives a value payment, that does not of necessity bring it within the charging Sections", to which he referred us.

I quite agree with what my Lord, the Master of the Rolls, said. I can quite conceive of a landowner, who is also a trader, receiving payments which are not payments which are to be brought in as trading receipts accruing to the business. The point in this case, as put in the summary of Mr. Senter's argument with which he supplied us, is this: "Is the value payment a trade receipt arising in the course of carrying on a trade in the ordinary way?" To that he makes the answer, "No. He did not receive the value payment in his capacity as a trader at all; he received it, as everybody else in the country received it, because he was compelled to pay the five instalments under the Act. They were instalments of a capital nature, and he was entitled, in the case of property which was damaged, to the value payment which the Act prescribed and laid down." Indeed, at the conclusion of Mr. Senter's argument, when he summarised for our

(1) *See* pages 99-100 *ante*.

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benefit the points which he endeavoured to support, this point again loomed large. Said he, "The source of the payment to the landowner in this case is his statutory right under the Act of Parliament; it is not a source of profit from trading activities. The landowner is not allowed to deduct the premiums paid under the War Damage Act by Section 66 of the Act of 1943, and the whole scheme of that Act and the Act of 1949 indicates that the payments which he receives because of those capital premiums are not to be regarded at all in the light of trade receipts but they are received by him in his capacity as a landowner." All persons were compelled to make the payments, and as Upjohn, J., recognising the strength of the argument which was put, said(1),

> "We start, then, with this. There is nothing in the nature of a premium here. A capital payment has to be made in five instalments, and it is to be made by the owner of every acre of land in England and Wales. It seems to me quite clear on the construction of Section 28 that, if and when a payment is received, no part of that payment, even if it be expended in restoring the property to its former state, can be brought into account when the property is sold and the net profit is realised as it otherwise admittedly would have been apart from the Section."

Then he deals with the trading aspect.

Now, on that contention Mr. Senter is saying: This is received not as a trader at all. It is quite wrong to consider a value payment in that capacity, even though it does so happen that the Company I represent admittedly trades in property and in land. That factor must be entirely disregarded, and you must consider the Company exactly as you consider any other landowner who was not a trader and who was compelled, as this Company was compelled, to pay the five sums and to receive the statutory benefit in case their property was damaged. That is the argument.

As against that it was said: You cannot ignore the fact that the Company in this case was in fact trading in property. It makes the whole distinction. When the circumstances of the case are considered, it is said by the Crown, this is a value payment. You cannot really divorce this value payment from the ordinary trading of the Company.

Reliance was placed upon two cases which it is not necessary to cite again, *Green* v. *J. Gliksten & Son, Ltd.*(2), the case of the timber, and the *Newcastle Breweries* case(3), the case of the rum. Mr. Senter attempted to show that those cases really did not affect the point in this case, and primarily I think for this reason. So far as the *Gliksten* case was concerned it would appear that both in the Court below and in this Court he was contending that it was because of the payment of the insurance premiums that the money came, and that it was not a trading receipt in the ordinary sense at all. Nevertheless what really happened in that case may be put as simply as this: a stock of timber which you had was, through no wish of yours or through no fault of yours, transformed into money, and the effect was the same as though you had in fact sold it; and therefore it must be brought into account. Similarly, with regard to the rum, the case which went all the way to the House of Lords. The point taken there was that this rum had not been treated as being sold in the ordinary course of trade; it was requisitioned. But there again the decision in simple language came to this: you had rum which was part of your stock-in-trade, in its natural state if you wish; but if you had sold it in that condition and received cash for it you would admittedly have had to bring that into your trading accounts. What happened was that by this elaborate process of requisitioning

(1) *See* page 99 *ante*. (2) 14 T.C. 364. (3) 12 T.C. 927.

you had the rum taken out of your possession, and in its place you had a sum of money, and you must bring that into account.

I think, despite all the valiant efforts which Mr. Senter made, those two cases are really very strong authorities in this case. My Lord has covered every point in the case, and my own conclusion is that I can find nothing, either in Section 66 of the War Damage Act, 1943, or in Section 28 of the Act of 1949, upon which reliance was placed, which takes this value payment, as I think, out of the category of a trading receipt properly falling within the charging Section and puts it into some other category.

For those reasons I agree that this appeal ought to be allowed.

Romer, L.J.—I agree, and I only wish to add a very few words because we are differing from Upjohn, J., who has considerable experience of tax matters and to whose judgments one always and naturally attributes considerable weight. I think there is only one point really on which we do differ from him. Where a trader sells or disposes of part of his circulating capital it is a well-settled principle that the proceeds, for tax purposes, are treated as a trading receipt, and it is not confined to cases where the circulating capital, be it timber or other property, is actually sold, because, as Lord Reid said in *John Hudson & Co., Ltd.* v. *Kirkness,* 36 T.C. 28, at page 74,

> "A sum may well be a trading receipt although it does not come to the trader as the price of goods sold."

The *Gliksten* case[1] was not a case of a sale but a case of a loss of circulating capital, which was timber, by fire; and it was there held that the insurance money which was recovered was to be treated as a trade receipt. Nor is it relevant that the transaction which led to the loss or the disposal of the asset is a compulsory transaction enforced upon the owner; that sufficiently appears from the *Newcastle Breweries* case[2]. I myself feel little doubt that the analogy of those cases is close enough for the application of the principle to a case such as the present, where property forming part of the trading company's circulating capital was lost or destroyed as a result of war damage and was compensated for by a payment under the War Damage Act of what is called a "value payment". So far I have no reason to suppose that Upjohn, J., took a different view.

Mr. Senter, without I think going so far as to concede the applicability of the *Gliksten* case principle to the present case, from a *prima facie* point of view said: "In any case, if you look at the War Damage Act, the whole structure and the scheme of the Act, and in particular at Section 66 of the 1943 Act and Section 28 of the 1949 Act, it becomes clear that it was the intention of Parliament that 'value payments' should be capital and nothing else". Following from that premise Mr. Senter said that there is a dichotomy of character in which this Company may have received a value payment, and if in one character the money in their hands would be capital and in the other character it would be income, then in conformity with the intention of the Act they are to be taken as receiving that payment in the character which would enable the payment to preserve its capital nature. In other words, they must

(1) 14 T.C. 364. (2) 12 T.C. 927.

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be taken to have received the money in the character of property owners and not as traders. Then he proceeded to say, as has already been pointed out by my brethren, that the source of the Company's right to receive these value payments was not to be found in the fact that they were traders ; it was to be found solely in the fact that they were owners of property upon whom had been imposed an obligation to pay capital instalments so that, if a certain contingency happened, which it did, they would receive a payment under the Act ; and that neither that payment had anything whatever to do, nor had the contributions which they paid anything whatever to do, with the fact that they were traders. They were solely referable to their position as property owners and as such were brought within the provisions of the Act both as to contributions and as to payments. He then pointed out that it was quite a different thing from a voluntary insurance under which the Company would pay premiums out of revenue and would be entitled to bring them in as deductions from their taxable profits. He finally pointed out that the amounts of the instalments they paid as contributions had no reference, apart altogether from being capital payments, to trading receipts or the trading position at all. They simply were paid on the basis of the Schedule A valuation of the property.

That is an attractive way of presenting the case, especially when one bears in mind that hardship falls upon the traders in some circumstances if the Crown's contention is right, hardships to which the Master of the Rolls has referred ; but I do not think myself that the argument, although it commended itself to the learned Judge, is one which can really be accepted.

Of course, generally speaking, it is perfectly true to say that value payments made under the Act would be, in the hands of the recipients, capital. For example, if they were paid to trustees of a settlement, to trustees who held property under a trust for sale, then as between the tenant for life (unless there was some unexpected and unusual provision in the settlement) and the remainderman the sums in the hands of the trustees would be capital and not income, and more especially having regard to the fact that the contributions had been paid out of corpus.

It seems to me that the answer really to Mr. Senter's way of putting the case is that there is no sufficient indication in the Acts that Parliament intended the value payments to be capital in the hands of the recipients, whoever the recipients might be. The truth is, as I think, that Parliament was not concerned with the fate of the payments after they had been received. If they were paid to trustees, that was the end of the matter so far as the War Damage Commission was concerned. In such a case one looks at the terms of the trust, and one finds that the capital sums have to be dealt with in accordance with the provisions thereof. So also, in my judgment, if they are paid to a company in respect of the loss of part of the company's circulating capital, they are to be treated as such and dealt with as such in the hands of the recipients. I do not think there is any room or justification to be found in the Act for this suggested dichotomy of which Mr. Senter spoke. As the Master of the Rolls has pointed out, Section 28 of the 1949 Act, which is expressly directed to the fiscal aspect of the matter, makes no mention of this point at all, although it was manifestly directed to the position of people in trade.

That is all I wish to say on the matter, except with regard to the suggested harshness, indeed not only the suggested but the actual harshness, in cases where a company such as the present applies a value payment towards restoring the damaged property. They are, of course, in a worse position

than a private individual, or a company which has received a payment in respect of a loss of fixed capital as distinct from circulating. On the other hand there is the very important consideration, to which the Master of the Rolls has referred, that a trading company such as the present Company which loses a valuable item of circulating capital by war damage in any given year could, according to accepted practice, deduct the value of that property from its taxable profits for that year, which no individual could do, and which no company could do which suffered a loss of some house or property which formed part of its fixed capital. That consideration does, to some extent at all events, mitigate the undoubted harshness of the result for which the Crown is contending.

Finally, although I have every sympathy with the gallant endeavour which the Special Commissioners made to put the matter right from an equitable point of view, there is no justification or warrant for introducing words into a taxing Statute which are not there, that being a matter for the Legislature and not for this Court, which can only take the language as it finds it and put such interpretation as it thinks right upon that.

For those reasons I agree that the appeal should be allowed.

Mr. Geoffrey Cross.—I do not know whether Mr. Senter will agree with this, but I suggest that the Order should be that the decision of Upjohn, J., is reversed, and the case should be sent back to the Special Commissioners to adjust the assessments in question. It will mean alterations.

Mr. John Senter.—I would agree.

Mr. Cross.—It will be the same in all the cases because they all fall together. I submit that the appeal should be allowed with the usual consequence of costs here and below.

Mr. Senter.—I cannot object to that in view of your Lordships' decision. My Lord, I am instructed to ask your Lordships for leave to appeal to the House of Lords in this case.

Lord Evershed, M.R.—What have you to say about that, Mr. Cross?

Mr. Cross.—I cannot object to that, in view of your Lordships differing from the judgment of Upjohn, J.

(*The Court conferred.*)

Lord Evershed, M.R.—Yes, Mr. Senter, you can have leave.

Mr. Senter.—If your Lordship pleases.

The Company having appealed against the above decision, the cases came before the House of Lords (Viscount Simonds and Lords Morton of Henryton, Reid, Tucker and Somervell of Harrow) on 3rd and 4th March, 1958, when judgment was reserved. On 24th April, 1958, judgment was given unanimously in favour of the Crown, with costs.

Mr. John Senter, Q.C., and Mr. Desmond Miller appeared as Counsel for the Company, and Mr. Geoffrey Cross, Q.C., and Mr. Alan Orr for the Crown.

Viscount Simonds.—My Lords, this appeal relates to assessments to Income Tax made upon the Appellant Company for the years 1948–49 and 1949–50 and to Profits Tax for the chargeable accounting periods 1st April, 1947, to 31st March, 1948, and 1st April, 1948, to 31st March, 1949. Upon each of the assessments the same question arises.

The material facts as found by the Commissioners for the Special Purposes of the Income Tax Acts are that the Appellant Company was at the relevant times a property dealing company, that during the war certain of its properties suffered war damage and that under the provisions of the War Damage Acts, 1941, 1943 and 1949, it received value payments from the War Damage Commission in respect of a number of these properties. The short question is whether these value payments ought to be treated as trading receipts in computing the profits or gains of the Company for the purpose of the assessments in question. The Crown contends that they should, the Appellants that they should not.

The Commissioners held that such payments ought *prima facie* to be brought in as receipts of the Company's trade, as the properties formed part of its stock-in-trade and

> "on well-known principles any sum received as compensation for their loss is a trading receipt",

but they further held, in view of certain provisions of the War Damage Acts, to which I shall refer, that,

> "where a property has been, is being, or is intended to be repaired or rebuilt, sums received in respect of it should not be included as receipts but should be deducted from the amount expended on rebuilding."

This determination may well appear to produce an equitable result, but it has not been found possible to support it in any Court, and there is in fact no *via media*. The value payments as a whole are to be treated as trading receipts or as a whole are not. Upjohn, J., has held that they are not, the Court of Appeal that they are. I agree with the Court of Appeal.

My Lords, I have no doubt that the Commissioners were right in saying that the payments were *prima facie* trading receipts. It was the business of the Company to dispose of its stock-in-trade and to receive a cash equivalent or other compensation in return and for the purpose of Income Tax law such cases as *Green* v. *J. Gliksten & Son, Ltd.*, 14 T.C. 364, and *Commissioners of Inland Revenue* v. *Newcastle Breweries, Ltd.*, 12 T.C. 927, show that it is irrelevant whether the disposition is by sale, voluntary or compulsory, or by an involuntary loss attended by subsequent compensation. The Company had one asset, lost it, and acquired another. I think it is incontrovertible that the asset it acquired was acquired in the course of its business, and not the less so because the war damage scheme was universal and compulsory and applied equally to all property owners whether or not they carried on the business of dealers in property. I do not deal at greater length with this part of the case because I am in complete agreement with the judgment of the Court of Appeal.

But the strength of the Company's case lay in the special provisions of the War Damage Acts and in particular Section 66 of the Act of 1943 and Section 28 of the Act of 1949. Section 66 of the 1943 Act provided that contributions made and indemnities given under that Part of the Act should be treated for all purposes as outgoings of a capital nature. The contributions here referred to are the contributions which under the Act property owners were required to make towards the expense of making the payments in respect of war damage as therein provided. They might be regarded as analogous to premiums paid upon insurance, with the State acting as insurer but making a

contribution of its own towards the necessary payments. The argument was that, since the contribution was for all purposes to be treated as an outgoing of a capital nature, including, no doubt, a computation of profits for tax purposes, it should be implied that any payment must also be regarded as of a capital nature for the same purpose. I should not be disposed to give much weight to this argument in any case, but what weight it has is lost upon a consideration of Section 80. That Section authorised the Treasury from time to time to make estimates of the net receipts of the Exchequer under that part of the Act on the one hand and the expected payments on the other hand, and to increase or reduce the contributions accordingly. It would therefore appear reasonable that the total net contribution to the Exchequer should not be in effect reduced by allowing the contributor to bring it into account as an income payment for Income Tax purposes.

A more serious argument was founded on Section 28 of the Act of 1949, which replaced Section 113 of the Act of 1943. Section 28 was made retrospective and is applicable to the present case. It is a Section which relates to Income Tax and Profits Tax and Excess Profits Tax and nothing else, and I think that I must cite a substantial part of it. It provides that in computing the amount of the profits or gains, or of the income from any source, of any person for any purpose of the taxes I have mentioned, no sum shall be deducted in respect of any payment or expenditure therein mentioned. It then provides, by Sub-section (2), that no sum shall be included in respect of any payment or expenditure to which the Section applies in computing (*inter alia*) (*b*) the cost to any person of maintenance, repairs, insurance and management in respect of which relief may be claimed under or by reference to Rule 8 of No. V of Schedule A and by Sub-section (4) (so far as relevant) that the expenditure to which the Section applies is any expenditure on repairing or otherwise making good war damage to land in so far as any person has received or is entitled to a payment in respect of the damage by virtue of any of the provisions of the principal Act, i.e., the Act of 1943. It is to be observed that the Section does not purport to deal in any way with the manner in which receipts are to be treated for tax purposes. It is concerned only with deductions. " No sum shall be deducted " are the governing words. But it is said that it is a matter of necessary implication that, if expenditure on repairing or otherwise making good war damage is not allowable as a deduction so far as it may be covered by a war damage payment, then such payments must in no circumstances be treated as trading receipts for tax purposes.

My Lords, I cannot accede to this argument. I hesitate in any case to introduce by way of implication in a taxing Statute a provision which cries aloud for express statement if it is intended. But I am not satisfied of any such intention. No doubt it operates hardly against the taxpayer if, having brought into account a payment as a trading receipt, he is disallowed an equivalent amount of expenditure in repair. But equally it is for him an uncovenanted benefit if he does not bring into account a sum which, had it been the proceeds of sale of his property instead of compensation for its loss, he must have brought into account, and which he may dispose of as

(Viscount Simonds.)

he thinks fit whether in repair or rebuilding or otherwise. It might be possible—I do not say it would—to come to a different conclusion if the property owner receiving a value payment was bound to apply it in repair. But he is under no such obligation and I cannot write into the Act words which are not there so as to divest of its normal fiscal consequence the receipt by him of a sum of money which he *prima facie* receives as a trading receipt. In this case we are concerned with a value payment, not with a cost of works payment. The latter payment is only made after the cost has been incurred, and we were told that in practice it was usually made direct to the building contractor. It may be that different considerations apply to it. I do not intend to say anything that would prejudice such a case, but, so far as value payments are concerned, whether deliberately or through inadvertence, the case of the property dealer being overlooked or incompletely regarded, there is, in my opinion, no provision express or implied which enables him to exclude them from his computation of profits.

In the course of the argument there was some discussion of Rule 3 (*k*) of the Rules applicable to Cases I and II of Schedule D of the Income Tax Act, 1918. It was suggested that it provides a useful analogy to Section 28. Perhaps it does. But I am content to abide by what appears to me to be the plain meaning of the Statute.

I would dismiss this appeal with costs.

Lord Morton of Henryton.—My Lords, I agree with the speech which has just been delivered by my noble and learned friend on the Woolsack, and have nothing to add.

Lord Reid (read by Lord Somervell of Harrow).—My Lords, I regard this as a difficult case. Apart from the provisions of Section 28 (4) of the War Damage (Public Utility Undertakings, &c.) Act, 1949, I should have no difficulty. It may be true that a person who does not trade in property, but carries on another trade within property owned by him, may pay or receive money in his capacity of owner and not in his capacity of trader. But when the property, in respect of the ownership of which he receives money, is part of his stock-in-trade, I find it difficult to imagine a case where that money would not be a trading receipt. In this case the money was received because the value of the stock-in-trade had been diminished by enemy action, and it must certainly be treated as a trading receipt unless the Statute requires it to be treated in some other way.

Section 28 (4) applies to all payments made in respect of war damage to land. Its provisions are intelligible and just in all cases where the owner was not trading in land and did not hold the land as part of his stock-in-trade, but they are so ill designed and lead to such unjust and anomalous results if one tries to apply them literally where the land was stock-in-trade of a trader that it was admitted and seems clear that the draftsman did not have in mind the case of a trader who deals in land. As I recently ventured to point out in *Special Commissioners of Income Tax* v. *Linsleys* (*Established* 1894), *Ltd.*(1), [1958] 2 W.L.R. 292, at page 298,

> "We are therefore confronted with the not unusual problem of applying statutory provisions to circumstances which they were not designed to meet. In such a case it appears to me to be necessary to make a rather wide survey, because one can easily reach a wrong conclusion if attention is concentrated only on those provisions which are immediately applicable to the particular case."

(1) 37 T.C. 677, at p. 704.

I therefore think it necessary to examine the operation of Section 28 (4) not only in relation to value payments but also in relation to cost of works payments. This matter was not fully developed in argument and I state my views with some hesitation. But a decision of this House as to the meaning and effect of a Statute is none the less final though some relevant argument was not developed in the case and I therefore feel bound to state my views as briefly as I can.

Under the War Damage Act, 1943, a payment made in respect of war damage may be either a cost of works payment or a value payment, the latter being made where war damage involves total loss. But total loss does not mean that the property is incapable of repair or reinstatement: it means broadly that the cost of reinstatement would be more than the amount by which the value of the property as a site and in its damaged state would be increased if reinstatement was carried out. And the Act goes on to provide that in certain cases value payments shall be made although the general rule would require a cost of works payment, and *vice versa.* Both kinds of payment are normally payable to the owner; but a cost of works payment can only be made when the sum involved has already been expended on the property, whereas a person receiving a value payment is free to do as he likes with it—he may, but need not, spend it on repairing the property. I should add that 1939 values are used in these calculations, but there is provision for increasing value payments so calculated by 45 per cent. It appears to me that, if a value payment received by an owner who is a trader in land is a trading receipt, then *a fortiori* a cost of works payment received by such an owner must be a trading receipt. But I need not elaborate that because I understood that that was not disputed by Counsel for the Crown.

Section 28 of the 1949 Act, which replaced an earlier provision in the 1943 Act, is designed to deal with the Income Tax position of owners who receive war damage payments. It applies alike to value payments and cost of works payments, and it provides that in computing income no sum shall be deducted in respect of any payment or expenditure to which the Section applies, and that in computing cost of repairs, etc., no such sum shall be included in any claim for relief. The expenditure to which the Section applies includes (Sub-section (4) (*a*)):

> "any expenditure on repairing or otherwise making good war damage to land in so far as any person has received or is entitled to a payment in respect of the damage by virtue of any of the provisions of the principal Act (whether alone or as applied or modified by or under any provision of this Act)".

Where damage is suffered by land which is not part of a trader's stock-in-trade, the diminution in value of the land does not enter into his account of profits for Income Tax purposes, and when he receives a value payment or cost of works payment that payment also does not enter into that account. But without Section 28 (4) he might, as a result of spending the payment on repairs, be able to diminish his Income Tax liability. That would plainly be wrong, and Section 28 (4) prevents it.

(Lord Reid.)

But the position is very different if the land is part of the trader's stock-in-trade. The value of the stock-in-trade (at cost or market price, whichever is the lower) at the beginning and also at the end of the year must enter the Income Tax account. Apart from Section 28 (4) the position as I see it would be that, if land is damaged and its value after damage is less than the value at which it stood in the valuation of stock-in-trade at the beginning of the year, only its damaged value can be included in the valuation of stock-in-trade at the end of the year. That will either diminish the profits for the year or produce a loss which it may be possible to carry forward. Then later, when the cost of works payment or value payment is received, it is a trading receipt and must enter the account as such, and the cost of works payment, being spent on repairing the property, or any part of the value payment so spent, will enter the account as an expense. And finally the valuation of the damaged property in the valuation of stock-in-trade will have to be written up to the value of the repaired property. I did not understand Counsel for the Crown to deny that.

Where a trader in land receives a cost of works payment there appears to be no need for Section 28, and it would introduce confusion and injustice if it were applied literally. The 1943 Act contemplates that he, like other owners of war damaged land, will carry out and pay for the reinstatement, and will then receive the cost of works payment. Apart from Section 28 the trader in land would in his tax account enter the cost of reinstatement as an outgoing and enter the cost of works payment as a receipt. That would produce a just result. But Section 28 prevents him from showing as an outgoing the cost which he has incurred and paid, but contains no express authority for excluding the cost of works payment from the other side of his account. And, being a trading receipt, it must be included unless there is authority to exclude it. If it is not excluded, then a fictitious profit will result. I understood Counsel for the Crown to admit that this is an impossible result, that in practice the payment is always omitted and that Section 28 must be so interpreted as to authorise this omission. He pointed out that in many cases the owner does not in fact receive the payment, because the payment is often made directly to the contractor who has carried out the reinstatement. In such a case neither the cost of reinstatement nor the cost of works payment would appear in the trader's account, because he did not in fact pay the one or receive the other, and Section 28 would have no application. But Section 28 does apply to cases where in fact the trader pays for the reinstatement and receives the cost of works payment, and it could not be right that its application should increase the trader's tax liability merely by reason of the fact that the cost of works payment was paid to the trader and passed on by him to the contractor instead of being paid directly to the contractor.

So this question arises. It being admitted, and I think rightly admitted, that Section 28 cannot be applied literally to traders in land, and that it must be so interpreted as to authorise the trader to omit from his tax account one kind of war damage payment, a cost of works payment, ought the Section to be interpreted so as to authorise a similar omission of the other kind of war damage payment, a value payment? There is no hard and fast line between the two. Both are payments in respect of war damage and both appear to me to be trading receipts when received by a trader in land. The only relevant difference is that whereas a cost of works payment must be spent on reinstatement a value payment may but need not be so spent. If the value payment is so spent then the reason for interpreting Section 28 so as to exclude it is just as strong as in the case

of a cost of works payment. But it is said that if the trader chooses not to spend his value payment on the property he will make an untaxed gain if it is omitted from his trading account. For the moment that might be so. But if later on he spends money on making good the damage, or if he sells the property in its damaged state and the purchaser spends money for that purpose, Section 28 still applies to prevent credit being taken for such expenditure in so far as it does not exceed the amount of the value payment.

For these reasons I find great difficulty in reading into Section 28 an implied provision with regard to cost of works payments but refusing to read in a similar provision with regard to value payments. But in the peculiar circumstances of this case I do not find it necessary to dissent from the conclusion at which your Lordships have arrived.

Lord Tucker.—My Lords, for the reasons which have been stated by my noble and learned friend on the Woolsack, I agree that this appeal should be dismissed.

Lord Somervell of Harrow.—My Lords, for the reasons which have been stated by my noble and learned friend on the Woolsack, I agree that this appeal should be dismissed.

Questions put:

That the Orders appealed from be reversed.

The Not Contents have it.

That the Orders appealed from be affirmed and the appeals dismissed with costs.

The Contents have it.

[Solicitors:—R. C. Bartlett & Co.; Solicitor of Inland Revenue.]