HIGH COURT OF JUSTICE (CHANCERY DIVISION)—17TH DECEMBER, 1957

COURT OF APPEAL—6TH JUNE, 1958

HOUSE OF LORDS—2ND JUNE AND 6TH JULY, 1959

Bennett

v.

Rowse (H.M. Inspector of Taxes)

Income Tax, Schedule D—Date of cessation of trade—Balancing charge —Income Tax Act, 1945 (8 & 9 *Geo.* VI, *c.* 32), *Section* 17 (1).

The Appellant owned two Tudor aircraft and hired them to a company formed by him. On 12*th March,* 1950, *one of the aircraft crashed with much loss of life and was completely destroyed; the other was then at the aerodrome of an aircraft manufacturer. Having been notified by telephone shortly after the accident, the Appellant immediately informed the company that, with effect from the said* 12*th March, he had ceased to hire both aircraft to it.*

On appeal against a balancing charge for the year 1949–50 *in respect of the destroyed aircraft the Appellant contended that his trade of hiring aircraft was permanently discontinued at the same moment as this asset was destroyed. The Special Commissioners found that the trade ceased at some time thereafter and accordingly the asset was destroyed before the trade was permanently discontinued.*

Held, *that there was evidence on which the Commissioners could reach their conclusion.*

CASE

Stated under the Income Tax Act, 1952, Section 64, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the High Court of Justice.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 13th September, 1956, Air Vice-Marshal D. C. T. Bennett (R.A.F. (ret.)), C.B., C.B.E., D.S.O. (hereinafter called "the Appellant"), appealed against an assessment made upon him under Case I of Schedule D for the year of assessment 1949–50 in the sum of £21,000 in respect of a balancing charge arising under the provisions of Section 17, Income Tax Act, 1945. The grounds of the appeal were that no balancing charge fell to be made on the Appellant under the provisions of the said Section 17, Income Tax Act, 1945, and accordingly the said assessment was incorrect in law.

2. Evidence was given by the Appellant and Elsa Bennett, wife of the Appellant (hereinafter called "Mrs. Bennett"), and the following documents were produced and admitted or proved, except where the contrary is stated:

(i) A statement dated 29th March, 1956, signed by Mrs. Bennett (the contents not admitted or proved, except in so far as they are incorporated in the facts found by us).

(ii) A copy of a letter dated 31st January, 1950, from the Appellant to the secretary, Fairflight, Ltd.

(iii) A copy of a letter dated 12th March, 1950, from the Appellant to the secretary, Fairflight, Ltd.

(iv) A bundle of correspondence.

(v) Ministry of Civil Aviation pamphlet no. 88, " Civil Aircraft Accident ; Report of the Court Investigation on the accident to Tudor Aircraft G—AKBY on 12th March, 1950 ".

(vi) Return of income of the Appellant for the year 1948–49 and claim for allowances for the year 1949–50 and computation.

(vii) Return of income of the Appellant for the year 1949–50 and claim for allowances for the year 1950–51, and computation.

(viii) Minutes of a meeting of the directors of Fairflight, Ltd., held on 16th March, 1950.

(ix) Fairflight, Ltd. profit and loss account and appropriation account for the year from date of incorporation to 24th August, 1950, and notes on accounts.

The above documents are not attached to and do not form part of this Case, but are available for the use of the High Court if required.

3. We found the following facts admitted or proved on the evidence adduced at the hearing of the appeal.

(i) The Appellant purchased from the Ministry of Aircraft Production in 1948 two Tudor V aircraft, nos. G—AKBY and G—AGRY, for £30,000 each, for use in the operation historically known as " the Berlin airlift ". These aircraft were at first hired by the Appellant to a company called Airflight, Ltd., of which the Appellant and Mrs. Bennett were the only directors. The hiring agreement was embodied in a letter dated 6th September, 1948, which was in the following terms :

> " In accordance with a recent decision of the Board of Airflight Limited, we are pleased to confirm the terms of hire whereby the two Tudors G—AGRY and G—AKBY are let out on hire from you to the Company at a rental charge of £5,625 per month. In addition, the Company will keep the aircraft insured for damage or loss and also for any Third Party claims, and moreover the Company would remain legally responsible for all matters arising out of the operation of the aircraft. It is further agreed that this rental shall continue so long as the high rate of wear and tear due to the Air Lift continues. Thereafter the rate will be reviewed. The Company will maintain the aircraft in accordance with normal maintenance schedules, and agrees to return the aircraft in an airworthy condition except that wear and tear is, of course, allowable."

On 22nd July, 1949, at the conclusion of the Berlin airlift, Airflight, Ltd., terminated the agreement of hire, and the Appellant endeavoured to sell the two aircraft in question to Airflight, Ltd., but was unsuccessful.

(ii) In July, 1949, another company, Fairflight, Ltd., was promoted by the Appellant, of which the Appellant was the managing director. Fairflight, Ltd., took over the two aircraft concerned on hire from the Appellant. No written agreement was produced to us, but the hiring agreement was similar to that between Airflight, Ltd., and the Appellant referred to in sub-paragraph (i) above, except for the amount of the rental charge. The two aircraft, however, were not in a very good state of repair and were not much used by Fairflight, Ltd.

(iii) On 31st January, 1950, the Appellant wrote to the secretary of Fairflight, Ltd., in the following terms:

> " This is to inform you that, owing to my political and other activities, it is my intention to cease the business of hiring aircraft, and I cannot, therefore, continue to permit Fairflight Ltd., to hire the two Tudor aircraft G—AGRY

and G—AKBY. I must, therefore, give formal notice that this hiring arrangement is to cease. I propose to sell the aircraft concerned and if the Company wishes to purchase them then I will be happy to consider the sale of these two aircraft to the Company. In the meanwhile, I repeat that I cannot go on indefinitely with the present hiring arrangement."

(iv) On 12th March, 1950, the Tudor V aircraft G—AKBY whilst returning from a charter flight to Eire crashed at Llandow airfield. The report of the court of investigation on the accident contained, *inter alia*, the following :

"INTRODUCTION.

1. On Friday, 10th March, the Tudor V Aircraft G—AKBY owned and operated by Fairflight Limited left Llandow airfield for Dublin with a crew of five and carrying seventy-eight passengers on a visit to Dublin to attend the International Rugby Match between Ireland and Wales at Belfast on Saturday, 11th March. Nothing untoward occurred on the outward flight. On Sunday, 12th March, the aircraft with the same crew and passengers took off from Collinstown Aerodrome at Dublin with the intention of returning to Llandow. While making her approach to land on Runway 28 at Llandow the aircraft was seen to enter into a steep climb with her engines full on ; she apparently stalled, fell away to starboard and crashed to the ground near the village of Sigginstone. The whole of her crew and seventy-five of the passengers perished in the disaster. There was no fire.

. . . . . .

PART I.

(A) Particulars, etc.

1. The aircraft was owned and operated by Fairflight Limited of which Air Vice Marshal D. C. T. Bennett (R.A.F. Rtd.), C.B., C.B.E., D.S.O., was the Managing Director. Air Vice Marshal Bennett has (as is well known) had a distinguished career in many branches of aviation and has a wide knowledge of the Tudor aircraft both as pilot, administrator and operator. At the material time Fairflight Limited as the successor of an earlier company known as Airflight Ltd., owned two Tudor aircraft of which G—AKBY was one. The Company had a comparatively small organisation consisting of six pilots with experience in flying Tudors and the appropriate engineering and ground staff. Its base in the United Kingdom was at Langley, Bucks. . . .

The Tudor V aircraft G—AKBY before its last flight, and while owned and operated by Fairflight Limited (or its predecessor Airflight Ltd.), had taken an arduous part in the Berlin air lift on freight carrying service by day and by night under conditions far more arduous than would normally be accepted in civil operations. Special authorisation had been granted to land at an all up weight of 76,000 lbs. instead of the normal limit imposed by the Certificate of Airworthiness of 74,000 lbs. After withdrawal from the Berlin air lift she was engaged in passenger flying for 450 hours mainly in the Middle East and Pakistan and had done several trips between Pakistan and the United Kingdom and one trip to South Africa. No adverse incident during these operations was reported to the Court. During much of this time she was in command of Captain Parsons."

In fact the aircraft G—AKBY was owned by the Appellant at all times material to this Case, including the time of the accident, and not by Fairflight, Ltd., as stated in the report.

(v) The accident occurred about 3.20 p.m. on 12th March, 1950, and the Appellant was notified by telephone shortly afterwards and immediately left for the scene of the disaster by air. Before doing so he gave instructions to Mrs. Bennett and Group Captain Sarsby, respectively director and administrative manager and technical manager of Fairflight, Ltd., for the other Tudor aircraft, G—AGRY, which at that time was at the Hawker Aircraft Co.'s aerodrome at Langley, to be grounded, and thereafter Fairflight, Ltd., was no longer allowed access to that aircraft. He also

directed that those instructions should be confirmed in writing forthwith, and a letter dated 12th March, 1950, was written in the following terms to the secretary of Fairflight, Ltd.:

> "This is to notify you formally that, with effect from 12th March, 1950, I have ceased to hire you the two Tudor aircraft G—AGRY and G—AKBY."

This letter was not signed by the Appellant until 13th March, 1950, after his return from the scene of the accident.

(vi) On 16th March, 1950, a meeting of the directors of Fairflight, Ltd., was held and the following minutes were recorded:

> "Fairflight Limited
>
> Minutes of the Fifth Meeting of the Board of Directors held at Deepwood House, Farnham Royal, Bucks on 16th March, 1950.
>
> Present:—Mrs. E. Bennett, Air Vice Marshal D. C. T. Bennett.
>
> 1. Minutes of the Fourth Meeting were read and approved.
>
> 2. Accident:—It was reported that Tudor Aircraft G-AKBY operated by the Company had met with complete destruction at Llandow, Wales on 12th March 1950 with the loss of 80 lives including all members of the crew.
>
> 3. Aircraft and Equipment:—It was reported that A/V/M/D. C. T. Bennett had withdrawn his aircraft and equipment from hire to the Company with effect from 12th March 1950. It was resolved to purchase Tudor aircraft G—AGRY from A/V/M/D. C. T. Bennett for the sum of £20,000.0.0,—this sum to be placed to the credit of his loan account with the Company, to be paid off within a period not exceeding 2 years, in four equal instalments at half yearly intervals. In the event of failure of the Company to meet these payments A/V/M/D. C. T. Bennett would have the right to repossess the aircraft. Interest is to be payable half yearly on the outstanding balance due to A/V/M/D. C. T. Bennett at the rate of 4% per annum.
>
> It was further resolved to purchase essential vehicles required for the operation of this aircraft; namely:—One Tractor, One Mobile Crane, One Van, One 6 Wheeler enclosed Lorry, and One Motorcycle Combination, for the sum of £500.0.0.
>
> (Signed) D. C. T. Bennett"

(vii) The aircraft G—AKBY had been insured for £80,000, but the amount actually received by the Appellant in respect of its loss was £38,000. During the year of assessment 1948–49 capital allowances were made to the Appellant in respect of this aircraft amounting to £21,000, and on 29th March, 1956, the balancing charge, hereinafter referred to and which forms the subject-matter of this appeal, was made on this amount.

4. It was contended on behalf of the Appellant:

(i) that the trade carried on by him of hiring aircraft was permanently discontinued at the same moment as the Tudor V aircraft G—AKBY was destroyed;

(ii) that, as the machinery or plant had been destroyed simultaneously with the cessation of the activities of the Appellant's trade, then it followed that such machinery or plant had not been destroyed before the said activities had been permanently discontinued, within the meaning of Sections 17 (1) and 20, Income Tax Act, 1945;

(iii) that no balancing charge fell to be made in respect of the said aircraft G—AKBY;

(iv) that the appeal should be allowed and the assessment discharged.

5. It was contended on behalf of the Inspector of Taxes:

(i) that the Tudor V aircraft G—AKBY was destroyed prior to the discontinuance of the Appellant's trade of hiring aircraft;

(ii) that a balancing charge therefore fell to be made in respect of the amount received in compensation for the loss of the said aircraft, limited to the amount of the capital allowances allowed in respect thereof, which amounted to £21,000;

(iii) that the appeal should be dismissed and the assessment confirmed.

6. We, the Commissioners who heard the appeal, upon consideration of the evidence adduced and the arguments addressed to us by the Appellant and on behalf of the Inspector, decided:

(i) that the trade of hiring aircraft carried on by the Appellant did not cease at the moment when the Tudor V aircraft G—AKBY was destroyed but at some time thereafter;

(ii) that the machinery or plant employed in the trade of the Appellant was therefore destroyed before the trade was permanently discontinued, and a balancing charge fell to be made under the provisions of Section 17, Income Tax Act, 1945, on the amount received as compensation for the destruction of the machinery or plant, limited, however, to the amount allowed by way of capital allowances, namely, £21,000.

Accordingly, we dismissed the appeal and confirmed the assessment.

7. Immediately after the determination of the appeal, the Appellant expressed to us his dissatisfaction therewith as being erroneous in point of law and required us to state a Case for the opinion of the High Court, pursuant to the Income Tax Act, 1952, Section 64, which Case we have stated and do sign accordingly.

8. The point of law for the opinion of the High Court is whether on the facts found by us there was evidence upon which we could properly arrive at our decision, and whether on the facts so found, our determination of the appeal was correct in law.

N. F. Rowe
A. W. Baldwin } Commissioners for the Special Purposes of the Income Tax Acts.

Turnstile House,
94–99, High Holborn,
London, W.C.1.
18th March, 1957.

The case came before Upjohn, J., in the Chancery Division on 17th December, 1957, when judgment was given in favour of the Crown, with costs.

The taxpayer appeared in person; Mr. F. N. Bucher, Q.C., and Mr. Alan Orr appeared as Counsel for the Crown.

Upjohn, J.—This is an appeal by way of Case Stated by Air Vice-Marshal Bennett from an assessment to tax for the year 1949–50 under Case I of Schedule D in a sum of £21,000 in respect of a balancing charge arising under the provisions of Section 17 of the Income Tax Act, 1945. I will turn straight to that Section. Sub-section (1) reads in this way:

> "Subject to the provisions of this section, where, on or after the appointed day, any of the following events occurs in the case of any machinery or plant in respect of which an initial allowance or a deduction under Rule 6 of the Rules applicable to Cases I and II of Schedule D has been made or allowed for any year of assessment to a person carrying on a trade, that is to say, either—"

then four alternatives are set out, and I only need the third—

> "(*c*) the machinery or plant is destroyed; . . . and the event in question occurs before the trade is permanently discontinued . . . a balancing charge . . . shall . . . be made".

The whole question here is whether a certain aeroplane was destroyed before a trade was permanently discontinued.

The facts are not in dispute and, of course, are set out fully in the Stated Case. At the material time in 1950 the Appellant was the owner of two Tudor V aircraft, G—AKBY and G—AGRY, which he hired to a company which he caused to be formed, called Fairflight, Ltd. They had been hired to another company earlier, but I do not think I need go into that matter. At the material time these aircraft, as I have said, were owned by the Appellant and were hired to this company, Fairflight, Ltd. Most unfortunately the aircraft G—AKBY, whilst returning from a charter flight to Eire, crashed at Llandow airfield, and unfortunately there was much loss of life, the aircraft being completely destroyed. The accident occurred about 3.20 p.m. on 12th March, 1950, and the Appellant was notified by telephone and immediately left for the scene of the disaster. Before doing so he gave instructions to his wife and Group Captain Sarsby, who were respectively director and administrative manager of Fairflight, Ltd., to ground the other aircraft, G—AGRY. It was at that time at the Hawker Aircraft Co.'s aerodrome at Langley, and he directed that those instructions should be confirmed in writing. The following letter, dated 12th March, 1950, was written to the secretary of Fairflight, Ltd.:

> "This is to notify you formally that, with effect from 12th March, 1950, I have ceased to hire you the two Tudor aircraft G—AGRY and G—AKBY."

Although that letter was not signed until his return on 13th March, Counsel for the Crown makes no point on that, and that letter may be taken as an instruction given, I suppose, just before he departed for the scene of the accident. The aircraft was insured, and the amount of about £38,000 was in due course received by the Appellant.

The whole question that has to be considered in those circumstances is whether it is right to say that the trade of hiring these aircraft to Fairflight, Ltd., was discontinued at or after the time the aircraft was destroyed. It is common ground that this trade was discontinued shortly thereafter. That, of course, is not good enough, but Counsel for the Crown concedes that if the destruction of the aircraft and the discontinuance of the trade were simultaneous that is sufficient to enable the Appellant to succeed.

The Commissioners heard evidence, and their finding of fact is to be found in paragraph 6 of the Case in these terms:

> "We, the Commissioners who heard the appeal, upon consideration of the evidence adduced and the arguments addressed to us by the Appellant and on behalf of the Inspector, decided: (1) that the trade of hiring aircraft carried on by the Appellant did not cease at the moment when the Tudor V aircraft G—AKBY was destroyed but at some time thereafter".

And it was upon that decision that they then found that a balancing charge fell to be made.

The Air Vice-Marshal has appeared in person and argued his case before me, and I should like most sincerely to offer him my congratulations on the presentation of his argument, which was extremely able and very moderate, entirely to the point, and, almost unique amongst litigants in person, very brief.

(Upjohn, J.)

The question that I have to determine is whether there are facts upon which the Commissioners could come to their conclusion. The question as to when a trade is discontinued is admittedly essentially one of fact, and unless I come to the conclusion that there are no facts upon which they could come to their conclusion, or that they have in some way misdirected themselves in law, it is not for me to disturb their finding, for they are the tribunal whose duty it is to find the facts.

The Air Vice-Marshal says that from the moment the aircraft crashed his trading activity came to an end physically because it was in fact impossible to carry on. He very properly made the point that he did not use these aircraft which he owned for a general hiring. There was one hiring between himself and Fairflight, Ltd., the terms of the hiring being in fact quite informal, and therefore there was no ordinary trade in the sense that he let out these aeroplanes from time to time to a variety of different persons. He said that at the time of the crash G—AKBY was in fact the only aircraft that was on hire because the other one, G—AGRY, was then undergoing some repairs, and when the crash occurred it was apparent that the trade, such as it was, could not be carried on. That is a matter which the Commissioners no doubt had before them when the Air Vice-Marshal appeared before them and, I have no doubt, argued his case there with as much ability as he has done here ; but, of course, there were other elements which they were, it seems to me, entitled to take into account. For instance, G—AGRY was still in existence and when repaired could have been used to continue the trade of being hired. The insurance moneys received could have been applied in purchasing a new aircraft. I am not saying in this case that the Air Vice-Marshal ever had any such intention, but when you are considering discontinuance of a trade permanently it seems to me that there are two elements: first of all, a discontinuance in fact, and, secondly, there must be an element of intention to discontinue. To take an example quoted in argument, if a man's warehouse and all his plant is destroyed he may then and there make up his mind to discontinue it, or he may then and there decide to put the insurance moneys into rebuilding the warehouse and continue the trade. I come to no conclusion on the matter, but I do not see how I can say, consistently with principle, that there is no evidence upon which the Commissioners after reviewing all the facts could come to the conclusion which they did. It is not for me to express any view as to the conclusion I should have reached, for, indeed, I have not heard the evidence ; but it seems to me impossible to say, consistently with principle, that there was no evidence upon which the Commissioners could reach the conclusion that the trade of hiring did not cease at the moment when the aircraft was destroyed but at some time thereafter. Therefore it is my duty, I am afraid, to dismiss this appeal.

I only desire to add one thing. It does seem very unfortunate that the Crown should have waited for so long after the accident before raising this assessment. It may well be a source of serious embarrassment—I do not say it is in this case for one moment—but to wait for five years, as far as I can make out, before the matter was first raised and nearly six years before the assessment was made does seem to me to be a great hardship upon the taxpayer. But that does not affect the matter, of course, and I have no option but to dismiss the appeal, with costs.

The taxpayer having appealed against the above decision, the case came before the Court of Appeal (Jenkins, Parker and Pearce, L.JJ.) on 6th June, 1958, when judgment was unanimously given in favour of the Crown, with costs.

Sir Andrew Clark, Q.C., and Mr. E. I. Goulding appeared as Counsel for the taxpayer, and Mr. F. N. Bucher, Q.C., and Mr. Alan Orr for the Crown.

Jenkins, L.J.—This is an appeal from a judgment of Upjohn, J., dated 17th December, 1957, dismissing the appeal of the present Appellant, Air Vice-Marshal Bennett, from a determination of the Special Commissioners to the effect that, in the circumstances to which I am about to refer, he had become liable to what is known as a balancing charge under the provisions of Section 17 of the Income Tax Act, 1945.

The business in relation to which the claim arose was a business of hiring out aircraft. The Air Vice-Marshal had two Tudor aircraft, G—AKBY and G—AGRY, and these at the material time he was hiring out to a company called Fairflight, Ltd., of which he and his wife were the sole directors and he was managing director. The two businesses were separate. The company, having hired the machines from the Appellant, operated them for reward. The Appellant was concerned only with the hiring out of the machines. On 12th March, 1950, which is the critical date in this case, G—AGRY was temporarily grounded for repairs and so was not being operated, but there is no doubt that it was then on hire to the Fairflight company. G—AKBY was engaged in a charter flight to Eire, this being an operation which it was carrying out under the aegis of the Fairflight company as one of the two aeroplanes hired to them. Most unfortunately G—AKBY crashed on its return from Eire at Llandow airfield in North Wales and became a total loss. The position as regards insurance was this. G—AKBY had been insured for £80,000, but the amount actually received by the Appellant in respect of its loss was £38,000. During the year of assessment 1948–49 capital allowances were made to the Appellant in respect of this aircraft amounting to £21,000, and on 29th March, 1956, the balancing charge, which is the matter in dispute, was made on this amount. That is the position as described in the Case Stated.

In those circumstances the Appellant contested his liability to a balancing charge on the ground that the case did not fall within Section 17 of the Act of 1945, and I had better next read that Section.

> "(1) Subject to the provisions of this section, where, on or after the appointed day, any of the following events occurs in the case of any machinery or plant in respect of which an initial allowance or a deduction under Rule 6 of the Rules applicable to Cases I and II of Schedule D has been made or allowed for any year of assessment to a person carrying on a trade, that is to say, either—"

then a number of events are mentioned of which the only material one is—

> "(*c*) the machinery or plant is destroyed".

Omitting (*d*), which is immaterial, the Section goes on:

> "and the event in question occurs before the trade is permanently discontinued, an allowance or charge (in this Part of this Act referred to as 'a balancing allowance' or 'a balancing charge') shall, in the circumstances mentioned in this section, be made to, or, as the case may be, on, that person for the year of assessment in his basis period for which that event occurs".

(Jenkins, L.J.)

Then Sub-section (3):

> "If the sale, insurance, salvage or compensation moneys exceed the amount, if any, of the said expenditure still unallowed as at the time of the event, a balancing charge shall be made, and the amount on which it is made shall be an amount equal to the excess or, where the said amount still unallowed is nil, to the said moneys".

I think those are all the provisions of the Section which I need read.

The question in the case, and the only question, is whether the event which happened, that is to say, the destruction of G—AKBY, occurred before the trade of hiring aircraft carried on by the Appellant was permanently discontinued. The Special Commissioners in effect found that the event did occur before the trade was permanently discontinued, and they held that the liability to the balancing charge was made out. Their conclusion was upheld by the learned Judge as a finding of fact not unsupported by evidence, that is to say, a finding of fact which the Special Commissioners were justified in reaching on the evidence before them.

I should, I think, say something of the early history of this business of hiring out aircraft. Originally the Appellant acquired the two aircraft for service in the operation known as the Berlin airlift, and he did that in conjunction with a company called Airflight, Ltd. On 22nd July, 1949, the Berlin airlift came to an end and the hiring to Airflight was discontinued. The Appellant then hired the two machines to Fairflight, Ltd. The terms of the hiring were similar to those applied in connection with the earlier venture. I do not think I need read the detail of the hiring agreement between the Appellant and Fairflight, Ltd., but it is observable that there was no express provision for its determination by notice.

The Appellant apparently by January, 1950, had it in mind to discontinue the hiring of these machines to Fairflight, Ltd., or, in other words, to discontinue his business as hirer of these two machines, and, on 31st January, 1950, he wrote to the secretary of Fairflight in the following terms:

> "This is to inform you that, owing to my political and other activities, it is my intention to cease the business of hiring aircraft, and I cannot, therefore, continue to permit Fairflight Ltd., to hire the two Tudor aircraft G—AGRY and G—AKBY. I must, therefore, give formal notice that this hiring arrangement is to cease. I propose to sell the aircraft concerned and if the Company wishes to purchase them then I will be happy to consider the sale of these two aircraft to the Company."

It will be observed that that letter says:

> "I must, therefore, give formal notice that this hiring arrangement is to cease".

The previous position was, I suppose, as there was no provision about termination of the hiring, that it could be terminated by reasonable notice. This, although it was described as a formal notice determining the agreement, if it was to operate as a termination would have operated as a summary termination without any notice. Actually, notwithstanding that letter of 31st January, 1950, the hiring was continued, but continued, it may be, on a day-to-day basis (as Sir Andrew Clark put it) on the same terms as the previously existing hiring so far as appropriate to a day-to-day basis. Whether that is right or not, I think this letter has, perhaps, some materiality in the case because it does show an intention to cease the business in the near future.

The accident to G—AKBY, as I have said, happened on 12th March, 1950, and the time at which it happened was about 3.20 p.m. on that day. Taking up the story at paragraph 3 (v) of the Case Stated, after referring to the accident the Case continues:

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> "the Appellant was notified by telephone shortly afterwards and immediately left for the scene of the disaster by air. Before doing so he gave instructions to Mrs. Bennett and Group Captain Sarsby, respectively director and administrative manager and technical manager of Fairflight, Ltd., for the other Tudor aircraft, G—AGRY, which at that time was at the Hawker Aircraft Co.'s aerodrome at Langley, to be grounded, and thereafter Fairflight, Ltd., was no longer allowed access to that aircraft. He also directed that those instructions should be confirmed in writing forthwith, and a letter dated 12th March, 1950, was written in the following terms to the secretary of Fairflight, Ltd.: 'This is to notify you formally that, with effect from 12th March, 1950, I have ceased to hire you the two Tudor aircraft G—AGRY and G—AKBY.' This letter was not signed by the Appellant until 13th March, 1950, after his return from the scene of the accident. (vi) On 16th March, 1950, a meeting of the directors of Fairflight, Ltd., was held and the following minutes were recorded: 'Fairflight Limited: Minutes of the Fifth Meeting of the Board of Directors held at Deepwood House, Farnham Royal, Bucks on 16th March, 1950. Present:—Mrs. E. Bennett; Air Vice Marshal D. C. T. Bennett.'"

Then there is a reference to the minutes of the fourth meeting and, in paragraph 2 of the minutes, there is a report of the accident to G—AKBY. The minutes continue:

> "3. Aircraft and Equipment:—It was reported that A/V/M/D.C.T. Bennett had withdrawn his aircraft and equipment from hire to the Company with effect from 12th March 1950. It was resolved to purchase Tudor aircraft G—AGRY from A/V/M/D.C.T. Bennett for the sum of £20,000.0.0,—this sum to be placed to the credit of his loan account with the Company, to be paid off within a period not exceeding 2 years,".

The details of that transaction are set out and the minutes continue:

> "It was further resolved to purchase essential vehicles required for the operation of this aircraft;".

Then the items of equipment are set out.

Now, the question is whether, on those facts, the destruction of G—AKBY took place before the trade was permanently discontinued. Sir Andrew Clark, in an ingenious and persuasive argument for the Appellant, maintained that the discontinuance of the trade took place simultaneously with the destruction of the aircraft, and accordingly that that event is not shown to have taken place before the trade was permanently discontinued. Sir Andrew reaches that conclusion by this process of reasoning. He says (and I am quite prepared to accept it) that the notification to the Appellant of the destruction of the aircraft took place in a matter of minutes and that thereupon the Appellant did everything it was in his power to do as quickly as he could to manifest an intention to discontinue his hiring business altogether. He had taken the various steps described in the Case on 12th March, so soon as he heard the news, and Sir Andrew says in those circumstances the crash can only have preceded the discontinuance by a matter of minutes. Really, I suppose, something within an hour would meet Sir Andrew's purpose. He says that, for the purposes of the Section, that is a discontinuance simultaneous with the destruction of the aircraft and not a case of destruction of the aircraft while the business was still being continued. He supports that contention by the principle that the Court will not regard fractions of a day in the computation of time. He says all these events happened on the same day, and destruction and discontinuance, having happened on the same day, must thus be regarded as having happened simultaneously.

That is a submission I find it impossible to accept. I agree that the principle to which Sir Andrew Clark refers is applied in some instances for the purpose of computing time, but, so far as I am aware, it has never been applied to a case in which it is necessary to determine the order in point of time in which two or more events occurred. In my view, it is necessary in

(Jenkins, L.J.)

a case like that to ascertain what, in fact, was the order in point of time in which the events occurred and, looking at the matter from that point of view, there can be, to my mind, no doubt but that the order of events was this: (*a*) destruction of the aircraft; (*b*) communication to Air Vice-Marshal Bennett; and (*c*) the action he immediately took on hearing the news with a view to discontinuance. In other words, I think the true position is that the Air Vice-Marshal determined to discontinue the business and did all he could to discontinue it so soon as he heard of the destruction of the aircraft and because of that destruction.

Sir Andrew referred us to a number of cases, and he was concerned to establish the proposition that discontinuance for the present purpose may take place contemporaneously with the disposal of the plant in relation to which the balancing charge is made. He referred us to *Commissioners of Inland Revenue* v. *Francis West and Others*, 31 T.C. 402. That report dealt with a number of Scottish cases all raising similar points. The material case, for the present purpose, was the case of the "Girl Eileen"(1), and I think that that case shows that where there is a concern such, for example, as a single-ship company and the proprietors sell their ship and all their assets and plant used in connection with it then there is a discontinuance taking effect simultaneously with the sale. Sir Andrew suggested, as I understood him, that this was a comparable case and it might be said that the destruction of the aircraft brought about in itself a discontinuance of the business. In my view the two cases are not comparable. Where the proprietors of a business sell all the essential plant used in connection with the business it may be said that they, by their conduct, there and then manifest an intention to get rid of the plant and close down the business; but where the event which is said to attract a balancing charge is not a sale, or any voluntary act on the part of the proprietor of the business, but is a disaster over which he has no control, as here the destruction of G—AKBY, one cannot, to my mind, say that the business was automatically discontinued by the destruction of the machine. If there had only been one machine in the case, it is conceivable that this view might have been supported for the reason that, irrespective of any intention to discontinue the business, what in fact happened was that the means of carrying on the business was wholly destroyed; but, be that as it may, that was not this case because there was the other machine G—AGRY which was still on hire to the Fairflight company, albeit it was not in a condition to fly. Therefore, one is thrown back on the actual order of events which was as I have stated.

Sir Andrew said in the course of his argument that the Appellant's intention to discontinue business might properly be held to relate back to the event which gave rise to his immediate intention to discontinue the business, that is to say, the destruction of G—AKBY. As to that submission, with all respect to Sir Andrew, I confess I cannot follow it. No authority was cited to us, I think, to justify that principle of relation back. I do not think it is covered by the whisky case of *Commissioners of Inland Revenue* v. *Nelson*, 22 T.C. 716, where an intention to discontinue a business of whisky broking was manifested by the proprietor of the business and that was followed up later by the sale of his entire stock. The point of the case, as I understand it, was that if the business had been discontinued before the sale of the stock then the substantial sum received on such sale was not a profit of the business. We were referred to some observations of Lord Normand at page 722, where he said this:

(1) 31 T.C., at pp. 420–1.

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> "I think that the Special Commissioners have not, as was suggested, made the mistake of confusing an intention to discontinue with an actual discontinuance. Their substantive finding is that the Respondent ceased to carry on trade on 15th July and that the sale on 27th July, 1937, was not in the course of trade. It seems to me that they might be entitled to find that he had in fact, as opposed to mere intention, permanently ceased to carry on trade on 15th July though the practical impossibility of resuming it, even if he wished to do so, was brought about only on 27th July. There are many cases in which a man permanently ceases to carry on a trade though it can never be said till he is dead that it is impossible for him to re-enter trade. But the fact that on a certain day a trader intimates that he has ceased to carry on trade and takes a step which results a fortnight later in making his resumption of trade practically impossible is good evidence that he permanently discontinued trade on that day if the other facts are consistent with that conclusion."

That shows that a manifestation of intention may itself amount to a discontinuance of trade, but it does not, I think, show that a manifestation of intention to discontinue trade in the present can be related back and equated to an intention manifested at some earlier date.

I do not think there are any others of the authorities cited by Sir Andrew to which I can usefully refer. He showed us some cases dealing with the matter of computation of time, but I found nothing in any of them which would justify us in the present case in holding that because the destruction of the aircraft and the discontinuance of the business took place on the same day therefore they must be taken as having happened simultaneously.

The Special Commissioners expressed their decision in these terms in paragraph 6 of the Case:

> "We, the Commissioners . . . decided: (i) that the trade of hiring aircraft carried on by the Appellant did not cease at the moment when the Tudor V aircraft G—AKBY was destroyed but at some time thereafter; (ii) that the machinery or plant employed in the trade of the Appellant was therefore destroyed before the trade was permanently discontinued"

and they go on to refer to the consequences with regard to the balancing charge. It appears to me that those were findings to which they were well justified in coming on the evidence before them. Sir Andrew Clark submitted the contrary, but I find it impossible to agree with him.

For the reasons I have stated it appears to me that in this most unusual case the liability to the balancing charge did arise. I agree with the views expressed by Upjohn, J., and by the Special Commissioners in the Case Stated and would dismiss the appeal accordingly.

Parker, L.J.—I confess that for my part I cannot help feeling sorry for the Appellant in this case. In January, 1950, he had clearly expressed an intention to discontinue his trade of hiring aircraft, and to implement that he was going to sell. If he had succeeded in selling the aircraft—certainly if he had sold them both at the same time—I do not think that he could have been assessed to any balancing charge; equally, if both aircraft had been destroyed simultaneously on the ground he would not have been the subject of any assessment. It is only the exact facts in this case, in which one aircraft was destroyed while the other, though grounded, was still under hire pursuant to the trade or business, which has produced the assessment in this case.

Be that as it may, however, it seems to me that if one takes the primary facts as found by the Commissioners and applies the law the answer can only be one way and for the reasons given by my Lord I would dismiss this appeal.

Pearce, L.J.—I agree with what my Lords have said.

Mr. F. N. Bucher.—My Lords, before I ask your Lordships for costs, may I say one sentence about the suggestion of delay on the part of the Inspector of which my learned friend very handsomely did not make a point?

Jenkins, L.J.—He did not make a point on it ; now you want to ventilate it. Are you wearing a hair shirt?

Mr. Bucher.—If it stands unqualified it is hard on the Inspector. It could not stand had the accompanying documents which were in Court been read to the learned Judge. They were not because, as the Appellant appeared in person, I conceived it not particularly in his interest to read them. For that reason the learned Judge was led into a misstatement of fact in the very final paragraph of his judgment.

Jenkins, L.J.—There are no reflections on anyone.

Mr. Bucher.—My Lord, if your Lordship pleases, could the appeal be dismissed with costs?

Jenkins, L.J.—I am afraid that must be the result.

(*The Court adjourned but shortly afterwards reassembled.*)

Sir Andrew Clark.—Would your Lordships accept my humble apologies for having troubled your Lordships to come back and my sincere thanks to your Lordships for being so gracious as to do so. I had not previously been instructed to do so, but I was instructed by my client after your Lordships had risen to ask your Lordships for leave to appeal before the House of Lords, and therefore I now make formal application to your Lordships that your Lordships will give my client leave to appeal to the House of Lords.

Jenkins, L.J.—Mr. Bucher, I understand that on your side it is not the practice to raise any objection?

Mr. Bucher.—I leave it entirely to your Lordships, with respect.

Jenkins, L.J.—Very well, Sir Andrew ; you may take your leave.

Sir Andrew Clark.—I am very much obliged to your Lordships. I am extremely sorry not to have put it at the proper time.

Jenkins, L.J.—Not at all.

The taxpayer having appealed against the above decision, the case came before the House of Lords (Viscount Simonds and Lords Goddard, Keith of Avonholm and Evershed) on 2nd June, 1959, when judgment was reserved. On 6th July, 1959, judgment was given unanimously in favour of the Crown, with costs.

The taxpayer appeared in person ; Mr. F. N. Bucher, Q.C., and Mr. Alan Orr appeared as Counsel for the Crown.

Viscount Simonds.—My Lords, the question in this appeal is whether the Appellant was rightly assessed to Income Tax in the sum of £21,000 for the year of assessment 1949–50. The Commissioners for the Special Purposes of the Income Tax Acts held that he was, and upon a Case Stated their determination was upheld by Upjohn, J., and the Court of Appeal. The assessment in question was made upon the Appellant in respect of the trade of a hirer of aircraft carried on by him and it was made as a balancing charge under Section 17 of the Income Tax Act, 1945.

(Viscount Simonds.)

The material facts as found by the Special Commissioners were these :

"(i) The Appellant purchased from the Ministry of Aircraft Production in 1948 two Tudor V aircraft, nos. G—AKBY and G—AGRY, for £30,000 each, for use in the operation historically known as 'the Berlin air-lift'. These aircraft were at first hired by the Appellant to a company called Airflight, Ltd., of which the Appellant and Mrs. Bennett were the only directors. The hiring agreement was embodied in a letter dated 6th September, 1948, which was in the following terms:

'In accordance with a recent decision of the Board of Airflight Limited, we are pleased to confirm the terms of hire whereby the two Tudors G—AGRY and G—AKBY are let out on hire from you to the Company at a rental charge of £5,625 per month. In addition, the Company will keep the aircraft insured for damage or loss and also for any Third Party claims, and moreover the Company would remain legally responsible for all matters arising out of the operation of the aircraft. It is further agreed that this rental shall continue so long as the high rate of wear and tear due to the Air Lift continues. Thereafter the rate will be reviewed. The Company will maintain the aircraft in accordance with normal maintenance schedules, and agrees to return the aircraft in an airworthy condition except that wear and tear is, of course, allowable.'

On 22nd July, 1949, at the conclusion of the Berlin air-lift, Airflight, Ltd., terminated the agreement of hire, and the Appellant endeavoured to sell the two aircraft in question to Airflight, Ltd., but was unsuccessful.

(ii) In July, 1949, another company, Fairflight, Ltd., was promoted by the Appellant, of which the Appellant was the managing director. Fairflight, Ltd., took over the two aircraft concerned on hire from the Appellant. No written agreement was produced to us, but the hiring agreement was similar to that between Airflight, Ltd., and the Appellant referred to in sub-paragraph (i) above, except for the amount of the rental charge. The two aircraft, however, were not in a very good state of repair and were not much used by Fairflight, Ltd.

(iii) On 31st January, 1950, the Appellant wrote to the secretary of Fairflight, Ltd., in the following terms:

'This is to inform you that, owing to my political and other activities, it is my intention to cease the business of hiring aircraft, and I cannot, therefore, continue to permit Fairflight Ltd., to hire the two Tudor aircraft G—AGRY and G—AKBY. I must, therefore, give formal notice that this hiring arrangement is to cease. I propose to sell the aircraft concerned and if the Company wishes to purchase them then I will be happy to consider the sale of these two aircraft to the Company. In the meanwhile, I repeat that I cannot go on indefinitely with the present hiring arrangement.'

(iv) On 12th March, 1950, the Tudor V aircraft G—AKBY whilst returning from a charter flight to Eire crashed at Llandow airfield."

A report was duly made by the Court of Investigation upon the accident, but I need not refer to it except to say that the statement therein contained that the Company was the owner of the aircraft was admittedly erroneous. The further material facts were these :

"(v) The accident occurred about 3.20 p.m. on 12th March, 1950, and the Appellant was notified by telephone shortly afterwards and immediately left for the scene of the disaster by air. Before doing so he gave instructions to Mrs. Bennett and Group Captain Sarsby, respectively director and administrative manager and technical manager of Fairflight, Ltd., for the other Tudor aircraft, G—AGRY, which at that time was at the Hawker Aircraft Co.'s aerodrome at Langley, to be grounded, and thereafter Fairflight, Ltd., was no longer allowed access to that aircraft. He also directed that those instructions should be confirmed in writing forthwith, and a letter dated 12th March, 1950, was written in the following terms to the secretary of Fairflight, Ltd.: 'This is to notify you formally that, with effect from 12th March, 1950, I have ceased to hire you the two Tudor aircraft G—AGRY and G—AKBY.' This letter was not signed by the Appellant until 13th March, 1950, after his return from the scene of the accident."

(Viscount Simonds.)

I will only add that on 16th March—that is, four days after the accident —there was a meeting of the board of directors of the company at which the Appellant and his wife were present. The minutes of this meeting, which were signed by the Appellant, recorded *inter alia* that

> "it was reported that A/V/M/D.C.T. Bennett had withdrawn his aircraft and equipment from hire to the Company with effect from 12th March 1950."

The aircraft which crashed had been insured for £80,000, but the amount actually received by the Appellant in respect of its loss was £38,000. During the year of assessment 1948–49 capital allowances were made in respect of this aircraft amounting to £21,000, and on 29th March, 1956, the balancing charge which I have already mentioned was made. The Commissioners who heard the appeal against this assessment decided (1) that the trade of hiring aircraft carried on by the Appellant did not cease at the moment when the aircraft was destroyed but at some time thereafter, and (2) that the machinery or plant employed in the trade of the Appellant was therefore destroyed before the trade was permanently discontinued, and that a balancing charge fell to be made under the provisions of Section 17 of the Income Tax Act, 1945, on the amount received as compensation for the destruction of the machinery or plant, limited, however, to the amount allowed by way of capital allowances, namely £21,000. The point of law which they stated for the opinion of the High Court was whether on the facts found by them there was evidence upon which they could properly arrive at their decision and whether upon the facts so found their determination of the appeal was correct in law. Some criticism was made by the Appellant of the form of this question, but it does not appear to me to be in any way objectionable. Nor can I entertain any doubt that the Commissioners came to a correct decision.

It perhaps sufficiently appears from what I have already said, but I will remind your Lordships of the familiar provisions of Section 17, under which where, in respect of any machinery or plant, an initial allowance has been made or allowed for any year of assessment to a person carrying on a trade and that machinery or plant is destroyed before the trade is permanently discontinued, a balancing charge shall be made on that person in the manner prescribed by the Section. Here then is the single question, viz., whether the aircraft was destroyed before the trade carried on by the Appellant was permanently discontinued. I say that that is the single question, for though the Appellant appeared to contend that the activity, as he called it, of hiring aircraft to the company was not a trade, I can see no justification for such a contention.

The question being whether the aircraft was destroyed before this trade was permanently discontinued, I can dispose at once of one argument which appears to have been stressed by Counsel in the Court of Appeal but to which the Appellant himself, wisely as I think, was disposed to give little weight. It was that, as the destruction of the aircraft and the notification by the Appellant to the company that with effect from 12th March, 1950, he had ceased to hire the two aircraft to the company took place on the same day, and as the law, so it was said, takes no note of part of a day, the two events could be regarded as taking place simultaneously. But it is not arguable that the theory of the indivisibility of a day, which is sometimes used as a convenient fiction, has any application where the priority of events is precisely the question which the law requires to be determined. That question admits of only one answer: the order of events was (1) destruction of the aircraft, (2) the communication of that fact to the Appellant, and (3) action taken by him to effect the discontinuance of the trade.

(Viscount Simonds.)

But, my Lords, the question cannot be decided upon the footing that the trade was carried on only by means of the aircraft that was destroyed. Even if it could be held that the trade in respect of that aircraft was terminated by its destruction, there remained the second aircraft. There had been, it is true, the notice of 31st January, 1950, which ended with the words :

> "I cannot go on indefinitely with the present hiring arrangement."

But I do not see how the Commissioners could have come to any other conclusion than that this second aircraft was subject to that arrangement until the letter of 12th March, 1950, was communicated to the company. They found as a fact that it was at the Hawker Aircraft Co.'s aerodrome at Langley at the time of the accident, that the Appellant then gave instructions to his wife and Group Captain Sarsby, the director and administrative manager and technical manager of the company, that it should be grounded, and that thereafter the company was no longer allowed access to that aircraft. The operative word is " thereafter ". They had too the letter of 12th March and the minutes of 16th March to which I have referred. This was material which fully justified the Commissioners in concluding that on 12th March the trade of hiring aircraft was being carried on and that it was not discontinued until the notice of that date was given, an event which took place after the accident.

It remains only to note that before your Lordships, but not, I think, before Upjohn, J., or the Court of Appeal, the point was taken that in the first paragraph of the Case the assessment upon the Appellant was stated to have been made under Case I of Schedule D, whereas in fact it was made under Case VI. It is a matter of no moment, for the assessment might, I think, be made under either Case and the question would be the same, viz., whether a balancing charge could properly be made.

The appeal should in my opinion be dismissed with costs.

My noble and learned friend **Lord Evershed,** who is unable to be here today, has asked me to say that he entirely concurs in my opinion.

Lord Goddard.—My Lords, I entirely agree with the opinion of my noble and learned friend Lord Simonds and do not desire to add anything thereto.

Lord Keith of Avonholm.—My Lords, I agree.

Questions put :

That the Order appealed from be reversed.

The Not Contents have it.

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

The Contents have it.

[Solicitors:—Lee, Ockerby, Johnson & Co. ; Solicitor of Inland Revenue.]
