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COURT OF APPEAL—3RD AND 4TH JULY, 1934

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HOUSE OF LORDS—4TH AND 6TH FEBRUARY, 1936

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MONTAGUE BURTON, LTD. (IN LIQUIDATION) v. COMMISSIONERS OF  
INLAND REVENUE<sup>(1)</sup>

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*Sur-tax—Undistributed income of company—Finance Act, 1922 (12 & 13 Geo. V, c. 17), Section 21.*

*All the ordinary shares issued by the Appellant Company (except one) were held directly or indirectly by M.B., to whom the Company advanced large sums of money for the acquisition of shop properties required by the Company for its business, which was rapidly expanding. During the year ended 31st March, 1929, the Company expended on the business and advanced to M.B. sums much in excess of the net profits of the year, which amounted to £371,328.*

*In February, 1929, a new public company was incorporated which acquired, in consideration of the allotment of shares, the business of the Appellant Company and its assets (excluding the loan to M.B.) and liabilities as at 31st March, 1928.*

*On the completion of this transaction on 31st March, 1929, the sum at the credit of the Appellant Company's profit and loss account was £1,643,235. On 12th April, 1929, it declared a dividend of 100 per cent. on its ordinary shares (absorbing £45,000) for the year to 31st March, 1929, M.B.'s dividend being credited to his loan account. It was conceded that the Company had assets available out of which further dividends for the year could legally have been paid.*

*The Appellant Company went into voluntary liquidation in May, 1929.*

*A direction was made under Section 21 of the Finance Act, 1922, that for the purposes of assessment to Sur-tax, the Appellant Company's actual income for the year ended 31st March, 1929, should be deemed to be the income of the members. The direction was confirmed on appeal by the Special Commissioners and, on a re-hearing, affirmed by the Board of Referees.*

*Held, that there was evidence upon which the Board of Referees could arrive at their decision and that they had made no error in law.*

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<sup>(1)</sup> Reported (K.B. & C.A.) 152 L.T.8 ; (H.L.) 154 L.T. 355.

## CASE

Stated by the Board of Referees, pursuant to the Finance Act, 1922, First Schedule, Paragraph 2, for the opinion of the High Court of Justice.

1. At a meeting of the Board of Referees, held on the 8th February, 1933, for the purpose of re-hearing appeals under paragraph 2 of the First Schedule to the Finance Act, 1922, We, members of the said Board present at the said meeting, re-heard an appeal by Montague Burton, Limited (in liquidation), hereinafter called "the Company", whose registered office is at Hudson Road Mills, Leeds, against a direction made by the Commissioners for the Special Purposes of the Income Tax Acts under Section 21 of the Finance Act, 1922, whereby they directed that for the purposes of assessment to Sur-tax the actual income from all sources of the Company should, for the year ended the 31st March, 1929, be deemed to be the income of the members, and the amount thereof apportioned among them.

2. The Company being aggrieved by the said direction appealed against the same to the said Special Commissioners who, upon the hearing thereof did, on the 11th May, 1932, determine that the said direction be confirmed.

3. The Company being dissatisfied with the said determination required the said appeal to be re-heard by the Board of Referees, and we re-heard the same accordingly.

4. On the said re-hearing no oral evidence was called before us, but the following facts were admitted :

(i) The Company was incorporated on the 22nd February, 1917, for the purpose of acquiring the business of clothing manufacture and bespoke tailoring then being carried on by Montague Maurice Burton. The said business had been commenced in 1901 by Mr. Burton (now Sir Montague Burton) with a capital of £100, and at the time of the incorporation of the Company the premises used for the purposes of the business consisted of a small clothing factory in Leeds, and a number of shops situated chiefly in the industrial districts of the West Riding of Yorkshire and of the North-East Coast.

(ii) The nominal capital of the Company was £50,000, divided into 48,000 ordinary shares of £1 each, and 2,000 10 per cent. cumulative preference shares of £1 each. At all times material to this appeal the issued capital was 45,002 ordinary shares and 2,000 preference shares held as follows :—

Ordinary shares :

M. M. Burton	...	...	...	...	...	41,251
Sophia Amelia Burton (wife of M. M. Burton)	...					1
Henry Holding, Limited (hereinafter referred to)						3,750

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45,002

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Preference shares (having no voting rights) :

Alfred William Wansborough	...	...	...	1,000
Joseph Richard Cooper	...	...	...	1,000
				2,000

The Directors of the Company at all material times were Mr. Burton (Governing Director, receiving a salary of £10,000 per annum), Mrs. Burton and Mr. Wansborough.

(iii) From the outset the Company adopted and continually followed a policy of development and expansion, both of its factory capacity, and of the number, size and attractiveness of its shops. The expansion of the Company's business from the 31st March, 1922, to the 31st March, 1929, is shown by the following table :—

31st March,	Value of assets employed in business including loans to Mr. Burton as hereinafter mentioned.	Shops open.	Direct employees.
	£		
1922	452,808	107	2,550
1923	678,600	148	2,943
1924	1,023,759	172	3,513
1925	1,406,650	197	4,142
1926	1,588,645	214	4,551
1927	1,911,749	229	5,190
1928	2,825,100	263	6,643
1929	3,876,135	301	7,855
	Turnover for year.	Net profit as per accounts.	
	£	£	
1922	...	1,059,637	55,489
1923	...	1,319,897	105,675
1924	...	1,422,372	97,675
1925	...	1,683,802	102,195
1926	...	1,970,534	253,743
1927	...	2,096,424	290,102
1928	...	2,630,679	440,123
1929	...	2,824,292	371,328

The expansion of the business has continued since it was purchased by the new Company. At the 31st March, 1931, the number of shops was 362, and the number of direct employees 10,081.

(iv) The capital expenditure of the Company was incurred mainly in the purchase, alteration and improvement of shop properties in all parts of the British Isles, and the provision of fixtures and plant. Large sums were also applied in increasing stocks.

- (v) The said capital was provided by :
- (a) using the Company's profits ;
  - (b) obtaining extended credit ;
  - (c) obtaining the maximum amount of accommodation from the Company's bankers ;
  - (d) raising mortgages on properties.

(vi) Where shop properties required for the purposes of the Company's business could be satisfactorily obtained on short leases (approximately 21 years or less) the leases were taken in the name of the Company. No value was put on these short leases in the Company's balance sheets. In most cases, however, the shop properties required for the purposes of the Company's business could be more economically and advantageously acquired by purchasing the freehold or taking a long lease, and at all times material to this appeal the great majority of the properties occupied by the Company were properties acquired in this way. In October, 1928, the freehold and long leasehold properties were valued by Messrs. Hillier, Parker, May and Rowden at £3,946,540. The amount of capital required to carry out this policy was provided by means of mortgages on the properties acquired, and the acquisition of freeholds and long leaseholds for the purposes of the Company's business was carried out in the manner described in the following sub-paragraphs.

(vii) Prior to the 28th April, 1927, the shop properties occupied by the Company (other than those held on short leases) were bought or acquired on long lease by Mr. Burton, to whom the Company advanced by way of loan the amounts required to satisfy the purchase consideration therefor, less amounts left on mortgage by the vendors. The sums so advanced were duly debited to Mr. Burton in the Company's books as loans. Amounts required to meet current outgoings in respect of the said properties were also advanced by the Company to Mr. Burton, and debited to him as loans. Rents were charged by Mr. Burton to the Company for the use of the shop premises belonging to him, and were credited to his loan account. The Company's accounts shew that Mr. Burton was indebted to the Company to the extent of £997,245 on the 31st March, 1928 (after crediting £33,001 in respect of a dividend on his ordinary shares in the Company for the year ended the 31st March, 1926), and to the extent of £1,051,188 on the 31st March, 1929. Substantially the whole of the said indebtedness resulted from advances made by the Company to Mr. Burton to enable him to meet the above-mentioned expenditure on properties acquired and used for the Company's business, and did not represent money advanced to Mr. Burton for his private purposes. A copy of Mr. Burton's loan account with the Company for the year ended the 31st March, 1929, is annexed hereto, marked "A", and forms part of this Case<sup>(1)</sup>.

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(1) Not included in the present print.

(viii) In cases where no part of the purchase price of any of the said properties, purchased as aforesaid by Mr. Burton, was left on mortgage by the vendor, Mr. Burton paid the whole of the purchase price by means of moneys advanced to him by the Company for the purchase, as set out above. Mr. Burton personally raised mortgages on such properties as soon as possible after completion of the purchase, and paid the proceeds of such mortgages into a personal deposit account in his own name at the Company's bank. This deposit account was not incorporated in the Company's accounts as an asset of the Company. The Company's overdraft was guaranteed by Mr. Burton personally, and the bank had a charge over the said deposit account in support of Mr. Burton's guarantee. The sum to the credit of the said deposit account on the 31st March, 1929, amounted to £496,594 8s. 2d.

(ix) After the 28th April, 1927, no further properties were acquired by Mr. Burton, except that a number of purchases, of which completion was then pending, were completed by him.

(x) From the 28th April, 1927, onwards, freehold and long leasehold properties acquired for the purposes of the Company's business were purchased in the following manner. On the 31st March, 1927, a company was incorporated under the name of Henry Holding, Limited, of which Mr. Burton by himself or his nominees was the sole ordinary shareholder; and on the 28th April, 1927, another company was incorporated under the name of Key Estates, Limited. Henry Holding, Limited, took up (and held until February, 1929) the whole of the issued capital of Key Estates, Limited, except 12 shares, and acquired from Mr. Burton the 3,750 ordinary shares in Montague Burton, Limited, referred to in paragraph 4 (ii) hereof.

(xi) After the 28th April, 1927, freehold and long leasehold properties acquired for the purposes of the Company's business were purchased by Key Estates, Limited, in the same manner as had been formerly adopted by Mr. Burton.

(xii) The moneys required to pay for these properties were advanced by the Company to Henry Holding, Limited, and by Henry Holding, Limited, to Key Estates, Limited.

(xiii) The Company credited Key Estates, Limited, with rents for the properties acquired by Key Estates, Limited, and occupied by the Company.

(xiv) The Company's advances made to enable these properties to be purchased amounted on the 31st March, 1928, to £469,584, and on the 31st March, 1929, to £836,199, then owing to the Company by Key Estates, Limited.

(xv) Expenditure on alterations and improvements to shops occupied by the Company, and on plant and fixtures, was made by the Company itself.

(xvi) The following documents are annexed hereto, and form part of this Case<sup>(1)</sup> :

Summary of Balance Sheets of the Company, 1917-29, marked " B " ;

Extracts from Trading and Profit and Loss Accounts, 1917-29, marked " C " ;

Balance Sheet and Accounts of the Company as at the 31st March, 1928, marked " D " ;

Balance Sheet and Accounts as at the 31st March, 1929, marked " E " ;

Statement shewing how income of the Company for the year ended the 31st March, 1929, has been dealt with, and financial changes during that year, marked " F " .

(xvii) The Company's Balance Sheets and Trading and Profit and Loss Accounts shew the sums expended by the Company for current requirements, and for the maintenance and development of the business. During the four years from the 1st April, 1924, to the 31st March, 1928, the net profits earned were £1,086,164, and the value of the assets employed in the business was increased by £1,801,341. During these four years the bank overdraft increased by £514,018, viz., from £255,069 to £769,087.

During the year ended the 31st March, 1929, the Company expended on the current requirements of its business, and on other requirements advisable for the maintenance and development of that business, amounts far in excess of the profits of the year.

	£	£
The net profit of that year was ...		371,328
Direct expenditure on fixed assets		
during the year ... ..	220,043	
Increase in stock ... ..	306,960	} 630,478
Increase in book debts £115,643		
Less decrease in cash ... £12,168	103,475	

During the same year further sums were advanced :

To Mr. Burton ... ..	£53,943
To Henry Holding, Limited ...	£366,614

The increase in the advances to Mr. Burton (from £997,245 to £1,051,188) was a net increase after crediting him with rents and with £66,003 in respect of dividends on his ordinary shares for the years ended the 31st March, 1927, and 31st March, 1928, declared during this year. All sums debited to Mr. Burton as advances were advances made by the Company to Mr. Burton to enable him to meet liabilities in respect of properties which had been purchased by him for the purposes of the

(<sup>1</sup>) Not included in the present print.

Company's business as hereinbefore set out. The bank overdraft was increased during the year by £573,507 (from £769,087 to £1,342,594) while sundry creditors and bills payable increased by £196,404.

(xviii) During the year 1928 the question arose of providing permanent capital for the business, and in January, 1929, a scheme was agreed upon for the formation of a new public company, and the purchase by it of the Company's business and assets and of the properties which had been acquired by Mr. Burton as hereinbefore set out. A report of Messrs. Blackburns, Barton, Mayhew & Co., Chartered Accountants, dated the 4th February, 1929, explanatory of the scheme, is annexed hereto, marked " G ", and forms part of this Case<sup>(1)</sup>. For the purpose of the scheme an arrangement was made with Messrs. Myers & Co., an issuing house, to underwrite an issue of shares in the new company. The prospectus relating to the issue is annexed hereto, marked " H ", and forms part of this Case<sup>(1)</sup>.

(xix) As preliminary steps in the carrying out of the above plan, the Company, early in February, 1929, acquired from Henry Holding, Limited, all its shares in Key Estates, Limited, viz., 25,000 ordinary shares of £1 each, and 15,000 preference shares of £1 each, at par, the price being satisfied by set-off against the debt of Henry Holding, Limited, to the Company; and the whole balance of the debt of Henry Holding, Limited, to the Company was taken over by Key Estates, Limited.

(xx) On the 27th February, 1929, a new company called Montague Burton (the Tailor of Taste), Limited, (hereinafter called " the new Company ") was incorporated. The name of the new Company was shortly afterwards changed to Montague Burton, Limited.

(xxi) On the 27th February, 1929, the new Company entered into two agreements :

- (a) An agreement between the new Company and Mr. Burton (a copy whereof, marked " I ", is annexed hereto and forms part of this Case<sup>(1)</sup>) whereby the new Company agreed to purchase (subject to the mortgages thereon) all the properties occupied by the Company, and which had been purchased by Mr. Burton as aforesaid, the consideration being the issue to him by the new Company of 1,492,428 ordinary shares of 10s. each, credited as fully paid up;
- (b) An agreement between the Company, Mr. Burton and the new Company (a copy whereof, marked

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(<sup>1</sup>) Not included in the present print.

" J ", is annexed hereto and forms part of this Case<sup>(1)</sup>) whereby the new Company (*inter alia*) agreed to purchase the business of the Company as at the 31st March, 1928 (the last date to which the Company's accounts had then been made up), all the assets of the Company (including the net profits earned from the 1st April, 1928, onwards) except the debt owing to the Company by Mr. Burton (which stood at £1,051,188 as at the 31st March, 1929) and a sum of £200,000 referred to below.

(xxii) As the consideration for the sale by the Company under the agreement mentioned in sub-paragraph (xxi) (b) hereof the new Company agreed :

- (a) To issue to the Company 2,507,572 ordinary shares of 10s. each, credited as fully paid up ;
- (b) To pay to the Company a net sum of £43,918 in cash ;
- (c) To take over all liabilities of the Company, including the bank overdraft, excepting a debt of £7,849 owing by the Company to Henry Holding, Limited, and excepting any liability of the Company to taxation in respect of any profits earned by the old Company down to the date of the agreement. It was also agreed that the Company should retain a sum of £200,000 to enable it to discharge this liability, this sum being based on an estimate of the Company's liability.

(xxiii) In the agreement mentioned in sub-paragraph (xxi) (b) hereof Mr. Burton guaranteed to the new Company :

- (a) That the balance of net profits of the Company as from the 1st April, 1928, included in the sale, after deducting the £200,000 above referred to, should be not less than £250,000, and undertook to make good to the new Company any deficiency ;
- (b) That the assets of the Company included in the sale were not of less value than they were estimated by Messrs. Price, Waterhouse & Co. for the purpose of the certificate given by them.

(xxiv) Completion of the purchases by the new Company under the agreements mentioned in sub-paragraph (xxi) hereof was to take place, and did take place, on the 31st March, 1929.

(xxv) The income of the Company for the purposes of the Direction appealed against is only the income attributable to the period from the 1st April, 1928, to the 27th February, 1929.

(xxvi) All proceeds of mortgages made by Mr. Burton after the 31st March, 1928, amounting to £93,459, were paid over by Mr. Burton to the new Company.

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(1) Not included in the present print.



(xxvii) After the completion of the sale of the Company's business to the new Company on the 31st March, 1929, the Company had no liabilities except £7,850 due to Henry Holding, Limited, taxation liabilities (for which £200,000 was reserved by the said vending agreement), and the expenses of winding up; while the Company's assets consisted of the following items :

Investments	... ..	£100
Due from Sir Montague Burton	... ..	£1,051,188
Due from new Company :		
(a) Shares in same (nominal)	£1,253,786	} £1,497,705
(b) Cash	£43,919	
(c) To meet taxation liability	£200,000	
		£2,548,993

The sum to the credit of the Company's Profit and Loss Account immediately after the sale was £1,643,235. A statement marked "K", showing the financial position of the Company immediately before and immediately after the sale is annexed hereto and forms part of this Case<sup>(1)</sup>.

(xxviii) On the 12th April, 1929, the Company declared a dividend of 100 per cent. on the ordinary shares for the year ended the 31st March, 1929 (£45,000 gross, £36,000 net), which was satisfied by the payment of £3,000 in cash to Henry Holding, Limited, and by setting off £33,000 against the amount shown in the Company's accounts as owing by Mr. Burton to the Company. It was conceded on behalf of the Company before us that the Company could have legally made a further distribution of profits for the year by way of dividend, and that it had assets available out of which such dividend could legally have been paid.

(xxix) By resolution passed on the 20th April, 1929, and confirmed on the 6th May then following, the Company went into voluntary liquidation. The development and expansion of the business have continued, since it was transferred to the new Company, along the same lines as before.

5. It was contended on behalf of the Company :

- (a) That the whole of the Company's actual income for the year ended the 31st March, 1929, not distributed to its members was expended by the Company during the said year on the current requirements of its business, and on other requirements necessary or advisable for the maintenance and development of that business, and no part thereof was income which it was reasonable for the Company to distribute to its members for the purposes of the Finance Act, 1922, Section 21 ;

<sup>(1)</sup> Not included in the present print.

- (b) That the said income having been so expended, the fact that the Company sold its business and went into liquidation was irrelevant;
- (c) That the Company distributed to its members a reasonable part of its income for the said year having regard to the current requirements of its business and other requirements necessary or advisable for the maintenance and development of its business;
- (d) That under the Finance Act, 1922, Section 21, and the proviso thereto, there was no ground in law or in fact on which the Direction appealed against could be sustained.

6. It was contended on behalf of the Commissioners of Inland Revenue (*inter alia*):

- (a) That the fact that receipts of the business were during the year used in the business does not affect the profits which had arisen from the business at the end of the year, and, as the Company had power to distribute these profits and had assets available wherewith to make a distribution of them, the provisions of Section 21 of the Finance Act, 1922, applied;
- (b) That the Company had not within a reasonable time after the end of the year ended the 31st March, 1929, distributed a reasonable part of its actual income from all sources within the meaning of Section 21 of the Finance Act, 1922, and that the Direction appealed against, as stated in paragraph 2 hereof, was correct, and should be affirmed.

7. We, the members of the said Board present at the said re-hearing, having heard both the Company and the Commissioners of Inland Revenue by their duly appointed representatives upon the merits of the said appeal, and having dealt with the case, determined that the above-mentioned Direction should be affirmed.

8. Immediately upon the determination of the appeal the Company declared to us its 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 of Justice, pursuant to the Finance Act, 1922, First Schedule, paragraph 2, which Case we have stated and do sign accordingly.

9. The sole question of law for the opinion of the Court is whether there was evidence upon which we could come to the determination set out in paragraph 7 hereof.

D. M. KERLY, *Chairman*.  
C. HEWETSON NELSON.  
J. R. POLLIT.  
SYDNEY M. SKINNER.

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The case came before Finlay, J., in the King's Bench Division on the 18th and 19th December, 1933, and on the latter date judgment was given in favour of the Crown, with costs.

Mr. Wilfrid Greene, K.C., and Mr. Frederick Grant appeared as Counsel for the Company and the Attorney-General (Sir Thomas Inskip, K.C.), the Solicitor-General (Sir Donald Somervell, K.C.) and Mr. Reginald P. Hills for the Crown.

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#### JUDGMENT

**Finlay, J.**—Notwithstanding the most skilful argument which has been urged I do not in this case see my way to differ from the view which has been adopted by the Board of Referees. The matter is one of some complexity and I think I have expressed my view sufficiently to make it, I hope, intelligible.

The first thing, of course, in a case of this sort is to ascertain what is the point for decision. The point for decision has been defined by the Board of Referees, who stated a Case for the opinion of the Court, and what they say in their last paragraph is this: "The sole question of law for the opinion of the Court is "whether there was evidence upon which we could come to the "determination set out in paragraph 7 hereof". The determination set out in paragraph 7 is this: they determine "that the "above-mentioned direction should be affirmed", and the direction was a determination of the Commissioners whereby they directed that, for the purpose of assessment to Sur-tax, the actual income from all sources of the Company should be deemed the income of the members.

I desire to begin by calling attention to the exact matter which is raised for the decision of the Court, because I think it is important to notice that it is a question of whether there was evidence. That stresses what I think is fundamental, that all questions of fact are for the authority, whether the Commissioners or the Referees, who are charged with the matter, and this Court can interfere and interfere only if there is some error of law, it being, of course, an error of law if a finding of fact is arrived at with no evidence to support it, but it not being an error of law to arrive at a finding of fact where there is, so to speak, evidence both ways. A great deal, I think, of most forcible argument which has been addressed to me was really an argument on fact—not all of it, but some of it was—and it is important that I should remember that I cannot deal with facts except to ascertain whether there was evidence to support the finding of the Board of Referees. The matter depends upon a Section which has already caused a great deal of difficulty and, I doubt not, is destined to cause a good deal more difficulty, Section 21 of the Act of 1922. It is not necessary that I should waste time by reading that rather long Section which, naturally, in the course of the argument before me, has several times been read. I think

**(Finlay, J.)**

an accurate general description of the nature of the Section and of the effect of the proviso was given when it was said that it was the duty of the Commissioners to see whether a reasonable part of the actual income had been distributed, and that, in doing that, they were to see to it that proper development of the business should not be penalised. It seems to me to read as put by Mr. Greene. I think I have substantially reproduced what he said and it seems to me that what he said, put generally, correctly represented the meaning of the Section, and the proviso, I think, makes it clear that they are to have regard not only to current requirements, but also to such requirements as may be necessary or advisable for the maintenance and development of the business.

My attention was called to several authorities. Two of them, the *Glazed Kid* case<sup>(1)</sup> and *Sutcliffe's* case<sup>(2)</sup> are fairly recent decisions of Rowlatt, J. Neither appears to me to be exactly in point, but from both, I think, some support is to be obtained for the view which I take. My attention was also called to a very recent decision of the Court of Appeal in *Collier's* case<sup>(3)</sup>, [1933] 1 K.B. 488, where a construction was put, not upon the original Section in the Act of 1922, but upon an amendment of it in 1927 with reference to winding-up, about which I shall have a word to say later.

It is not necessary that I should go in great detail through the Case. The whole of the facts will be found set out in detail. The matter relates to a company which is in liquidation, called Montague Burton, Limited. The Case sets out the history, a very honourable history, of the start and foundation of that business. It began, apparently, in quite a small way and it has developed into a very great business indeed with a factory in Leeds and shops, apparently, all over the country. The methods by which that highly honourable result has been achieved are set out in the Case, and it is there found that from the outset the Company adopted and continually followed a policy of development and expansion both as to its factory at Leeds and also as to the number, size, fittings, and so on, of the shops in various parts of the country, and a series of very striking figures of development is set out; one sees the number of shops open, the value of the assets, the turnover, and the net profit. The turnover was great and large profits were made. It is sufficient, probably, to give an idea of the thing, to take two years. In 1928 there was a net profit of £440,000; in 1929, the year with which I am actually concerned, there was a net profit of £371,000; and in previous years there had been very substantial amounts of profit.

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(1) *Glazed Kid, Ltd. v. Commissioners of Inland Revenue*, 15 T.C. 445.

(2) *Lionel Sutcliffe, Ltd. v. Commissioners of Inland Revenue*, 14 T.C. 171.

(3) *Collier and Sons, Ltd. (in liquidation) v. Commissioners of Inland Revenue*, 18 T.C. 83.

(Finlay, J.)

Attention is called in the Case to one peculiarity of the method of finance. A large part of the development has consisted, as I indicated a few moments ago, in the acquiring of shops in various parts of the country. Those shops were not always but, at all events, very frequently either freehold or long leasehold, and the method which was adopted was this, that Sir Montague Burton (then Mr. Burton I think) acquired these long leaseholds or freeholds for himself; he bought them and the Company advanced him money in order that he might do that. Sir Montague, having in that way acquired these premises, then mortgaged them and apparently the mortgage money was paid into a banking account and was used, I suppose, as security for an overdraft. Those details do not really very much matter. But the substance of what happened was this, that Sir Montague Burton had acquired this large number of leaseholds and freeholds and had acquired them with money which was lent to him for the purpose by the Company, and there was a very large loan account standing in the name of Sir Montague Burton. There was some discussion before me about the exact nature of that transaction. I do not doubt, it seems to me to be clear, that it was a perfectly genuine loan and a perfectly genuine debt. Sir Montague Burton, to whose initiative and energy I doubt not the success of this business was due, was, in effect, the Company, but it is perfectly true to say, of course, that the Company and Sir Montague were different people, and there appears to me to be there a quite genuine debt owing from the one to the other. The other details, which will be found fully in the Case, I do not think it is necessary to set out.

I referred a few moments ago to the policy of expansion which had been consistently followed in the year in question, which is the year ended 31st March, 1929. The financial year of the Company ran from the 1st April to the 31st March, and it is the period from 1st April, 1928, to 31st March, 1929, with which I have to deal. There is on page 6 of the Case a finding of fact with regard to the expenditure on current requirements in that year. "During the year ended the 31st March, 1929, the Company expended on the current requirements of its business, and on other requirements advisable for the maintenance and development of that business, amounts far in excess of the profits of the year." Then some details are set out. The profits were £371,000 and there is an expenditure to a much greater extent, of something like £630,000.

There is one other finding which it is convenient that I should refer to. It is to be found on page 9 and it is to this effect: "It was conceded on behalf of the Company before us that the Company could have legally made a further distribution of profits for the year by way of dividend, and that it had assets available out of which such dividend could legally have been paid". What

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had happened it is proper that I should refer to, though I do not place any reliance upon it one way or the other. What had happened, in fact, was this, that a dividend of 100 per cent. had been declared and paid. Of course, Sir Montague Burton, who was, subject to nominal exceptions, the shareholder, would get the benefit of that. This is a finding, if I rightly understand it, that there were profits in respect of which a further distribution could have been made, and there were assets. That really means nothing except this, I think, that there was money out of which the Company, if it had been so minded, could legally have paid dividend.

In those circumstances, the Commissioners and also the Referees have arrived at the conclusion that the Section applies and, accordingly, that the actual income is to be deemed to be income of the members. That depends upon this, whether it appears to them that the Company has not distributed a reasonable part of its actual income from all sources, and there are provisions, to which I called attention, adopting, I think, substantially the construction of them which has been put by Mr. Greene, and there is the proviso with regard to what are the considerations, or some of the considerations, to which they should have regard in arriving at a conclusion as to the reasonable part.

The Solicitor-General put his argument under three heads. In the first place, he said, generally, that the matter was a question of fact, and he was clearly right there; it is to a great extent a question of fact, and he said there was evidence. In particular, he relied upon two special matters, though really I think his second and third propositions were perhaps rather developments and applications of his first than new propositions. Under his second head he referred particularly to the debt of Sir Montague Burton, to which I made reference earlier, and in his third he made reference to the sale and winding-up. I have referred sufficiently to the debt of Sir Montague Burton. With regard to the sale and winding-up, the position was this. It was thought expedient to have a new company, which was to be issued to the public in some form, the details of which do not matter, and there was, accordingly, a sale by the old Company, the Company with which I am dealing, to the new Company. The contract for sale was made within the period with which I have to deal; February, 1929, was the date. The actual resolution for winding-up was outside the period with which I have to deal, because it was passed on the 20th April and confirmed on the 6th May. By that resolution the Company went into voluntary liquidation. Those two matters were relied upon by the Solicitor-General, among others, his general contention being, as I have said, that it was a question of fact and a question upon which there was evidence and the Commissioners might properly arrive at their conclusion. With regard to the debt of Sir Montague Burton, that does appear to me to possess some importance from this point of

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view. It was, as I have indicated, as far as I can see, a perfectly real debt. When, in fact, the dividend was declared and paid, money was not handed over; it was quite unnecessary. What was done was that a reduction was simply made in the debt; there was a mere book entry. I have already indicated that, in the circumstances, I do not desire to place reliance upon the 100 per cent. dividend which was declared, because it was explained to me that there was something in the nature of a compromise. But it is at least fair to look at the accounts to see how the thing was dealt with when the dividend was declared, and one finds that all that had to be done and all that was done was merely a book entry reducing *pro tanto* the debt. That, I think, has its importance, because it is of importance to look to see, from a business point of view, how the thing was done, and one finds that the thing could be done with quite extraordinary simplicity. Practically any dividend from this point of view could have been declared and satisfied simply by a book entry. I am not expressing any opinion as to what would have been the proper amount to declare, but it is, I think, material, when one is considering the whole question—and, after all, reasonableness is purely a question of fact and one is rather tempted to be drawn into questions of fact, but they are not for me—when one is considering reasonableness, it is of importance not to shut one's eyes, and, as I gather, the Referees thought they ought not to shut their eyes, to the fact that this dividend, if declared, could have been satisfied, not by the application of funds which might be difficult to get at, not by the sale of a factory or anything of that sort, but by the extremely simple expedient of a book entry.

The other matter is a matter of importance, the winding-up. It is not necessary that I should refer in detail to the Section in the Act of 1927 which has been recently the subject of construction in the Court of Appeal, in the case of *Collier*<sup>(1)</sup>. But the argument of Mr. Greene, if I rightly followed it, was this. He said: here is this Section in the 1927 Act; we have got it here and it must be supposed to have been put in for some good reason. It does not apply to this case because the dates do not fit. Therefore, he said, one must presume that but for that the winding-up could have had no bearing. I do not follow that. I think one could say that there might be reason why the Legislature would say, in the case of a winding-up, "We are going to have this absolutely definite and we are going to say that, with reference to a particular date, it is not open to people to say it was reasonable to apply it for development", but it does not say that the Legislature by saying that, by fixing dates and by saying that, within those dates after the date of the resolution, there would be no room for a development policy—paraphrasing it shortly, it does not seem to me that the Legislature

(1) *Collier and Sons, Ltd. (in liquidation) v. Commissioners of Inland Revenue*, 18 T.C. 83.

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by doing that has precluded the Commissioners, or those charged with the duty of arriving at the facts, from considering all the facts and considering, among other facts, the circumstance that a winding-up, though not put through, is contemplated and something more than contemplated. I do not want to place undue reliance upon the passage in the judgment of Rowlatt, J., in *Sutcliffe's case*<sup>(1)</sup>, but it is impossible to ignore it. It is impossible, I think, apart from authority, not to take the view that where there is a winding-up, not legally put through but from every business point of view settled on and fixed on—it is impossible to say that that is not a matter which the Commissioners and the Referees are entitled to take into account. It is a matter, indeed, which they may think is entitled to the greatest weight.

I am conscious that I have not expressed it so well as I would like. It is a case of some complexity, but one on which, having formed a view, I thought it better to express the view at once. That really represents the view which I take, and it may be expressed extremely concisely by saying this. I think one has got to look at the case as a whole. I agree with Mr. Greene, of course, that the Legislature has not said that because a company is in a strong position it has got to pay tax. Of course it has not, but one has got to survey the whole of the facts with a view to the ascertainment and solution of the extremely difficult question, though essentially a question of fact, of what is a reasonable part of its actual income for distribution. I do not think it can be suggested that, in considering that, one is not entitled to look at the history of the Company, to look at the stability of the Company, to look at the entire position and what is reasonable. The directors, in considering that, would, I suppose, among many other things, have great regard to the past and have great regard to what they thought the real position of the Company was, how much it could stand, and I cannot see why the Referees should not also have regard to that when they have regard to the whole of the facts. Two of those facts, I think, are those to which I made special reference, because the Solicitor-General relied specially upon the Montague Burton loan and the winding-up. I attach importance to both, but I attach a good deal more importance to the winding-up than to the Montague Burton loan, because I think it may be said that the Montague Burton loan, though undoubtedly of importance, is of importance rather as simplifying the machinery than from the other point of view. But, surveying, as far as one can, the whole of the facts, particularly with reference to those to which the Solicitor-General has drawn attention, I do not think it is possible for me to say that the Referees have made any error in law, and, in my opinion, I must answer the question which is put to me by saying, and confine it strictly to saying what I am asked to say, as indeed is my duty, that, in my opinion, there was evidence upon which

(1) *Lionel Sutcliffe, Ltd. v. Commissioners of Inland Revenue*, 14 T.C. 171, at p. 187.



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they could come to their determination. On that ground the appeal must be dismissed.

**The Solicitor-General.**—My Lord, the determination of the Commissioners will be upheld with costs?

**Finlay, J.**—Yes. The appeal dismissed with costs is the proper form.

**The Solicitor-General.**—Yes.

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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 Slesser and Romer, *L.JJ.*) on the 3rd and 4th July, 1934, and on the latter date judgment was given unanimously in favour of the Crown, with costs, confirming the decision of the Court below.

Mr. Wilfrid Greene, K.C., and Mr. Frederick Grant appeared as Counsel for the Company and the Attorney-General (Sir Thomas Inskip, K.C.), the Solicitor-General (Sir Donald Somervell, K.C.) and Mr. Reginald P. Hills for the Crown.

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#### JUDGMENT

**Lord Hanworth, M.R.**—We need not trouble you, Mr. Solicitor.

This case raises what must always be a difficult question, and it is not made less difficult by the somewhat loose expressions which are to be found in the relevant Sections of the Acts of Parliament which deal with the problem.

The case arises in this way. A claim was made that, for the purposes of assessment to Sur-tax, the actual income from all sources of the Company, that is, the Company of Montague Burton, Ltd. (in liquidation), should, for the year ended 31st March, 1929, "be deemed to be the income of the members" of the Company, "and the amount thereof . . . apportioned among" them—those being the appropriate words taken from Sub-section (1) of Section 21 of the Finance Act, 1922. The proceedings that followed upon that were these. The Company appealed to the Special Commissioners and on the 11th May, 1932, they determined that the direction so made should be confirmed. Upon that, the Company, still being not unnaturally dissatisfied with that confirmation, required the appeal to be re-heard by the Board of Referees, and it was re-heard accordingly. On the re-hearing, no oral evidence was called, but the facts which are set out in the Case Stated were placed before the Board of Referees by reference to the documents, the balance sheets and the accounts of the Company, and the Board, having heard the representatives of both parties, determined that the above-named direction should be confirmed. From that there is an appeal taken to this Court. Incidentally, it

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may perhaps be wise to recall the fact that in the case of a Case stated by the Board of Referees, similarly to the Case which is stated by the Commissioners, the decision of the Commissioners and the Board of Referees is expressly to be deemed to be final and conclusive. All that can be referred to this Court is a question of law.

The question that is raised is whether or not the Commissioners, as confirmed by the Board of Referees, have rightly applied Sub-section (1) of Section 21, and whether in the present case it is, upon the facts, one in which an assessment can be made, because there had been what I may call, for short, an insufficient distribution of dividend. Section 21 opens with these words: "With a view to preventing the avoidance of the payment of super-tax through the withholding from distribution of income of a company which would otherwise be distributed, it is hereby enacted as follows". At the outset, therefore, it has to be made plain that *prima facie* there is a withholding from distribution of the income of the company, it being predicated that, if income has been earned by a company, that income would be distributed in the case of a company which is formed for the purpose of carrying on business. But when that condition is *prima facie* fulfilled, we then have to apply Sub-section (1), which has two parts. It has the part which is contained in the first paragraph, and it is followed by a proviso. Here it may be convenient to say that, for the purposes of this case, it is unnecessary to deal with the addition which is made to Sub-section (1) by Section 31 (1) of the Finance Act, 1927.

I now turn to the facts of this case which have been presented to us in the Case Stated. Montague Burton, Ltd., is a company which is remarkable as an illustration of the remarkable advance and success in the enterprise undertaken by it. The nominal capital of the Company was £50,000, divided into 48,000 ordinary shares of £1 each, and 2,000 ten per cent. cumulative preference shares of £1 each. The shareholding was really, in effect, all held by Mr. M. M. Burton, for he held 41,251 shares in the Company, his wife held one share, and a holding company, Henry Holding, Ltd., all the shares in which belonged to Mr. M. M. Burton, held 3,750 shares, with the result that the totality of the holding of shares was in the hands of Mr. Burton. The Company has advanced in the most remarkable way. In 1922 the value of the assets employed in the business was £452,808; they had 107 shops open, and they had 2,550 direct employees. In 1929 those three figures had advanced to, assets, £3,876,135, shops open, 301, and the direct employees, 7,855. In other words, in those seven years the shops open were threefold, or practically threefold, what they had been seven years before. The direct employees were more than threefold, and the advance of assets from £452,000 to

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£3,876,000 is revealed by the mere statement of these remarkable figures. Equally, the turnovers for the years, which are stated in paragraph 4 (iii) of the Case, are significant to the same extent.

The way in which the capital was provided was this: (a) by using the Company's profits; (b) by obtaining extended credit; (c) by obtaining the maximum amount of accommodation from the Company's bankers; and (d) from raising mortgages on properties. It may be stated, and it ought to be stated, I think, that throughout it is quite obvious that Mr. Burton has placed not only his own zeal and energy but all his resources at the service of the Company, and in that way, by putting more money and more money back into the Company, he has accomplished a very remarkable result.

By February, 1929, or thereabouts, it became plain that it would be wise to form a larger company by means of a new public company; and on the 27th February, 1929, a new company called Montague Burton, Ltd., was incorporated. On the 27th February the new Company entered into two agreements; one was an agreement between the new Company and Mr. Burton, "whereby the new Company agreed to purchase (subject to the mortgages thereon) all the properties occupied by the Company, and which had been purchased by Mr. Burton as aforesaid, the consideration being the issue to him by the new Company of 1,492,428 ordinary shares of 10s. each, credited as fully paid up"; the other was an agreement between the Company and Mr. Burton and the new Company, whereby the new Company agreed to purchase the business of the Company as at the 31st March, 1928, which was the date at which the Company's last account had been made up, and all the assets (including the net profits earned from the 1st April, 1928, onwards) except the debt owing to the Company by Mr. Burton (which, at that time, stood at over £1,000,000) and the sum of £200,000 which is referred to later on in the agreement. The completion of the purchase by the new Company under the agreements I have referred to was to take place, and did take place, on the 31st March, 1929, which was the last day of the accounting year of the Company, and the income that we have got to deal with is the income of the Company which is attributable to the period from the 1st April, 1928, which was the last date at which the accounts had been made up, to the 27th February, 1929, when the agreements with the new Company were entered into. At that date, the 27th February, 1929, there was a large profit earned, but the 27th February was a few days more than a month before the ordinary conclusion of the financial year of the Company, and what we have got to consider is the income which had been earned during that period of eleven months.

We are told in paragraph 4 (xvii) of the Case that "During the year ended 31st March, 1929"—that is, the full accounting period—"the Company expended on the current requirements of

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“ its business, and on other requirements advisable for the maintenance and development of that business, amounts far in excess “ of the profits of the year ”. The whole of the net profit of the twelve months was £371,328; the direct expenditure on fixed assets during the year was £220,043; the increase of stock was £306,960; the increase in book debts was £115,643, less a decrease in cash of £12,168, which meant a net sum of £103,475; so that, in the matter of the direct expenditure on fixed assets, increase in stock and increase in book debts, there was an accretion during those twelve months of £630,478. It will be noted that there was this net profit in this period down to the end of the year of £371,328. I am not sure that we have got the exact figure stated for the period to the 27th February, but it does not matter for this purpose. It is quite obvious that in the eleven months there was a large net profit which ultimately, when the further month was added, reached this figure of £371,328. In fact, what was done during that year was that there was a payment of 100 per cent. made on the 45,000 shares which were held by Mr. Burton, but no more. That exhausted a certain sum, but it still left a sum which, upon the figures I have stated, would appear *prima facie* to justify the Commissioners taking the view that the opening words of Section 21 were complied with, and that there was a withholding from distribution of income of a company which might or which would otherwise be distributed if the purpose was to make what might be called a normal distribution of the profits of the business of the company. It is said, however, and fairly enough said, that the mere fact that you do not distribute but that you put the profits back into the company does not necessarily indicate that you have been withholding from distribution income with a view to the avoidance of the payment of Super-tax. It must be to a large extent a question of degree. The question which arises is one of degree upon the figures and, if it is a question of degree, then it is a question of fact, and we cannot say otherwise than that there was evidence upon which the Commissioners and the Board of Referees could hold that the facts were such as to justify the application of the considerations which are to be found in the later portion of Section 21 by reason of the fact that, in their opinion, the earlier portion of the opening words of Section 21 had been complied with. These later portions of Section 21 provide as follows: “ (1) Where it appears to the Special “ Commissioners that any company to which this section applies ”— I have dealt with that point—“ has not . . . distributed to its “ members . . . a reasonable part of its actual income from all “ sources for the said year or other period, the Commissioners may ” serve a notice for the purpose of the assessment and collection of Super-tax. Then comes the proviso: “ Provided that, in determining “ whether any company has or has not distributed a reasonable part “ of its income as aforesaid, the Commissioners shall have regard

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“ not only to the current requirements of the company’s business  
“ but also to such other requirements as may be necessary or  
“ advisable for the maintenance and development of that business ”.  
It is said by Mr. Greene, on behalf of the Company, with great force, that, even if the Special Commissioners had evidence on which the application of Section 21 was justifiable, yet, when you come to consider the terms of the proviso, the facts as found in paragraph 4 (xvii) of the Case indicate that the Company has been carrying on its business in a manner consonant with its previous history and transactions; that it has, first of all, provided for the current requirements of the business and also for such requirements as may be necessary or advisable for the maintenance and development of that business; and that the questions whether it is wise to develop the business, and how it is to be developed, and how it is to be maintained, and what is necessary or advisable for these propositions, are matters which must remain in the hands of the directors, and cannot be over-riden by the supervision, it might be said the hasty supervision, of some person acting on behalf of the public revenue. All that is true, and there is no doubt that the Company can excuse itself by pointing to the current requirements of the Company’s business and the requirements which are necessary or advisable for the maintenance and development of that business, and it can *pro tanto* cut down what might still be deemed to be available for the purpose of dividend. But those words do not, to my mind, cancel out or negative the fact that the Company has not distributed a reasonable part of its income. All these points must be questions of degree and so questions of fact. It may be that the Company can point to the requirements which they hold to be necessary or advisable for the development of the business and *pro tanto* justify that a smaller distribution only was possible, or it may be that a smaller sum is left to which the Section can be applied; but those words in the proviso do not cut out or negative wholly the considerations which are to be taken into account under the main portion of the Sub-section.

I therefore turn now to consider, bearing that proviso in mind, whether there is evidence on which the Board of Referees could reach the conclusion that they have reached. It will be noted that they have stated, in paragraph 4 (xvii), that these large sums indicated requirements which were advisable for the maintenance and development of the business, but that still leaves the fact that there was this net profit of the year of £371,000. When I refer to that figure, I refer to it without dealing with the particular sum that I ought to deal with under paragraph 4 (xxv) of the Case, because I have not got in my head, at any rate, the figure which is the income attributable to the period between the 1st April, 1928, and the 27th February, 1929. It is more convenient to deal with that sum of £371,000 as we have dealt with it during the argument

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of the case. But, side by side with paragraph 4 (xvii) and the fact that there is this net profit, it must not be overlooked that paragraph 4 (xxviii) says this: "It was conceded on behalf of the Company before us that the Company could have legally made a further distribution of profits for the year by way of dividend, and that it had assets available out of which such dividend could legally have been paid". I read those words, and particularly the use of the word "legally", as indicating that there has been no such depletion of capital as would render it impossible to make a distribution of dividend, or that there was a necessity for the replacement of capital before any such dividend could have been distributed. I think "legally" does not really add much to what I think is the interpretation of the paragraph, that there was available for distribution a sum out of which a dividend could have been paid. I turn, therefore, to see whether there is evidence of that fact, and whether or not the £371,000 was a net profit which had not been exhausted by the payment of dividends, and when I look at the balance sheet as at the 31st March, 1929, it is revealed that there was this net profit of £371,328, to which has to be added the balance brought forward from last year, which is £1,362,111, and there was payment of this dividend at the rate of 100 per cent. which exhausted a certain portion of that balance. In all, it exhausted the sums which are on the other side, which total £90,204. When those have been taken out of the united sum of the balance brought down and the net profit earned, depleted by the elimination of the sum paid as dividend, it still left the sum of £1,643,235, which was the balance carried forward. When one looks at the balance sheet, one finds that, in the liabilities, there is credited to the item "Profit and Loss Account, balance as per account", this sum of £1,643,235. There it is; it is a balance to the profit and loss account. It appears to me quite impossible to say that the attribution of the sums as they were attributed according to the statement made in paragraph 4 (xvii) answered the question that has to be answered when the inquiry is made under Section 21 of the Act of 1922. It appears to me that those figures clearly indicate that it is a matter of degree, a matter of discretion, and, therefore, a matter of fact, and that, while one may pay some tribute to the caution with which this Company has been managed and the way in which what are called conservative principles in the matter of distribution of dividend have been adopted, there was abundant evidence on which the Commissioners and the Board of Referees could come to a conclusion that Section 21 did apply and that, fulfilling the terms of the proviso and giving full effect to the direction that the Commissioners are to have regard to the matters to which I have called attention—having regard to those matters, there still remains a sum in respect of which the operative part of Sub-section (1) could be applied, and that it was a case in

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which the Commissioners have had a right, and consequently a duty to fulfil in bringing Section 21 into operation upon the materials before them in this case.

For these reasons, I have come to the conclusion that this appeal fails, and must be dismissed with the usual consequences as to costs.

**Slessor, L.J.**—I agree.

**Romer, L.J.**—I agree.

The only question of law submitted for the opinion of this Court is whether there was evidence on which the Board of Referees could come to the determination which is referred to in paragraph 7 of the Special Case. That determination is there described as follows: "We, the members of the said Board . . . , having heard both the Company and the Commissioners of Inland Revenue by their duly appointed representatives upon the merits of the said appeal, and having dealt with the case, determined that the above-mentioned direction"—that is, the direction given by the Commissioners—"should be affirmed". In my opinion, there was ample evidence on which the Board of Referees could come to the determination that they did, and I go further and say that, in my opinion, upon the facts of the case, they could not properly have arrived at any other determination.

The case of the Appellant Company is this: they say that during the financial year which is in question in the case they spent out of income a sum largely in excess of the net profits that they earned by their trading during that year, and that therefore the Commissioners had no right to give any such direction as they purported to give under Section 21, Sub-section (1), in relation to that income. In other words, the income having been spent upon current requirements of the Company's business—requirements that were necessary or advisable for the maintenance and development of that business—it is taken for ever out of the operation of the Sub-section, and no direction could thenceforward be given by the Commissioners in relation to it. I disagree with the premises, and, if the premises could be accepted, I disagree with the result that is said to flow from them. In the first place, it is not possible for this Company, any more than it is possible for any company that has such large financial commitments as this one, to say that any particular item of expenditure is derived from any particular item of incomings, whether of a capital or revenue nature. Take the present case. This Company was in the fortunate position of having very good credit with its bank and at the beginning of the year in question had an overdraft of £769,087. During that year it increased that overdraft by no less than £573,507. When, therefore, an item of expenditure was authorised by the directors which was necessary for the current requirements of the Company—necessary or advisable for the maintenance and development of its business—one may be quite sure that that expenditure was met by

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drawing a cheque on the Company's bankers, and so increasing the overdraft. In other words, the expenditure was, of course, made out of borrowed money, but, even assuming that the Company could show that during the year in question it kept a separate account of revenue receipts and revenue payments, that all revenue receipts were paid into a separate banking account, and that all revenue payments were made by cheques drawn on that separate banking account, so that they could say, and say truly, that the money spent upon these requirements was drawn out of money received on revenue account, it still does not follow that in the end those expenses are going to be thrown on revenue. At most, it can be said that the money has been temporarily taken out of revenue, and it is for the directors to determine, at the time when they have to consider the question of what they will do with their profits, whether the sum so temporarily taken out of revenue is to be permanently allocated to revenue so as to capitalize the payments—that part of the revenue—or is to be taken out of capital assets.

I ventured to give a simple example during the argument of the case, and I will venture to repeat it. A company with a capital of £1,000 spends that money on acquiring a factory, and, on that factory and by means of that factory, during the year it earns £500 net profit. During the year it spends £500 on adding to the machinery or what not of the factory. That £500, of course, has been paid out of the sums received on revenue account, because in that simple case no other sum during the year has been received by the company. At the end of the year the directors have to consider whether they will distribute the £500 profit as dividend among the shareholders or not. That they can distribute it as dividend, notwithstanding that they have increased the value of their capital asset by £500, must be admitted. The problem before the directors at the time in question is this: " Shall we distribute this £500 as dividend, borrowing £500 from the bank for the purpose, or shall we devote that £500 to meeting the necessary business requirements of the company? " If they adopt the former alternative, the £500 will be borrowed either from the bank or on mortgage of the factory, and will be distributed, and the balance sheet at the beginning of the following year will have, on the assets side, " Factory, £1,500 ", and, on the liability side, " Capital, £1,000, " £500 overdraft ", or " £500 due to the mortgagee ", as the case may be, contrasted with the balance sheet as at the end of the preceding year, which would have had the same items on the assets side, but, on the liability side, would have had £1,000 capital and £500 profit. If, in such a case as that, the Commissioners had considered the question whether that £500 should or should not, in reason, have been distributed as dividend among the shareholders, they are directed by the proviso to the Section to take into consideration the necessary requirements of the company—the current



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requirements of the company's business, and such other requirements as may be necessary or advisable for the maintenance of that business—and in an ordinary case, the directors having acted *bonâ fide*, one cannot doubt but that the Commissioners would accept the decision of the directors that it was right, instead of distributing the £500 as profit, to capitalize it for the purpose of meeting the current and other requirements of the business of the company. But I see nothing in the Section which prevents the Commissioners from investigating the question as to whether, in truth and in fact, the £500 was necessary to meet the current requirements of the business.

Let me apply that to the present case. During the year in question, as found in the Special Case, a sum of £630,478 was spent on the necessary business requirements of the Company, but, of course, as each item of expenditure was incurred, the directors did not call a board meeting for the purpose of ascertaining finally whether that sum should be allocated eventually to revenue or capital. As I have pointed out, that question does not arise until the directors have to consider what profit they have made during the year. At the time when a part of the expenditure was incurred, it might be, and very likely was so, that no realisable profit was in the hands of the Company at all. The Company cannot tell until the end of the financial year what its profit is, and until that time comes it cannot reasonably determine how much of that profit ought to be applied to the necessary requirements of the Company's business instead of being distributed as dividend. As I say, it has been found that the expenditure was an expenditure on the requirements of the Company's business, but the point of time that has to be considered is not the point of time at which the expenditure was incurred, but the time when the directors had to determine upon a distribution of the whole, or a part, or none, of the realised profit during the year as dividend, because, by the Section, the Commissioners have to consider whether a reasonable part of the income has been distributed by way of dividend. In a case where no dividend is declared at all, that point of time (the time at which the Commissioners have to consider the question) is a reasonable time after the expiration of the financial year. Where the directors have declared a dividend, the time at which the question has to be considered by the Commissioners is the time at which the directors did declare the dividend, and then the Commissioners have to determine whether at that time they declared a reasonable dividend or not, that is to say, whether they distributed a reasonable amount of the profits or not.

In this case, as we know, the Company did declare a dividend on the 12th April, 1929. They declared a dividend, as the Master of the Rolls has pointed out, of 100 per cent., exhausting some £45,000

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of the £371,000 odd profit that they had made during the year. The question the Commissioners have to put to themselves is: Why, on the 12th April, 1929, was not a larger sum declared as dividend? What is the answer to that? I have not heard one. At that time, the Company had no liabilities to speak of. There was a possible liability in respect of Income Tax, but to meet that the Company had retained £200,000 out of the assets transferred to the new Company, so that the Company had practically no liabilities or only a small liability of £7,000. There was standing to the credit of its profit and loss account a sum of over £1,000,000 at that time, of which £371,000 represented the profit for the year in question. Why was not more of that £371,000 distributed as dividend? The Company had no business whose requirements had to be considered; the business had been sold to a new company. There were no business requirements that the directors could take into consideration, or that the Commissioners would have to take into consideration. The only reason why the whole £371,000 was not distributed as dividend—and it is admitted that it could have been legally; the assets were there out of which it could have been paid—was either that the directors, of whom Sir Montague Burton is one, did not like to call upon him to pay up the debt which he owed the Company and which had been excluded from the sale to the new company, or for some reason or another they did not like to have the dividend set off against that sum. But that is not a good reason for not having distributed the whole £371,000 in dividend. When you arrive, as I think one must arrive, at the conclusion that the time at which it has to be considered whether the dividend is reasonable or not is the time when the dividend is declared, and that that is the time at which you have to look at the necessary and advisable requirements of the Company, it seems to me to follow that there was no reason why the £371,000 should not have been distributed as dividend in this case, and that the direction of the Commissioners was properly given.

For these reasons it appears to me that this appeal fails with the consequences that the Master of the Rolls has indicated.

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An appeal having been entered against the decision in the Court of Appeal, the case came before the House of Lords (Lord Hailsham, *L.C.*, and Lords Blanesburgh, Russell of Killowen, Macmillan and Roche) on the 4th and 6th February, 1936, and on the latter date judgment was given unanimously in favour of the Crown, with costs, confirming the decision of the Court below.

Sir William Jowitt, *K.C.*, Mr. Cyril Radcliffe, *K.C.*, and Mr. Frederick Grant appeared as Counsel for the Company and the Attorney-General (Sir Thomas Inskip, *K.C.*), the Solicitor-General (Sir Donald Somervell, *K.C.*) and Mr. Reginald P. Hills for the Crown.

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## JUDGMENT

**Lord Hailsham, L.C.**—My Lords, this is an appeal from an Order of the Court of Appeal affirming a decision of Finlay, J. Finlay, J., had answered in the affirmative a question put to him by the Board of Referees, whether there was evidence upon which that Board could come to the determination which they actually reached confirming a direction of the Special Commissioners as to the proper method of dealing with the income of the Appellant Company under provisions of the Finance Act, 1922.

My Lords, from the Case stated by the Board of Referees we find that the Appellant Company was formed in the year 1917 to take over a business of the manufacture of clothing and tailoring which was previously carried on by Sir Montague Burton, then Mr. Burton. At the time when the Company was formed in 1917 the capital issued was £5,002, there were creditors to the amount of £13,510, there was an overdraft of about £9,500, and in that year there was a total profit of £2,025. During the next twelve years the Company prospered exceedingly, and continued to grow in a very remarkable manner. In the year 1929 we find that the issued capital had grown to £47,002, the creditors had increased to £630,436, there were £212,867 of bills payable, there was an overdraft of £1,342,595, and there was a balance standing at the credit of profit and loss account of £1,643,235.

It appears that the method adopted for financing the business consisted partly of borrowing money from the bank and partly of lending money to Mr. Burton, who then bought long leasehold or freehold premises which were suitable for the shops which the Company desired to acquire, and let the shops so acquired to the Company. In the case of short leaseholds only, the Company itself seems to have acquired the premises; in the other cases they lent money to Mr. Burton, Mr. Burton bought the premises and let them to the Company, and the Company then spent sums of money in equipping them for the purposes of its business.

In February, 1929, the directors of the Appellant Company determined to sell their business to a big public company. Accordingly agreements were entered into between the new Company and the old Company and between Mr. Burton and the new Company whereby the shops of the old Company were transferred to the new Company; the old Company was to be treated as having carried on business since the 1st April, 1928, for the benefit of the new Company, and the old Company retained as one of its assets the debt owing to it by Sir Montague Burton. That arrangement having been come to in February, 1929, the sales and purchases were carried through to completion on the 31st March, 1929, and in accordance with the scheme which had been decided upon the old Company was put into liquidation by resolutions of the 20th April and 6th May, 1929. During the year ended 31st March, 1929, the

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actual profit earned by the Company was some £371,000. During that year the Company had continued to expend, and during that year £220,043 had been spent on fixed assets, £306,960 had been spent in increasing the stock, the book debts and cash had increased by £103,475, and the loans to Mr. Burton had increased by nearly £54,000.

In addition it appears that since 1927 the system of buying premises by Mr. Burton with money advanced by the Company had been altered. Two new companies had been formed known as Henry Holding, Limited, and Key Estates, Limited, Mr. Burton holding all the shares in Henry Holding, Limited, and Henry Holding, Limited, owning all save twelve of the shares in Key Estates, Limited. The system of acquiring premises had been modified so that during those two years the Appellant Company lent the money necessary for the purchase of the premises to Henry Holding, Limited, who apparently financed Key Estates, Limited, so that that company could become the owner of the shops in which the business was to be carried on.

My Lords, in those circumstances the Commissioners of Income Tax have reached the conclusion that the Company's business had been so carried on as to bring it within the purview of Section 21 of the Finance Act, 1922. It is admitted that the Company is a company to which the provisions of that Statute are applicable, that is to say that it answers the definition of Sub-section (6) of that Section in that substantially the whole capital and control of the Company were vested at all material times in Mr. Burton, now Sir Montague Burton.

By Section 21 it is provided : " With a view to preventing the  
" avoidance of the payment of super-tax through the withholding  
" from distribution of income of a company which would otherwise  
" be distributed, it is hereby enacted as follows—(1) Where it  
" appears to the Special Commissioners that any company to which  
" this section applies has not, within a reasonable time after the  
" end of any year or other period ending on any date subsequent  
" to the fifth day of April, nineteen hundred and twenty-two, for  
" which accounts have been made up, distributed to its members  
" in such manner as to render the amount distributed liable to be  
" included in the statements to be made by the members of the  
" company of their total income for the purposes of super-tax,  
" a reasonable part of its actual income from all sources for the said  
" year or other period, the Commissioners may, by notice in writing  
" to the company, direct that for purposes of assessment to super-  
" tax, the said income of the company shall, for the year or other  
" period specified in the notice, be deemed to be the income of the  
" members, and the amount thereof shall be apportioned among the  
" members : Provided that, in determining whether any company

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“ has or has not distributed a reasonable part of its income as aforesaid, the Commissioners shall have regard not only to the current requirements of the company's business but also to such other requirements as may be necessary or advisable for the maintenance and development of that business ”. Then there are other provisions, with which we are not concerned, as to the distribution of the burden thus imposed.

My Lords, pursuant to that Section the Commissioners of Income Tax have determined that this Company had not distributed “ a reasonable part of its actual income ” for the year ended 31st March, 1929. There seems in the Case to be some little confusion between that date and the date of the 27th February, 1929, when the agreement for sale was entered into, but the point is irrelevant for the matter which your Lordships are now considering.

From that decision of the Commissioners of Income Tax there was an appeal to the Special Commissioners. They affirmed their direction. There was then an appeal to the Board of Referees, who confirmed the decision of the Commissioners, and, as I stated at the beginning of this opinion, the only question which is open to the determination of the Court, as found in the Case stated by the Board of Referees, is whether there was evidence upon which the Board of Referees could reach that conclusion.

My Lords, it is argued on behalf of the Appellants that, inasmuch as the whole of the sums which were earned by the Company, or a sum at least as large as the whole of the sums earned by the Company, in any year were expended in the maintenance or development of the business, the Section is not applicable. Reliance is placed upon the findings of fact in the Case Stated. The particular findings which are relied upon are to be found in sub-paragraph (xvii) of paragraph 4 of the Case Stated: “ During the year ended the 31st March, 1929, the Company expended on the current requirements of its business, and on other requirements advisable for the maintenance and development of that business, amounts far in excess of the profits of the year ”, and then figures are set out which support that conclusion.

My Lords, Counsel for the Appellants took the point that on its true construction the Statute meant that in any case in which the Commissioners found that sums equal to the total income of the Company for any year had in fact been spent on requirements necessary or advisable for the maintenance and development of the business of the Company, then the Section did not operate. I do not so understand the Section. As I read the Section, the direction in the proviso is that one of the relevant factors to which attention must be paid by the Commissioners and by the Board of Referees is the fact that the income, or sums equivalent to the income, have been spent on requirements necessary or advisable for the maintenance and development of the business; but I do not read the

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proviso as meaning that wherever that happens, then, whatever the facts are, the Commissioners are bound to hold that the requirements of Section 21 have not been complied with.

In the present case it is obvious that, if the Company had so desired, it could have paid by way of dividend the sums which in fact it lent to Mr. Burton (as he then was), and the only differences which would have been occasioned by that course of business would have been first of all that the Company would not have been entitled to receive interest on the money so paid, and secondly that if the money had been paid by way of dividend there would have been a Sur-tax liability on Sir Montague Burton, and the amount of the dividend which would have been available in his hands to buy new premises would have been correspondingly diminished. But I cannot think that the fact that the Company chose to carry on its business in that particular way is one which can be disregarded, or which compels the Board of Referees to reach the conclusion for which the Appellant Company contends.

There is also in the present case a point which is very well put, if I may say so, in the judgment delivered by Romer, L.J., in the Court of Appeal. At the end of the year ended 31st March, 1929, the position was that the Company had sold its whole business to the new Company; it required no sums for the maintenance or development of the business which it had so transferred; it had an available asset of £1,000,000 in a debt owing from Mr. Burton; and there was no reason—at any rate no reason which seems in any way conclusive—why it should not have declared a dividend, which admittedly it could legally have done, and satisfied the dividend, of course, by writing off a corresponding proportion of the debt owing to it by Sir Montague Burton.

My Lords, I began my opinion by pointing out that the only question to be determined was whether there was evidence on which the Board of Referees could have reached the conclusion which they did reach. If there was such evidence, then it is not open to this House to review their findings of fact; and in my judgment there was ample evidence. It can only be suggested that they were wrong on the basis that the proviso does not mean merely that the Commissioners are to have regard to the facts therein stated but that they are to treat those facts as in every case conclusive, and that is a meaning which I cannot possibly put upon the language of the Statute.

For these reasons, my Lords, I think that this appeal fails, and I move your Lordships that it be dismissed.

**Lord Blanesburgh.**—My Lords, I am of the same opinion.

**Lord Russell of Killowen.**—My Lords, I also agree that this appeal fails, and I am content to rely upon the judgment of Romer, L.J., in the Court of Appeal as expressing the reasoning upon which my opinion is founded.

**Lord Macmillan.**—My Lords, I also agree.

**Lord Roche.**—My Lords, I agree.

*Questions Put:*

That the Order appealed from be reversed.

*The Not Contents have it.*

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

*The Contents have it.*

[Solicitors:—Maxwell, Batley & Co., for Simpson, Curtis & Burrill (Leeds); Solicitor of Inland Revenue.]