1949
April 27
Aug. 4

BETWEEN:

WILLIAM JOHN McDONOUGH,.....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE, ... } RESPONDENT.

Revenue—Income—Income tax—Income War Tax Act, R.S.C. 1927, c. 97, s. 3—Taxable income—Income or capital gain—Profits acquired in promotion of amalgamation of several companies—Profits gained through resale of shares acquired under option are assessable for income tax—Sale of shares the essential feature of business carried on by appellant—Isolated transaction may be a trading or business one—Appeal dismissed.

Appellant effected an amalgamation of several mining companies under one new company after having found a purchaser for an initial block of shares which the appellant contracted to take up from the new company. By successive option agreements the appellant took up further blocks of shares, in each case having previously completed arrangements for the resale thereof at a profit.

The appellant was assessed for income tax on the profit made by him on the several sales of the company's stock. He appealed from such assessment to this Court. The Court found that the operations carried on by the appellant were of the same kind and carried on in the same way as those which are characteristic of transactions normally carried on by a mining promoter and underwriter. The purchase and resale of the shares was not unconnected with the business of a mine promoter but was an essential part thereof.

Held: That the sale of the shares which gave rise to the profits now assessed to the appellant was not merely incidental to but in reality was the essential feature of the whole business carried on by the appellant; it was a gain made in an operation of business in carrying out a scheme for profit making and, therefore, properly assessable for income tax.

2. That the mere fact that a transaction is an isolated one does not exclude it from the category of trading or business transactions of such a nature as to attract income tax to the profit therefrom.

APPEAL under the Income War Tax Act.

The appeal was heard before the Honourable Mr. Justice Cameron at Toronto.

W. E. McLean, K.C. and *G. E. Burson* for appellant.

J. D. McNish, K.C. and *T. Z. Boles* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

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CAMERON J. now (August 4, 1949) delivered the following judgment:

The appellant appeals from assessments to income tax for the years 1939, 1940 and 1941. The basic facts—which are not in dispute—may be stated briefly. In 1939 the appellant conceived the plan of amalgamating a number of mining properties in the Township of Teck into one new company. The new company was incorporated and, under his agreement with the original owners and confirmed by agreement with the new company, the appellant agreed to buy certain shares therein and was given the option of purchasing additional shares from time to time at various prices as therein provided. In the same year he sold the shares which he had agreed to purchase and gave an option to purchase the remaining shares, all at prices in excess of what he had paid or agreed to pay therefor. The gross spread received by the appellant in those years totalled $20,400, from which it is admitted that $8,800 falls to be deducted as a proper deduction. The remaining sum of $11,600 has been added to the appellant's declared income over those three years. No question arises as to the amount or as to the manner in which the sum of $11,600 has been apportioned over the three years in question.

The assessments were made on the ground that the profits so made were "income" within the provisions of section 3 of the Income War Tax Act, 1927, ch. 97, s. 3, which defines taxable income as:

> Sec. 3. *"Income."*—1. For the purposes of this Act, "income" means the annual net profit or gain or gratuity, whether ascertained and capable of computation as being wages, salary, or other fixed amount, or unascertained as being fees or emoluments, or as being profits from a trade or commercial or financial or other business or calling, directly or indirectly received by a person from any office or employment, or from any profession or calling, or from any trade, manufacture or business, as the case may be whether derived from sources within Canada or elsewhere; and shall include the interest, dividends or profits directly or indirectly received from money at interest upon any security or without security, or from stocks, or from any other investment, and, whether such gains or profits are divided or distributed or not, and also the annual profit or gain from any other source including . . .

The appellant submits that the profits here realized were the result of an isolated transaction of purchase and re-sale of property and that, therefore, they were not in

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the nature of income but merely an accretion to capital. In support of that contention the well-known case of *Jones* v. *Leeming* (1) is cited. The headnote is as follows:

> The respondent joined with three other persons in obtaining an option to purchase a rubber estate in the Malay Peninsula. As the estate was too small for resale to a company for public flotation, they acquired a further option to purchase an adjoining estate. Ultimately the two estates were sold to a company at a profit. The respondent having been assessed to income tax on a sum representing his net share of the profit appealed. The Commissioners found that the respondent acquired the property or interest in the property with the sole object of turning it over again at a profit, and that he at no time had any intention of holding the property or interest as an investment, and confirmed the assessment. They subsequently found, on the case being referred back to them, that the transaction was not a concern in the nature of trade:—
>
> *Held,* that having regard to the finding of the Commissioners that the transaction was not a concern in the nature of trade, and to its being an isolated transaction of purchase and resale of property, the profits arising therefrom were not in the nature of income but were an accretion to capital, and were therefore not subject to tax under Case VI, of Sch. D of the Income Tax Act, 1918.

It is of particular importance to note that the judgment in the House of Lords (*supra*) was rendered "having regard to the finding of the Commissioners that the transaction was not a concern in the nature of trade." When the matter first came before Rowlatt, J., by way of appeal from the Commissioners (2), he referred the matter back to them to consider the question as to whether that which took place, was or was not a speculation or venture in the nature of trade. In a Supplementary Case they stated their findings as follows:

> The Commissioners, having considered the evidence and arguments submitted as to what took place in the nature of organizing the speculation, maturing the property, and disposing of the property, and after due consideration of the facts and arguments submitted to them, find that the transaction in question was not a concern in the nature of trade, and they sign the Supplementary Case accordingly.

Rowlatt, J. thereupon allowed the appeal following his own decision in *Pearn* v. *Miller* (3).

Both in the Court of Appeal (4), and in the House of Lords (*supra*), this finding of fact was accepted without review. In the Court of Appeal the Master of the Roles

(1) (1930) A.C 415.
(2) (1930) 1 K.B. 283.
(3) (1927) 11 T.C. 610.
(4) (1930) 1 K.B. 279.

intimated that had that Court not been bound by that finding of fact, the decision might have been otherwise. At p. 292 he said:—

> Now Rowlatt J., and I think this Court, might perhaps have taken the course of saying that having regard to what he had called attention to in this case, the particular facts, "of organizing the speculation, of maturing the property," and the diligence in discovering a second property to add to the first, "and the disposing of the property," there ought to be and there must be a finding that it was an adventure in the nature of trade; but Rowlatt J. refrained from so doing, and I think he was right, for however strongly one may feel as to the facts, the facts are for the Commissioners. It would make an inroad upon their sphere if one were to say in a case such as the present that there could be only one conclusion. The Commissioners are far better judges of these commercial transactions than the Courts, and although their attention has been drawn to what happened, they have in their final case negatived anything in the nature of an adventure or trade.

That case is therefore distinguishable from the instant case where all the facts are to be found by the Court.

The general principle to be followed is stated in *Collins* v. *The Firth-Brearley Stainless Steel Syndicate* (1), where Rowlatt J. said:

> Now the principle I think is very clear and has been established by many cases. The appreciation of an article, the subject of property, whether it is the property of an individual or whether it is the property of a company, is not taxed as such; but it is taxed if the realization of that appreciation forms part of a trade, because then the trade is taxed, and this is an item in the trade. That is all there is in the principle.

Reference may also be made to *Rutledge* v. *The Commissioners of Inland Revenue* (2), where the Lord President said at p. 496:

> It has been said, not without justice, that mere intention is not enough to invest a transaction with the character of trade. But, on the question whether the Appellant entered into an adventure or speculation, the circumstances of the purchase, and also the purchaser's object or intention in making it, do enter, and that directly, into the solution of the question . . . It is no doubt true that the question whether a particular adventure is "in the nature of trade" or not must depend on its character and circumstances, but if—as in the present case—the purchase is made for no purpose except that of re-sale at a profit, there seems little difficulty in arriving at the conclusion that the deal was "in the nature of trade," though it may be wholly insufficient to constitute by itself a trade.

It therefore becomes necessary to set forth all the surrounding facts and circumstances regarding the purchase and re-sale in the instant case.

(1) (1925) 9 T.C. 564. (2) (1929) 14 T.C. 490.

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The appellant came to Canada in 1928 and for a short time was on instructional duty with the Royal Canadian Air Force. Then he became Senior Exploration Pilot for the Northern Navigation Company. From 1930 to 1932 he was engaged on his own account as an explorer and prospector. In 1932 he joined the Lindsley Organization and was engaged in prospecting and exploring. In 1934 he was prospector and field scout for the Mining Corporation of Canada. In 1936 he returned to the Lindsley Organization and remained with that group until April 30, 1939, as Senior Field Scout. He was Managing Director of Westfield, a company formed by the Lindsleys for exploration and development of mines. He severed his connection with that organization on May 1, 1939. The transactions here in question took place in the main between that date and December 15, 1939, when he joined the Royal Canadian Air Force. In April, 1940, he became Director of Operations and Assistant Managing Director of De Havilland Aircraft of Canada, remaining with that company until April, 1942, when he joined Central Aircraft Limited at London, Ontario. At the end of the war he formed the Trans-American Mining Corporation, Limited—an exploration and development company—of which he is still General Manager.

While it is apparent that the appellant since coming to Canada has been engaged mainly in exploring for and prospecting for mines it is stated and not denied that with the exception of the promotion of Amalgamated Kirkland Mines Limited, he had no experience whatever in the promotion of companies or the raising of capital for mining development.

As I have said, the appellant, immediately after he was released by the Lindsley interests on May 1, 1939, conceived the idea of bringing several mining properties into one company. What he then did is best stated by using his own words:

> Immediately subsequent to the cessation of my employment with the Lindsley interests or Westfield, I then, on my own account, wished to get together certain mining properties with a view of having a mine—which I have been doing for the last twenty years in Canada—and I had in mind putting together a number of claims that had been long dormant for nearly thirty years. Those claims were, I should say, south and contiguous to the Lakeshore, Macassa and Teck-Hughes Mines . . .

Abortive efforts had been made, as I gave in my evidence a few minutes ago—for nearly thirty years to get those claims together, without success, and since the mining business was in a paralized condition and times were poor, as we approached the war and the company was no longer able to retain me and it was evident that a war was in sight—in the interim I decided to attempt to get the various holdings . . . and I was successful in putting those claims together. I used my own name to do those things and then, having obtained the claims, I tied them up . . . I offered to put those claims together and obtain money, if possible, for the development of them—*that is the usual procedure* . . . I happened one day to be in Mr. Fisher's office and I happened to mention about these claims and Fisher informed me that he was well-known to the man who controlled the Kirkland-Hunton Mines, the key to the whole situation—Fisher introduced me to a lawyer in the city who controlled—through his clients and friends—the Kirkland-Hunton Mine, and for that introduction this agreement came into being.

The agreement last referred to (Exhibit 1) is dated June 16, 1939, with one Harold Fisher. It recites that the appellant had obtained an option on certain mining properties for the purpose of amalgamation and that Fisher had been instrumental in assisting him in procuring the said option; it provided that each of the parties should exert his best efforts to obtain subscriptions for one-half the amount of money required to exercise the said option, and that all profits either in cash or shares, derived from the said option, or the underwriting of the shares of the company to be formed pursuant to the terms of the said option, should be divided equally between the parties thereto, after deduction of necessary expenses.

Fisher took no further part in the matter, all negotiations being carried on by the appellant. Fisher, however, was paid $8,800, that being one-half of the net profits resulting from the sale of shares.

On July 5, 1939, Exhibit 2 was signed. It is an agreement between three parties who were the owners of certain mining properties to form a company to be incorporated by the appellant and to be called Amalgamated Kirkland Mines, Limited (this company will hereafter be referred to as Amalgamated). It was to have a capital divided into 5,000,000 shares of a par value of one dollar each. Provision was made for transferring certain shares in the new company to the owners of the various properties brought into the merger. It was a further provision of the said agreement that following the organization of Amalga-

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mated it would enter an agreement with the appellant to sell or option to him 2,000,000 shares of the company, of which 400,000 were to be by firm purchase at eight cents per share and payable by July 12, 1939; and the remaining 1,600,000 shares were to be optioned to him in lots of 200,000 each at prices varying from twelve to fifty cents a share to be taken up at stated intervals extending to November 5, 1941. The options were conditional on the firm payment of $32,000 for the 400,000 shares by July 12, 1939.

It was further provided that if the appellant carried out the options as due he would be given an option to purchase an additional 700,000 shares at eighty cents per share; and that if he carried out all the various options he would be given the first refusal to option or purchase any additional Treasury shares at prices to be fixed by the Board. By clause 10 the appellant was given the right to purchase 300,000 shares at the special price of one-half cent per share (in lots of 100,000 each) when he had paid into the Treasury certain specified amounts as the result of having taken up the options first mentioned. Provision was also made for the purchase of other properties, if possible, and it is in evidence that by the appellant's efforts several other properties were brought into Amalgamated.

It will be seen, therefore, that the whole transaction depended on the appellant paying into the new company the sum of $32,000 by July 12, 1939, in payment of 400,000 shares. The appellant had previously taken steps to interest certain mining companies in the financing of Amalgamated, namely, the Lindsley interests, Macassa Mines and International Mining Company. Finally, about June 15, 1939, Mr. Lindsley undertook to provide the money to finance Amalgamated and on July 10, 1939, Exhibit 3 was signed. It is an agreement between Northfield Mines, Inc.—one of Mr. Lindsley's private companies—and the appellant. After referring to the agreement of July 5, 1939, and the fact that the appellant had agreed also to bring two other properties into Amalgamated, it said:

> And whereas Northfield is desirous of taking over from McDonough the financing of the New Company and McDonough has agreed to grant to Northfield the right to acquire shares of the New Company upon the terms hereinafter set forth.

And whereas McDonough has previously offered to International Mining Corporation (Canada) Limited the right to participate in the financing of the New Company to the extent of twenty-five per cent thereof, as disclosed by correspondence passing between the said parties and dated June 22nd, 1939, June 27th, 1939, and June 29th, 1939, copies of which have been furnished Northfield.

And whereas Northfield has agreed to assign to International Mining Corporation (Canada) Limited a twenty-five per cent interest in all rights which it acquires in connection with the financing of the New Company.

This agreement in essence provides that Northfield would purchase from the appellant the 400,000 shares of Amalgamated at the price of $36,000 (the appellant having agreed to pay $32,000 therefor to Amalgamated), and that the remaining 1,600,000 shares should be optioned by him to Northfield at a spread of two cents over the price which the appellant was required to pay Amalgamated therefor. The appellant immediately caused Amalgamated to be incorporated and became its General Manager. The various properties were conveyed to it and the consideration for the transfers was paid as provided. Northfield paid over the sum of $36,000 and received 400,000 shares in Amalgamated.

A number of other exhibits were filed on behalf of the appellant. They are of importance only as an indication of the nature and scope of the operations carried on by the appellant and I shall give but a brief reference to each of them.

By Exhibit 4, dated July 11, 1939, Amalgamated adopted the agreement of July 5, 1939 (Exhibit 1), as if it had been a party thereto in place of the appellant, and released the appellant from all liability.

Exhibit 5 is an agreement dated July 11, 1939. It recites that Amalgamated is desirous of obtaining funds to carry on exploration, development and mining work and that the appellant is willing to supply funds for that purpose. The agreement then provides for the sale and option of shares in Amalgamated to the appellant in exactly the same manner as is provided for in Exhibit 1.

Exhibit 6 is an agreement dated July 20, 1939, by which the appellant agrees to use his best endeavours to cause Northfield to assign to International Mining Corporation

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a 25 per cent interest in all rights which it acquires in connection with financing Amalgamated; and it also provides that if Northfield fails to carry out its options, International would have the right to do so.

Exhibit 7, dated August 15, 1939, is a confirmation of the agreement dated July 10, 1939 (Exhibit 3), and was made after Northfield had been incorporated.

Exhibit 8 is an agreement dated September 27, 1939, by which Amalgamated agrees with the appellant to extend the time for taking up the various options set forth in the agreement of July 11, in view of the outbreak of war, but by which the appellant also agreed forthwith to take up the purchase of 200,000 shares at twelve cents per share.

Exhibit 9 is an agreement dated September 28, 1939, by which the appellant agrees to sell to Northfield, International and Macassa, 200,000 shares of Amalgamated at fourteen cents per share, and the time of taking up further options was extended.

Exhibit 10 is an agreement dated September 29, 1939, by which Amalgamated and the former owners of the properties agreed to vary the terms of the agreement of July 5, 1939, in regard to the option to the appellant of 300,000 shares in Amalgamated at one-half cent per share, due to the outbreak of war.

Exhibit 11 is an agreement dated September 15, 1941, between Amalgamated and the appellant in which it is recited that the appellant had paid $150,000 to Amalgamated for 1,200,000 shares, and by which it was agreed that the appellant would forthwith purchase a further 20,000 shares, and the time for taking up the further option was extended, due to the war. The company further agreed that it would not sell or option further shares while any of the options to the appellant were in force.

Exhibit 12, dated September 15, 1941, is an agreement by which the appellant agrees to sell to the various companies therein named the 20,000 shares in Amalgamated, referred to in Exhibit 11, at a spread of two cents per share, and extending the time within which the said companies were to take up the remaining options.

Appellant's counsel attaches much weight to the fact that the appellant had had no previous experience in pro-

moting mining companies. But for years he had been engaged in exploring and prospecting for mines on behalf of various organizations that did promote and finance the development of mining companies, and undoubtedly he had a knowledge of how such matters were carried out. Quite naturally, therefore, when he gave up his position with Westfield he had the intention of putting his knowledge, experience and ability into a producing mine and he agrees that such was the case. He states: "I naturally wanted to look around and engage myself in prospecting ventures until such time as I was likely to be called up," and, "I had to carry on in my mining business and my prospecting endeavours until there was a war or there was not going to be a war," and *that if there had been no war he would have carried on his mining operations.*

In cross-examination he was asked whether it was his intention either temporarily or permanently to carry on in the mining business, and he agreed that such was the case. He agreed also that because of his past operating experience it was his intention to play a major role in the development and the financial development of the mining properties. Having no funds of his own to finance the development, he found it necessary to turn to Northfield and others to provide the money for that purpose. He was appointed General Manager of Amalgamated and received salary from the time of its incorporation until the end of 1939. He then gave up his position as General Manager, but remained as a director for some time and as such was called upon from time to time to give advice as to problems which arose in the development of the mine.

Certain additional facts are also well established. The appellant did not invest any of his own money in the purchase of the shares. Moreover, it was not his intention at any time to retain as his own property any of the shares which were purchased and re-sold. Before he bound himself to purchase the original 400,000 shares, he had made arrangements to re-sell them to Northfield at a profit; and at each subsequent purchase, Northfield or some of its associates had agreed to take up the options from the appellant before the appellant took up his option from Amalgamated. It is manifest throughout that the shares

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were bought by or optioned to the appellant with the idea that they should be re-sold immediately, and, if possible, at a profit. That is evidenced by the agreement to share the profits of sale or underwriting with Fisher, and also by the fact that in order to enable the appellant to take up the first shares and to finance the development of the mine (which was the appellant's declared purpose), they had to be sold, the appellant having no means to do so himself.

These are the facts. The question then is whether the profits derived in that manner are of a revenue nature. I am of the opinion that they are as being profits or gain derived from a trade or business.

The appellant's salaried position had come to an end and he decided to use his knowledge and experience and to go into the business of promoting mines on his own account. I do not think there can be the least doubt that that was his intention for, as I have mentioned above, he said that he had to carry on in his mining business and prospecting endeavours, and that if there had been no war he would have carried on his mining operations. And what he did may properly be called his business. It engaged his entire time and attention from May, 1939, to December 15, 1939, and was discontinued only because he was recalled for duty in the Forces. It included all those matters which would normally be carried out by one in the business of a mine promoter, namely, the location of properties, securing options, the merging of all the properties, the formation of a new company and the arranging of finances for the necessary development.

While the appellant at the trial insisted that his purpose was to establish a mine and so help the country, it is quite apparent from all the evidence that his purpose throughout was to make a profit for himself, and his counsel admitted that such was the case. Now the only way in which it was possible for him to make a profit, under the plan which he himself had conceived, was to dispose of the shares which he agreed to buy, or on which he held options, at prices exceeding those which he was obliged to pay. That was the only way in which he could realize a profit or compensate himself for his time and effort in organizing

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Amalgamated. He himself had no funds with which to develop a mine and the company could secure working capital only when the appellant paid for his shares out of monies which he received on the re-sale. The appellant, therefore, was not only engaged in the business of promoting the company, but of underwriting its shares, the latter being an essential feature of the business so far as the appellant was concerned, if not the main feature.

The principles to be followed in cases such as the present one were explained by the Lord Justice Clerk (Macdonald) in *Californian Copper Syndicate* v. *Harris* (1), where he said:

> It is quite a well settled principle in dealing with questions of assessment of Income Tax, that where the owner of an ordinary investment chooses to realize it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of Schedule D of the Income Tax Act of 1842 assessable to Income Tax. But it is equally well established that enhanced values obtained from realization or conversion of securities may be so assessable, where what is done is not merely a realization or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business. The simplest case is that of a person or association of persons buying and selling lands or securities speculatively, in order to make gain, dealing in such investments as a business, and thereby seeking to make profits. There are many companies which in their very inception are formed for such a purpose, and in these cases it is not doubtful that, where they make a gain by a realization, the gain they make is liable to be assessed for Income Tax.
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> . . . It is manifest that it never did intend to work this mineral field with the capital at its disposal. Such a thing was quite impossible. Its purpose was to exploit the field, and obtain gain by inducing others to take it up on such terms as would bring substantial gain to themselves. This was that the turning of investment to account was not to be merely incidental, but was . . . the essential feature of the business, speculation being among the appointed means of the company's gains.

In the present case there can be no doubt whatever that the sale of the shares which gave rise to the profits now assessed to the appellant was not merely incidental to but in reality the essential feature of the whole business carried on by the appellant. It was a gain made in an operation of business in carrying out a scheme for profit making and is, therefore, properly assessable to tax.

Reference may also be made to *Cooper* v. *Stubbs* (2).

The appellant, however, further submits that the purchase and re-sale of the shares was an isolated transaction outside of his usual business operations and unconnected

(1) (1904) 5 T.C. at 165 ff. (2) (1925) 10 T.C. 29.

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therewith, and that, therefore, the profits were not made from a trade or business. It is true that in the years in question the appellant bought and sold shares only in one company and that all the purchases arose under the agreement of July 5, 1939 (Exhibit 2), and all the sales originated under the agreement of July 10, 1939 (Exhibit 3). From another point of view, however, they were not single transactions inasmuch as the sales and purchases aggregated over a million shares and were made over a period of more than two years. But the mere fact that a transaction is an isolated one does not exclude it from the category of trading or business transactions of such a nature as to attract income tax to the profit therefrom. The President of this Court in *Atlantic Sugar Refineries, Ltd.* v. *Minister of National Revenue* (1), referred to the cases which support that proposition.

Reference may also be made to the case of *T. Beynon & Co. Ltd.* v. *Ogg* (2). There a company carrying on business as coal merchants, ship and insurance brokers, and as sole selling agents for various colliery companies, in which latter capacity it purchased wagons for its clients, made a purchase of wagons on its own account as a speculation and subsequently sold them at a profit. It contended that since the transaction was an isolated one, the profit was in the nature of a capital profit on the sale of an investment and should be excluded in computing its liability to income tax. But it was held that it was made in the operation of the company's business and properly included in the computation of its profit therefrom. Sankey, J. said at p. 132: "The only question one has to determine is which side of the line this transaction falls on. Is it . . . in the nature of capital profit on the sale of an investment? Or is it . . . a profit made in the operation of the appellant company's business?"

In the case of *The Commissioners of Inland Revenue* v. *Livingston* (3), the facts were that the respondents, a ship repairer, a blacksmith and a fish salesmen's employee, purchased as a joint venture a cargo vessel with a view to converting it into a steamdrifter and selling it. They were not connected in business and had never previously

(1) (1948) Ex. C.R. 622 at 631.
(2) (1918) 7 T.C. 125.
(3) (1926) 11 T.C. 538.

bought a ship. Extensive repairs and alterations to the ship were carried out and then the respondents sold the vessel at a profit. It was held that they were assessable to income tax in respect of it. At p. 542 the Lord President said:

I think the test which must be used to determine whether a venture such as we are now considering is, or is not, "in the nature of trade" is whether the operations involved in it are of the same kind, and carried on in the same way, as those which are characteristic of ordinary trading in the line of business in which the venture was made. If they are, I do not see why the venture should not be regarded as "in the nature of trade," merely because it was a single venture which took only three months to complete.

This statement of the test to be applied was approved by Rowlatt, J. in *Leeming* v. *Jones* (1). He regarded it as covering all the cases.

As I have indicated above, the operations carried on by the appellant were of the same kind and carried on in the same way as those which are characteristic of transactions normally carried on by a mining promoter and underwriter. The purchase and re-sale of the shares was not unconnected with the business of a mine promoter but was an essential part thereof.

Further reference may also be made to *Income Tax Case No. 118* (2). The headnote in that case is as follows:

Appellant was employed in an attorney's office. During the platinum "boom" he obtained information that norite, a formation in which platinum had been found to exist, was present in the northern part of the Rustenburg district. At that time no discoveries of platinum had been made within fifty miles of that particular area. Appellant, however, raised the necessary capital and acquired options over land in the area in question.

Shortly after the options had been acquired by him, appellant was able to sell them at a profit. This profit was included by the Commissioner for Inland Revenue in appellant's taxable income.

Against this assessment appellant appealed on the grounds that the profit in question was a receipt of a capital nature.

Held, dismissing the appeal and confirming the assessment made, that appellant had acquired the options for the purpose of disposing of them at a profit, and for that purpose had organized himself for carrying out a scheme of profit-making by exploiting the options for profit; the profits resulting were therefore the proceeds of a transaction in the nature of a business, and as such were within the statutory definition of gross income.

In that case the President of the Court said:

He intended to sell the options. He had no money to carry on mining operations. So from these facts the Court concluded that the appellant

(1) (1930) 1 K.B. 279 at 283. (2) 4 S.A.T.C. 71.

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secured the options with the purpose of selling them. It was true, as has been pointed out in argument that this was the only transaction of its kind in which appellant had indulged, and one of the contentions was that because it was an isolated transaction it was not taxable. The Court could not agree with that contention. It seemed to the Court that the appellant organized himself with the help of a friend into carrying out a scheme for profit-making, the scheme for profit-making consisting of exploiting certain options for profit. He could not do so himself, and so he induced a friend to enter into the transaction in the nature of a business. "Business might be defined as anything which occupied the time and attention of a man for profit: the money of appellant's friend and the attention of the appellant had been directed to making a profit by selling the options.

I am therefore of the opinion that the appeals must fail, and they will be dismissed with costs.

Judgment accordingly.