COURT OF SESSION (FIRST DIVISION)—1ST AND 2ND JULY, 1954, AND 13TH, 14TH AND 21ST DECEMBER, 1955.

HOUSE OF LORDS—29TH AND 30TH JANUARY, AND 14TH MARCH, 1957.

Hood Barrs

v.

Commissioners of Inland Revenue (No. 2)[1]

Income Tax, Schedule D—Deduction—Expenses—Timber merchant—Payments for right to fell and take standing timber.

The Appellant commenced business as a timber merchant, sawmiller and joiner in April, 1947. *Under the terms of agreements dated* 30*th September,* 1947, *and* 30*th September,* 1948, *relating to the purchase of standing timber from a company of which he was a shareholder and director, for* £24,275 *and* £24,900 *respectively, he was entitled to enter the lands of the vendor, and to select, fell and remove a specified number of various types of tree. Neither agreement set any limit to the time within which the felling was to be completed.*

On appeal to the General Commissioners against assessments to Income Tax made on him for the years 1947–48 *to* 1951–52 *inclusive under Case* I *of Schedule D, the Appellant contended* (*a*) *that the price paid for the timber was a fair and proper price,* (*b*) *that the purchase was a purchase of goods and that the timber was stock-in-trade,* (*c*) *that if what had been acquired was a right to fell and remove timber the sum paid should nevertheless be taken into account in arriving at the profits of his trade as sawmiller and joiner, and* (*d*) *that if the timber purchased was not stock-in-trade the assessments, which represented profits from its sale, should be discharged. For the Crown it was contended* (*a*) *that the Appellant had acquired a capital asset and that no part of the two sums was accordingly deductible in computing the profits of his business for Income Tax purposes, and* (*b*) *that in any event the prices payable under the agreements should not without investigation be regarded as the proper cost of the trading stock to be taken into account for Income Tax purposes. The Commissioners dismissed the appeal, holding that the sums paid were capital payments and that they were not satisfied that these sums were proper commercial prices for the timber in question.*

The case was remitted by the Court of Session to the Commissioners for amplification and amendment. The Commissioners subsequently issued further findings stating that "the words 'capital payments' were used . . . to denote payments made from the capital of the business and were intended so to indicate that the payments under the contracts referred to were substantial sums and therefore represented capital in the ordinary meaning of the word. But as these payments did not purchase what can be regarded as fixed capital assets we must regard them as having been made from the circulating capital of the business." They also stated that the payments in question "constituted the purchase of stock-in-trade"; that "the timber

[1] Reported (S.C.) 1956 S.C. 151; 1956 S.L.T. 259; (H.L.) [1957] 1 W.L.R. 529; 101 S.J. 285; [1957]1 All E.R. 832; 223 L.T.Jo. 167; 1957 S.L.T. 160.

specified in the Case . . . was in fact stock-in-trade of the Appellant's business" ; that "such timber was being sold and used for a hill farming scheme" and "was represented in the sales of the business" ; that in deciding that they were not satisfied that the sums paid were proper commercial prices they meant to say that they were unable to state what the proper commercial prices should be rather than that they had any reason to assume that they were wrong ; and that the prices for the timber specified in the Case could not be considered by them from the evidence submitted to be other than correct.

Held, *that the sums in question were capital expenditure.*

CASE

Stated for the opinion of the Court of Session, as the Court of Exchequer in Scotland, under the Income Tax Act, 1952, Section 64.

At a meeting of the Commissioners for the General Purposes of the Income Tax for the Division of Mull, held at the Aros Hall, Tobermory, Isle of Mull, on 12th November, 1952, Henry Rupert Hood Barrs (hereinafter called "the Appellant"), appealed against assessments made upon him (trading as the Killiechronan Sawmills & Joinery Works, Aros, Isle of Mull) under Case I of Schedule D, Income Tax Act, 1918, as under :—

1947–48 in the sum of £500.
1948–49 „ „ „ „ £500.
1949–50 „ „ „ „ £100.
1950–51 „ „ „ „ £500.
1951–52 „ „ „ „ £500.

The primary question for our determination was whether, and if so to what extent, the sums payable by the Appellant under the two agreements relating to the purchase of standing timber hereinafter referred to, fell to be taken into account in computing his trading profits for the years under appeal. It was agreed between the parties and approved by us that that primary question should be decided in principle by us in the first place, the consequences of our decision being deferred for agreement between the parties or failing such agreement, for our subsequent determination.

I. The following facts were proved or admitted before us and we therefore find as facts the matters hereinafter set out in this paragraph.

(1) On 6th April, 1947, the Appellant commenced to and did thereafter carry on the business of timber merchant, sawmiller and joiner in the name of the Killiechronan Sawmills & Joinery Works, Killiechronan, Aros, Isle of Mull, and for that purpose he purchased and installed thereat a quantity of sawmilling and joinery machinery.

(2) The Appellant is a shareholder and director of the Chalmers Property Investment Co., Ltd., hereinafter called "the company", and holds 49 shares out of an issued capital of 100 shares.

(3) By agreements dated 30th September, 1947, and 30th September, 1948, respectively, the Appellant agreed to buy and the company agreed to sell to the Appellant (trading as the Killiechronan Sawmills and

Joinery Works) the quantities of timber specified in the said agreements for the sums of £24,275 and £24,900 respectively. Copies of the said agreements are attached to and form part of this Case(1).

(4) The said sums of £24,275 and £24,900 payable by the Appellant to the company in terms of the said agreements were paid by him to the company as aforesaid.

(5) The said sums of £24,275 and £24,900 payable under the said agreements were arrived at (*a*) by estimating the cubic content of certain trees according to the "Hoppus System", which is a method recognised in the timber trade of estimating the cubic content of trees by means of certain measurements and tables, (*b*) by applying to the cubic content so arrived at, the maximum prices laid down by S.R. & O. 1946 No. 2209, referred to in the said agreements, and (*c*) by deducting from the resultant figure, a sum by way of discount. A copy of the said S.R. & O. is attached to and forms part of this Case(1). It was estimated before us that the trees in question were some 70 to 80 years old and were therefore ripe for cutting but we were not in a position finally to determine the age or quality of the trees in question or whether the sums agreed to be paid by the Appellant under the said agreements were fair and reasonable or were proper commercial prices. There is annexed hereto and forms part of this Case(1) a statement shewing in more detail how the sum of £24,275, mentioned in the first agreement before referred to, was arrived at.

(6) After the Appellant entered into the said agreements he acted as contractor to the company and supplied some of the fencing stobs in respect of a hill farming scheme put into operation by the company under the Hill Farming Act, 1946, to the value of £85,000.

(7) Alexander Stuart Smith, the District Valuer for Dunbartonshire, a chartered surveyor and Member of the Institute of Chartered Surveyors, gave evidence before us, which evidence we accepted, that he had had experience of valuing timber in the West of Scotland, that the over-all price paid for standing timber on the Island of Mull between 1947 and 1949 was 1*s.* per cu. ft. for mixed conifers and hardwood: that the value of standing timber on Mull was lower than the value of similar timber in accessible places on the mainland by reason of the cost of extraction and transport to market, and that normally the value of standing timber in Mull was governed by the price which could be obtained for it on the mainland market.

(8) Timber was in short supply in 1947 and 1948 and control of timber prices continued in operation until the end of 1949. The District Valuer was of the opinion that a fair price for the standing timber mentioned in the said agreements, without having seen or inspected such timber, would be about 1*s.* per cu. ft., but that the price agreed to be paid by the Appellant might be a fair commercial price if the trees were selected trees. On the removal of the control on timber the value of timber generally increased greatly but since 1952 timber prices generally have fallen to amounts nearly similar to those which prevailed at the end of the control period.

(9) The District Valuer was of the opinion that timber which would be worth about 1*s.* 1*d.* per cu. ft. on the Island of Mull would, on the mainland, be worth from 2*s.* 10*d.* to 3*s.* per cu. ft. He valued timber

(1) Not included in the present print.

imported on to the island at 4*s.* 10*d.* to 5*s.* per cu. ft. He considered 5*s.* a cu. ft. would be the proper price for timber shipped to the island.

(10) The District Valuer agreed that the price of 9½*d.* per cu. ft. paid for pine was very fair and had no complaint at all with that price. In his experience no standing timber on Mull had been sold for as much as the controlled price.

II. It was contended by the Appellant before us as follows :—

(*a*) that the price of the timber provided in the said agreements was agreed on the basis of the commercial rates laid down in S.R. & O. 1946 No. 2209, and having regard to the circumstances was a fair and proper price ;

(*b*) that there was no authority under the Income Tax Acts enabling us to concern ourselves with what in our view was or was not a reasonable price for the timber in question ;

(*c*) that the figure proper to be inserted in the Appellant's accounts in respect of such timber was the cost price thereof, and no other ;

(*d*) that the timber so purchased by the Appellant, whether or not such timber was sold with or without the land on which it was growing, comprised his stock-in-trade, and in consequence the price paid therefor required so to be inserted in the Appellant's accounts, and the opening and closing stocks would be valued on the same basis : *Murray* v. *Commissioners of Inland Revenue,* 32 T.C. 238 ; *Commissioners of Inland Revenue* v. *Williamson,* 31 T.C. 370 ;

(*e*) that the definition of goods contained in the Sale of Goods Act, 1893, in so far as it applied to Scotland, having regard to the fact that under the agreements for the sale thereof the trees were to be severed from the land, made the same goods within the said Act ;

(*f*) that if contrary to the contention that the said timber was goods within the meaning of the Sale of Goods Act, 1893, we were to hold otherwise and to hold that what had been acquired by the Appellant was a right to fell and remove the timber in question, since the business of the Appellant was that of sawmiller and joiner the sum paid in respect of such right still required to be inserted into the Appellant's accounts in the manner aforesaid and was an expenditure wholly and exclusively incurred by the Appellant in the carrying on of his trade ;

(*g*) that if the timber so purchased did not, contrary to the contention that the said timber was goods, constitute stock-in-trade, then the assessments, representing as they did the sale of such timber, were due to be discharged.

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

(1) that no part of the sums of £24,275 and £24,900, payable by the Appellant under the said agreements relating to timber on the Killiechronan Estate, were allowable as a deduction in computing for Income Tax purposes his trading profits from the business carried on by him at the Killiechronan Sawmills and Joinery Works ;

(2) that standing timber was *pars soli.* The Appellant had not, by virtue of the said agreements, and prior to severance, acquired the property in any trees on Killiechronan Estate : *Lockhart* v. *Morison,* 1912 S.C. 1017 ;

(3) that under the said agreements the Appellant had merely acquired a personal right against the company to the extent therein mentioned;

(4) that the said agreements did not fall to be treated as normal agreements for the acquisition of timber by a timber merchant in the ordinary course of business. The agreements did not provide for the severance and removal of any specific trees within a definite period but gave to the Appellant the right to cut and remove within such time as he alone determined such trees as he should choose up to the number specified in the said agreements. Such agreements were not for the sale of specific goods in terms of the Sale of Goods Act, 1893: *Kursell* v. *Timber Operators & Contractors Ltd.*, [1927] 1 K.B. 298;

(5) that as no time limit was imposed upon the Appellant within which he had to cut the trees, the said agreements gave him an interest in and possession of land together with the right to the additional growth of the trees thereon; that such a right was a capital asset: *Kauri Timber Co., Ltd.* v. *Commissioner of Taxes*, [1913] A.C. 771; that the sums payable under the agreements were not paid as the price of stock-in-trade: *John Smith & Son* v. *Moore*, 1920 S.C. 175; 12 T.C. 266, but were paid for the acquisition of an asset of enduring advantage and such sums were consequently capital sums: *Atherton* v. *British Insulated and Helsby Cables, Ltd.*, [1926] A.C. 205; 10 T.C. 155, per Viscount Cave, L.C., at pages 213 and 192 respectively;

(6) that the fact that the subject-matter of the agreements might become exhausted in the future did not convert the quality of the sums paid under them from capital to revenue payments: *Alianza Co., Ltd.* v. *Bell*, [1906] A.C. 18; 5 T.C. 60 and 172;

(7) that in any event having regard, *inter alia*, to (*a*) the connection between the Appellant and the company, (*b*) the price under the said agreements, the said sums should not without investigation be regarded as the proper cost of the Appellant's trading stock to be taken into account in computing his trading profits for Income Tax purposes, and

(8) that if the Appeal Commissioners were not satisfied that the said sums payable under the said agreements were proper commercial prices for the timber in question, the appeal should be adjourned in order that evidence might be given to them regarding the true value of such timber at the respective dates of the agreements. *Copeman* v. *William Flood & Sons, Ltd.*, [1941] 1 K.B. 202; 24 T.C. 53, was relied upon.

IV. We, the Commissioners, who heard the appeal after consideration of the foregoing facts and the contentions of the Appellant and Respondent decided to uphold the assessments appealed against and on 27th November, 1952, our decision to that effect was communicated to the parties.

After an enquiry on behalf of the Appellant as to the effect of that decision, we amplified it and our amplified decision was communicated in writing to the parties on 3rd January.

That the previous decision made by the Commissioners at their meeting on 27th November, 1952, was not intended to uphold the actual figures of assessments which were never intended to be serious assessments, but to uphold the contention of the Inland Revenue on the matter of principle involved. The Commissioners decided that the two sums referred to in the two agreements for the purchase of timber were capital payments and in any event they are not satisfied that the said sums were proper commercial prices for the timber in question.

V. The Appellant immediately after the determination of the appeal declared to us his dissatisfaction therewith as being erroneous in point of law and in due course required us to state and sign a Case for the opinion of the Court of Session as the Court of Exchequer in Scotland, pursuant to the provisions of Section 64 of the Income Tax Act, 1952, which Case we have stated and do sign accordingly.

VI. The questions of law for the opinion of the Court are:—

1. Whether the sums payable by the Appellant to the Chalmers Property Investment Co., Ltd., under the said agreements were of the nature of capital expenditure.

2. If the first question falls to be answered in the negative whether we were bound to decide that the whole of the said sums required to be taken into account as the proper price of timber in computing the Appellant's trading profits for Income Tax purposes.

A. H. Allan,
Donald S. Cameron,
John J. MacKay,
T. G. Macintyre.

Edinburgh,
30th March, 1954.

The case came before the First Division of the Court of Session (the Lord President (Cooper) and Lords Carmont, Russell and Sorn) on 1st and 2nd July, 1954, when it was remitted to the General Commissioners to amplify and amend the Case.

The Hon. David J. Watson, Q.C., and Mr. Douglas Reith appeared as Counsel for the taxpayer, and the Solicitor-General (Mr. W. R. Milligan, Q.C.) and Mr. W. R. Grieve for the Crown.

The Lord President (Cooper).—In a Revenue appeal our statutory duty is to hear and determine any question or questions of law arising from the Case and to reverse, affirm or amend the determination in respect of which the Case has been stated, and we also have an unlimited power to remit or to pronounce such order in relation to the matter as we may think fit.

In this case, for reasons into which it is unnecessary to investigate, the parties and the Commissioners—acting doubtless from the best of motives—have sought to take a short cut by examining what they describe as a question of principle and by leaving the details for subsequent investigation and decision. The difficulty in which we now find ourselves is that it is not clear to us, even after hearing the argument from the Appellant, what exactly are the points which it is sought to raise, or what are the materials on which our decision of a question of law is to be based. It has been pointed out more than once that a Stated Case must always raise a clear and distinct point of law, and I am afraid that this Case does not.

For instance, the first question of law is stated, if I may so put it, *in vacuo*, unrelated to the facts, or even to *pro forma* figures for the trade or business with regard to any of the years of assessment, five in number beginning in 1947 and ending in 1952. We do not know whether the accounts for one

(The Lord President (Cooper).)

year and statements printed in the appendix were ever before the Commissioners, nor on what basis they were compiled, least of all in regard to the vital figure of the alleged cost of the timber debited against the receipts earned by the Appellant. We do not even yet know whether, and if so to what extent, the Appellant has availed himself of the right he enjoys under certain agreements to enter upon the lands of somebody else and to fell and remove the trees growing on that land, nor whether timber so acquired was utilised in earning the receipts of his business in any of the years covered by the assessments. It seems to me that until the Case is presented to us in such a form as to clarify these matters and to provide us, not with detailed figures (which can be left for later adjustment), but at least with *pro forma* computations and an indication of the basis on which the Appellant on the one hand and the Inland Revenue on the other maintain that the liability of the Appellant should be determined, it is not feasible for us to appreciate or to decide the question in controversy.

So far I have been confining attention to the first question of law, and the second question hangs upon it and is affected materially by the same considerations. In so far as it is possible, and I may be wrong, to gather the point sought to be raised by the second question, it seems to me to involve a pure question of fact, namely, whether certain sums specified in the agreements to which I have referred were genuine commercial prices or were fictitious. To that question there are three possible answers :— (1) the figures were genuine commercial prices ; or (2) the figures were not genuine commercial prices ; or (3) on the evidence we do not know whether they were genuine commercial prices or not.

In the body of the Case the Commissioners tell us that they were not in a position to determine whether the sums were fair and reasonable or were proper commercial prices. At the end of the Case they say that they were " not satisfied " that the said sums were proper commercial prices for the timber in question. If, unfortunately, this means, or on further consideration may lead to, a verdict of not proven—and I hope that it may be possible for the Commissioners to come down on one side or the other— it seems to us that, in order to discover and determine a point of law, we should require in findings of fact the result of the evidence on which the Commissioners proceeded in order that we should be in a position to decide the only possible point of law, namely, whether there was evidence on the facts found proved by the Commissioners and on the correct view as to where the onus lay when the proof ended to entitle the Commissioners to find as they did.

I have indicated negatively the points we do not know and require to know, and I have deliberately abstained from committing myself in any way to a decision of the points of law which seem to lie in the background, but with regard to which I am still doubtful and on which I have certainly no sufficient material on which to proceed. My motion is that, under reference to our opinions, we should make a general open remit to the Commissioners to amplify and amend the Case, with power, if so moved by either side, to take further evidence.

Lord Carmont.—I am in complete agreement with your Lordship.

Lord Russell.—I also agree.

Lord Sorn.—I also agree.

In accordance with the Order of the Court of Session the General Commissioners issued the following further findings:

We, the General Commissioners for Income Tax for the Mull Division for the County of Argyll, have given at the request of the solicitors for the Appellant further consideration to the words "capital payments" employed by us in our decision, and we make the following further findings:

(1) the words "capital payments" were used by us to denote payments made from the capital of the business and were intended so to indicate that the payments under the contracts referred to were substantial sums and therefore represented capital in the ordinary meaning of the word. But as these payments did not purchase what can be regarded as fixed capital assets we must regard them as having been made from the circulating capital of the business.

We further find in fact that the payments in question referred to in our previous decision constituted the purchase of stock-in-trade of the business of timber merchants and that this stock is represented in the sales of the business.

(2) In our decision we said that we "were not satisfied that the said sums were proper commercial prices". By this we meant to say that we were unable to state what the proper commercial prices should be rather than that we had any reason to assume that the prices were wrong.

A. H. Allan, Chairman.
Donald S. Cameron.
T. G. Macintyre.
John J. MacKay.

Tobermory.
26th May, 1955.

In a letter dated 9th August, 1955, the Commissioners issued further findings as follows:—

I am directed by the Commissioners to inform you that on 26th May, 1955, the General Commissioners of Income Tax for the Division of Mull in the County of Argyll "issued in clarification of and to be read in conjunction with their original finding on the two points referred to them in the November, 1952, findings of fact as follows:

1. That the timber specified in the Case Stated was in fact stock-in-trade of the Appellant's business.

They relied on evidence that such timber was being sold and used for a hill farming scheme.

2. That the prices for the said timber specified in the Case Stated could not be considered by them from the evidence submitted to be other than correct.

They relied on the evidence of the District Valuer dealing with values of timber in the Isle of Mull.

Such findings of fact were finally decided by the Commissioners on 26th May, 1955, and have been duly notified to the parties."

Yours faithfully,
D. M. McWilliam,
Clerk to Commissioners.

We the Commissioners hereby confirm that the above letter was instructed by us.

A. H. Allan. D. S. Cameron.
T. G. Macintyre. John J. MacKay.

The case again came before the First Division of the Court of Session (the Lord President (Clyde) and Lords Carmont, Russell and Sorn) on 13th and 14th December, 1955, when judgment was reserved. On 21st December, 1955, judgment was given unanimously in favour of the Crown.

Mr. D. Johnston, Q.C., and Mr. R. Reid appeared as Counsel for the taxpayer and the Lord Advocate (Mr. W. R. Milligan, Q.C.) and Mr. W. R. Grieve for the Crown.

The Lord President (Clyde).—This case arises out of an appeal by the present Appellant against assessments made upon him (trading as the Killiechronan Sawmills and Joinery Works) in respect of the years 1947–48 to 1951–52 both inclusive. The appeal came before the General Commissioners in Tobermory, Isle of Mull, and it is found in the Case that the primary question for their determination was whether the sums payable by the Appellant under two agreements relating to the purchase of standing timber fell to be taken into account in computing his trading profits for the years under appeal. Upon this question they heard evidence and after hearing parties they decided to uphold the assessments appealed against. Thereafter they informed the parties that this was not intended to uphold the actual figures of assessments, but to uphold the contention of the Inland Revenue on the matter of principle involved. They intimated that they had decided that the two sums referred to in the agreements for the purchase of timber were capital payments, and they went on to deal with another matter, namely, whether the sums in question were proper commercial prices for the timber in question. I do not propose to refer further to this other matter which in the light of the agreement between the parties was never properly before the Commissioners. The Case as now presented to us is sufficiently confusing to make it unnecessary to add a further irrelevancy to it.

The Appellant was dissatisfied with the decision of the General Commissioners and required them to state a Case to the Court of Session, which they have done. Question 1 in that Case raises or is intended to raise the question of principle which the parties wished decided in regard to the two sums payable under the two agreements. When the case came before the Court of Session however it was decided that the case should be remitted

(The Lord President (Clyde).)

back to the Commissioners to make further findings of the facts upon which they had arrived at their determination. To avoid undue repetition I refer to the opinion delivered by the Lord President (Cooper) on this matter where the reasons for the remit are more fully set forth. On 26th May, 1955, the Commissioners issued what they describe as further findings and on 9th August, 1955, they issued other findings in what they call " clarification of and to be read in conjunction with the original findings ". These two sets of findings, which appear to overlap one another to some extent, were successively issued by the Commissioners without hearing the parties, and the Case has now been amended by the parties to incorporate the additional findings so made.

Although the additional findings appear at first sight at least to be somewhat inconsistent with the conclusion which the Commissioners previously reached, the Commissioners have not in any way altered the decision which they previously made. Moreover the additional findings go hardly any way to meet the requirements indicated by the Court when the Case was remitted back to the General Commissioners. In these circumstances the Lord Advocate moved us to remit back to the Commissioners to hear and determine the appeal *de novo*. There is no precedent for such a course which in any event I do not consider in the light of the history of the case would serve any useful purpose. Moreover the Appellant moved us to hear the case now and was content to argue it on the findings now incorporated in it. It may well be that there were no further facts before the General Commissioners which would assist the Court.

It was not in dispute between the parties that the answer to the question as to whether payments such as those in question should be taken into account in computing trading profits depends to a considerable extent on the circumstances. Although several tests for determining or aiding in the determination of the matter have been enunciated in the decided cases, none of them is conclusive and infallible. The fact for instance that the payment is a once and for all payment indicates that it may be a capital payment (*Atherton* v. *British Insulated and Helsby Cables, Ltd.*, 10 T.C. 155, at page 192), but as Channell, J., said in the *Alianza* case, [1904] 2 K.B. 666, at page 673, this is not conclusive. Another test has been canvassed as to whether what was purchased was the raw material of the Appellant's business, in which case the value of the asset would fall to be taken into account in computing profits (*Golden Horse Shoe (New), Ltd.* v. *Thurgood*[1], [1934] 1 K.B. 548, at page 565 ; *Mohanlal Hargovind of Jubbulpore* v. *Commissioner of Income Tax, Central Provinces and Berar*, [1949] A.C. 521) or whether the payments merely provide the means of obtaining that raw material, in which event they are probably payments for a capital asset (*Kauri Timber Co., Ltd.* v. *Commissioner of Taxes*, [1913] A.C. 771 ; *Stow Bardolph Gravel Co., Ltd.* v. *Poole*[2], [1954] 3 All E.R. 637). In several of the cases importance was laid on the nature of the business and the size of the transaction. But in none of them is any of these considerations *per se* conclusive.

In the present case the Appellant commenced business as a timber merchant, sawmiller and joiner in Mull very shortly before entering into the first of the two contracts in question. He holds 49 of the issued shares and is a director of the Chalmers Property Investment Co., Ltd., which owns the forests which are the subject-matter of the contracts. By two agreements

(1) 18 T.C. 280, at p. 301. (2) 35 T.C. 459.

(The Lord President (Clyde).)

dated respectively 30th September, 1947, and 30th September, 1948, between him and the company he agreed to buy certain growing timber specified in the contracts for sums of £24,275 and £24,900. These sums were duly paid to the company. From the only accounts of the business produced before the Commissioners it appears that these substantial contracts formed much the most important item in the new business being carried on. The sums involved were substantial, and the number of trees affected very large indeed. But the crucial factor in the present case in my view is the very special nature of the two agreements in question. Under them he did not purchase the trees, for they remained the property of the selling company till severance (see *Morison* v. *A. & D. F. Lockhart*, 1912 S.C. 1017). He acquired a right to enter the lands of the owner of the forests, and to fell and remove the trees. But the unusual feature is that there was no time limit in either of the agreements; he was free to cut and remove the timber as and when he chose. Moreover the agreements did not provide for clearing the sites, but enabled him to select which trees he would take, up to a specified number of each type of tree, and in the case of one agreement of a specified average size. In none of the reported cases has so enduring a right as this been regarded as a proper item to be taken into account in computing trading profits. In my opinion in the case of contracts so unusual as these, and covering as they do an indefinite tract of time, it is not possible in the circumstances to conclude that the price paid for the selective right conferred by them represents a payment for the raw material of the business. The decision of the Commissioners therefore that these were capital payments, and that the contention of the Inland Revenue on principle should be sustained, appears to me to be well founded.

It was suggested, however, that the subsequent findings of the Commissioners issued after the remit modified or altered this conclusion, and should at least lead us to arrive at a different result. With this I do not agree.

In the first of the two documents issued by the Commissioners they find that

> "the words 'capital payments' were used to denote payments made from the capital of the business and were intended so to indicate that the payments under the contracts referred to were substantial sums and therefore represented capital in the ordinary sense of the word".

So far the new finding reinforces the capital and non-revenue nature of the payments in question. But the remainder of that finding was invoked by the Appellant as being in his favour. It is an argument rather than a finding. It is as follows :—

> "But as these payments did not purchase what can be regarded as fixed capital assets we must regard them as having been made from the circulating capital of the business".

But the conclusion does not follow from the premise at all. The two substantial payments did not complete a purchase. They merely conferred on the Appellant the right as and when he chose to go into the forests and sever the trees and so acquire the property in them at some future date. The fact therefore that the payments did not purchase fixed capital assets does not warrant the conclusion which the Commissioners sought to draw.

The only other new finding is that the payments in question

> "constituted the purchase of stock-in-trade",

or that

> "the timber specified in the Case was, in fact, stock-in-trade of the Appellant's business".

(The Lord President (Clyde).)

This finding seems to confuse an agreement to sell and a sale. But apart from that, the question remains, whether there was in the Case evidence on which the General Commissioners could so hold. The finding is certainly inconsistent with all the other considerations in the Case to which I have already alluded, but the Commissioners have in both their statements of this new finding informed us how they arrived at this conclusion. It was based on the fact that

> " such timber was being sold and used for a hill farming scheme "

or that

> " it was represented in the sales of the business ".

From the facts in the Case, the extent to which this was so must have been very small indeed, but what is much more important is that the use to which the sawn timber was put can in no way aid nor assist the question in the Case. For the finished product might equally well have been sold whether the payments under the agreements were or were not properly to be taken into account in computing the trading profits. Although given an opportunity to obtain from the General Commissioners further findings upon the matter, the Appellant declined to move for this. We must therefore decide the case as it is. In view of the confusion which has emerged as to the meaning of the words used in the first question put by the Commissioners we shall not answer the questions in the Case, and in the end both parties asked us to make a finding on the primary question which they wish decided. We shall therefore find that the sums of £24,275 and £24,900 payable by the Appellant under the two agreements relating to the purchase of standing timber did not fall to be taken into account in computing the Appellant's trading profit for the years under appeal.

Lord Carmont.—I agree.

Lord Russell.—I agree.

Lord Sorn.—When this case was previously before us we remitted it to the General Commissioners in order that they might make further findings in fact. The result of the remit is contained in two so-called " findings " and in what appears to be a restatement of these findings issued at a later date. It is no use pretending that these additional findings supply the desired information, and recognising this, the suggestion was made on behalf of the Crown that we might jettison this Stated Case and remit to the Commissioners to start proceedings *de novo*. Without entering into the question whether this was a competent course for us to take we decided to hear argument with the object of seeing whether, without requiring further facts, we could give a decision in principle upon the main point at issue without going into the business accounts in detail and without entering into the question of the reasonableness of the price. Having heard the argument, it seems to me that it is possible for us to give such a decision. The facts are certainly not stated as fully as they might have been, but we asked Counsel for the Appellant whether he desired a remit to give him the opportunity of bringing forward additional facts favourable to his contention and he replied in the negative. This satisfies me that the Appellant will not be prejudiced if we decide the case on the facts we have.

The Appellant's first point was that the question whether expenditure was capital expenditure or revenue expenditure was a question of fact for the Commissioners to decide. He claimed that, on the strength of the additional findings, he held a decision by the Commissioners in his favour

(Lord Sorn.)

and that, accordingly, we had only a limited jurisdiction to interfere. The situation created by the new findings is a somewhat confused one and it is necessary to consider how the matter truly stands. So far as the original Case is concerned it is quite clear that the Commissioners determined the point in favour of the Inland Revenue and held that the sums paid for the timber under the agreements were capital payments made for the acquisition of capital assets. The Case bears that the intendment of the Commissioners' decision was

> " to uphold the contention of the Inland Revenue on the matter of principle involved. The Commissioners decided that the two sums referred to in the two agreements for the purchase of timber were capital payments ".

Passing to the new findings, we discover in the guise of a finding in fact something which appears to be a reversal of this determination. Without making any additional findings in fact which might account for this change of view, the Commissioners bluntly state that the payments did not purchase " what can be regarded as fixed capital assets " and that they must therefore be regarded as having been made from the circulating capital of the business. In line with this altered view they also state that the timber referred to in the contracts was stock-in-trade of the business. I have said that this altered view is not based upon any newly found facts and it may be added that it is not supported by the expression of any relevant reasons. I will not take up time by analysing the new findings because it is apparent that, in light of the principles laid down in the decided cases, the considerations adduced by the Commissioners to explain their change of view are not really in point. What then is the position? It is, as I see it, that the Commissioners have purported, upon the same facts, to give two different and opposite determinations. Neither side can claim a decision in their favour and we are very much in the position described by Viscount Cave, L.C., in *British Insulated and Helsby Cables, Ltd.* v. *Atherton*[1], [1926] A.C. 205, at page 213, where he said:—

> " This appears to me to be a question of fact which is proper to be decided by the Commissioners upon the evidence brought before them in each case; but where, as in the present case, there is no express finding by the Commissioners upon the point, it must be determined by the Courts upon the materials which are available and with due regard to the principles which have been laid down in the authorities."

I might add that, even if the effect of the new findings could be regarded as a decision in fact in the Appellant's favour, we would still have had to consider whether, having regard to the principles laid down, there was evidence upon which such a decision could have been reached and, travelling along this path, I think the same result would be arrived at.

As the question at issue mainly depends upon the two agreements for the purchase of timber, I begin by considering what these agreements effected. They are both expressed in similar terms and the language used is calculated to convey the impression that what was effected was an immediate sale of goods consisting of specified standing timber down to the level of the soil but not including the roots. The attempt to effect a sale of this kind was, however, a hopeless one. So far from being a sale of specified goods it can be seen, when we get to the schedules, that what is sold is a certain number of trees of defined categories to be selected and felled by the purchaser out of certain named woodlands. A sale of unascertained goods is a legal impossibility and even if the trees to be felled had been ascertained trees the contract would still not have been a sale of goods. The legal effect of a sale of standing timber was considered in the case of *Morison* v. *A. & D. F.*

(1) 10 T.C. 155, at p. 192.

(Lord Sorn.)

Lockhart, 1912 S.C. 1017, and I refer to the full exposition of the matter there given in the leading opinion of Lord Johnston. From this exposition it is apparent that what a contract such as we have here effects is not a sale, but an agreement to sell. It is only when the timber is severed that the property passes and a sale takes place. This being the true nature of the agreements, we have to consider whether the two sums of £24.275 and £24,900 paid respectively in 1947 and 1948 were paid for the acquisition of stock-in-trade or for the acquisition of a capital asset.

The decided cases show that no one criterion can be used to decide this delicate question and that the answer depends upon the combined circumstances of the particular case. What are the relevant circumstances here? The estate on which the timber is situated belongs to a company in which the Appellant holds 49 per cent. of the shares. He began business as a timber merchant and sawmiller contemporaneously with his purchases of timber from the estate under the two agreements. There is no evidence and no suggestion that he ever entered into any contracts for the purchase of standing timber other than these ones. What was it that he acquired under these contracts? The substance of the matter is that he acquired the right—stretching over an indefinite period of time—to go into certain woodlands and fell trees up to a certain number. The agreement is a quite unusual one and, in effect, what he bought was a concession over certain woodlands to cut trees of certain categories up to certain numbers. It seems to me that when this transaction is seen to be linked with the inception of the business; and when one sees the magnitude of it, and that it is the only transaction of the kind that the business has entered into; and when, above all, one sees that the rights under it endure for an indefinite period, then, it seems to me, the proper way to regard it is as the acquisition of a capital asset. I would like to add that I have purposely refrained from attaching special weight to the consideration that the timber had still to be "gotten and won" about which we heard so much in the argument. This consideration has sometimes been made the touchstone as in *Golden Horse Shoe (New), Ltd.* v. *Thurgood*(1), [1934] 1 K.B. 548, distinguishing *Alianza Co., Ltd.* v. *Bell*(2), [1904] 2 K.B. 666, in which the thing acquired still had to be dug and treated. My reason for this is that under the ordinary contracts for purchases of standing timber which a regular timber merchant makes to supply himself with his current requirements, the merchant has to go and win the material for himself, and yet I have never heard it suggested that, by entering such a contract, he is acquiring a capital asset and cannot debit the cost in his annual accounts. It seems to me that we are nearer the Privy Council case of *Kauri Timber Co., Ltd.* v. *Commissioner of Taxes*, [1913] A.C. 771. In that case Lord Shaw (at page 779), referring to *Marshall* v. *Green*, 1 C.P.D. 35, and a note in Saunders' Reports(3), distinguishes between a sale of timber for immediate severance and a sale for severance within the prolonged period for which the contracts in that case provided. The decision was to the effect that, in the latter case, what the purchaser acquired was not goods or stock-in-trade but an enduring interest in the land and the natural increment of the trees of the nature of a capital asset. That is what I think the facts stated in the present case show to have been the nature of the asset acquired by the Appellant under the two contracts, and accordingly I agree that we should make a finding to that effect.

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(1) 18 T.C. 280. (2) 5 T.C. 60, and 172. (3) Wms. Saund. 277c.

The taxpayer having appealed against the above decision the case came before the House of Lords (Viscount Simonds and Lords Oaksey, Morton of Henryton, Cohen and Keith of Avonholm) on 29th and 30th January, 1957, when judgment was reserved. On 14th March, 1957, judgment was given in favour of the Crown, with costs (Lord Oaksey dissenting).

Mr. Roy Borneman, Q.C., and Mr. Charles Lawson appeared as Counsel for the taxpayer and the Lord Advocate (Mr. W. R. Milligan, Q.C.), Sir Reginald Hills and Mr. W. R. Grieve for the Crown.

Viscount Simonds.—My Lords, the facts of this case are fully stated in the opinion of my noble and learned friend, Lord Keith of Avonholm, which I have had the privilege of reading and I will not occupy time by stating them at length myself.

Apart from some confusion which has arisen from the manner in which the Commissioners for the General Purposes of the Income Tax for the Division of Mull originally stated a Case for the opinion of the Court of Session and upon a remit made further so-called findings of fact, I do not think that the case would have presented any difficulty.

The Appellant in the year 1947 began to trade in the name of the Killiechronan Sawmills and Joinery Works. In that and the following year he entered into agreements with a company called the Chalmers Property Investment Co., Ltd., of which he owned 49 per cent. of the capital. By these agreements he agreed to pay the sums of £24,275 and £24,900 in respect of a large quantity of trees then growing on the company's estates in the Island of Mull. The first agreement related to 10,000 large and 1,000 small larches, 500 sitka and 500 *pinus silvestris*, the latter to 20,000 large and 1,000 small larch, 200 common ash and 100 common oak. In the first agreement no indication was given how the price was arrived at, unless it was to be found in a reference to S.R. & O. 1946 No. 2209, which regulated maximum prices for the sale of timber; in the second agreement the price was apparently arrived at by assuming a selection of trees which had not yet been made and fixing an average price.

I have used the vague words " in respect of " and " related to ", because, though in each agreement there purported to be a sale and purchase of

> " all the timber specified in the First part of the Schedule now standing and growing "

in the forests therein mentioned, it is clear that the trees had not been selected and identified. On the contrary, the primary right of the Appellant, the purchaser, was to

> " mark fell and carry away all the said trees and complete all the operations authorised at such times as he the Purchaser shall consider convenient."

From this it follows that he did not purchase the trees, for they remained the property of the company until severance : *Morison* v. *A. & D. F. Lockhart*, 1912 S.C. 1017.

It was under these circumstances that he was assessed in an arbitrary or conventional figure in respect of his trade for the years 1947–48 to 1951–52 inclusive for the purpose of determining, as was said, the question of principle whether the two sums that I have mentioned of £24,275 and £24,900 could be taken into account for the purpose of computing his trading profits for the years in question. The Appellant alleged that they

could as representing the purchase price of stock-in-trade; the Crown denied it, saying that these were capital sums paid for an enduring right to cut timber. The Commissioners held that the payments were in the nature of capital expenditure and this was the question submitted for the opinion of the Court. The proceedings before the Court, the remit to the Commissioners and their further findings are fully stated in the opinion of my noble and learned friend, and I refer to what he will say.

It appears that when the matter came before the Commissioners, whether originally or at a later stage, they had no other accounts of the trade than a profit and loss account and a balance sheet for the year ended 31st March, 1948, together with a stock valuation as at the same date. It is worth while to glance at these documents, for it is possible that the Commissioners may have been misled by them into making a statement much relied on by the Appellant, for which there was no possible justification, that the payments in question

> "constituted the purchase of stock-in-trade of the business of timber merchants and that this stock is represented in the sales of the business."

The stock valuation, which is reflected in the other documents to which I have referred, states the cost price of timber at £24,275, adds

> "Annual appreciation of growth at 80/90 year maturity 1·17, say 1 per cent. . . . £242 15*s.*",

and deducts

> "Depreciation attributable to gale damage—blown trees, damaged trees and extra costs lumbering: 10 per cent. . . . £2,451",

thus arriving at a figure of £22,065 19*s.* 6*d.* To this figure there is added the net value of "blown trees" and the ultimate amount of £23,061 5*s.* is reached.

My Lords, it is not putting it too high to say that this statement is sheer nonsense. The Appellant had not by selection and marking, much less by felling and carrying away, appropriated any trees. Yet he claims that already by 31st March, 1948, he had an identifiable stock of trees of which some had grown and others had been blown down. It is hardly to be supposed that having a right of selection he deliberately selected trees that had been blown down. That there was no such scarcity as to require him to do so is plain from the fact that six months later he agreed to purchase a larger number of trees from the same forests. The Commissioners do not seem to have had any other accounts for later years and I am not prepared to assume in their absence that they would have assisted the Appellant. It is obvious that at this date the only relevant asset possessed by the Appellant was a valuable right to cut timber for which he had paid a large sum, and that, when the Commissioners upon a remit made the finding to which I have referred, they were proceeding upon a wholly false basis and their finding must be disregarded. There was, it is true, a statement that at a date unknown after the Appellant made the agreements to which I have referred he acted as contractor to the company and supplied some of the fencing stobs in respect of a certain large hill farming scheme and a later statement identifying the stobs with the timber which was the subject of the agreements. But these statements, vague as to time and quantity, cannot displace what is *ex facie* the plain character of the asset that was purchased. This being the position as far as it can be ascertained from the Case Stated, the further findings of the Commissioners, and their somewhat contradictory conclusions, I do not doubt that the sums payable

(Viscount Simonds.)

under the agreements were, to answer the question of law as put in the Case, of the nature of capital expenditure, and that the Court of Session was right in so holding.

My Lords, I think it right to add, in view of the argument at the Bar, that in my opinion this appeal does not raise any broad question of principle nor do I think it relevant to discuss the impact of the Sale of Goods Act upon a purchase of an ascertained tree or trees. Though the agreements are in certain respects unusual and though the manner in which the case has been presented to the Court is probably unprecedented, in essence this case raises once more the familiar question which from *Alianza Co.* v. *Bell*(1), [1904] 2 K.B. 666, onwards has been the subject of so many judicial decisions. But, unlike many cases where it is difficult to say on which side of the line the case falls, here I can find no factor which does not lead inescapably to the conclusion that the payments were in the nature of capital expenditure. I will not repeat what has been said by the Lord President and Lord Sorn upon this point. I agree with them.

I will only make two further observations. In the first place, it does not follow from this decision that, wherever a timber merchant buys standing timber in small or large quantities, he cannot debit his profit and loss account with the cost. It may well be that, until he has reduced the trees into possession, it would be correct to show the right to do so rather than the trees themselves as an asset, particularly when the trees are not even identified. But I doubt whether this would be regarded as necessary for the purpose of the administration of the Income Tax law, and it is not a very material factor. The issue will be determined by a consideration of all the factors to which the Lord President and Lord Sorn refer. Not the least important of them will be whether the purchase is of one tree or thirty thousand.

Lastly, I must refer to a contention put forward at a late hour by learned Counsel for the Appellant. I cannot find that it was advanced to the Court of Session and I do not think that he was entitled to raise it in this House. It appeared to be founded on what was said in this House in the recent case of *Sharkey* v. *Wernher*, 36 T.C. 275, and it was to the effect that as and when he cut down the trees and made the timber available for his business he was entitled to debit his trading account with the market value of such timber. I will only say that this may or may not be so. I express no opinion, for it has nothing whatever to do with the Case Stated for the opinion of the Court or the appeal before this House.

The appeal should, in my opinion, be dismissed with costs.

Lord Oaksey.—My Lords, I have the misfortune to differ from your Lordships in this case.

The question is whether two payments made by the Appellant, a timber merchant and sawmiller, for standing timber were capital or revenue payments. It was settled by agreement between the parties approved by the Commissioners for Mull that this question should be decided in principle in the first place and the facts were therefore not fully gone into. The Commissioners in the first instance upheld the nominal assessments made by the Respondents for the five years in question, holding that the two payments were capital payments and that in any event they were not satisfied that the sums were proper commercial prices for the timber in

(1) 5 T.C. 60 and 172.

question. On appeal on 2nd July, 1954, the Court of Session remitted the case to the Commissioners to amplify and amend the case and, if so moved by either party, to take further evidence.

The Commissioners, on 26th May, 1955, without further hearing, made the following further findings:

> "(1) The words 'capital payments' were used by us to denote payments made from the capital of the business and were intended so to indicate that the payments under the contracts referred to were substantial sums and therefore represented capital in the ordinary meaning of the word. But as these payments did not purchase what can be regarded as fixed capital assets we must regard them as having been made from the circulating capital of the business.
>
> We further find in fact that the payments in question referred to in our previous decision constituted the purchase of stock-in-trade of the business of timber merchants and that this stock is represented in the sales of the business.
>
> (2) In our decision we said that we 'were not satisfied that the said sums were proper commercial prices'. By this we meant to say that we were unable to state what the proper commercial prices should be rather than that we had any reason to assume that the prices were wrong."

And on 9th August, 1955, the Commissioners issued further findings of fact as follows:

> "1. That the timber specified in the Case Stated was in fact stock-in-trade of the Appellant's business.
>
> They relied on evidence that such timber was being sold and used for a hill farming scheme.
>
> 2. That the prices for the said timber specified in the Case Stated could not be considered by them from the evidence submitted to be other than correct.
>
> They relied on the evidence of the District Valuer dealing with values of timber in the Isle of Mull."

In my opinion the Commissioners of Mull are open to no criticism for their change of view. The Lord President (Cooper) had pointed out in his judgment of 2nd July, 1954, that the Court of Session did not know whether the Appellant had availed himself of the rights he enjoyed under the agreements. The Commissioners thereupon found as a fact that the timber in question was stock-in-trade and relied for that finding on evidence that such timber was being sold and used for a hill farming scheme. The Commissioners also explained the sense in which they had used the word "capital" and are not, I think, open to criticism for a change of view upon a question of such difficulty.

The Respondents then appealed to the First Division of the Court of Session, who said that in view of the confusion which had emerged as to the Commissioners' findings they would not answer the questions stated in the Case but held that the two payments did not fall to be taken into account in computing the Appellant's trading profit for the years under appeal.

The facts stated by the Commissioners are that the Appellant, in pursuance of written contracts, had paid to a company which owned certain forests in the Island of Mull the sums of £24,275 and £24,900 for standing timber in certain named forests which was to be felled and carried away by the Appellant at such times as he considered convenient, the number and categories of trees being stated and the price arrived at in accordance with the maximum prices permitted by S.R. & O. 1949 No. 2209, although in one contract the Statutory Rule price was not referred to. A licence from the Government was necessary for the cutting of any timber. The individual trees were not specified but were to be selected by the Appellant

(Lord Oaksey.)

and were to be cut down to the soil but not the roots or other parts which should be within or below the surface of the soil. The trees were 70 to 80 years old and were ripe for cutting.

The Respondents' contention is that the trees were *partes soli* and that there is no distinction between the present case and the cases of mines such as *Alianza Co., Ltd.* v. *Bell*(1), [1906] A.C. 18, and *Kauri Timber Co., Ltd.* v. *Commissioner of Taxes,* [1913] A.C. 771, in which it was held that no allowance could be made for exhaustion of the mines and that payments for the timber there in question were capital which could not be deducted in arriving at the balance of profits and gains of the mine or timber owner. In my opinion these cases do not govern the present case. Mines are specifically dealt with in the Income Tax Act; standing timber is not. In the *Kauri* case the Privy Council was dealing with a New Zealand Statute, which is not the same as the British Statute, and the observations of the Board, at page 779 of the report, show that the decision was not intended to decide anything beyond the construction of the New Zealand Statute, and, indeed, the Board expressly adopted the judgment of Brett, J., in *Marshall* v. *Green,* 1 C.P.D. 35, which they said properly accepted the note in Saunders' Reports.

The note in Saunders upon *Duppa* v. *Mayo*(2) is as follows:

> "The principle of these decisions appears to be this—that wherever at the time of the contract it is contemplated that the purchaser should derive a benefit from the further growth of the thing sold, from further vegetation, and from the nutriment afforded by the land, the contract is to be considered as for an interest in land; but where the process of vegetation is over, or the parties agree that the thing sold shall be immediately withdrawn from the land, the land is to be considered as a mere warehouse of the thing sold, and the contract is for *goods.*
>
> This doctrine has been materially qualified by later decisions, and it appears to be now settled that, with respect to emblements or *fructus industriales* (*i.e.* the corn and other growth of the earth which are produced, not spontaneously, but by labour and industry), a contract for the sale of them while growing, whether they are in a state of maturity, or whether they have still to derive nutriment from the land in order to bring them to that state, is not a contract for the sale of any interest in land, but merely for the sale of *goods.* 5 B. & C. 829. *Evans* v. *Roberts.* 8 D. & R. 611. S.C. 4 M. & W. 343. *Sainsbury* v. *Matthews.* And it will make no difference whether they are to be reaped or dug up by the buyer or by the seller. 10 A. & E. 759. 2 Perr. & D. 594. The true question is, whether, in order to effectuate the intention of the parties, it be necessary to give the buyer an interest in the land, or whether an easement of the right to enter the land, for the purpose of harvesting and carrying them away, is all that was intended to be granted to the buyer."

In the present case the timber was mature timber 70 to 80 years old and ripe for cutting, and although the time for felling was not specified it is to be presumed that a timber merchant who had paid such a large sum of money for ripe timber would fell it within a reasonable time. In any event, it could not have been contemplated that the purchaser would derive a benefit from further growth of the timber, and it is therefore to be regarded as goods, and the rights acquired by the Appellant do not constitute an interest in land.

If I am right in thinking that the Appellant acquired no interest in the land on which the trees stood, the distinction between the two classes of cases is that in the case of mines the purchaser purchases the land of which the mine forms the integral part, and although he makes use of the products of the land as his stock-in-trade, yet he has the land when

(1) 5 T.C. 60 and 172. (2) 1 Wms. Saund. 275, 277.

that stock-in-trade has been exhausted and his purchase is therefore regarded as the purchase of a capital asset and not as a forward purchase of stock-in-trade.

But, as Lord Sorn said in the present case[1]:

> "My reason for this is that under the ordinary contracts for purchases of standing timber which a regular timber merchant makes to supply himself with his current requirements, the merchant has to go and win the material for himself, and yet I have never heard it suggested that, by entering such a contract, he is acquiring a capital asset and cannot debit the cost in his annual accounts."

It appears to me that if the decision of the Court of Session is right, every sale of a standing tree is the purchase of a capital asset. The fact that it is a comparatively small transaction cannot make any difference. It is the purchase of a growing tree which, it is said, is *pars soli*, and if the fact that the tree is *pars soli* at the time the contract is made regardless of whether the soil remains in the seller or the buyer after severance, I cannot see that it makes any difference whether the purchase is for one tree or one thousand. If the woods or forests had been bought in their entirety in the present case and the property in them and in the ground on which they stand had been acquired by the Appellant, I should agree that the purchase price had been a capital payment. The fundamental distinction which the Income Tax Acts make is between fixed capital and circulating capital or stock-in-trade. All payments laid out for the purposes of trade are, of course, capital in a sense, but the class of capital which cannot be set off against the profits is the capital which is employed to produce the income without any intention of using it up, whereas the capital which can be set off against the profits is the capital which it is intended to circulate by sales and fresh purchases.

A timber merchant such as the Appellant, who buys mature standing timber, has no interest in the forest unless he purchases the forest as such, except as a purchase of his stock-in-trade which he must acquire in order to carry on his trade. He is not interested in the forest in the way that a landowner is, as a fixed asset, nor in what it may grow in the future either by replanting or natural regeneration. The purchase price is not, to use the words of Viscount Cave, L.C., in *British Insulated and Helsby Cables, Ltd.* v. *Atherton*[2], [1926] A.C. 205, at page 213, an expenditure once and for all with a view to bringing into existence an asset for the enduring benefit of a trade.

Purchases of standing timber are merely a way of acquiring the timber merchant's stock-in-trade in the way most convenient to him and to the landowner, and the question is not how does the taxpayer acquire his stock-in-trade but what is his stock-in-trade. It does not cease to be his stock-in-trade because he buys it by a forward contract nor because he buys a little or much of it at one time. As Channell, J., said in the *Alianza* case, [1904] 2 K.B. 666, at page 673:

> "The Legislature might if it chose say that the gross receipts of a business should be treated as profits for the purpose of income tax without any allowance for current expenses, and, if it did say so, the rule would have to be followed. But it has not gone quite so far as that. I find nothing in the rules to say that if the business to be assessed is that of manufacturing an article and selling it, and nothing more, the cost price of the material consumed in the manufacture is not to be taken into account in assessing the profits.

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(1) *See* page 201 *ante*. (2) 10 T.C. 155, at p. 192.

(Lord Oaksey.)

> In the ordinary case, the cost of the material worked up in a manufactory is not a capital expenditure; it is a current expenditure, and does not become a capital expenditure merely because the material is provided by something like a forward contract, under which a person for the payment of a lump sum down secures a supply of the raw material for a period extending over several years. I do not think it would be necessary that the payment for the raw material should be in the year of assessment, or even in the three years over which the average extends. It is not necessary to deal with that point at present, and I do not decide it; I merely say that I do not think it would be necessary. The question in this case which we have to consider is what is the nature of the adventure or concern which this particular company is carrying on. If it is merely a manufacturing business, then the procuring of the raw material would not be a capital expenditure."

The only thing I wish to add is that the only question before the Commissioners was the question of principle and it was not suggested that the two sums of £24,275 and £24,900 were expenses of any of the particular five years in question.

For these reasons I am of opinion that this appeal should be allowed and the case sent back to the Commissioners with a direction that the sums paid for the trees cut in the years in question on the basis of the contract should be allowed as deductions from the Appellant's profits.

Lord Morton of Henryton.—My Lords, I agree with the decision of the First Division of the Court of Session and with the speech which is about to be delivered by my noble and learned friend, Lord Keith of Avonholm.

The question arising in the present case is the same as the question posed by Jenkins, L.J., in *Stow Bardolph Gravel Co., Ltd.* v. *Poole,* 35 T.C. 459, at page 475:

> "Is this a case of a purchase of the raw material of the trade, or of the stock-in-trade in which a particular trader deals, or is it a case of a purchase of a capital asset from which the Taxpayers will be able to derive raw material or stock-in-trade as and when the requirements of the Taxpayers' business make it expedient to do so?"

In my opinion, having regard not only to the nature of the right acquired but to the other circumstances of the present case, the purchase now under consideration is accurately described as a purchase of the latter kind.

Counsel for the Appellant sought to put forward an alternative argument, in the event of his main contention being rejected. The argument was that the Appellant would be entitled to deduct, in his trading accounts, for each year in which he exercised his right to cut down trees and made the resulting timber available for use in his business, a sum equal to the market value of that timber at the date when it was so made available. In support of this argument he cited *Craddock* v. *Zevo Finance Co., Ltd.,* 27 T.C. 267, at page 279; *Commissioners of Inland Revenue* v. *Williamson Brothers,* 31 T.C. 370; and *Sharkey* v. *Wernher,* 36 T.C. 275, at pages 299 and 306. I am of opinion that this question did not arise under the Case Stated, as any sums so claimed to be deducted would not be a part of the two sums of £24,275 and £24,900 paid by the Appellant under the two agreements in question and, indeed, would bear no relationship to either of these sums. Consequently, I express no opinion on it.

I would dismiss the appeal.

Lord Cohen.—My Lords, this is an appeal from an Interlocutor of the Court of Session dated 21st December, 1955, finding that the sums of £24,275 and £24,900, payable by the Appellant under two agreements dated respectively 30th September, 1947, and 30th September, 1948, both

relating to the purchase of standing timber, did not fall to be taken into account in computing the trading profit of the business of the Appellant as a timber merchant, saw miller and joiner for the years under appeal.

The Appellant based his appeal on two main grounds:

I. He said that the matter was concluded in his favour by findings of fact of the General Commissioners;

II. He said that if your Lordships rejected his first contention, your Lordships, acting as a tribunal of fact, should conclude that the said agreements were purchases of stock-in-trade and therefore fell to be taken into account in computing the Appellant's trading profit for the years under appeal.

My Lords, I have had the opportunity of reading in print the speech which the noble and learned Lord, Lord Keith, is about to deliver. I agree on both points with the conclusion he has reached. I will therefore not trouble your Lordships with a detailed recapitulation of the facts but will state shortly my reasons for agreeing that this appeal should be dismissed.

On the first point, the substance of the Appellant's contention is to be found in the letter of the General Commissioners dated 9th August, 1955, "issued in clarification of and to be read in conjunction with their original finding" on the points submitted to them. In that letter the General Commissioners say that the timber specified in the Case Stated (i.e., the timber comprised in the two agreements attached to the Case Stated) was in fact stock-in-trade of the Appellant's business. I agree with Lord Sorn that, regarded as a finding of fact, this finding was in flat contradiction with the original finding and cannot form a firm basis for a decision of the issues between the parties, and I would add that in my opinion the question whether the timber comprised in the agreements was or was not stock-in-trade of the Appellant's business raises a question as to the construction of the agreements and the question is, therefore, a question of mixed fact and law proper for reconsideration before the Court of Session.

On the second point I find myself in complete agreement with Lord Sorn. Like him, I see no reason for doubting that under the ordinary contracts for purchases of standing timber which a regular timber merchant makes to supply himself with his current requirements, the merchant is not acquiring a capital asset and is entitled to make the appropriate debit in his annual accounts. Equally, I think it is clear from the authorities to which your Lordships' attention was directed and in particular from the judgment of the Judicial Committee of the Privy Council in *Kauri Timber Co., Ltd.* v. *Commissioner of Taxes,* [1913] A.C. 771, that the terms of the contract in question in a particular case and the surrounding circumstances may be so special that the proper conclusion may be that under the contract the trader acquired a capital asset from which he intended to get and win his stock-in-trade. In each case it must be, as Counsel for the Appellant admitted, a question of degree, and for the reasons given by their Lordships in the Court of Session and about to be given by the noble and learned Lord, Lord Keith, I have no doubt but that in this case, as in *Kauri's* case, what the Appellant, under the agreements in question, acquired was not goods or stock-in-trade but an enduring interest in the land and the natural increment of the trees of the nature of a capital asset.

I therefore agree that the appeal should be dismissed.

Lord Keith of Avonholm.—My Lords, this is an appeal from a judgment of the First Division of the Court of Session, sitting as Court of Exchequer, making a finding on a Case stated by the Commissioners for the General Purposes of the Income Tax for the Division of Mull. The case arose out of assessments made on the Appellant under Case I of Schedule D of the Income Tax Act, 1918, in the form of random assessments for the five fiscal years, 1947–48 to 1951–52. The procedure in the case has taken an unusual and remarkable course. As the procedure, however, is involved to some extent with the facts of the case it will be convenient for a full understanding of the case to deal with the facts before coming to matters of procedure.

The Appellant carries on business as a timber merchant, sawmiller and joiner under the name Killiechronan Sawmills & Joinery Works, Killiechronan, Aros, Isle of Mull. He commenced business on 6th April, 1947. He is also a shareholder and director of a company known as the Chalmers Property Investment Co., Ltd. (hereinafter called "the company"), which owns a large estate in the Isle of Mull. He holds 49 shares in the company out of an issued capital of 100 shares.

On 30th September, 1947, and 30th September, 1948, the Appellant and the company entered into two agreements. Apart from the schedules to the agreements, the prices mentioned therein and the dates from which the agreements were to run these agreements are in identical terms and it will be sufficient to quote in full the material portions of the first agreement. The company (called "the Vendors") and the Appellant (called "the Purchaser") agreed as follows:

> "1. The Vendors will sell and the Purchaser will buy as at 7th April 1948 all the timber specified in the First part of the Schedule now standing and growing in or upon the forests referred to in the Second part of the Schedule hereto which forests form part of the Vendors estate situate and being at Killechronan Aros Mull together with the boughs branches and other parts of the same trees respectively down to the soil whereon the same shall be growing but not the roots or other parts thereof which shall be within or below the surface of the soil Together with the following powers and authorities namely:—
>
> Full and free powers and authority for the Purchaser his servants agents and workmen to go to and return from the lands upon which the said trees are situate through over and along the existing or usual roadways or tracks for the purpose of felling cutting or sawing up and carrying away or otherwise dealing with the said trees and the boughs tops logs and bark thereof at all usual and convenient times and also to top lop and strip off the bark thereof and also to place and dry the bark of the said trees on convenient parts of the said premises to be appointed by the Vendors or their agents for that purpose and also for any of the purposes aforesaid to employ horses wagons motor traction and other mechanical contrivances which may be necessary or convenient and also to dig and use sawpits and stages and erect and construct sawmills and other erections and to break and saw up the said timber and stack up the same upon proper and convenient parts of the ground.
>
> 2. The purchase price shall be the sum of £24,275:0:0 (twentyfour thousand two hundred and seventyfive pounds).
>
> 3. The Purchaser may mark fell and carry away all the said trees and complete all the operations authorised at such times as he the Purchaser shall consider convenient.
>
> 4. The cutting of the trees and all the operations hereby authorised shall be done in a proper customary and workmanlike manner and so as to cause as little injury or damage as possible to the standing timber underwood grass crops and other property of the Vendors or its tenants and the Purchaser shall make compensation for all injury or damage which he shall commit or occasion in or upon the Vendors lands.

(Lord Keith of Avonholm.)

5. The Purchaser will amend and repair all such hedges ditches fences and gates as may be injured or damaged in the felling cutting down or carrying away of the said trees including all gaps made in the hedges by the cutting away of trees therefrom and for the purposes aforesaid will allow and supply proper hedge botes and timber.

6. All Questions in dispute between the parties hereto touching this Agreement or the rights duties and liabilities of either party hereunder shall be referred to a single arbitrator pursuant to the provisions of the Arbitration Acts 1889 to 1934.

The Schedule above referred to

First Part

500 Sitka or Silver Spruce
500 Pinus Silvestris or Contorta
10,000 Larch, Large
1,000 Larch, Small

Second Part

Pairce Choille
Old Killiechronan
Coire Pholachie
Garden Plantations
Narrow Plantations
Horse Park Wood

The above in accordance with S.R. & O. 2209 of 1946."

In the second agreement entered into exactly a year later and operative as at 7th April, 1948, the price agreed was £24,900 for further lots of trees in the same forests specified as follows:

"First Part

200 Common Ash, selected, at avge. 25c. @ 5s.		£1,250
100 Common Oak, selected, at avge. 20c. @ 4s.		400
20,000 Larch, Large 6" and over avge. 18c. @ 1s. 3d. ...		22,500
1,000 Larch, Small, under 6" at avge. 10c. @ 9d.		750
		£24,900

Second Part

Pairce Choille
Old Killiechronan
Coire Pholachie
Garden Plantations
Narrow Plantations
Horse Park Wood

The above in accordance with S.R. & O. 2209 of 1946."

The sums of £24,275 and £24,900 were paid by the Appellant to the company. It is found in the Stated Case that these sums were arrived at

> "(*a*) by estimating the cubic content of certain trees according to the 'Hoppus System', which is a method recognised in the timber trade of estimating the cubic content of trees by means of certain measurements and tables, (*b*) by applying to the cubic content so arrived at, the maximum prices laid down by S.R. & O. 1946 No. 2209 referred to in the said agreements, and (*c*) by deducting from the resultant figure, a sum by way of discount."

It will be observed that while the cubic content and rates applied are indicated in the schedule to the second agreement, no such figures appear in the schedule to the first agreement.

(Lord Keith of Avonholm.)

It is stated in the Case that

> "It was estimated before us that the trees in question were some 70 to 80 years old and were therefore ripe for cutting but we were not in a position finally to determine the age or quality of the trees in question".

For the purposes of this appeal I shall accept it that the trees were ripe for cutting. The only other material fact found in the Case is that after the Appellant entered into the agreements he acted as contractor to the company and supplied some of the fencing stobs in respect of a hill farming scheme put into operation by the company under the Hill Farming Act, 1946. From a subsequent finding of the Commissioners made in circumstances which I shall refer to in a moment it would appear that some at least of these fencing stobs were supplied from timber procured under the agreements in question.

In view of what subsequently happened, I should here quote in full the original finding of the Commissioners:

> "We, the Commissioners, who heard the appeal, after consideration of the foregoing facts and the contentions of the Appellant and Respondent decided to uphold the assessments appealed against and on 27th November, 1952, our decision to that effect was communicated to the parties.
>
> After an enquiry on behalf of the Appellant as to the effect of that decision, we amplified it and our amplified decision was communicated in writing to the parties on 3rd January.
>
> That the previous decision made by the Commissioners at their meeting on 27th November, 1952, was not intended to uphold the actual figures of assessments which were never intended to be serious assessments, but to uphold the contention of the Inland Revenue on the matter of principle involved. The Commissioners decided that the two sums referred to in the two agreements for the purchase of timber were capital payments and in any event they are not satisfied that the said sums were proper commercial prices for the timber in question."

The concluding words from "and in any event" are not material to this appeal and need not be further noticed.

The Appellant appealed against this determination of the Commissioners and on the appeal coming before the First Division of the Court of Session, the Court, on 2nd July, 1954, under reference to the opinion of the Court, remitted to the Commissioners to amplify and amend the Case with power, if so moved by either side, to take further evidence. The Lord President (Cooper) in the course of his opinion said[1]:

> "The difficulty in which we now find ourselves is that it is not clear to us, even after hearing the argument from the Appellant, what exactly are the points which it is sought to raise, or what are the materials on which our decision of a question of law is to be based. It has been pointed out more than once that a Stated Case must always raise a clear and distinct point of law, and I am afraid that this Case does not.
>
> For instance, the first question of law is stated, if I may so put it, *in vacuo*, unrelated to the facts, or even to *pro forma* figures for the trade or business with regard to any of the years of assessment, five in number beginning in 1947 and ending in 1952. We do not know whether the accounts for one year and statements printed in the appendix were ever before the Commissioners, nor on what basis they were compiled, least of all in regard to the vital figures of the alleged cost of the timber debited against the receipts earned by the Appellant. We do not even yet know whether, and if so to what extent, the Appellant has availed himself of the right he enjoys under certain agreements to enter upon the lands of somebody else and to fell and remove the trees growing on that land, nor whether timber as acquired was utilised in earning the receipts of his business in any of the years covered by the assessments. It seems to me that until the Case is presented to us in such a form as to clarify these matters and to provide us not with detailed figures (which can

[1] *See* pages 193-4 *ante*.

be left for later adjustment), but at least with *pro forma* computations and an indication of the basis on which the Appellant on the one hand and the Inland Revenue on the other maintain that the liability of the Appellant should be determined, it is not feasible for us to appreciate or to decide the question in controversy."

Proceeding upon this remit the Commissioners, after an interval of almost a year, issued two documents which had no recognisable relationship to the points on which the First Division wished to be enlightened. It is necessary to quote these in full. The first runs:

"We, the General Commissioners for Income Tax for the Mull Division for the County of Argyll, have given at the request of the solicitors for the Appellant further consideration to the words 'capital payments' employed by us in our decision, and we make the following further findings:

(1) The words 'capital payments' were used by us to denote payments made from the capital of the business and were intended so to indicate that the payments under the contracts referred to were substantial sums and therefore represented capital in the ordinary meaning of the word. But as these payments did not purchase what can be regarded as fixed capital assets we must regard them as having been made from the circulating capital of the business.

We further find in fact that the payments in question referred to in our previous decision constituted the purchase of stock-in-trade of the business of timber merchants and that this stock is represented in the sales of the business.

(2) In our decision we said that we 'were not satisfied the said sums were proper commercial prices'. By this we meant to say that we were unable to state what the proper commercial prices should be rather than that we had any reason to assume that the prices were wrong.

Tobermory
26th May, 1955."

The second document is as follows:

"9th August, 1955.

I am directed by the Commissioners to inform you that on 26th May, 1955, the General Commissioners of Income Tax for the Division of Mull in the County of Argyll 'issued in clarification of and to be read in conjunction with their original finding on the two points referred to them in the November, 1952, findings of fact as follows:

1. That the timber specified in the Case Stated was in fact stock-in-trade of the Appellant's business.

They relied on evidence that such timber was being sold and used for a hill farming scheme.

2. That the prices for the said timber specified in the Case Stated could not be considered by them from the evidence submitted to be other than correct.

They relied on the evidence of the District Valuer dealing with values of timber in the Isle of Mull.

Such findings of fact were finally decided by the Commissioners on 26th May, 1955, and have been duly notified to the parties.'

Yours faithfully,
D. M. McWilliam,
Clerk to Commissioners."

When the case came back to the Court of Session, Counsel for the Revenue moved the Court to remit back to the Commissioners to hear and determine the appeal *de novo*. This was opposed by Counsel for the Appellant and the motion was refused, the Lord President (Clyde) saying(1):

"There is no precedent for such a course which in any event I do not consider in the light of the history of the case would serve any useful purpose."

The additional findings were incorporated as part of the Case.

(1) *See* page 197 *ante*.

(Lord Keith of Avonholm.)

The view taken by the First Division on the merits of the appeal is summarised in the following passage from the opinion of the Lord President(1):

> "In my opinion in the case of contracts so unusual as these and covering as they do an indefinite tract of time, it is not possible in the circumstances to conclude that the price paid for the selective right conferred by them represents a payment for the raw material of the business. The decision of the Commissioners therefore that these were capital payments, and that the contention of the Inland Revenue on principle should be sustained, appears to me to be well founded."

Lord Carmont and Lord Russell concurred and Lord Sorn on an independent consideration of the facts of the case reached the conclusion that the right acquired by the Appellant was the acquisition of a capital asset.

My Lords, the Judges of the First Division, in my opinion, reached a right conclusion. There is included among the documents attached to the Stated Case a profit and loss account of the Appellant's business for the year ended 31st March, 1948. That is the only account produced in the case and it is earlier than the date of the second agreement. It brings in, as in a trading account, the sum paid under the first agreement as a purchase during the year and shows as stock at the end of the year this sum of £24,275 reduced to £23,061 5*s*. A further statement shows that this depreciation is wholly due to gale damage, less the value of the blown trees and natural appreciation of growth of the standing trees.

It is unnecessary in this case to consider whether standing trees can ever be so treated. Lord Sorn considered that there may be cases where a timber merchant buying standing trees for his current requirements is entitled to debit the cost in his annual accounts. This may be so if regard is had to current requirements and the timber merchant proceeds to cut down the trees and reduce them into his possession within a short time of their acquisition. It may be that the cut timber then becomes his stock-in-trade and that the price paid for the trees should enter into the cost price of this stock-in-trade. I say no more because much may depend on the circumstances of the particular case and such a case is not, in my opinion, this case.

The number of trees here was very large, 30,000 large larch, and 2,000 small larch, as well as other conifers and a quantity of hard timber. There is no evidence that there was any immediate outlet for such a large quantity of timber. The Appellant's balance sheet shows him as possessing at 31st March, 1948, relatively modest plant and machinery costing some £832, and loose tools and equipment costing some £118, a total of £950. These figures do not suggest that the Appellant was able to cope within any short period of time with the large quantity of trees made matter of the agreements. Further, the trees under the two agreements were quite unidentified, though no doubt understood to be trees of varying average sizes or contents. The Appellant was to

> "mark fell and carry away all the said trees and complete all the operations authorised at such times as he the Purchaser shall consider convenient."

As was observed in the Court of Session, this absence of any time limit presents an unusual feature. It gives the Appellant a right to defer the cutting of the trees for a very long period, if not indefinitely, though practical considerations and the ripe condition of the trees might well stimulate the Appellant to exercise his rights with such promptitude as was consistent with his capacity and opportunity to do so. The fact, however, remains

(1) *See* page 198 *ante*.

(Lord Keith of Avonholm.)

that when the agreements were completed he had no right of property in a single tree. He had merely a right to select and thereafter to cut. Even by selection he acquired no property in the trees. He could obtain no property in any part of a tree till he had felled it to the ground.

I find it impossible to hold that this very peculiar right is capable of being treated as stock-in-trade of the Appellant. The nature of the right, the indefiniteness of the period for its exercise, and the lack of identification of the trees on which the right was to be exercised, to which may be added the size of the transaction and the absence of any evidence of intention or means to complete it within any foreseeable time, all, in my opinion, negative the idea that the Appellant had anything that could be called stock-in-trade.

In my opinion, what the Appellant acquired here was merely a right to go on to the company's land to mark, cut and carry away such trees, up to a specified number, as fell within the size and description mentioned in the agreements. The money paid for this right was, in my opinion, a capital but not a revenue expenditure. There may be many cases where the dividing line is a narrow one. But in this case I consider that the scale falls heavily on the capital side of the line. I find it fruitless to examine the many cases that were cited at the hearing. In these cases the question generally was what was the proper inference to be drawn as to the nature and purpose of the transaction in the particular circumstances of the case. No infallible test can be propounded for all cases.

A similar question was recently considered in *Stow Bardolph Gravel Co., Ltd.* v. *Poole,* 35 T.C. 459, in which it was decided that the purchase of unworked deposits of gravel by a dealer in sand and gravel was capital and not revenue expenditure. There, Jenkins, L.J., said (at page 475):

> "I would say that the Taxpayers here do carry on the business of dealers in sand and gravel, but I would say that one part of the business consists not merely in purchasing gravel but in obtaining gravel and there may be expenditure necessary or desirable with a view to obtaining gravel which is nevertheless not the purchase price of gravel as stock-in-trade of the business."

Mutatis mutandis this passage could be applied to the Appellant here as dealer in timber. As it was expressed in argument in the case cited he has provided himself with a means of supplying himself with timber which when procured would form part of his stock-in-trade. A similar illustration was given by Romer, L.J., in *Golden Horse Shoe (New), Ltd.* v. *Thurgood,* 18 T.C. 280; [1934] 1 K.B. 548, with reference to a manufacturer of gas acquiring a coal mine with a view to supplying himself with coal for his gas-works.

Reliance was placed by Counsel for the Appellant on the definition of "goods" in Section 62 (1) of the Sale of Goods Act, 1893, viz.,

> "'Goods' include all chattels personal other than things in action and money, and in Scotland all corporeal moveables except money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale".

Forest trees some 70 years old are not industrial growing crops and it was the last part of the definition that was prayed in aid. As between parties to a contract the definition may, in cases to which it applies, be important as affecting their rights and duties under the contract, but it may be doubted whether in a case with third parties, in this case the Revenue, it can have the effect of making something stock-in-trade which would not properly

(Lord Keith of Avonholm.)

be so regarded until reduced into possession. But, in any event, the considerations already referred to would preclude an appeal to this definition. There are no trees ascertained as the subject-matter of the contract and therefore no one can say what are the trees attached to and forming part of the land that are said to be "goods". Further, there is no obligation on either vendor or purchaser to sever the trees. At best the Appellant has only a licence to sever trees at such times as he shall consider convenient. The definition, in my opinion, has no application to the circumstances of this contract and it is unnecessary to consider what the precise effect of this definition may be in an appropriate case.

It remains only to consider the effect of the additional findings made by the Commissioners. These findings are in contradiction of the previous decision of the Commissioners upholding the contention of the Inland Revenue on the matter of principle involved and were made without any additional evidence being led. It was represented by Counsel for the Appellant that the finding that the payments were "made from circulating capital", that they "constituted the purchase of stock-in-trade" and that the timber "was in fact stock-in-trade" were findings in fact which should not be disturbed. In truth they are findings in law or of mixed fact and law which, for the reasons I have already expressed, are opposed to all the real findings of fact and documents in the case.

In my opinion the Court below came to a right conclusion. The assessments, I apprehend, have still to be considered on actual figures and nothing that I have said in upholding the decision that the sums in question were capital payments is intended to preclude consideration of what, if any, allowance is to be made for timber actually cut down and taken into stock by the Appellant.

I would dismiss the appeal.

Questions put:

That the Interlocutor appealed from be reversed.

The Not Contents have it.

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

The Contents have it.

[Solicitors:—Fyfe, Ireland & Co., W. S.; Tyrrell, Lewis & Co.; Solicitor of Inland Revenue (Scotland); Solicitor of Inland Revenue (England).]

(85376) Wt. 46—A4461 K48 10/57 D.L./IL/18