HIGH COURT OF JUSTICE (CHANCERY DIVISION)—27TH AND 28TH APRIL, 1953, AND 17TH FEBRUARY, 1954

COURT OF APPEAL—6TH AND 10TH MAY, 1954

HOUSE OF LORDS—20TH, 21ST AND 22ND JUNE, AND 25TH JULY, 1955

Edwards (H.M. Inspector of Taxes)

v.

Bairstow & Harrison[1]

Income Tax, Schedule D—Purchase and sale of cotton spinning plant—Isolated transaction—Whether adventure in nature of trade.

The Respondents, who were respectively a director of a leather manufacturing company and an employee of a spinning firm, purchased a complete cotton spinning plant in 1946 *with the object of selling it as quickly as possible at a profit. They hoped to sell the plant in one lot, but ultimately had to dispose of it in five separate lots over the period from November,* 1946, *to February,* 1948. *Assessments to Income Tax in respect of profits arising from this transaction were made under Case* I *of Schedule D for the years* 1946–47 *and* 1947–48. *On appeal, the General Commissioners found that it was an isolated case and not taxable, and discharged the assessments.*

The Case was remitted by the Chancery Division to the Commissioners to hear legal argument and answer the question whether the transaction was an adventure in the nature of trade. They decided after further consideration that the transaction was not an adventure in the nature of trade.

Held, *that the only reasonable conclusion on the evidence before the Commissioners was that the transaction was an adventure in the nature of trade.*

CASE

Stated under Section 149 of the Income Tax Act, 1918, by the Commissioners for the General Purposes of the Income Tax for the Division of West Morley in the County of York, for the opinion of the High Court of Justice.

1. At a meeting of the Commissioners for the General Purposes of the Income Tax for the Division of West Morley in the County of York, held on 14th October, 1949, at 28, Prescott Street, Halifax, Harold Bairstow and Fred Harrison (hereinafter referred to as "the Respondents") appealed

(1) Reported (H.L.) [1955] 3 W.L.R. 410; 99 S.J. 558; [1955] 3 All E.R. 48; 220 L.T.Jo. 93.

against additional first assessments for Income Tax made upon H. Bairstow in the sums of £10,326 for the year of assessment ended 5th April, 1947, and £5,000 for the year of assessment ended 5th April, 1948, in respect of profits made from sales of machinery.

2. Mr. B. R. Lewis, solicitor, appearing for the Respondents, drew the Commissioners' attention to the fact that it was common ground between the parties that the assessments had been made on Mr. Harold Bairstow, who had at the time regarded himself as being solely entitled to the profits of the transaction in question. Mr. Fred Harrison had later successfully claimed a half share of those profits and it was now clear that it was a joint venture; the case was therefore to be argued, by agreement between the parties, as if the assessments had been made in the joint names of H. Bairstow and F. Harrison. Mr. H. L. Edwards, H.M. Inspector of Taxes, said he associated himself with these remarks.

3. The following facts were admitted or proved:—

(1) Mr. Harrison became aware in 1946 that a complete spinning plant was for sale at Messrs. Whitworths at Luddendenfoot and had reason to believe that the plant could be purchased for a reasonable figure. He communicated this information to Mr. Bairstow as he himself was not in a position to finance any purchase. Mr. Bairstow expressed himself to be interested, but both he and Harrison agreed that they had no intention of holding the plant; what they desired was a quick purchase and re-sale. Mr. Bairstow therefore arranged for a valuation to be made by a professional valuer in order that he might be satisfied that the price asked by Whitworths was one on which he could make a quick profit. He also immediately and before purchasing the plant made enquiries as to whether he could arrange to sell the plant even before it had been purchased. Mr. Harrison was in touch with an Indian by name Wattal who was very anxious to purchase some of the plant, namely, the botany spinning section. For this he was prepared to pay £17,000, but both Harrison and Bairstow were quite decided that they had no intention of selling the plant piecemeal; they wanted to sell it as a complete unit. Then Mr. Bairstow began negotiations with the International Export Co. They said they were prepared to buy the whole of the plant. On 14th November the International Export Co. wrote to Mr. Bairstow saying that they were prepared to buy the plant which was on the fourth floor, which was the botany spinning plant, for £15,000, this, of course, being £2,000 less than the price offered for the same section of the plant by the Indian Wattal. The reason why the International Export Co. were prepared to pay £15,000 immediately for that particular section of the plant was because although they were willing to purchase the whole of the plant it was their intention to export it, and whilst they were confident that an import licence into China would be forthcoming for the asking in respect of the botany spinning section they were not willing to complete the purchase of the remainder of the plant until the import licences for such remainder were in fact forthcoming. On 20th November Mr. Bairstow, on behalf of himself and Harrison, having negotiated the purchase of the spinning plant together with two small items of warping plant, completed the purchase by the payment to Whitworths of £12,000. On 27th November, one week later, the International Export Co. paid Mr. Bairstow the sum of £15,000 for the botany spinning plant. Subsequently Messrs. Bairstow and Harrison were informed by the International Export Co. that unfortunately the import licences relating to the remainder of the plant could not be obtained and therefore it was regretted that they

could not purchase the remainder of the plant. Thus Mr. Bairstow and Mr. Harrison found themselves with the remainder of the plant on their hands (which they had endeavoured to avoid) and this left them no alternative but to sell that remainder in whatever market they could.

(2) The rest of the plant was sold in two other principal and two smaller lots by February, 1948, though owing to difficulties the last plant was not removed until March, 1949. The two smaller lots consisted of the two items of warping plant.

(3) Mr. Bairstow was a director of a company manufacturing leather. Mr. Harrison was an employee of a spinning firm. Neither of them had had any transactions in machinery or any other commodity before.

(4) The profit shown by the accounts, which form part of this Case and are annexed hereto, marked " A "(1), was £18,225 11*s*. 3*d*.

(5) The Respondents' sole purpose in the transaction was to sell the plant at a profit.

(6) With regard to the manner in which the sales were effected :—

(*a*) Some commissions were paid for assistance received in effecting sales.

(*b*) There was no advertising. Customers principally learnt of the existence of the plant for sale when they came to inspect the premises which were being advertised by the original owners as becoming vacant.

(*c*) About 400 spindles out of the 220,000 which the plant represented were replaced because they were missing or damaged.

(*d*) Insurance risks were covered by the Respondents while the plant was in their hands.

(*e*) Some costs for renovation were incurred because of damage by floods during their ownership.

(*f*) When it was seen that the transaction would not be over in a matter of weeks, wages were paid to Mr. Bairstow's secretary, who kept books and did other office jobs in connection with these transactions.

(*g*) The Respondents incurred expense in travelling and entertainment in meeting both the actual persons who would eventually buy the plant and others who did not in fact become customers. A number of advertisements asking for plant, which appeared in trade papers, were answered by the Respondents in an attempt to sell the plant remaining after the first main sale.

(*h*) Owing to the delay in removing the plant, rent was paid to the landlords for the last six months during which the plant was housed, and it is thought that a further amount will have to be paid to put the premises in order.

4. It was contended on behalf of the Respondents that this was a transaction which could not be held liable to tax under Case I of Schedule D for the following reasons:—

(1) In the case of *Leeming* v. *Jones*, 15 T.C. 333, four conditions had been approved by the Court, one of which must be present to establish liability:—

(*a*) the existence of an organisation, or

(*b*) activities which led to the maturing of the asset to be sold, or

(*c*) the existence of special skill, opportunities, in connection with the article dealt with, or

(1) *See* page 222 *post*.

(*d*) the fact that the nature of the asset itself should lend itself to commercial transactions.

Not one of these conditions was present in this case, for there had been no organisation or numerous sales, no work had been done on the asset, the Respondents' normal activities did not call for any special knowledge of the commodity dealt with, and the purchase and sale of plant lent itself to capital, rather than commercial, transactions.

(2) Mr. Lewis referred to three cases which had been decided in favour of the Revenue and distinguished them from that of his clients as follows :—

(*a*) In *Martin* v. *Lowry*, 11 T.C. 297, though there had been one purchase, there had been many sales and a trading organisation. The whole intention of his clients had been to effect one sale alone and it was incidental that this had been defeated by circumstances.

(*b*) In *Rutledge* v. *Commissioners of Inland Revenue*, 14 T.C. 490, it had been established that Rutledge was a man who embarked on many deals. The Respondents had never had any similar transactions.

(*c*) In *Commissioners of Inland Revenue* v. *Fraser*, 24 T.C. 498, the commodity dealt in—whisky—lent itself to trading transactions, as had also linen and paper, which were the commodities dealt in by Martin and Rutledge. The difference between the sale of a complete spinning plant and those commodities lay in the fact that the former could and was intended to be sold as one unit, whereas it would be very unusual for any of the latter so to be sold.

(3) In *Whyte* v. *Clancy*, 20 T.C. 695, approval had been set on Rowlatt, J.'s dictum in *Ryall* v. *Hoare*, 8 T.C. 525:—

"That rules out, of course, the well-known case of a casual profit made upon an isolated buying and selling of some article; that is a capital accretion, and unless it is merged with other similar transactions in the carrying on of a trade, and the trade is taxed, no tax is exigible".

(4) Mr. Lewis submitted to the Commissioners that they should hold that the profit was a capital one and that there was no concern in the nature of trade that could be taxed.

5. It was contended on behalf of the Crown that the buying and selling of the plant constituted a trade or adventure in the nature of a trade and that the profit or gains arising therefrom were assessable to Income Tax under Case I of Schedule D.

6. We, the Commissioners, having considered the facts and evidence submitted to us, are of opinion that this was an isolated case and not taxable, and discharge the assessments.

7. Whereupon H.M. Inspector of Taxes declared his dissatisfaction with the decision of the Commissioners as being erroneous in point of law, and demanded a Case to be stated for the opinion of the High Court, which Case we hereby state and sign accordingly.

Charles Robertshaw,
W. A. Simpson-Hinchliffe,
Rufus Stirk,
Hansen Marshall,
} General Commissioners.

2nd November, 1951.

The case came before Upjohn, J., in the Chancery Division on 27th and 28th April, 1953, when it was ordered that it be remitted to the General Commissioners for further consideration.

Mr. Cyril King, Q.C., and Sir Reginald Hills appeared as Counsel for the Crown, and Mr. F. Grant, Q.C., Mr. John Senter, Q.C., and Mr. Roderick Watson for the taxpayers.

Upjohn, J.—This is an appeal by the Crown from a decision of the General Commissioners for the Division of West Morley in the County of York, and it raises a question as to whether a particular transaction is assessable to tax under Case I of Schedule D of the Income Tax Act, 1918.

The transaction in question admittedly is and has been found by the Commissioners an isolated transaction. It was a transaction in which the Respondents proposed to purchase, and they did in fact purchase, certain cotton spinning plant with the object of selling it as quickly as possible at a profit. They hoped to be able to sell the plant in one lot, but in that they were disappointed, and ultimately they had to dispose of this plant in five separate transactions. The purchase took place in 1946, and these five sales were spread over the years from 1946 down to February, 1948. A substantial profit of some £18,000 was made on the transaction. As I have said, it is admittedly an isolated transaction, and the sole question which arises is whether, having regard to the definition of " trade " in Section 237 of the Income Tax Act, 1918, this is an

" adventure . . . in the nature of trade ".

It is not actually a trade because an isolated transaction has not the character of carrying on a trade. As it was put by Lord Clyde in one of the authorities quoted to me, one isolated transaction does not make a trade any more than one swallow makes a summer(1).

The matter came before the General Commissioners, who dealt with the contentions of the Appellant and Respondents. Reading from sub-paragraph (4) of paragraph 4 of the Stated Case, briefly summarised, they said this :—

> " Mr. Lewis " (who was the solicitor for the Respondents) " submitted to the Commissioners that they should hold that the profit was a capital one and that there was no concern in the nature of trade that could be taxed."

Then they say in paragraph 5 :—

> " It was contended on behalf of the Crown that the buying and selling of the plant constituted a trade or adventure in the nature of a trade and that the profit and gains arising therefrom were assessable to Income Tax under Case I of Schedule D."

Then the Commissioners proceed (paragraph 6) :—

> " We, the Commissioners, having considered the facts and evidence submitted to us, are of opinion that this was an isolated case and not taxable. and discharge the assessments."

It was submitted to me on behalf of the Respondents that, having regard to the submissions made, that was really a finding that the case was not an adventure in the nature of trade. However, I cannot so regard it. The Commissioners plainly stated on consideration of the facts that it was " an isolated case ". I note that in sub-paragraph (3) of paragraph 4 of the

(1) Commissioners of Inland Revenue v. Livingston, 11 T.C. 538, at p. 542.

(Upjohn, J.)

Stated Case they set out the dictum of Rowlatt, J., in *Ryall* v. *Hoare*, 8 T.C. 521, at page 525, in these terms :—

> "That rules out, of course, the well-known case of a casual profit made upon an isolated buying and selling of some article ; that is a capital accretion, and unless it is merged with other similar transactions in the carrying on of a trade, and the trade is taxed, no tax is exigible ".

Having regard to the way in which the findings of the Commissioners were expressed, I do not quite know what was in their minds. Paragraph 6 is most unhappily phrased. Logically, it seems to me, if they were going to mention the fact that it was an isolated case, they should then have gone on and said : Being an isolated case we therefore had to consider whether this was an adventure in the nature of trade. The fact that the transaction was isolated is a relevant consideration to be taken into account, but it has not been suggested that it is decisive or conclusive of the matter. Therefore, it seems to me that this case must be remitted to the General Commissioners with an intimation to them that they must consider and answer the question: Aye or no, was this transaction an adventure in the nature of trade?

Mr. King, for the Crown, submitted to me that, having regard to certain recent Scottish decisions, I should treat the answer to this question as a mixed question of fact and law, and on the findings set out in paragraph 3 of the Case Stated I should come to a conclusion in his favour upon that matter myself. In my judgment, sitting in this Court it is not open to me to adopt that attitude.

It has been held in the Court of Appeal, in *Cooper* v. *Stubbs*, 10 T.C. 29, that a finding as to whether a trade is or is not being carried on is a finding of fact which is binding upon the Court. In the later case of *Leeming* v. *Jones*, 15 T.C. 333, the Court of Appeal had to consider the question whether a transaction was an adventure in the nature of trade. What happened in that case was this. When it came before Rowlatt, J., it seemed to the learned Judge that the Commissioners had not given a definite answer to that question, and therefore he remitted the matter to them, as I propose to do, to answer that question. A Supplemental Case was then stated by the Commissioners, and they answered the question in that particular case by holding that it was not an adventure in the nature of trade. When the matter came before the Court of Appeal that finding was treated as a finding of fact binding upon them. The case went to the House of Lords, but not on Case I of Schedule D, but upon the claim under Case VI of Schedule D. That is not a matter which is before me. It was admitted in *Leeming* v. *Jones* by the Crown in the House of Lords that it was a question of fact, and solely a question of fact, and therefore they could not submit any argument upon Case I.

In those circumstances, it seems to me that I am clearly bound to treat the question whether or not this transaction was an adventure in the nature of trade as one purely of fact, and therefore I cannot come to any conclusion upon the matter in the absence of a finding thereon by the General Commissioners.

It is quite true that in a Scottish case which was cited to me of *Commissioners of Inland Revenue* v. *Fraser*, 24 T.C. 498, the Court of Session felt that it was at liberty to treat the matter as a mixed question of fact and law, and in fact in that case the finding of the General Commissioners was overruled. That case has been followed in two other recent

Scottish cases, *Commissioners of Inland Revenue* v. *Toll Property Co., Ltd.*(1), and *Commissioners of Inland Revenue* v. *Reinhold*(2). In the latter case Lord Russell said this(3):—

> "The profit of an isolated transaction by way of purchase and resale at a profit may be taxable as income under Schedule D if the transaction is properly to be regarded as 'an adventure in the nature of trade'. In each case regard must be had to the character and circumstances of the particular transaction. In this appeal the Commissioners of Inland Revenue, as Appellants, challenge the decision of the General Commissioners and maintain that the facts found in the case are consistent only with the inference that the Respondent's transaction was one in the nature of trade. The question raised in that form appears to have been regarded as a question of fact by the Court of Appeal in England in *Leeming* v. *Jones*(4), [1930] 1 K.B. 279, the learned judges following and applying the views expressed in the same Court by two judges in the earlier case of *Cooper* v. *Stubbs*(5), [1925] 2 K.B. 753. When *Leeming* v. *Jones* was appealed to the House of Lords, Counsel for the Commissioners did not challenge that proposition, see [1930] A.C. 415. In the Scottish courts, however, it is clear that such a question is regarded as a question of law, or at least of mixed fact and law, see *Commissioners of Inland Revenue* v. *Fraser*(6)."

It does not seem to me that in this Court I am at liberty to follow the practice of the Scottish Courts, attractive though it would be to do so if the matter were *res integra*. But I say no more about that.

Therefore, all I can do is to remit the matter to the General Commissioners with an intimation that they are to consider the question whether, the transaction being an isolated transaction, there was nevertheless an adventure in the nature of trade which was assessable to tax under Case I of Schedule D. In my judgment it is desirable that the Commissioners should hear further argument on this point before stating a Supplemental Case and I shall so direct. The costs of this appeal are reserved.

The case was accordingly again considered by the General Commissioners and the following Supplemental Case stated.

SUPPLEMENTAL CASE

Stated under Section 64 of the Income Tax Act, 1952, by the Commissioners for the General Purposes of the Income Tax for the Division of West Morley in the County of York, for the opinion of the High Court of Justice.

1. Pursuant to the Order of the High Court dated 28th April, 1953, whereby the Court ordered that the Case stated by the Commissioners in this matter be remitted to them to consider and answer the question whether the transaction, the subject matter of this Case, was an adventure in the nature of trade, they to be assisted in their finding by legal argument, a meeting of the Commissioners was held at Halifax in the County of York on 9th October, 1953.

2. After hearing legal argument on behalf of both the Appellant, Her Majesty's Inspector of Taxes, and the Respondents, and after further consideration, we, the Commissioners, decided as follows:—

We find that the transaction, the subject-matter of this Case, was not an adventure in the nature of trade.

(1) 34 T.C. 13. (2) 34 T.C. 389. (3) *Ibid.*, at p. 394. (4) 15 T.C. 333. (5) 10 T.C. 29. (6) 24 T.C. 498.

3. We, the Commissioners, sign this Supplemental Case accordingly this 30th day of October, 1953.

Charles Robertshaw, } Commissioners for the General Purposes of the Income Tax acting in and for the Division of West Morley, in the County of York.
H. Clifford Smith, }

The case came before Wynn-Parry, J., in the Chancery Division on 17th February, 1954, when judgment was given against the Crown, with costs.

Mr. Cyril King, Q.C., and Sir Reginald Hills appeared as Counsel for the Crown, and Mr. John Senter, Q.C., and Mr. Roderick Watson for the taxpayers.

Wynn-Parry, J.—This matter comes before me on a Supplemental Case dated 30th October, 1953, signed by the Commissioners for the Division of West Morley in the County of York, to whom their original Case was remitted by Upjohn, J. He remitted the original Case because, in his view, with which I respectfully agree, their finding under paragraph 6 was not clear.

They stated in paragraph 6 :—

> "We, the Commissioners, having considered the facts and evidence submitted to us, are of opinion that this was an isolated case and not taxable, and discharge the assessments."

Now, that, in effect, begged the question. The whole question was whether or not the transaction was an adventure in the nature of trade, and therefore the Case was remitted to them for the purpose of answering that question one way or the other.

At the hearing before Upjohn, J., he took the view, and again I respectfully agree, that, having regard to the authorities, he was bound to take the view that the question before this Court must be regarded as purely a question of fact, and that it was not open to this Court to take the view which is taken in the Scottish Courts that such a question as this may be regarded as a mixed question of fact and law. Mr. King has made it clear that, while he is bound to accept that view of the matter in this Court, he desires to reserve the right in a higher Court to argue to the contrary, and I only mention that to place beyond doubt that that point is kept open on behalf of the Revenue. I am, therefore, only concerned with the matter, regarding the question purely as one of fact.

The General Commissioners were directed to have the benefit of legal argument and, as appears upon the face of the Supplemental Case, that course was followed, for they say in paragraph 2 :—

> "After hearing legal argument on behalf of both the Appellant, Her Majesty's Inspector of Taxes, and the Respondents, and after further consideration, we, the Commissioners, decided as follows: "—

and then follows their decision—

> "We find that the transaction, the subject matter of this Case, was not an adventure in the nature of trade."

Now, in view of that finding *prima facie*, at any rate, the matter is concluded. In *Leeming* v. *Jones*, 15 T.C. 333, Rowlatt, J., in deciding to remit the case to the Commissioners, said this (at pages 340–1) :—

> "What the Commissioners must do is to say, one way or the other, was this, I will not say carrying on a trade, but was it a speculation or an

adventure in the nature of trade. I do not indicate which way it ought to be, but I commend the Commissioners to consider what took place in the nature of organising the speculation, maturing the property and disposing of the property, and when they have considered all that, to say whether they think it was an adventure in the nature of trade or not."

I have read that passage to show how completely the matter in a case such as this is left to the opinion of the Commissioners, because their decision in such a case as this is, when analysed, no more than the expression of an opinion to which binding force is given.

Again in the case of *Cooper* v. *Stubbs,* 10 T.C. 29, at page 56, Atkin, L.J., says this :—

"As it appears to me that is an inference of fact pure and simple, I think that their finding"

—that is the Commissioners'—

"must stand, and therefore it is immaterial what view I or any Judge on the Bench takes of the matter. I am not saying that I agree with them, because I think it is irrelevant."

Now, those two passages illustrate the principle which I must apply, because, as I say, on those authorities *prima facie* the matter is concluded by the decision of the Commissioners, that the transaction the subject-matter of this case was not an adventure in the nature of trade.

Putting aside the point which Mr. King desires to preserve, there remains to him only one way of attacking that finding, and that is to say that the finding in view of the evidence before the Commissioners is so perverse that, as a matter of law, it cannot stand. The force or otherwise of that submission must turn upon the particular facts of this case. It is perfectly clear from the original Case that the Commissioners went into the facts with very considerable care. Their statement of them appears to me to merit the epithet exhaustive, and it also appears from the Supplemental Case that they must again have considered the facts when the matter came back to them. Now, once it is established, as in my view it is, that what they have to do is to form a considered opinion which will represent their decision, it is then obvious that the matter is one which involves a question of degree and no Judge is entitled to refuse to recognise the force of their decision merely because he can perhaps fasten upon one or more points with which he might not find himself in agreement. At the end of the consideration of the matter it is necessary, as it seems to me, in order not to accept the decision of the Commissioners, to say that it is so wholly perverse that no reasonable men, directing their minds intelligently to the evidence, could have arrived at the opinion at which they have arrived.

I do not intend to traverse the evidence in any detail at all. In my view it is quite impossible to say that the decision of the Commissioners in this case, reviewed as a matter of fact, was so perverse that it cannot stand.

For those short reasons I do not propose to interfere with that decision.

Mr. John Senter.—I ask your Lordship to say that the Crown's appeal will be dismissed with costs before Upjohn, J., and before your Lordship. Your Lordship will remember that the costs were reserved.

Wynn-Parry, J.—Yes, very well.

The Crown having appealed against the above decision, the case came before the Court of Appeal (Sir Raymond Evershed, M.R., and Jenkins and Hodson, L.JJ.) on 6th and 10th May, 1954, when judgment was given unanimously against the Crown, with costs.

Mr. Cyril King, Q.C., and Sir Reginald Hills appeared as Counsel for the Crown, and Mr. John Senter, Q.C., and Mr. Roderick Watson for the taxpayers.

Sir Raymond Evershed, M.R.—This is an appeal by the Inspector of Taxes on behalf of the Crown against a refusal by Wynn-Parry, J., to interfere with the decision of the Commissioners for the General Purposes of the Income Tax discharging an assessment made on the Respondents for the two tax years ended 5th April, 1947, and 5th April, 1948, in respect of a transaction engaged in by them in purchasing and later selling certain spinning machinery. The profit which was realised was considerable. Although the original intention of the Respondents appears to have been to achieve a quick sale in one lot of this machinery, and perhaps to sell it before possession of it was taken—and if that had happened it would, I think, have made more difficult the assessment which was made—the fact is that that scheme was not possible. The account, letter A(1), an exhibit with our papers, shows that the resale was effected in five lots over a period of some 15 months, and that in the meantime a certain amount of work was done and a certain amount of expense was incurred in the way of storage and repairs of the plant and negotiations in regard to the sales, etc.

Although one of the Respondents appears to be employed in the spinning business, the other is concerned with the leather trade, and neither of the Respondents, except for the transaction here in question, has ever, before or since, been concerned in the buying or selling of textile machinery.

The case of the Crown is that the profits are assessable as annual profits or gains of trade within Case I of Schedule D of the Income Tax Act, 1918, having particular regard to the definition of the word "trade" to be found in Section 237 of that Act, including the words

"adventure . . . in the nature of trade".

When the matter was first before the General Commissioners they came to the conclusion, expressed by them in their Case Stated, that the transaction was an isolated case and not, therefore, taxable. The matter came before Upjohn, J., and he, being of opinion that the finding of the Commissioners was not conclusive, and that the question was not so much whether it was an isolated case (and therefore not an ordinary trading operation) but whether, being an isolated case, it was an adventure in the nature of trade, remitted the matter to the Commissioners in order that the question I have formulated might be answered by them. It is to be noted that the Crown did not, as their argument before us might have led one to suppose that they would have done, appeal from the direction of Upjohn, J., on the ground that, on the facts as they appeared, the answer should inevitably be given in favour of the Crown; but in fact the matter did proceed to the Commissioners, who had Upjohn, J.'s judgment before them and who heard argument from Mr. Senter on behalf of the Respondents and also argument on behalf of the Inspector of Taxes. The Commissioners thereupon answered the question remitted to them

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(1) *See* page 222 *post*.

(Sir Raymond Evershed, M.R.)

negatively. As I have already indicated, Wynn-Parry, J., has refused to interfere with their resultant discharge of the assessments.

We have had the advantage of two judgments, the judgments of Upjohn, J., and Wynn-Parry, J., and both the learned Judges were of the opinion that they were bound by the decision of the Court of Appeal in two cases (*Cooper* v. *Stubbs,* 10 T.C. 29, and *Leeming* v. *Jones,* 15 T.C. 333), notwithstanding certain later decisions in the Scottish Court of Session, to hold that the conclusion by the Commissioners, that a particular transaction or transactions does not or do not constitute trade within the Schedule of the Act and the definition I have mentioned, is *prima facie,* that is, for example, in the absence of some plain and material misdirection to be observed in the Stated Case or where it can be shown tuat there was no evidence to support such conclusion, a question of fact with which the Courts in England will not and cannot interfere. I am clearly of opinion that the two learned Judges, who went carefully into the cases to which I have alluded, were entirely right in their conclusion.

The case of *Cooper* v. *Stubbs* was a case of a series of speculative transactions in cotton futures over a substantial period of time. It may, therefore, be said to be an *a fortiori* case. Although the Commissioners' decision that in that case the transactions did not constitute trade within the Schedule may have surprised the Court of Appeal, as it certainly surprised Rowlatt, J., the majority of the Court of Appeal, reversing Rowlatt, J., clearly laid it down that the decision of the Commissioners was binding upon the Court as a finding of fact.

Leeming v. *Jones* upon its facts was somewhat closer to the present case, because there it was held, as here, that the transaction in question was not an adventure in the nature of trade, and also, as in this case, the matter was remitted to the Commissioners for further consideration by Rowlatt, J.—not, I may say, as I read his observations, without a hint to the Commissioners that they might have come to an opposite conclusion from that which they in fact reached.

In my judgment there can be no question of the two decisions of the Court of Appeal having been arrived at in any sense *per incuriam.* I think, therefore, that they are binding on this Court no less than on a Court of first instance.

Mr. King and Sir Reginald Hills relied upon the later Scottish cases which I have mentioned for the view that, upon a true analysis, the question here involved is at least a mixed question of law and fact and accordingly that it is open to this Court, if it thinks that the Commissioners have arrived at a wrong conclusion, to substitute its own opinion for that of the Commissioners. I see the force and attractiveness of the argument for the suggestion that the Respondents here were engaged in truth in an adventure in the nature of trade ; but, to use the language of Atkin, L.J., in the case of *Cooper* v. *Stubbs* (at page 56), that view or suggestion is irrelevant.

Although the Scottish Courts (as, I think, is clear from a citation from the judgment of the latest of them in the judgment of Upjohn, J.) may have taken a road which diverges from that followed by the English Courts, the two jurisdictions, as it seems to me, can only now be got together again by the House of Lords ; for, as I have already indicated,

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it is, I think, clear that there is nothing in the two Scottish cases which supports the view that the decisions of the English Court of Appeal were decided *per incuriam* or otherwise in such circumstances as would entitle this Court now to decline to follow them.

I note that in one of the Scottish cases, *Commissioners of Inland Revenue* v. *Fraser*, 24 T.C. 498, which concerns a speculation in a large quantity of whisky, the findings of the Commissioners were not so laconically expressed as in the present case. They said (at page 500) :—

> "That an adventure in the nature of a trade had not been carried on; that merely an investment had been made and subsequently realised, and that the profit was not assessable to Income Tax."

It may be that that somewhat fuller finding enabled the Lord President (Normand) to say, as he did at page 504, that in his opinion

> "the Commissioners here have either misunderstood the statutory language (which I think is the probable explanation of their error) or, having understood it, have made a perverse finding without evidence to support it."

If the case can be distinguished from the present case and the English cases for the reasons which I have indicated, then I need say no more about it; otherwise, as I have already said, there appears now to have arisen a divergence which I think this Court is quite powerless to solve.

As I have earlier indicated, it would, however, be open to an appellant to challenge the findings of the Commissioners if it could be shown, for example, that there was no evidence to support such findings. That submission was put to Wynn-Parry, J., but rejected by him. Mr. King, I think, felt that he could not press the view upon us here, though Sir Reginald Hills was somewhat bolder. However that may be, I am quite satisfied that the learned Judge rightly concluded that the submission must fail. It is also quite clear that there is not, upon the face of the Case Stated, any such clear and material (or indeed any) misdirection in law which would entitle the Appellant successfully to impugn the relevant finding.

For these reasons I think we are bound to hold that the conclusion of the Commissioners here is a finding of fact which the Courts cannot disturb. I think, therefore, that the appeal fails and should be dismissed.

Jenkins, L.J.—I agree.

Hodson, L.J.—I agree.

Mr. John Senter.—With costs?

Sir Raymond Evershed, M.R.—I think that must follow.

Mr. Cyril King.—In view of your Lordships' judgment I have to ask your Lordships to give the Crown leave to get this divergence solved in the House of Lords. Whatever terms your Lordships choose to impose can be observed.

Sir Raymond Evershed, M.R.—If there is a divergence created by a certain independence of spirit north of the Tweed which has been noticed in our history before it would seem a little unfair that Mr. Senter should be at risk as to costs.

Mr. King.—My Lord, we place ourselves, of course, entirely in the hands of the Court on that point.

Sir Raymond Evershed, M.R.—Mr. King, perhaps you and Mr. Senter can help us? It is obviously a test case: this divergence has arisen and

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in the interests of good administration I think it may well be desirable to have it resolved one way or the other. Would you have any objection to make if we asked whether you would be willing, in those circumstances, to say that you would pay Mr. Senter's costs in any case in the House of Lords and will not seek to disturb the Order here?

Mr. King.—If that is what your Lordships think should be done, it shall be done.

Sir Raymond Evershed, M.R.—I do not want to impose it; it would not be right; but, if the Crown is willing, in the circumstances, to say that it would do that in order to get this matter decided, then I think, Mr. Senter, we ought to give leave.

Mr. Senter.—My Lord, that would be in accordance with the precedent of a case in which Jenkins, L.J., appeared for the Crown called *Commissioners of Inland Revenue* v. *Broadway Car Co. (Wimbledon), Ltd.*(1). Scott, L.J., addressing Mr. Jenkins, said(2): We are not imposing terms; have you any offer to make? The matter was resolved in that case by Mr. Jenkins offering on behalf of the Crown.

Sir Raymond Evershed, M.R.—In effect, Mr. King does, Mr. Senter: he has said on behalf of the Crown that if we think it right that he should make that offer, then he makes it. Of course the risk that you run now is only this: that, at the end of it all, you may have to pay the tax. But you will have had all this learning without any costs.

Mr. Senter.—Years after the transaction.

Jenkins, L.J.—If we said that the Crown will not demand the tax if they succeed their appeal would fail in its purpose, because they would have been told that it was merely academic.

Sir Raymond Evershed, M.R.—If Mr. King succeeds in the House of Lords they will have to pay the tax.

Mr. Senter.—That is fully appreciated, my Lord. The offer of the Crown, as I understand it, will be embodied in this Court's Order.

Sir Raymond Evershed, M.R.—It will be stated that the Crown have offered to pay your costs in the House of Lords.

Mr. Senter.—On a solicitor and client basis as in previous cases?

Sir Raymond Evershed, M.R.—No, party and party.

Mr. King.—I do not think we mind that; it has been done.

Sir Raymond Evershed, M.R.—I should have thought that party and party would have been better.

Mr. King.—It has been done.

Sir Raymond Evershed, M.R.—Mr. Senter, they will pay your solicitor and client costs and will not seek to disturb the Order as to costs here which is not solicitor and client, but party and party.

Mr. Senter.—Yes, my Lord.

(1) 29 T.C. 214. (2) *Ibid.*, at p. 224.

Sir Raymond Evershed, M.R.—Then we grant leave to appeal.

Mr. Senter.—I am greatly obliged.

The Crown having appealed against the above decision, the case came before the House of Lords (Viscount Simonds and Lords Radcliffe, Tucker and Somervell of Harrow) on 20th, 21st and 22nd June, 1955, when judgment was reserved. On 25th July, 1955, judgment was given unanimously in favour of the Crown.

The Attorney-General (Sir Reginald Manningham-Buller, Q.C.), Mr. Cyril King, Q.C., and Sir Reginald Hills appeared as Counsel for the Crown, and Mr. John Senter, Q.C., and Mr. Roderick Watson for the taxpayers.

Viscount Simonds.—My Lords, this appeal relates to certain assessments for Income Tax made upon the Respondents, Harold Bairstow and Fred Harrison, for the years of assessment ending respectively 5th April, 1947, and 5th April, 1948, in respect of the profits made by them from sales of machinery. The assessments had originally been made on the Respondent Harold Bairstow only, but it became common ground that the operations out of which the profits arose were the joint venture of both Respondents and the case has throughout been argued upon the footing of the assessments being made in their joint names.

Against these assessments, which were in the sum of £10,326 for the first year and £5,000 for the second year, appeals were taken to the Commissioners for the General Purposes of the Income Tax for the Division of West Morley in the County of York. They discharged the assessments but, the Appellant having expressed his dissatisfaction with their decision as being erroneous in point of law, stated a Case for the opinion of the High Court.

My Lords, it would not be right for me, in view of the conclusion which I have reached in this appeal, to try to abbreviate the statement of facts upon which the Commissioners made their determination and I therefore set out verbatim paragraph 3 of the Case which is in these terms.

"3. The following facts were admitted or proved:—

(1) Mr. Harrison became aware in 1946 that a complete spinning plant was for sale at Messrs. Whitworths at Luddendenfoot and had reason to believe that the plant could be purchased for a reasonable figure. He communicated this information to Mr. Bairstow as he himself was not in a position to finance any purchase. Mr. Bairstow expressed himself to be interested, but both he and Harrison agreed that they had no intention of holding the plant; what they desired was a quick purchase and re-sale. Mr. Bairstow therefore arranged for a valuation to be made by a professional valuer in order that he might be satisfied that the price asked by Whitworths was one on which he could make a quick profit. He also immediately and before purchasing the plant made enquiries as to whether he could arrange to sell the plant even before it had been purchased. Mr. Harrison was in touch with an Indian by name Wattal who was very anxious to purchase some of the plant, namely, the botany spinning section; for this he was prepared to pay £17,000, but both Harrison and Bairstow were quite decided that they had no intention of selling the plant piecemeal; they wanted to sell it as a complete unit. Then Mr. Bairstow began negotiations with the International Export Co. They said they were prepared to buy the whole of the plant. On 14th November the International Export Co. wrote to Mr. Bairstow saying that they were prepared to buy

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the plant which was on the fourth floor, which was the botany spinning plant, for £15,000, this, of course, being £2,000 less than the price offered for the same section of the plant by the Indian Wattal. The reason why the International Export Co. were prepared to pay £15,000 immediately for that particular section of the plant was because although they were willing to purchase the whole of the plant it was their intention to export it, and whilst they were confident that an import licence into China would be forthcoming for the asking in respect of the botany spinning section they were not willing to complete the purchase of the remainder of the plant until the import licences for such remainder were in fact forthcoming. On 20th November Mr. Bairstow, on behalf of himself and Harrison, having negotiated the purchase of the spinning plant together with two small items of warping plant, completed the purchase by the payment to Whitworths of £12,000. On 27th November, one week later, the International Export Co. paid Mr. Bairstow the sum of £15,000 for the botany spinning plant. Subsequently Messrs. Bairstow and Harrison were informed by the International Export Co. that unfortunately the import licences relating to the remainder of the plant could not be obtained and therefore it was regretted that they could not purchase the remainder of the plant. Thus Mr. Bairstow and Mr. Harrison found themselves with the remainder of the plant on their hands (which they had endeavoured to avoid) and this left them no alternative but to sell that remainder in whatever market they could.

(2) The rest of the plant was sold in two other principal and two smaller lots by February, 1948, though owing to difficulties the last plant was not removed until March, 1949. The two smaller lots consisted of the two items of warping plant.

(3) Mr. Bairstow was a director of a company manufacturing leather. Mr. Harrison was an employee of a spinning firm. Neither of them had had any transactions in machinery or any other commodity before.

(4) The profit shown by the accounts, which form part of this Case and are annexed hereto, marked 'A '[1], was £18,225 11*s.* 3*d.*

(5) The Respondents' sole purpose in the transaction was to sell the plant at a profit.

(6) With regard to the manner in which the sales were effected:—

(*a*) Some commissions were paid for assistance received in effecting sales.

(*b*) There was no advertising. Customers principally learnt of the existence of the plant for sale when they came to inspect the premises which were being advertised by the original owners as becoming vacant.

(*c*) About 400 spindles out of the 220,000 which the plant represented were replaced because they were missing or damaged.

(*d*) Insurance risks were covered by the Respondents while the plant was in their hands.

(*e*) Some costs for renovation were incurred because of damage by floods during their ownership.

(*f*) When it was seen that the transaction would not be over in a matter of weeks, wages were paid to Mr. Bairstow's secretary, who kept books and did other office jobs in connection with these transactions.

(*g*) The Respondents incurred expense in travelling and entertainment in meeting both the actual persons who would eventually buy the plant and others who did not in fact become customers. A number of advertisements asking for the plant, which appeared in trade papers, were answered by the Respondents in an attempt to sell the plant remaining after the first main sale.

(*h*) Owing to the delay in removing the plant, rent was paid to the landlords for the last six months during which the plant was housed, and it is thought that a further amount will have to be paid to put the premises in order.'

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[1] *See* page 222 *post*.

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EXHIBIT "A" TO CASE STATED

MR. HAROLD BAIRSTOW AND MR. FRED HARRISON

JOINT VENTURE—A SPINNING PLANT EX WHITWORTH MILL, LUDDENDENFOOT

PERIOD FROM 20TH NOVEMBER, 1946, TO 31ST MARCH, 1949

	£ s. d.	£ s. d.
To Purchase of Plant		12,000 0 0
,, Repairs and Replacements		110 18 10
,, Commissions:—		
Cornelius Lane of Bradford... ...	4,573 4 4	
Mr. and Mrs. Horace Shaw, High-thorn, Belmont Rise, Baildon ...	751 2 0	
W. Murgatroyd—Address not known, but our clients believe he has gone abroad	250 0 0	
Cash Commission to a workman ...	10 0 0	
		5,584 6 4
,, Insurance...		71 15 6
,, Christmas Boxes		32 0 0
,, Flood Damage Costs:—		
Wages	300 5.11	
Renovations	42 16 9	
		343 2 8
,, Wages		117 5 0
,, Stationery		3 0 0
,, Travelling and Entertainment		366 13 11
,, Rent		130 0 0
,, Reserve for Cost of Dilapidations, Legal and Accountancy Charges ...		785 0 0
,, Profit on the Transactions		18,225 11 3
		£37,769 13 6

	£ s. d.	£ s. d.
By Sale of Plant:—		
1946—Nov. 27, International Export Co.	15,439 13 6	
1947—Jan. 29, H. E. Crabtree & Co. ...	80 0 0	
June 26, Bailey, Verity & Raynor	12,000 0 0	
Oct. 22, Stalybridge Vigoyne Spinning Co.	250 0 0	
1948—Feb. 20, Joseph Cooper, Junr. ...	10,000 0 0	
		37,769 13 6
		£37,769 13 6

Profit Divisible :—	£ s. d.
Harold Bairstow	9,112 15 7
Fred Harrison...	9,112 15 7

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Nor can I omit a reference to some at least of the contentions which were urged before the Commissioners on the one side or the other.

The Respondents contended that this was a transaction the profits of which could not be liable to tax under Case I of Schedule D, because, as they said, in the case of *Leeming* v. *Jones*, 15 T.C. 333, to which I shall refer later, four conditions had been approved by the Court, one of which must be present to establish liability:—

(*a*) the existence of an organisation, or

(*b*) activities which led to the maturing of the assets to be sold, or

(*c*) the existence of special skill, opportunities, in connection with the article dealt with, or

(*d*) the fact that the nature of the asset itself should lend itself to commercial transactions;

and they contended that none of these conditions was present in the transaction in question. They distinguished certain cases upon which the Appellant relied and urged that the profit was a capital one and that there was no concern in the nature of trade that could be taxed.

On behalf of the Appellant it was contended that the buying and selling of the plant constituted a trade or adventure in the nature of a trade and that the profits and gains arising therefrom were assessable accordingly.

The Commissioners expressed their original determination in these terms :—

> "We, the Commissioners, having considered the facts and evidence submitted to us, are of opinion that this was an isolated case and not taxable, and discharge the assessments."

This, my Lords, was clearly an unsatisfactory determination, for it appeared to suggest that the fact that the transaction was an isolated one, whatever that may mean, was by itself conclusive, and, when the matter came before Upjohn, J., upon the Case Stated, that learned Judge took a course which he was entitled to take and remitted the matter to the General Commissioners with the intimation that they were to consider the question whether, the transaction being an isolated transaction, there was, nevertheless, an adventure in the nature of trade which was assessable to tax under Case I of Schedule D, and he further directed they should be assisted in their finding by legal argument.

I pause in the narrative to remind your Lordships that tax under Schedule D is charged in respect of, *inter alia*, profits arising from any trade, profession, employment or vocation and that by definition "trade" includes "every trade, manufacture, adventure or concern in the nature of trade". It is these words which are echoed in the Order of Upjohn, J.

The Commissioners accordingly met again and, having heard legal argument and further considered the matter, signed a Supplemental Case in which they stated their further decision as follows:—

> "We find that the transaction, the subject-matter of this Case, was not an adventure in the nature of trade."

The Case thus supplemented came once more before the High Court, this time before Wynn-Parry, J. That learned Judge took the view that he was bound by authority to hold that the question before the Court was

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purely a question of fact and that the finding of the Commissioners could not be upset unless it was so perverse that as a matter of law it could not stand, and, holding that it was not possible for him to take that view of their decision, dismissed the Appellant's appeal with costs.

From the decision of Wynn-Parry, J., the Appellant appealed to the Court of Appeal, which unanimously dismissed the appeal for the reasons given by the learned Judge. In the course of his judgment the Master of the Rolls made this observation which has given rise to much discussion before your Lordships(1).

> "Although the Scottish Courts (as, I think, is clear from a citation from the judgment of the latest of them in the judgment of Upjohn, J.) may have taken a road which diverges from that followed by the English Courts, the two jurisdictions, as it seems to me, can only now be got together again by the House of Lords . . ."

And it is clear that the Revenue authorities were anxious to bring this case to your Lordships' House largely because it was apprehended that the Courts of England and Scotland had to some degree diverged in their treatment of this subject. That there is some ground for this apprehension will be clear from a comparison of, for example, the observations of Atkin and Warrington, L.JJ., in *Cooper* v. *Stubbs,* 10 T.C. 29, with those of Lord Russell in *Commissioners of Inland Revenue* v. *Reinhold,* 34 T.C. 389 (at page 394),

> "In the Scottish Courts, however, it is clear that such a question"

(that is, whether a transaction is "an adventure in the nature of trade")

> "is regarded as a question of law, or at least of mixed fact and law".

It is not to be doubted that particularly in a matter of taxation any possible conflict, even if it be only an apparent conflict, should be resolved and that is the task which now falls to your Lordships.

Before, however, examining the authorities in any detail, I would make it clear that in my opinion, whatever test is adopted, that is whether the finding that the transaction was not an adventure in the nature of trade is to be regarded as a pure finding of fact or as the determination of a question of law or of mixed law and fact, the same result is reached in this case. The determination cannot stand: this appeal must be allowed and the assessments must be confirmed. For it is universally conceded that, though it is a pure finding of fact, it may be set aside on grounds which have been stated in various ways but are, I think, fairly summarised by saying that the Court should take that course if it appears that the Commissioners have acted without any evidence or upon a view of the facts which could not reasonably be entertained. It is for this reason that I thought it right to set out the whole of the facts as they were found by the Commissioners in this case. For, having set them out and having read and re-read them with every desire to support the determination if it can reasonably be supported, I find myself quite unable to do so. The primary facts, as they are sometimes called, do not in my opinion justify the inference or conclusion which the Commissioners have drawn: not only do they not justify it but they lead irresistibly to the opposite inference or conclusion. It is therefore a case in which, whether it be said of the Commissioners that their finding is perverse or that they have misdirected themselves in law by a misunderstanding of the statutory language or otherwise, their determination cannot stand. I venture to put the matter thus strongly because I do not find in the careful and indeed exhaustive statement of facts any item which points to the transaction not being an

(1) *See* **page 217** ***ante.***

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adventure in the nature of trade. Everything pointed the other way. When I asked learned counsel upon what, in his submission, the Commissioners could have reasonably founded their decision, he could do no more than refer to the contentions which I have already mentioned. But these upon examination seemed to help him not at all. For, if it is a characteristic of an adventure in the nature of trade that there should be an "organisation", I find that characteristic present here in the association of the two Respondents and their subsequent operations. I find "activities which led to the maturing of the asset to be sold" and the search for opportunities for its sale, and, conspicuously, I find that the nature of the asset lent itself to commercial transactions. And by that I mean what I think Rowlatt, J., meant in *Leeming* v. *Jones*[1], that a complete spinning plant is an asset which, unlike stocks or shares, by itself produces no income and, unlike a picture, does not serve to adorn the drawing room of its owner. It is a commercial asset and nothing else.

Your Lordships have examined a large number of cases in some of which the Commissioners have found an adventure or concern in the nature of trade and in others have not. And in each category will be found cases in which the Court has upheld and others in which the Court has reversed the Commissioners' decision. I do not think it necessary to review them. It is inevitable that the boundary line should not be precisely drawn, but I think that there has been no case cited to us in which the question, however framed, whether the determination of the Commissioners was maintainable, could be answered more clearly and decisively than in the present case.

I must turn now to the question of the apparent divergence between the English and Scottish Courts and venture to approach it by a brief consideration of the nature of a problem which has many aspects, for example, the finding of a jury, the award of an arbitrator or the determination of a tribunal which is by statute made the judge of fact. And the present case affords an exact illustration of the considerations which I would place before your Lordships.

When the Commissioners, having found the so-called primary facts which are stated in paragraph 3 of their case, proceed to their finding in the Supplemental Case that "the transaction, the subject-matter of this Case, was not an adventure in the nature of trade", this is a finding which is in truth no more than an inference from the facts previously found. It could aptly be preceded by the word "therefore". Is it then an inference of fact? My Lords, it appears to me that the authority is overwhelming for saying that it is. Such cases as *Cooper* v. *Stubbs*, 10 T.C. 29, *Leeming* v. *Jones*, 15 T.C. 333, and *Lysaght* v. *Commissioners of Inland Revenue*, 13 T.C. 511 (a case of residence), amongst many others are decisive. Yet it must be clear that to say that such an inference is one of fact postulates that the character of that which is inferred is a matter of fact. To say that a transaction is or is not an adventure in the nature of trade is to say that it has or has not the characteristics which distinguish such an adventure. But it is a question of law, not of fact, what are those characteristics, or, in other words, what the statutory language means. It follows that the inference can only be regarded as an inference of fact if it is assumed that the tribunal which makes it is rightly directed in law what the characteristics are and that, I think, is

(1) 15 T.C. 333.

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the assumption that is made. It is a question of law what is murder: a jury finding as a fact that murder has been committed has been directed on the law and acts under that direction. The Commissioners making an inference of fact that a transaction is or is not an adventure in the nature of trade are assumed to be similarly directed, and their finding thus becomes an inference of fact.

If this is, as I hope it is, a just analysis of the position, the somewhat different approach to the question in some but by no means all of the Scottish cases is easily explicable. For as the Lord President (Normand) put it in *Commissioners of Inland Revenue* v. *Fraser*, 24 T.C. 498, at page 504,

> ". . . the Commissioners here have either misunderstood the statutory language (which I think is the probable explanation of their error) or, having understood it, have made a perverse finding without evidence to support it."

He might equally well have said that the assumption that they were rightly directed in law was displaced by a finding which was upon that assumption inexplicable. The misdirection may appear upon the face of the determination. It did so here, I think, in the Case as originally stated; for in effect that determination was that the transaction was not an adventure in the nature of trade because it was an isolated transaction, which was clearly wrong in law. But sometimes, as in the case as it now comes before the Court, where all the admitted or found facts point one way and the inference is the other way, it can only be a matter of conjecture why that inference has been made. In such a case it is easy either to say that the Commissioners have made a wrong inference of fact because they have misdirected themselves in law or to take a short cut and say that they have made a wrong inference of law, and I venture to doubt whether there is more than this in the divergence between the two jurisdictions which has so much agitated the Revenue authorities.

But, my Lords, having said so much, I think it right to add that in my opinion, if and so far as there is any divergence between the English and Scottish approach, it is the former which is supported by the previous authority of this House to which reference has been made. It is true that the decision of the Commissioners is only impeachable if it is erroneous in law and it may appear paradoxical to say that it may be erroneous in law where no question of law appears on the face of the Case Stated. But it cannot be, and has not been, questioned, that an inference, though regarded as a mere inference of fact, yet can be challenged as a matter of law on the grounds that I have already mentioned, and this is I think the safest way to leave it. We were warned by learned Counsel for the Respondents that to allow this appeal would open the floodgates to appeals against the decisions of the General Commissioners up and down the country. That would cause me no alarm, if decisions such as that we have spent some time in reviewing were common up and down the country. But nothing, I think, will fall from your Lordships to suggest that there is not a large area in which the opinion of the Commissioners is decisive. I would myself say nothing to detract from what was said by Lord Sterndale, M.R., and Scrutton, L.J., in *Currie* v. *Commissioners of Inland Revenue*[1], [1921] 2 K.B. 332, upon the kindred question whether the taxpayer was carrying on a profession, for I do not think that any more precise guidance can be given in the infinitely complex and ever-changing conditions of commercial adventures.

(1) 12 T.C. 245.

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In the result the appeal will be allowed, but effect will be given to the special arrangement as to costs which was a condition of leave to appeal being given.

Lord Radcliffe.—My Lords, the Crown has sought to charge the Respondents with Income Tax upon the profit arising from the purchase and sales of certain spinning plant acquired and sold during the period 1946–48. This profit, it is said, came from a " trade, manufacture, adventure or concern in the nature of trade " and so is taxable under Case I of Schedule D of the Income Tax Act, 1918. The Commissioners for the General Purposes of the Income Tax for the Division of West Morley in the County of York, to whom the Respondents appealed against the assessments, determined that the transaction which was their subject-matter was not an adventure in the nature of trade and discharged the assessments. In the High Court the Crown's appeal was dismissed by the learned Judge, Wynn-Parry, J., on the ground that the determination was purely a question of fact and that accordingly it was not open to the Court to interfere with it. The matter was treated in exactly the same way in the Court of Appeal.

I should not myself have thought that the principles which govern a case of this sort offered much scope for controversy at this date, whether they are sought for in English or in Scottish legal decisions. The only difficulty that I see arises from the fact that in some cases judges have not been at pains to distinguish in their judgments what are the conditions which make the particular question before them no more than a question of fact.

My Lords, I think that it is a question of law what meaning is to be given to the words of the Income Tax Act " trade, manufacture, adventure or concern in the nature of trade ", and for that matter what constitute " profits or gains " arising from it. Here we have a statutory phrase involving a charge of tax, and it is for the Courts to interpret its meaning, having regard to the context in which it occurs and to the principles which they bring to bear upon the meaning of income. But, that being said, the law does not supply a precise definition of the word " trade " ; much less does it prescribe a detailed or exhaustive set of rules for application to any particular set of circumstances. In effect it lays down the limits within which it would be permissible to say that a " trade " as interpreted by Section 237 of the Act does or does not exist.

But the field so marked out is a wide one and there are many combinations of circumstances in which it could not be said to be wrong to arrive at a conclusion one way or the other. If the facts of any particular case are fairly capable of being so described, it seems to me that it necessarily follows that the determination of the Commissioners, Special or General, to the effect that a trade does or does not exist is not " erroneous in point of law " ; and, if a determination cannot be shown to be erroneous in point of law, the Statute does not admit of its being upset by the Court on appeal. I except the occasions when the Commissioners, although dealing with a set of facts which would warrant a decision either way, show by some reason they give or statement they make in the body of the Case that they have misunderstood the law in some relevant particular.

All these cases in which the facts warrant a determination either way can be described as questions of degree and therefore as questions of fact. In this, I am only saying what was said by Lord Sterndale, M.R., in *Currie* v. *Commissioners of Inland Revenue*(1), [1921] 2 K.B. 332, and repeated by

(1) 12 T.C. 245.

(Lord Radcliffe.)

Atkin, L.J., in *Cooper* v. *Stubbs*, 10 T.C. 29, at page 55. And, in Scotland, Lord Sands says the same thing in *Commissioners of Inland Revenue* v. *Livingston*, 11 T.C. 538, at pages 545-6. I agree with them. But, of course, in proper circumstances a case can be described as one of fact, or as purely one of fact (if the testimonial adds anything), without going through the procedure of explaining that is so because it is one of degree and, the facts fairly admitting of the determination come to, there is no error which justifies the Court's intervention. I see nothing more than this in anything that was said in this House in *Leeming* v. *Jones*, 15 T.C. 333. The only thing that I would deprecate is too much abbreviation in stating the question, as by asserting that it is simply a question of fact whether or not a trade exists. It is not simply a question of fact. The true clue to the understanding of the position lies, I think, in recalling that the Court can allow an appeal from the Commissioners' determination only if it is shown to be erroneous in point of law.

Nor do I think that there can be any real divergence of opinion as to what constitutes error of law for this purpose. Naturally, judges have not always expressed it in exactly the same terms. I will take one or two instances. As I have said, where there is an actual statement in the Case which shows a misconception of the law, no one feels any difficulty. But, equally, no one supposes that the Court's right, or, as I would say, duty, to intervene stops at this. For example, in *Cooper* v. *Stubbs*, Rowlatt, J., was prepared to overrule the Commissioners' determination that no trade existed because, as he said (at page 43),

> "If one were trying a question of this sort with a jury, one would have to say upon these facts, 'Well now a trade is proved', and I think that what the Commissioners have done is merely to give the wrong name to a state of facts which in law amount to something else."

In the Court of Appeal the majority did not agree with him, holding, in effect, that it would not have been right to give such a direction to the jury on the facts as found. We are not rehearing the case of *Cooper* v. *Stubbs*, though one can say, at any rate, "*sed victa Catoni*". But I see no reason to think that the majority were following any different principle. Warrington, L.J., said (at page 51) that intervention was proper only

> "in very clear cases where either the Commissioners have come to their conclusion without evidence which would support it, that is to say, have come to a conclusion which on the evidence no reasonable person could arrive at, or have misdirected themselves in point of law."

And Atkin, L.J., recognised (at page 55) that

> "there may be a state of facts which can only lead to one conclusion of law".

Now, if I turn to the Scottish decisions I find that the Judges are stating, though sometimes in somewhat different words, the same principle. Lord Normand's judgment in the Court of Session (First Division) in *Commissioners of Inland Revenue* v. *Fraser*, 24 T.C. 498, has said almost everything that needs to be said on this branch of the subject.

> "In cases",

he says (at page 501),

> "where it is competent for a tribunal to make findings in fact which are excluded from review, the Appeal Court has always jurisdiction to intervene if it appears either that the tribunal has misunderstood the statutory language—because a proper construction of the statutory language is a matter of law—or that the tribunal has made a finding for which there is no evidence or which is inconsistent with the evidence and contradictory of it."

(Lord Radcliffe.)

And that, in its turn, appears to me to propound the same principle as that adopted by Lord Cooper in *Commissioners of Inland Revenue* v. *Toll Property Co., Ltd.*, 34 T.C. 13, where he says (at pages 18-9):—

> "Keeping in view the nature of the transaction, the purpose with which the Company was floated and the objects which were prescribed in the memorandum of association, and the whole of the other circumstances which I have briefly summarised, it seems to me that the majority of the Commissioners were not entitled to reach the conclusion which they did, that they must have misdirected themselves in law, and that the true and only reasonable conclusion on the facts found is the conclusion reached by the dissenting Commissioner."

My Lords, I must apologise for taking so much time to repeat what I believe to be settled law. But it seemed to be desirable to say this much, having regard to what appears in the judgments in the Courts below as to a possible divergence of principle between the English and Scottish Courts. I think that the true position of the Court in all these cases can be shortly stated. If a party to a hearing before Commissioners expresses dissatisfaction with their determination as being erroneous in point of law, it is for them to state a Case and in the body of it to set out the facts that they have found as well as their determination. I do not think that inferences drawn from other facts are incapable of being themselves findings of fact, although there is value in the distinction between primary facts and inferences drawn from them. When the Case comes before the Court, it is its duty to examine the determination having regard to its knowledge of the relevant law. If the Case contains anything *ex facie* which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing *ex facie*, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the Court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in themselves and only to take their colour from the combination of circumstances in which they are found to occur.

If I apply what I regard as the accepted test to the facts found in the present Case I am bound to say, with all respect to the judgments under appeal, that I can see only one true and reasonable conclusion. The profit from the set of operations that comprised the purchase and sales of the spinning plant was the profit of an adventure in the nature of trade.

What other word is apt to describe the operations? Here are two gentlemen who put their money, or the money of one of them, into buying a lot of machinery. They have no intention of using it as machinery, so they do not buy it to hold as an income-producing asset. They do not buy it to consume or for the pleasure of enjoyment. On the contrary, they have no intention of holding their purchase at all. They are planning

(Lord Radcliffe.)

to sell the machinery even before they have bought it. And in due course they do sell it, in five separate lots, as events turned out. And, as they hoped and expected, they make a net profit on the deal, after charging all expenses such as repairs and replacements, commissions, wages, travelling and entertainments and incidentals, which do in fact represent the cost of organising the venture and carrying it through.

This seems to me to be, inescapably, a commercial deal in second-hand plant. What detail does it lack that prevents it from being an adventure in the nature of trade, or what element is present in it that makes it capable of being aptly described as anything else? Well, to judge by the Respondents' contentions as recited in the Case, there were some circumstances lacking in this deal of which the presence has been regarded as of importance in other cases. I do not think that this line of argument is ever very conclusive; but, in any event, it breaks down completely on the facts that are found. It is said that there was no organisation for the purposes of the transaction. But in fact there was organisation, as much of it as the transaction required. It is true that the plant was not advertised for sale, though advertisements asking for plant were answered by the Respondents. But why should they incur the cost of advertising if they judged that they could achieve the sale of the plant without it? It is said that no work had been done on the maturing of the asset to be sold. But such replacement and renovation as were needed were in fact carried out, and I can see no reason why a dealer should do more work in making his plant saleable than the purposes of sale require. It is said that neither of the Respondents had any special skill from his normal activities which placed him in an advantageous position for the purposes of this transaction. It may be so, though one of them was the employee of a spinning firm. In any case the members of a commercial community do not need much instruction in the principles and possibility of dealing, and I think that, given the opportunity, the existence or non-existence of special skill is of no significance whatever. It is said, finally, that the purchase and sale of plant lent itself to capital, rather than commercial, transactions. I am not sure that I understand what this is intended to mean. If it means that at the relevant period there was no market for second-hand plant in which deals could take place, there is no finding to that effect and all the facts that are recited seem to be against the contention. If it means anything else, it is merely an attempt to describe the conclusion which the Respondents would wish to see arrived at on the whole case.

There remains the fact which was avowedly the original ground of the Commissioners' decision: "this was an isolated case". But, as we know, that circumstance does not prevent a transaction which bears the badges of trade from being in truth an adventure in the nature of trade. The true question in such cases is whether the operations constitute an adventure of that kind, not whether they by themselves or they in conjunction with other operations constitute the operator a person who carries on a trade. Dealing is, I think, essentially a trading adventure, and the Respondents' operations were nothing but a deal or deals in plant and machinery.

There is only one thing more that I wish to add. The appeal was presented to us as involving a question of great importance, since it offered an opportunity of reconciling what were thought to be divergences between the views of the English and Scottish Courts as to their jurisdiction in dealing with Cases Stated which involve the existence or non-existence

(Lord Radcliffe.)

of a trade under Case I of Schedule D. As I have tried to show, I do not think that there has been any such divergence of principle. But I do not feel equally confident that there has not been some divergence in the understanding and application of the governing principles. I find it difficult to think that, had there not been, the Crown would have been Appellant in the present case.

I think it possible that the English Courts have been led to be rather overready to treat these questions as "pure questions of fact" by some observations of Warrington and Atkin, L.JJ., in *Cooper* v. *Stubbs*(1). If so, I would say, with very great respect, that I think it a pity that such a tendency should persist. As I see it, the reason why the Courts do not interfere with Commissioners' findings or determinations when they really do involve nothing but questions of fact is not any supposed advantage in the Commissioners of greater experience in matters of business or any other matters. The reason is simply that by the system that has been set up the Commissioners are the first tribunal to try an appeal and in the interests of the efficient administration of justice their decisions can only be upset on appeal if they have been positively wrong in law. The Court is not a second opinion, where there is reasonable ground for the first. But there is no reason to make a mystery about the subjects that Commissioners deal with or to invite the Courts to impose any exceptional restraints upon themselves because they are dealing with cases that arise out of facts found by Commissioners. Their duty is no more than to examine those facts with a decent respect for the tribunal appealed from, and, if they think that the only reasonable conclusion on the facts found is inconsistent with the determination come to, to say so without more ado.

I agree that the appeal should be allowed.

Lord Tucker.—My Lords, I agree, for the reasons which have been stated, that this appeal should be allowed.

Lord Somervell of Harrow.—My Lords, I have had the advantage of reading the opinion of my noble and learned friend, Lord Radcliffe, in which I concur.

Questions put :

That the Order appealed from be reversed, except as to costs.

The Contents have it.

That the cause be remitted to the Chancery Division of the High Court of Justice with a declaration that the buying and selling of the plant constituted a trade, or adventure in the nature of a trade, and that the profit and gains arising therefrom are assessable to Income Tax under Case I of Schedule D of the Income Tax Act, 1918.

The Contents have it.

That the Appellant do pay to the Respondents their costs in this House as between solicitor and client.

The Contents have it.

[Solicitors:—Solicitor of Inland Revenue; Iliffe, Sweet & Co., for Laycock, Dyson & Laycock, Huddersfield.]

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(1) 10 T.C. 29.

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