No. 929.—HIGH COURT OF JUSTICE (KING'S BENCH DIVISION).—30TH AND 31ST JANUARY, 1933

COURT OF APPEAL.—7TH JULY, 1933

HOUSE OF LORDS.—7TH, 8TH, 11TH AND 12TH JUNE, AND 19TH JULY, 1934

ELLIOTT (H.M. INSPECTOR OF TAXES) *v.* BURN (J. H. & F. H.)[1]

Income Tax, Schedules A and D—Payments in consideration of right to withdraw support from surface lands by colliery workings—Income Tax Act, 1918 (8 *&* 9, *Geo.* V, *c.* 40), *Schedule A*, *No.* II, *Rule* 7.

The Respondents were the surface owners of lands, the minerals under which belonged to and were worked by a colliery company. The Respondents granted to the company full liberty, in working any mines or seams of coal under these lands, to withdraw support therefrom in consideration, inter alia, *of an annual certain rent and a tonnage rent. The Respondents received the rents from the company without deduction of Income Tax.*

The surface land was in the occupation of a farmer to whom it was let by the Respondents at a rack rent and was assessed to Income Tax under No. I *of Schedule A accordingly.*

The Crown contended that the Respondents were assessable in respect of the rents received from the colliery company, either under Rule 7 *of No.* II *of Schedule A, or under Case* III *or Case* VI *of Schedule D.*

Held, *that the Respondents were not assessable to Income Tax either under Rule* 7 *of No.* II *of Schedule A or under Schedule D on the rents received from the colliery company, since they arose from the Respondents' property in the lands themselves the liability in respect of which was exhausted by the assessment already made thereon under No.* I *of Schedule A.*

CASE

Stated by the Commissioners for the General Purposes of the Income Tax for the Division of Chester Ward, in the County of Durham, pursuant to Section 149 of the Income Tax Act, 1918, for the opinion of the High Court of Justice.

1. At a meeting of the General Commissioners for the Division of Chester Ward, held at the Town Hall, Gateshead, on Tuesday, the sixth day of October, 1931, Messrs. J. H. and F. H. Burn, of

[1] Reported (K.B. & C.A.) [1934] 1 K.B. 109; (H.L.) 50 T.L.R. 556.

32, Mosley Street, Newcastle upon Tyne, (hereinafter referred to as " the Respondents ") appealed against certain assessments made upon them under Schedule D of the Income Tax Acts for the years shown below and, alternatively, under Schedule A for the years 1924–25, 1925–26 and 1926–27, in respect of certain payments made to them under the circumstances hereinafter set out.

2. The assessments against which the Respondents appealed were as follows :—

For the year ending 5th April,	1924	...	£75
do.	1925	...	£155
do.	1926	...	£432
do.	1927	...	£526
do.	1928	...	£778
do.	1929	...	£288 10*s.* 0*d.*
do.	1930	...	£694

3. The following facts were admitted or proved :—

(*a*) The Respondents are the surface owners of certain lands at North Follonsby in the County of Durham. The minerals under the said lands belong to, and are worked by, Messrs. John Bowes and Partners, Limited, colliery owners.

(*b*) By an agreement dated the 19th day of December, 1906, a copy of which is annexed to this case and is marked " A "(1), and made between the Respondents of the one part and Messrs. John Bowes and Partners, Limited, of the other part, the Respondents granted to Messrs. John Bowes and Partners, Limited, the surface liberties required in the working of the coal subject to the conditions set out in that agreement.

(*c*) By a further agreement dated the 21st December, 1922, a copy of which is annexed to and forms part of this Case and is marked " B "(1), and made between the same parties, the Respondents, therein referred to as " the " lessors ", granted to the said John Bowes and Partners, Limited, therein referred to as " the lessees ", by clause 5 thereof " Full liberty in working any mines " or seams of coal which the lessees may for the time " being be entitled to work under the said lands of the " lessors at North Follonsby aforesaid (which lands are " hereinafter referred to as ' the said lands hereinbefore " ' described ') to withdraw from the said lands herein- " before described or any part thereof any support for " such lands whether vertical or lateral but subject as " to such parts of the said lands hereinbefore described " or any other lands as may be affected thereby or " subject thereto to the provisions of the Railway Clauses

(1) Not included in the present print.

" Consolidation Act 1845 and it is expressly declared " that nothing in these presents shall be deemed to " authorise the lessees to cause any damage or injury " to any lands adjacent to any of the said lands herein- " before described or any buildings railways works or " erections on such adjacent lands whether belonging to " the lessors or to any other person."

The consideration for the said grant as set out in clauses 7 and 8 of the said agreement is as follows :—

Clause 7. " Yielding and paying therefor the " yearly certain rent of £150 and so in proportion for " any less period than a year."

Clause 8. " And also yielding and paying yearly " the rent of 1½*d.* for every ton of coal worked by the " lessees from underneath the said lands hereinbefore " described."

These payments are the subject of the assessments in dispute.

It was also agreed by clauses 14, 15, 16 and 17 of the said agreement that any actual damage caused to crops, drains, pipes or other injury to the said lands referred to or to any buildings thereon should be compensated for in addition to the payment of the said certain and tonnage rents referred to in clauses 7 and 8 of the agreement. Also, by clause 18, the Respondents were indemnified against claims by third parties in respect of damage to adjoining lands. No such payments for actual damage were however included in the assessments under appeal.

Up to the date of the hearing of the appeal no sums had been expended by the Respondents in restoring the damage to lands caused by the colliery workings.

(*d*) The amounts paid on certain rent or tonnage under clauses 7 and 8 of the said agreement and received by the Respondents were :—

For the year ended 5th April,	1923	...	£75
do.	1924	...	£155
do.	1925	...	£432
do.	1926	...	£526
do.	1927	...	£778
do.	1928	...	£288 16*s.* 0*d.*
do.	1929	...	£694

The amounts had been paid to the Respondents in full without deducting Income Tax.

The surface of the said land is let by the Respondents and is in the occupation of a farmer at an annual rack rent of £296, and this is taxed under Schedule A accordingly.

4. It was contended on behalf of the Respondents, *inter alia*:

(1) that the Respondents were not in occupation of the said land;

(2) that if the said rents were profits arising from lands they were profits liable to deduction and not chargeable on the owner thereof;

(3) that Income Tax had already been charged under Schedule A of the Income Tax Act, 1918, on the full annual value of the said land and no further charge could be made under Schedule A in respect of the said land;

(4) that the said rents were not annual profits or gains in respect of any trade, profession, employment or vocation carried on by the Respondents;

(5) that if the said rents were not profits arising from lands they were annual payments made by virtue of a contract, *viz.*, the agreement dated the 21st day of December, 1922;

(6) that the assessments should be discharged.

The case of *Salisbury House Estate, Ltd.* v. *Fry*, 15 T.C. 266, was referred to.

Counsel on behalf of the Respondents agreed that the payments in question should be treated as payments of income and not capital.

5. It was contended by H.M. Inspector of Taxes, *inter alia*:

(1) that the payments in question were profits or gains chargeable to Income Tax under the Income Tax Acts;

(2) that the payments in question were not a distribution of profits to the owner of the soil or property from which the colliery owner was entitled to deduct Income Tax under Rule 5 of No. III of Schedule A;

(3) that the payments in question were not part of the annual value of the land assessed under No. I of Schedule A;

(4) that the payments in question were assessable either under Rule 7 of No. II of Schedule A, or under Case III or Case VI of Schedule D.

6. Having considered the evidence and arguments adduced before us, we held that the said rents were not liable to assessment under Rule 7 of No. II, Schedule A, or Case III or Case VI of Schedule D, and that the third contention submitted on behalf of the Respondents was correct and accordingly allowed the appeal and thereupon discharged the assessments.

7. The Appellant, immediately upon the determination of the appeal, declared to us his dissatisfaction therewith as being erroneous in point of law and in due course required us to state a

Case for the opinion of the High Court pursuant to the Income Tax Act, 1918, Section 149, which Case we have stated and do sign accordingly.

Dated this 30th day of September, 1932.

PHILIP KIRKUP,
E. H. KIRKUP, } General Commissioners.

D. SIDNEY DAVIES.

The case came before Finlay, *J.*, in the King's Bench Division on the 30th and 31st January, 1933, and on the latter date judgment was given in favour of the Crown, with costs.

The Attorney-General (Sir Thomas Inskip, K.C.) and Mr. R. P. Hills appeared as Counsel for the Crown and Mr. A. M. Latter, K.C., and Mr. J. Charlesworth for Messrs. J. H. & F. H. Burn.

JUDGMENT

Finlay, J.—This case raises a question, which, I think, is not free from difficulty, under No. II of Schedule A in the Income Tax Act of 1918. The Rule actually in question is Rule 7. Nothing turns upon a transfer of parts of Schedule A to Schedule D. The point may be considered as a point arising simply upon Rule 7 of No. II of Schedule A. The way in which the matter arises is this. It is a Case stated by the Commissioners for the Division of Chester Ward in the County of Durham, and it relates to an appeal which was made to them by a firm, Messrs. J. H. and F. H. Burn of Newcastle-upon-Tyne, against certain assessments made upon them for certain years. Nothing turns upon either the years or the exact figures; but the years were, in fact, from the year 1924 down to 1930 and the assessments were in various sums ranging from £75 up to £778. The facts upon which the matter turns were these: Messrs. Burn, now Respondents, are surface owners of certain lands at a place called North Follonsby in the County of Durham. The minerals under those lands are the property of, and are worked by, Messrs. John Bowes and Partners, Limited, who are colliery owners. There was an agreement in 1906 whereby certain surface liberties were granted to Messrs. John Bowes and Partners, Limited, but the agreement upon which the matter before me turns is an agreement attached to the Case, marked " B ", and by it the Respondents granted to John Bowes and Partners, Limited, the owners of the minerals, full liberty, in working any mines or seams of coal which the lessees may for the time being be entitled to work under the said lands, to withdraw from the said lands thereinafter described or any part thereof any support for such lands, whether vertical or lateral—with some qualifications which I need not deal with. In consideration of the grant of that right there was to

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be a yearly rent of £150 and also a rent of three-half-pence for every ton of coal worked by the lessees, that is, Messrs. Bowes and Partners, Limited, from under the lands in question. Now it is upon that agreement that the question before me turns, and the point is whether the Crown succeed in bringing the sums admittedly received each year in respect of the grant of the right described in the agreement within Rule 7, which I will read in one moment. There were further clauses 14, 15, 16 and 17 in the said agreement. I do not think it is necessary to read them or to refer to them in detail, but they relate to actual damage caused to crops or drains or pipes or other injuries of that character to the lands.

In these circumstances, the question which arises, and it is a question, as I have already indicated, not free from difficulty, is whether the Crown can charge under this Rule 7. Rule 7 is contained in No. II of Schedule A, and the heading is as follows: "Rules for estimating the annual value of certain Lands, Tene- "ments, Hereditaments or Heritages which are not to be charged "according to the preceding General Rule, and for determining "the person chargeable." Then it deals with certain matters: tithes; dues in right of the church or by endowment; manors and other royalties and other dues and services of that sort; fines received in consideration of any demise of lands or tenements. Then we come to this Rule 7: "In the case of all other profits "not before enumerated (other than profits liable to deduction in "pursuance of rules 1 and 4 of No. VIII of this Schedule) arising "from lands, tenements, hereditaments or heritages not being in "the actual possession or occupation of the person to be charged, "the annual value shall be understood to be the average amount "for one year of the profits of the number of years which, on "the statement of the person to be charged, appears to the com- "missioners to be fair and equitable." There is one additional fact which it is proper to mention, and that is that the Respondents, being the owners of the surface, had let the surface to a farmer, and that the farmer paid, in respect of that letting, what is admitted to be a rack rent, that is, full rent, for the lease of the surface of the land. Income Tax was charged in the ordinary course on the occupier and then deducted by him from his rent; and that Income Tax, under the General Rule of Schedule A, was thus charged upon the Respondents and charged on the annual value, that is, in this case, the amount of the annual rent. These lands were let at a rack rent and, therefore, what for convenience one may call the ordinary Schedule A assessment—as distinguished from the rather special matters to be dealt with under No. II and under No. III—was admittedly and correctly made, and made on the proper annual value, measured by the rack rent.

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The Crown say that this is exactly within the words of Rule 7. They say that here there is a profit " not before enumerated ", that is, it is a profit arising from lands, tenements, hereditaments or heritages not being in the actual possession or occupation of the person to be charged, and they therefore say that they bring themselves exactly within the terms of the Rule. There is no doubt at all, of course, that the Crown have to bring themselves within the terms of the Rule. I think it is true to say that in this case there is no apparent reason why tax could not be levied on these sums. They were annual sums, and they were annual sums arising year by year to the Respondents, by reason of the circumstances that they had got something which they were in a position to turn to advantage, and there is, as far as I can see, no reason why they should not pay tax on this just as much as on any other source of income that comes to them; but I entirely assent to the view which was put so forcibly by Mr. Latter when he said that the Crown had to bring the subject within the actual words of some charging Section imposing taxation, and that is well illustrated by a case, not I think with any very direct bearing upon the present case, but a case to which my attention was very properly called, and to which reference was made both by Mr. Latter in his argument and by Mr. Hills in his reply—the case of the *Forth Conservancy Commissioners*(1). In that case, there were two cases and the first case arose in this way: the Crown sought to impose a tax in respect of income derived by the Commissioners from dues paid by vessels using the Firth of Forth, or part of the Firth of Forth, and they sought to levy that tax under Schedule A. It was held that that failed, and failed because, though these dues were income, they were not income arising out of the land, and, therefore, there was no taxation under Schedule A. Thereupon the Crown said that these dues, the sums received in respect of these dues, were a proper subject matter of assessment under Schedule D; and, on that occasion, the Crown succeeded because, not only had they shown that there was income, but they had shown that there was income which was caught by the Schedule which, in the second case they were alleging was the appropriate Schedule. Now, as I have said, it looks, at first sight, as if this, being income—and I think it clearly is income—was caught by the exact words of Rule No. 7. But Mr. Latter urged upon me an argument that certainly does require careful attention. I shall not put it as well as he did, but the substance of what he said was this: " If you look at this Rule No. II you will see that " these are all in themselves properties; they are lands, tenements, " hereditaments or heritages; the title shows it; and the various " things, the tithes, the dues and so on are all hereditaments.

(1) 14 T.C. 709 and 16 T.C. 103.

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" It may well be that some of them, at all events, are incorporeal " hereditaments, but hereditaments they are, and you want," —this was the argument—" in order that there may be further " taxation levied under Schedule A, in addition to the ordinary " Schedule A taxation "—as I called it earlier—" to have some " other property which attracts the tax. It will not do, if there " is only one property, to say : ' Here we have got the full annual " ' value taxed, but there is something more.' You are getting " something more out of that property." The argument was : " That will not do : you must have some separate property and " then, and then only, can you get additional taxation under " Schedule A." That argument suggests, of course, a reference to the recent and much discussed case in the House of Lords, the *Salisbury House*(1) case. I am not going into that case again, but, in substance, what was there decided was that the full measure of taxation having been levied in respect of the annual value, you could not get a further tax under Schedule D—and that was what was there suggested—in respect of the amount by which the rents received exceeded the annual value. The Schedule A tax is not a tax on rents, as it has been put by more than one great authority in that very case. It may be, and Mr. Hills suggested it, that some further consideration may need to be given to the precise bearing of that statement, which is certainly true, because it was made by more than one of the Lords; but, however that may be, the actual decision in the *Salisbury House* case amounts really only to this, that when you have imposed the full tax on the annual value, you cannot then impose a tax under Schedule D by reason of the circumstance that, for one reason or another (and it does not seem to matter what the reason is), the rents received exceed the annual value as measured for the purposes of Schedule A. That case was very naturally referred to before the Commissioners and before me, but it does not seem to me to have any direct bearing upon the problem that I have to consider. Nearer the present case, though again I think distinguishable, and I think successfully distinguished by Mr. Latter, is the case of *Hill* v. *Gregory*, [1912] 2 K.B. 61(2). That shows quite clearly that the sum received—£60 a year I think it was there—in respect of a right to work minerals which nobody was working and of which no one was in occupation, was taxable under this very Rule, taxable in the hands of the recipient. The case, as I have said, was, I think, successfully distinguished by Mr. Latter on this ground. The whole question is whether it is a distinction which makes the difference. Mr. Latter rightly pointed out that there there was most undoubtedly

(1) Salisbury House Estate, Ltd. *v.* Fry, 15 T.C. 266.
(2) 6 T.C. 39.

(Finlay, J.)

the other property; there were the actual minerals there and, therefore, he said that that case did not really govern the present case. I agree that there was that distinction, but, nevertheless, I think that great weight attaches to a passage in the judgment of the great authority, Mr. Justice Hamilton, as he then was, who delivered judgment in that case. It is true, of course, that he was dealing with the case before him, and was not anticipating, and could not possibly anticipate, the sort of questions which have developed in such cases as the *Salisbury House* case and other cases, but, none the less, his words do appear to me to afford direct support for the argument of the Crown here. In the passage I refer to the learned judge was dealing with the argument of the Crown; he also stated the argument of the Appellant, and he, in substance, accepted the argument of the Crown. I think that the great authority of Mr. Justice Hamilton must be considered to lie within this passage(1): "It is said that "those general words, the object of which is to bring within the "ambit of Case No. II everything that may be differentiated from "rent in the ordinary sense of the term, and yet is a profit arising "from land, varying in amount according to changing circum-"stances, and at the same time arising from the land and not "from some business carried on upon the land . . . . are exactly "appropriate to include this particular case." Now here it seems to me that what Mr. Justice Hamilton there said is really applicable. Here you get something which may be differentiated from rent in the ordinary sense of the term; that is clear; the rack rent in the ordinary sense of the term is the rent paid by the farmer. Mr. Justice Hamilton goes on: "and yet is a profit "arising from land." This, I think, is a profit arising from land, and it is necessary for me to say, though quite shortly, why I think so.

The position here is this: the Respondents were the owners of the surface and, as an incident of their ownership, they had the right to support—it has often been called, and I think called by high authorities an easement—but it does not really matter very much whether one calls it an easement, or not; it does not seem to me to matter very much whether it is an incorporeal hereditament, though, if necessary, I should be disposed to think that Mr. Hills was right when he said that the owner may be regarded as having carved out of his estate what is really in the nature of an incorporeal hereditament. But, however exactly these refinements may stand, the position seems to me to be sufficiently clear, and it is this. These people were the owners of the land. As owners, and as one of the incidents of ownership, they had a valuable right, namely, the right to have their land supported by the minerals lying under it. They choose to turn that right to account; they

(1) 6 T.C. at p. 46.

(Finlay, J.)

choose to give some of it away and to give it away in return for an annual payment. It seems to me that that is within the fair meaning of this Rule 7, and I do attach weight (appreciating as I do the distinction which Mr. Latter quite correctly drew) to the passage in Mr. Justice Hamilton's judgment in the case of *Hill* v. *Gregory*(1). Many illustrations may be put in connection with the substance of the case. I suggested, I think, earlier in the argument, a possible illustration based upon tolls, and that was to some extent developed, I think, both by the Attorney-General and by Mr. Hills. Numerous illustrations occur to one of various matters for which charges might be made, charges to certain specific people for rights to walk across the ground and things of that sort. If annual sums are made in these sorts of ways, it seems to me that they come fairly within the meaning of this seventh Rule; it seems to me that they are " profits not before enumerated, " arising from the lands, tenements and hereditaments ", and I am unable to accept the view which Mr. Latter so forcibly urged, that you must have, so to speak, a completely new property, something different from the property which was charged to the general Schedule A assessment. It seems to me that that is not right. It seems to me that if you get something—and I do not think it matters whether you call it an incorporeal hereditament or what you call it—but that, if you get something arising out of the land, something that may be differentiated from rent in the ordinary sense of the term, that is, the rent which goes to measure the ordinary Schedule A assessment—if you get something of that sort arising out of the land and arising because the owner of the land chooses to put to profitable use an incident of his ownership, something which he has got because he is the owner of the land, something which is of value to him—whether you call it an easement or anything else, I do not think really matters—if you get that, it seems to me that then the case is brought within the terms of Rule 7. I cannot entertain any doubt, as I indicated at the beginning, that this is income, but I have come to the conclusion, not without hesitation, that Mr. Latter's argument is not right. If I had thought it right, I should not have hesitated to give effect to it, because it is vital, not merely that the Crown should say : " Here is income which ought to be " charged," but that they should also point to the charging Section which hits the case. I think here that they do successfully point to this charging Section and, therefore, the Commissioners, having arrived at an opposite conclusion, I ought just to refer to what they said, out of respect to them; it was this : " Having considered the evidence and arguments adduced before " us we held that the said rents were not liable to assessment " under Rule 7 of No. II Schedule A, or Case III or Case VI of

(1) 6 T.C. at p. 46.

(Finlay, J.)

" Schedule D "—I need not trouble about those—" and that the " third contention submitted on behalf of the Respondents was " correct and, accordingly, allowed the appeal and thereupon " discharged the assessments." The third contention was that " Income Tax had already been charged under Schedule A of the " Income Tax Act, 1918, on the full annual value of the said land " and no further charge could be made under Schedule A in respect " of the said land." The Commissioners accepted that third contention and, for the reasons which I have tried to express, I am unable to think that correct. On the ground that, though Income Tax under Schedule A had already been levied on the full annual value of the land, yet a further charge under this Rule 7 could be levied, I decide this case in favour of the Crown.

The Attorney-General.—The appeal will be allowed with costs, my Lord?

Finlay, J.—Yes. The assessment, of course, would be under Schedule D when Schedule A was transferred to Schedule D.

Mr. Hills.—Yes, my Lord; that is the point.

Finlay, J.—The Attorney-General and Mr. Latter are completely agreed about that. You put it under Rule 7 but my judgment will take effect under Schedule D as from the date Rule 7 was transferred to Schedule D.

Mr. Latter.—The case has been decided and argued only on the ground of Rule 7.

Finlay, J.—Therefore, when Rule 7 gets into another Schedule, of course, inevitably the tax goes, but it is under Schedule D only because Rule 7 of No. II was transferred to Schedule D.

Mr. Latter.—Since 1927?

Finlay, J.—Yes, it will be under Schedule D since 1927, but I have based my judgment entirely upon Schedule A, omitting the point which you completely agreed with the Attorney-General.

Mr. Latter.—The only point I was anxious about was that it has been argued under Schedule A.

Finlay, J.—Absolutely, and I should not have decided that it was under Schedule D for the later years on any ground, except that that part of Schedule A had then been transferred to Schedule D.

The Attorney-General.—I so argued it.

Mr. Latter.—Yes; I only wanted to make the position quite clear.

Finlay, J.—That is quite clear.

An appeal having been entered against the decision in the King's Bench Division, the case came before the Court of Appeal (Lord Hanworth, *M.R.*, and Lawrence and Slesser, *L.JJ.*) on the 7th July, 1933, when judgment was given unanimously against the Crown, with costs, reversing the decision of the Court below.

Mr. A. M. Latter, K.C., and Mr. J. Charlesworth appeared as Counsel for Messrs. J. H. & F. H. Burn and the Attorney-General (Sir Thomas Inskip, K.C.) and Mr. R. P. Hills for the Crown.

JUDGMENT

Lord Hanworth, M.R.—We need not trouble you, Mr. Latter. This case raises an interesting point, but it is one which is, to my mind, completely answered by the facts of the case. I should be prepared to assent to, I think, almost all, if not quite all, of the arguments that have been presented for the Crown, if they were in any way applicable to the facts of the case. I must, therefore, state the facts as I understand them. The Respondents, who are now the Appellants, Messrs. J. H. and F. H. Burn, are the surface owners of certain lands at North Follonsby, in the County of Durham. There are minerals under that land, and those minerals under that land belong to and are worked by Messrs. John Bowes and Partners. Limited, colliery owners; in other words, Messrs. J. H. and F. H. Burn had the surface and the surface only of these lands; they had not any interest of any sort in the minerals. We are told in the Case that the surface of the land, which does belong to Messrs. J. H. and F. H. Burn, is let by them and is in the occupation of a farmer at an annual rack rent of £296, and this is taxed under Schedule A accordingly; so that, so far as the surface goes, which is owned by these present Appellants, that surface has been handed over to the occupation of the farmer, and Schedule A tax has been paid in respect of the ownership of the surface of the land.

It is plain beyond doubt that you can have many items of property in lands which are not occupational; you may have a number of rights in relation to the lands, such as are indicated in No. II of Schedule A, which we have been discussing; you may find that there are tithes; there are royalties in the case of manors; you can have fines received in consideration of any demise of lands, or the like, based upon the fact that those are paid independently of the actual occupation of the land. But this sum which has been paid in the course of these years is a sum which arises under an agreement, of which paragraph 3 is: "And whereas the lessors claim"—the lessors being Messrs. J. H. and F. H. Burn—"that the lessees are not entitled to work any of the said mines and "seams of coal with or under the said lands or adjacent thereto in such "manner as to let down the surface thereof and that the lessees are "liable to pay damages to them for injury already caused to the

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" said lands or some part thereof by the letting down of such surface " and it has been agreed between the lessors and the lessees that the " lessors shall grant to the lessees liberty in working the said mines and " seams of coal to let down such surface upon the terms hereinafter " appearing." Therefore, full liberty in working the mines and seams of coal is granted to the lessees on the terms of certain payments. What is that right that has been given ? It is in no sense analogous to a licence to use a pathway, a licence to lay down a tramway over the surface of the land, and take a toll in respect of the things that pass over it ; it is in no sense a licence to make use of some of the advantages to which the land as land can be put. There is, on the part of the owner of the surface, a right to protect his land against an invasion of that surface by letting it down, and, as has been pointed out—and one goes back to the origin of the subject matter of this agreement—it is a right to claim that the owner of the surface is entitled to support, not by means of an easement acquired—he might have to acquire the easement if he put a house upon it—but to support as inherent to the surface. I am looking at *Humphries* v. *Brogden* in 12 A. & E. (Q.B.) at page 746, and in that case it was said by Lord Campbell : " If the owner of the entirety is " supposed to have alienated the surface, reserving the minerals, he " cannot be presumed to have reserved to himself, in derogation of his " grant, the power of removing all the minerals without leaving a " support for the surface ; and, if he is supposed to have alienated " the minerals, reserving the surface, he cannot be presumed to " have parted with the right to that support for the surface by the " minerals which it had ever before enjoyed."

Considered as land or surface there is no question that this land has paid its tax ; it has been taxed under Schedule A. The owner who has demised the land to the occupier of the surface is minded to make an agreement whereby he says : " I will not take proceedings " against you for an injunction to prevent you, the worker of the " minerals, over which I have no right, from working the minerals " in some way which you may wish to do." The Attorney-General said that the owner of the surface of the land had a right to prevent trespasses. So he has, a power—I do not call it a right ; he has a power to prevent trespasses being exercised against or upon his land. That is an inherent right and, in the case of the right to support, it has been established, in the case to which our attention was called by Mr. Latter, *Bonomi* v. *Backhouse*(1), that he has that right, but that the right of action accrues as and when and not until the surface of the land is actually injured. What is the nature of that right ? Let us see whether or not the agreement not to take proceedings by way of an injunction to enforce a right if and when that right should cause damage is a matter which is brought within the Income Tax Acts. By Section 1 there is a tax

(1) 4 L.T. 754.

(Lord Hanworth, M.R.)

given under certain circumstances which are fulfilled. The Section enacts that Income Tax shall be charged at a certain rate for that year in respect of " all property, profits or gains respectively described " or comprised in the schedules . . . and in accordance with the " rules respectively applicable to those Schedules." Very well, let us go to the Schedules, let us look at the property, profits or gains, which are comprised in the Schedules. Schedule A says : " Tax . . . " shall be charged in respect of the property in all lands, tenements, " hereditaments, and heritages in the United Kingdom, for every " twenty shillings of the annual value thereof." That is the charge. Then the Rules that are applicable give one a Rule for estimating the annual value, which is No. I. No. II gives one the " Rules for " estimating the annual value of certain Lands, Tenements, ' Hereditaments or Heritages which are not to be charged according " to the preceding General Rule and for determining the person " chargeable." I quite agree that No. II refers to a number of interests in land which are not occupational. It is said that Rule 7 will sweep in this sum which is payable to the owner of the surface, to my mind, entirely divorced from the land, and these are the words : " In the case of all other profits not before enumerated (other than " profits liable to deduction in pursuance of rules 1 and 4 of No. VIII " of this Schedule) arising from lands, tenements, hereditaments or " heritages not being in the actual possession or occupation . . ." Is this within a reasonable interpretation of the words, a profit arising from the lands, tenements or hereditaments ? Never mind whether it is occupational or not ; can it really be said to be a profit which arises out of the land, it being in truth and in fact a sum which is given to the owner of the land to deter him from exercising the protective rights which he has got in favour of the land ? It does not arise out of any user of the land ; it is occasioned by reason of the misuser of the mines which let down the surface ; it is a payment in respect of the value of the surface becoming less ; it is a sum paid to the landowner to restrain his hand from exercising a protective power. The land itself has already paid tax ; it has suffered under Schedule A, and this seems to be an independent agreement, apart from any user of the land, apart from any profit arising from the land ; it is, no doubt, a sum quantified by the amount of the minerals which are taken by the owners of the minerals from their mines in which these Appellants have no part or lot, for they do not own the minerals—that is how it is quantified—but in truth and in effect it is a sum to deter and to stay the hands of these owners of the surface which has duly paid its tax under Schedule A.

It comes back to this : I think the Respondents to this appeal have overlooked the fact that you cannot bring every single payment that is made of all kinds and sorts within Schedule A. You must show the payment has been made in respect of property in lands, tenements, hereditaments or heritages, and that it is in respect of a

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profit which arises from the lands. From the facts of this case, it appears to me that those words are at the very outset of the case not satisfied, and, while I do not desire to dispute and certainly not to confute a great deal of the argument presented for the Crown, it seems to me the Crown have not complied with the onus which initially lies upon them to say that the money received under this agreement was something that fell within even the widest interpretation of Schedule A and the Rules for the elucidation of its terms. On these grounds, the appeal must be allowed, with costs here and below.

Lawrence, L.J.—The question in this case is whether or not the rent payable under the agreement of the 21st December, 1922, comes within the provisions of Rule 7 of No. II of Schedule A as being "other profits not before enumerated . . . arising from lands, tenements, hereditaments or heritages." By the agreement, the owner of the surface agreed to grant to the colliery company, the owners of the underlying minerals, full liberty to work those minerals without leaving support for the surface and, in consideration of the liberty so granted, the grantees agreed to pay a yearly certain rent of £150 and a further rent of 1½*d.* for every ton of coal worked under the surface, the certain rent merging in the 1½*d.* rent. The rents so payable by the grantees are not, in my opinion, profits or rents arising from the land of the grantors, that is to say, they are not profits which are yielded by any user of his land on the part of the grantees; they are payments, as the Master of the Rolls has said, agreed to be made by persons who neither have nor take any estate or interest in or over the land of the grantors for the privilege of being able to work their own minerals without let or hindrance, notwithstanding that they may thereby do damage to the land of the grantors. Such payments do not, in my opinion, come within any of the heads of receipts enumerated in No. II of Schedule A. In my judgment, the tax assessed and paid under No. I of Schedule A is, in the circumstances of this case, the only tax which is payable in respect of the property in the land in question, including in such property the natural right of support incident to it, and that no further tax is payable under Schedule A in respect of the profits or other receipts made or received by the owner in respect of that land. For these reasons, I agree that the appeal succeeds.

Slesser, L.J.—I agree that this appeal must be allowed for the reasons stated by the Master of the Rolls. I have nothing to add.

The Crown having appealed against the decision in the Court of Appeal, the case came before the House of Lords (Lords Blanesburgh, Warrington of Clyffe, Atkin, Thankerton and Wright) on the 7th, 8th, 11th and 12th June, 1934, when judgment was

reserved. On the 19th July, 1934, judgment was given unanimously against the Crown, with costs, confirming the decision of the Court below.

The Attorney-General (Sir Thomas Inskip, K.C.) and Mr. R. P. Hills appeared as Counsel for the Crown and Mr. A. M. Latter, K.C., and Mr. J. Charlesworth for Messrs. J. H. & F. H. Burn.

JUDGMENT

Lord Warrington of Clyffe.—My Lords, this is an appeal from an order of the Court of Appeal, dated the 7th July, 1933, allowing an appeal by the Respondents from an order of the King's Bench Division, dated the 31st January, 1933, whereby an appeal by the Crown upon a Case stated by the Commissioners for the General Purposes of the Income Tax for the Chester Ward, in the County of Durham, was allowed and the decision of the Commissioners was reversed.

The Respondents are the owners of the surface of certain land at North Follonsby in the County of Durham. The minerals under the land are owned and worked by John Bowes and Partners, Limited, hereinafter called the colliery company. The surface of the land has at all material times been let by the Respondents to a farming tenant at a rack rent of £296. On the basis of that rent, as being under No. I of Schedule A the annual value of the lands, the tenant as occupier has been assessed to tax under that Schedule.

The claim on the part of the Crown, which has been rejected by the General Commissioners and by the Court of Appeal, is in respect of certain annual payments payable under an agreement dated the 21st December, 1922, between the Respondents, therein called the lessors, of the one part, and the colliery company, therein called the lessees, of the other part. The agreement contained recitals to the effect that the lessors claimed that the lessees were not entitled to work any of the mines under the lands or adjacent thereto in such a manner as to let down the surface of the lands, and that the lessees were liable to pay damages to the lessors for injury already caused to the lands by the letting down of the surface and it had been agreed that the lessors should grant to the lessees (clause 3) : " Liberty in working the said mines and " seams of coal to let down such surface upon the terms hereinafter " appearing."

It was then witnessed that, in pursuance of the said agreement and in consideration of the rent thereinafter reserved and of the covenants by the lessees thereinafter contained, the lessors thereby demised unto the lessees : " (5) Full liberty in working any mines " or seams of coal which the lessees may for the time being be " entitled to work under the said lands of the lessors at North " Follonsby aforesaid (which lands are hereinafter referred to as

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" ' the said lands hereinbefore described ') to withdraw from the " said lands hereinbefore described or any part thereof any support " for such lands whether vertical or lateral but subject as to such " parts of the said lands hereinbefore described or any other lands " as may be affected thereby or subject thereto to the provisions of " the Railway Clauses Consolidation Act 1845 and it is expressly " declared that nothing in these presents shall be deemed to " authorise the lessees to cause any damage or injury to any lands " adjacent to any of the said lands hereinbefore described or any " buildings railways works or erections on such adjacent lands " whether belonging to the lessors or to any other person. (6) To " hold the liberties granted unto the lessees from the 1st day of " May 1922 until the 30th day of October 1948 provided the lease " dated the 19th day of December 1906 from the lessors to the " lessees of surface liberties in connection with the said lands " hereinbefore described shall so long continue and subject and " without prejudice to any rights of support to which any third " party may now be entitled as the owner of any adjoining land. " (7) Yielding and paying therefor the yearly certain rent of £150 " or so in proportion for any less period than a year. (8) And also " yielding and paying yearly the rent of 1½*d.* for every ton of coal " worked by the lessees from underneath the said lands herein- " before described." There then follow clauses as to short workings and as to the details of the payment of the several rents and other matters not relevant to the construction of the clauses quoted above.

The agreement then contains clauses providing for the payment (clause 14) to the lessors or their tenants of " full compensation for " all damage which has already been caused or arisen or may " hereafter be caused or arise by or in consequence of any letting " down of the surface of such lands to any drains pipes crops " stock cattle or other things for the time being thereon by reason " or in consequence of any past or future underground operations " of the lessees under the said lands hereinbefore described or else- " where whether the subsidence of such lands causing such damage " arose previous to or after the commencement of any tenancy " whether present or future of any of the said tenants." The rest of this clause need not be quoted for the present purpose.

Clause 15 however is important; it is as follows: " On the " expiration or sooner determination of the said terms or within any " time within 3 years thereafter or if so required by the lessors at " any time previous thereto to pay full compensation to the lessors " for any injury which has already been caused or may hereafter " be caused to any lands of the lessors by any past or future work- " ing of the lessees whether under the said lands hereinbefore " demised or any adjoining lands." The word " demised " must, I think, be a misprint or a clerical error for " described ". No lands were " hereinbefore demised ".

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By a further lease, dated the 20th February, 1931, between the same parties, the term granted by the preceding instrument was extended to the 30th October, 1970.

I defer any remarks on the construction and effect of the instrument of the 21st December, 1922, until I have called attention to the material provisions of the Income Tax Act, 1918.

The charge of Income Tax is effected by Section 1 of the Income Tax Act, 1918: " Where any Act enacts that income tax shall be " charged for any year at any rate, the tax at that rate shall be " charged for that year in respect of all property, profits or gains " respectively described or comprised in the schedules marked A, " B, C, D, and E, contained in the First Schedule to this Act and " in accordance with the Rules respectively applicable to those " Schedules." The only Schedule which deals with the charge in respect of " property " as distinct from " profits or gains " is Schedule A, and that Schedule begins with the statement that " tax under Schedule A shall be charged in respect of the property " in all lands, tenements, hereditaments, and heritages in the " United Kingdom, for every twenty shillings of the annual value " thereof." The point is that in order that the tax may be charged you must find something falling within the description of " lands, " tenements, hereditaments, and heritages " capable of being the property of some person.

There follows a series of Rules under Nos. I, II and III directed to the estimation of the annual value of particular descriptions of lands, tenements and hereditaments, and in the case of No. II for determining the person chargeable. No. I applies to all lands, tenements, hereditaments or heritages capable of actual occupation of whatever nature and for whatever purpose occupied or enjoyed, and of whatever value (except the properties mentioned in No. II and No. III of the Schedule). The annual value is to be understood to be the rack rent at which they are actually let if there be one, or, if not let at a fixed rack rent, then the rack rent at which they are worth to be let by the year.

The main arguments in this House on both sides were devoted to the question whether the case falls within Rule 7 of No. II of Schedule A, and I accordingly propose to state, as shortly as I can, the terms and the effects of No. II. I do not forget that, by Section 28 of the Finance Act, 1926, it is provided that Income Tax in respect of the property in the lands, tenements, hereditaments or heritages to which the Rules of No. II of Schedule A apply shall cease to be chargeable under Schedule A and shall become chargeable under Schedule D, but it is common ground that this transfer does not affect the questions in issue in this appeal, and I propose, therefore, to deal with the matter as if this change had not been made.

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No. II is thus described: "Rules for estimating the annual "value of certain Lands, Tenements, Hereditaments or Heritages "which are not to be charged according to the preceding General "Rule, and for determining the person chargeable." There follows a series of Rules enumerating the hereditaments to which this general Rule is to apply. The first three Rules relate: (1) to such hereditaments as tithes in kind; (2) payments in right of the Church or by endowment or in lieu of tithes and teinds in Scotland; and (3) tithes arising from lands if compounded for, and rents and other money payments in lieu of tithes arising from lands (except rent charges confirmed under the Tithe Act, 1836). By Rule 4 these are all to be assessed and charged on the person entitled to the tithes or payments, or his lessee or tenant, agent or factor. Rule 5 relates to manorial dues and casual profits. These are to be charged on the lord of the manor or the person renting the same. Rule 6 deals with fines received in consideration of a demise of land or tenements and the tax is to be assessed and charged on the receiver of the fines, with a proviso protecting fines applied as productive capital. Putting aside Rule 6, which stands by itself, it is a common feature of all the subjects of taxation mentioned in these Rules that they are all properly called "hereditaments or "heritages", but, as such, they are separate from the land itself from which they arise and that land is not necessarily in the actual possession or occupation of the person to be charged.

I now come to Rule 7 itself. It is in the following terms: "In the case of all other profits not before enumerated (other than "profits liable to deduction in pursuance of rules 1 and 4 of "No. VIII of this Schedule) arising from lands, tenements, "hereditaments or heritages not being in the actual possession or "occupation of the person to be charged, the annual value shall "be understood to be the average amount for one year of the "profits of the number of years which, on the statement of the "person to be charged, appears to the commissioners to be fair "and equitable. Tax shall be assessed and charged on the "receiver of such profits or on the persons entitled thereto." "Profits liable to deduction in pursuance of Rules 1 and 4 of "No. VIII" are rent payable to a landlord from which the tenant occupier may deduct the tax paid by him and annuities payable by an owner of land from which he may deduct the tax relating thereto. This exception throws no light on the construction of the Rule.

The Crown contends that the rents payable under the lease of December, 1922, are profits comprised in Rule 7 of No. II of Schedule A. In my opinion, before the Crown can succeed, it must establish that such alleged profits arise from some hereditament, not being the lands themselves the subject of taxation under Schedule A, for these last-mentioned lands are in the actual possession and occupation either of the owner or of his tenant.

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In a sense, they arise from the right of support, for it is the possession of this right which enabled the Respondents to obtain the payments in question. But it is now thoroughly well settled, and it is unnecessary to refer to specific authorities in support of the proposition, that the right of the surface owner to support of that surface by subjacent soil is not an easement, but is a natural incident to the land itself. If, therefore, the payments in question are to be regarded as arising from the right of support, they arise from the ownership of the land itself and would not come within Rule 7 of No. II, but within the General Rule of No. I and would be covered by the assessment on the annual value under that Rule.

Then the Attorney-General insists that they should be treated as arising from the separate hereditament consisting of an easement alleged to be vested in the colliery company by virtue of the lease of 1922, the alleged easement being a right to let down the surface in the working of their mines without interference on the part of the surface owners. The answer to this seems to me to be twofold. In the first place, in my opinion, on the true construction of the lease, no such right was, in fact, conferred upon the colliery company, and, in the second place, such a right, if conferred, would be a detriment to the owners of the surface, and I cannot see how sums of money received as the consideration for granting the right to inflict that detriment can be profits or gains arising to the owners of the surface from such right itself.

The first answer, however, requires further consideration. I need not repeat the terms of the lease which are sufficiently set forth above. The lease gives to the colliery company, for a limited and uncertain period, liberty, in working any subjacent coal which they were entitled to work, to withdraw from the lands of the Respondents any support for such lands. This, I think, merely means that the Respondents during the term will not seek either to recover damages for nuisance or an injunction restraining the colliery company from committing such a nuisance, but there is no actual surrender of the right of support itself. That this is so is, I think, made plain by the provisions of clauses 14 and 15 as to compensation, for it is only on the assumption that the right of support continues to exist, though its immediate assertion may be controlled, that any claim to compensation could possibly arise.

On the whole, then, I am of opinion that the claim on the part of the Crown that the payments in question constitute profits arising from lands chargeable under Schedule A, as being profits comprised in Rule 7 of No. II of Schedule A, fails. In strictness, this, in terms, only applies to the payments prior to 1927–28, but the same result follows as to the subsequent payments because it is common ground that the legal position is not altered by the transfer of the Rule to Schedule D under the Act of 1926.

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So far, if at all, as the payments represent a profit of the Respondents, it comes to them in respect of their property in the lands themselves. Tax in respect of this property has been assessed on the annual value of the lands as ascertained under the General Rule of No. I and this assessment covers the present claim. It follows, on the authority of the *Salisbury House* case, 15 T.C. 266, that the Crown's alternative claim under Schedule D also fails.

In my opinion, the appeal should be dismissed with costs.

My Lords, I am asked to say that my noble and learned friends **Lord Blanesburgh** and **Lord Thankerton** concur in this opinion.

Lord Wright.—My Lords, I also agree.

Lord Atkin.—My Lords, I also agree.

Questions put:

That the Order appealed from be reversed.

The Not Contents have it.

That the Order appealed from be affirmed and this appeal be dismissed with costs.

The Contents have it.

[Solicitors :—Solicitor of Inland Revenue; Gregory, Rowcliffe & Co., for Cooper & Jackson, Newcastle-upon-Tyne.]

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