COURT OF SESSION (OUTER HOUSE)—

10TH AND 11TH NOVEMBER, AND 10TH DECEMBER, 1959

COURT OF SESSION (FIRST DIVISION)—

8TH, 9TH, 10TH AND 22ND MARCH, 1960

HOUSE OF LORDS—7TH AND 8TH JUNE, AND 6TH JULY, 1961

Commissioners of Inland Revenue

v.

Hood Barrs(1)

Income Tax—Procedure—Repayment claim—Loss in trade—Losses certified by General Commissioners without hearing Inspector—Whether appeal in nature of Certiorari lies to Court of Session—Whether certificates valid—Court of Exchequer (Scotland) Act, 1856 (19 & 20 *Vict. c.* 56), *Section* 17; *Income Tax Act,* 1918 (8 & 9 *Geo.* V, *c.* 40), *Section* 34.

At a meeting of the General Commissioners on 28th November, 1958, *the Respondent appealed against certain assessments to Income Tax under Schedule D in respect of his profits as timber merchant, and produced accounts showing losses for the four years ending 31st March,* 1951, *amounting to* £4,221. *The Commissioners discharged the assessments and the Respondent then made an oral application for relief for losses. At the request of the parties, consideration of the claim was deferred, but on 20th February,* 1959, *the Commissioners met and issued certificates under Section* 34, *Income Tax Act,* 1918, *for the years* 1947–48 *to* 1950–51 *in respect of losses amounting in all to* £34,284. *The Crown were not represented at that meeting and received no copy of any written application for relief nor of any computation of loss except a computation for* 1947–48 *which the Respondent had sent them in January,* 1958. *The Clerk to the Commissioners furnished the Crown with a copy of a directive explaining the procedure followed by the Commissioners.*

On appeal to the Court of Session under Section 17 *of the Court of Exchequer (Scotland) Act,* 1856, *the Crown contended* (a) *that the directive disclosed an error in law for which the certificates should be quashed, and* (b) *that the Commissioners had acted contrary to natural justice. The Respondent contended* (i) *that an appeal under Section* 17 *was not competent, and* (ii) *that there was no error in law.*

Held, (1) *that Section* 17 *applied;* (2) *that the certificates should be quashed because the Commissioners had departed from the fundamental principles of justice.*

The case came before the Lord Ordinary in Exchequer Causes (Lord Walker) in the Outer House of the Court of Session on 10th and 11th November, 1959, when judgment was reserved. On 10th December, 1959, judgment was given in favour of the Crown.

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(1) Reported (C.S.—Outer House and First Division) 1959 S.C. 273; 1960 S.L.T. 278; (H.L.) 1961 S.L.T. 343.

The Solicitor-General for Scotland (Mr. William Grant, Q.C.) and Mr. A. J. Mackenzie Stuart appeared as Counsel for the Crown, and Mr. W. I. R. Fraser, Q.C., and Mr. W. A. Elliott for the taxpayer.

Lord Walker.—This is a note of appeal presented by the Commissioners of Inland Revenue under Section 17 of the Court of Exchequer (Scotland) Act, 1856, in which they seek to have quashed and set aside four certificates issued by the Commissioners for the General Purposes of the Income Tax for the Division of Mull. The certificates relate to the fiscal years 1947–48, 1948–49, 1949–50 and 1950–51. Each sets out the amount of the loss sustained by Mr. Henry Rupert Hood Barrs in his business of timber merchant and the amount of tax paid on his aggregate income, and certifies that he is entitled under Section 341 of the Income Tax Act, 1952, to repayment of tax amounting on the respective certificates to £2,830 0*s.* 6*d.*, £4,193 13*s.* 3*d.*, £1,796 14*s.* 11*d.*, and £5,528 5*s.* All four certificates bear date 20th February, 1959, and were sent by or on behalf of Mr. Hood Barrs to the Commissioners of Inland Revenue on 11th March with a request for payment. The latter, without paying the certified amount, presented this note of appeal on the following day. Mr. Hood Barrs, as the only appearing Respondent, lodged answers; the Commissioners of Inland Revenue lodged a statement of facts and grounds of appeal, and the Respondent lodged replies. He has argued that the note of appeal is incompetent, or at all events the grounds on which it is supported are irrelevant, and that the appeal should be dismissed. The Crown have moved me to quash and set aside the certificates and to remit back to the General Commissioners with directions.

The first question for decision is whether or not an appeal is competent. Section 17 of the Act of 1856 provides that a note of appeal in the prescribed form shall be competent

> "In all Cases where, at the Date of the passing of this Act, a Writ of Habeas or a Writ of Certiorari might have competently issued from the Court of Exchequer to the Effect of removing any Proceedings before, or Warrant granted or issued by any Inferior Court or Magistrate or Public Officer to the said Court of Exchequer, in order to Examination".

Counsel for the Respondent argued that before an appeal could be competent you must have a case where, at the date of the passing of the Act, a writ of Certiorari might have competently issued from Exchequer and that, as proceedings for tax relief were first introduced into the scheme of the Income Tax by Section 23 of the Customs and Inland Revenue Act, 1890, this could not be such a case. As I understood the argument, it was immaterial that the General Commissioners under the Income Tax Act, 1842, had jurisdiction in certain Income Tax matters, or that in 1856 any proceedings before them might have been removable by Certiorari. The argument therefore appears to me to depend on attributing to the word "cases" a somewhat special meaning as denoting particular statutory provisions under which proceeding might be initiated. Thus, if the particular statutory provisions were in force at the date of the passing of the Act the appeal would be competent, but otherwise not. In my opinion the word has no such special meaning. It is used in the Act as though interchangeable with "causes". Thus, while the preamble has "Exchequer cases", Sections 2, 3 and 4 have "Exchequer causes"; and while Section 12 has "any cause", Sections 13, 14, 15, 16 and 17 have "all cases" or "any case". The word, therefore, is of too indefinite meaning to form a fixed point from which to construe the Section. I prefer a broader approach. The main object of the Act was to transfer to the Court

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of Session the jurisdiction then vested in the Court of Exchequer and incidentally to provide new forms of process in place of the older forms. But whereas the date of the passing of the Act was 21st July, 1856, it did not take effect until 12th November of that year: see Section 49. As at the latter date the Court of Exchequer ceased to have any jurisdiction, and accordingly the Sections which refer to the competence or practice of that Court are expressly related to the earlier date as being a time when it still had jurisdiction. There is, I think, some authority for the view that in construing the statutory provisions consequential upon the transfer of jurisdiction the assumption must be made of the Court of Exchequer still possessing jurisdiction. Thus in *Balfour*, 1909 S.C. 358, at page 361, when the Lord President, in dealing with a cause arising under a Statute of 1892, speaks of

> "causes which would have been brought in the Court of Exchequer but are by this Act transferred",

I think he is making the assumption of Exchequer still having jurisdiction. In my opinion, therefore, a note of appeal is competent where, upon the assumption of the Court of Exchequer possessing jurisdiction, a writ of Certiorari might competently issue from it. Accordingly, I reject this branch of the Respondent's argument.

The next contention advanced on behalf of the Respondent relative to the competence of the appeal was that the granting of the certificates in question was a purely executive act which did not involve the exercise of any judicial function, and therefore it was said that a writ of Certiorari could not have competently issued. Counsel for the Crown intimated that he did not contend that the writ could have issued against a purely executive act, but did not concede that it could not. His contention was that the certificates in question could only have been granted in the exercise of a judicial function.

Before endeavouring to solve the problem thus raised it is necessary to mention two matters in order to clear the way. Applications for certificates relating to 1953–54 and subsequent years are admittedly judicial proceedings from which there is an appeal by Stated Case: see Section 15 (4) of the Finance Act, 1953. Prior to that Act the General Commissioners had no power to state a Case because applications for relief were not appeals against assessments: see *Bruce* v. *Burton*, 4 T.C. 399. The Act of 1953 was referred to by the Respondent as suggesting that prior to 1953–54, and in particular for the years here in question, such applications were not judicial proceedings. I have not been able to adopt that view. The character of the proceedings before the General Commissioners must, in my opinion, be determined solely by reference to the statutory provisions which governed their competence. The second matter is that the four certificates are plainly in error in stating that the General Commissioners acted after notice given under Section 341 of the Income Tax Act, 1952, and that the Respondent is entitled to repayment under that Section. The provisions of the Act of 1952 do not apply to years of assessment prior to 1951–52: see Section 527 (1). The statutory provisions which do apply are those contained in Section 34 of the Income Tax Act, 1918, as amended by Section 30 (3) of the Finance Act, 1923, and Section 13 of the Finance Act, 1937. No point was made, however, about that error, and the argument proceeded on the footing that it was the earlier statutory provisions which governed the problem.

It is now possible to summarise the relevant statutory provisions. (1) Any person who sustains a loss in any trade may, upon giving notice in writing to the surveyor, apply to the General Commissioners for an adjustment of his tax liability—the period for giving notice being within one year after the year

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of assessment: Finance Act, 1923, Section 30 (3). (2) The adjustment is to be with reference to the loss and to the aggregate of his income for the year. (3) The amount of the loss must be computed in like manner as the profits or gains arising from the trade are computed under the Rules applicable to Case I of Schedule D: Finance Act, 1937, Section 13. (4) The Commissioners must, on proof to their satisfaction of the amount of the loss and of the payment of tax on the aggregate income, give a certificate authorising repayment of so much of the sum paid for tax as would represent the amount of tax upon income equal to the amount of the loss. (5) Upon receipt of the certificate the Commissioners of Inland Revenue must repay the certified amount.

Under reference to those provisions the Respondent contends that, a loss having *ex hypothesi* been sustained, the sole function of the General Commissioners is to quantify the amount of that loss from the accounts before them, to check the voucher for payment of tax and to make an arithmetical calculation. There is, so the argument runs, no dispute between two opposing parties, but only an application by the person who has sustained the loss. The General Commissioners, it is said, are themselves acting on behalf of the Crown in quantifying the loss fairly, and the Commissioners of Inland Revenue have only to pay the certified amount. In my opinion, however, this account of matters ignores the requirement that written notice must be given to the surveyor. I think that requirement is crucial in the present connection. Before the General Commissioners can consider the application they must be satisfied that the notice has been given. There are then two parties with an interest, the applicant and the surveyor, and it seems to me necessarily to follow that the duty of the Commissioners is to judge fairly between those parties. I think, therefore, that the statutory proceedings were intended to be of a judicial nature and, as they affect the Crown, a writ of Certiorari might, on the assumption that the Court of Exchequer still possessed jurisdiction, have competently issued. Although the point does not seem to have been taken in *Rex* v. *Commissioners of Income Tax* (1904), 91 L.T. 94, and *Rex* v. *General Commissioners of Income Tax* (ex parte *Hood Barrs*), 27 T.C. 506, I think these cases lend some support to my conclusion. Accordingly, as no further challenge to competence was advanced, I hold that the note of appeal is competent.

The next question in dispute relates to what is relevant and sufficient in law to enable the certificates to be quashed. Parties were agreed that if the General Commissioners had acted contrary to natural justice, as the Crown maintain they did, then the certificates could be quashed. But parties were in dispute as to whether that result could follow if the General Commissioners had merely erred in law, as the Crown also say they did. The solution of this problem must depend on a proper construction of Section 17 of the Act of 1856. Two opposing views were maintained in argument, namely (1) that, as the Crown contended, the Section was merely procedural with the consequence that the certificates could be quashed on precisely the same grounds as in Certiorari, which includes review for error in law; and (2) that, as the Respondent contended, when Section 17 says the Lord Ordinary may

> "pronounce such Orders or Decrees as he may deem proper upon the Matters raised by such Appeal",

he is remitted to the common law of Scotland and to the grounds available in an action of reduction which excludes review for error in law.

Only two reported cases under Section 17 were cited: *Dodsworth* v. *Rijnbergen* (1886), 14 R. 238, and *Struijs* v. *Hughes* (1897), 35 S.L.R. 640 *Dodsworth's* case was an appeal against conviction for an offence under the Customs Consolidation Act, 1876. Particular reference was made to Lord

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Fraser's judgment, at page 241. What he was considering was whether the Justice had been wrong in not recording the evidence, and he held that the Justice had not been wrong because his decision could not be touched on the ground that he had come to a wrong conclusion on the evidence. Lord Fraser was affirmed in the Inner House, but on the ground that the Justice had not been specially asked to record the evidence. The actual decision in *Dodsworth's* case(1), therefore, does not help on the question in dispute here. What is of interest is Lord Fraser's observation that he had no means of ascertaining under what circumstances a writ of Certiorari could be issued by Exchequer before 1856, and his consequent reliance on the use of that writ in the Court of Queen's Bench in England as set out in Archbold's "Justice of the Peace". That was, perhaps, somewhat of a leap in the dark. The only interest of *Struijs'* case(2) is that it revealed the existence of an old Latin form of the writ in use before 1729, which had not been brought to Lord Fraser's attention.

Counsel referred me to a work by two of the original Barons of Exchequer —Clerk and Scrope on the Forms and Powers of the Court of Exchequer in Scotland (1820)—which does not appear to have been cited to Lord Fraser. Although not published until 1820, the book relates primarily to the practice in the first half of the eighteenth century. At page 75 a reference is made to *habeas corpus*, but only as a mode of bringing a defendant bodily before the Court. It seems reasonably certain, however, that the writ must have been used where a person was imprisoned for a revenue offence, because where the Revenue Statutes prescribed that review should be by writs of Habeas and Certiorari the jurisdiction of the High Court of Justiciary was held to be impliedly excluded: *Soky* v. *Wilcox* (1849), reported as a note to *Alexander* v. *Lindsay* (1887), 5 Irv. 495. But it is not clear upon what grounds Exchequer reviewed a conviction and ordered liberation.

As regards the writ of Certiorari, one finds in Clerk and Scrope, at pages 57–8, two examples of its use. The first example given is where the King's debtor is sued in Courts such as those of Sheriffs, Baillies or Justices. The same was probably true in the converse case of the Revenue officer being sued in an action affecting revenue: see *Struijs'* case and *Sharpe* v. *Miller* (1861), 23 D. 1015, with particular reference to "subordinate point" 3 in the opinion of the consulted Judges, at page 1029. The opinion of the consulted Judges in that case shows quite clearly that the practice in Exchequer had been to compel, in one way or another, the trial of a Revenue cause before itself. It seems probable, therefore, that the circumstance that made the issue of the writ competent, namely the fact that a Revenue cause was depending in a non-Revenue Court, was also sufficient in law to justify an order setting aside the proceedings with a view to compel parties to seek their remedy in Exchequer. There was thus no distinction between competency and relevancy in relation to the use of the writ.

The second example given by Clerk and Scrope is nearer the present dispute because it relates to proceedings before a Revenue Court. Where the Justice had "absolute power and authority" over some part of the Revenue, Exchequer would, say the learned Barons, be "very tender" of removing such causes

> "except in shires where are no Justices who will act, or where they act in a negligent way, and without due regard to the execution of the laws of Excise."

The passage is rather curiously expressed, for I think the authors intend to illustrate by stating extreme cases in which Exchequer will not be at all

(1) 14 R. 238. (2) 35 S.L.R. 640.

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tender. In my opinion, the examples given sufficiently express the ideas of (*a*) defect in the exercise of jurisdiction, and (*b*) unsound application of Revenue law. Here again the circumstances which made the issue of the writ competent were probably also sufficient for setting aside the proceedings, though what happened in the case where no Justices would act may be matter of conjecture.

Reverting to Section 17, its object was, I think, merely procedural by making appeal competent where either of the two writs had been competent. Prior to 1856 there had been no distinction between the circumstances which made the issue of the writ competent and those which justified the proceedings being set aside. When, therefore, under the note of appeal the proceedings are to be brought up "to the like effect" as by the old writs, that means that the law to be applied should remain the same. The Respondent's view that the Court is remitted to the common law and the grounds available in an action of reduction does not appear to me to be necessary to give effect to the Section, and if that is so then I think the pre-1856 law is preserved by Section 48. I therefore reject the Respondent's contention that error in law is not relevant and sufficient to enable the certificates to be quashed.

The Respondent further contended that in any event error in law can only be looked for in the certificates sought to be quashed. As already mentioned, each certificate does bear an error in law on its face, but the Crown did not move me to quash them on that account. They desire to look for error in a copy "directive" which was sent them by the Clerk to the Commissioners on 7th January, 1959, and which appears to repeat an earlier "directive" of 30th November, 1957, a copy of which had also been sent them by the clerk, and to obtain from the Court a direction under Section 17 addressed to the General Commissioners and informing them of the law they must apply. On the question whether the Commissioners' "directives" can be looked at or not I was referred to *Rex* v. *Northumberland Compensation Appeal Tribunal*, [1951] 1 K.B. 711 and [1952] 1 K.B. 338, and *Baldwin and Francis* v. *Patents Appeal Tribunal*, [1959] 2 W.L.R. 826. If I understand the principle correctly, it is not Certiorari itself that sets a limit to the documents that may be examined for error; it is the extent of what is returned by the inferior tribunal in response to the writ or order; and the extent of what must be returned has varied from time to time with the law governing the procedure in the inferior tribunal. There is, I think, nothing technical about that principle, and I am prepared to follow it here because Section 17 authorises me to

> "direct such Warrant or proceedings to be transmitted to the Court of Session."

In pursuance of that authority I directed the Commissioners to transmit

> "the applications and all proceedings before them in respect of which the certificates of loss referred to in the note of appeal were issued."

The only return has been a letter from their clerk which in effect states that the whole proceedings were oral, with the single exception of the certificates which are already in Court. According to that return, therefore, there is no written record except the certificates themselves. Even assuming that the two directives of 11th January, 1959, and 30th November, 1957, contained errors in law, I do not know what part, if any, such errors may have played in the determination of 20th February, 1959. They form no part of the record as returned. Accordingly, I cannot sustain the appeal on the ground of error in law, or give a direction as moved for by the Crown.

I have now to consider whether in granting the certificates the Commissioners acted contrary to natural justice. That question must be determined on the admitted facts, which are in short compass. At a meeting of the Com-

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missioners on 28th November, 1958, the Respondent produced accounts showing his loss for each of the four years ended 31st March, 1951, and they amounted *in cumulo* to £4,221. After hearing parties the Commissioners discharged the Schedule D assessments for the four years. The Respondent then made an oral application for relief in respect of loss, but at the request of parties consideration of the claim was deferred. On 20th February, 1959, the Commissioners met and issued four certificates certifying losses amounting in all to £34,384. The Commissioners of Inland Revenue were not represented at that meeting and never at any time received a copy of any written application for relief nor a copy of any computation of loss for the purpose of Section 34 of the Income Tax Act, 1918, other than a copy of the computation for the year 1947–48 which the Respondent had sent them in January, 1958. Counsel for the Respondent quite correctly points out that it is neither alleged nor admitted that after the meeting of 28th November, when consideration of the claim was deferred by agreement, the Respondent communicated with, or received a hearing from, the Commissioners behind the back of the Commissioners of Inland Revenue. That, however, leaves entirely unexplained how the Commissioners in February fixed at £34,384 the loss which in November the Respondent had stated at £4,221. Before the Commissioners could enter upon consideration of such an increase in loss I think that justice required them to give the Crown fair notice of what new matter had arisen and an opportunity of stating objections. The Commissioners failed to do so, and their failure in my opinion amounts to a departure from the fundamental principles of justice. I shall accordingly quash and set aside the four certificates.

The taxpayer having appealed against the above decision, the case came before the First Division of the Court of Session (the Lord President (Clyde) and Lords Carmont, Russell and Sorn) on 8th, 9th and 10th March, 1960, when judgment was reserved. On 22nd March, 1960, judgment was given unanimously in favour of the Crown, with expenses.

Mr. W. I. R. Fraser, Q.C., and Mr. W. A. Elliott appeared as Counsel for the taxpayer, and the Solicitor-General for Scotland (Mr. William Grant, Q.C.) and Mr. A. J. Mackenzie Stuart for the Crown.

The Lord President (Clyde).—This case is concerned with four certificates issued by the General Commissioners in Mull in favour of Mr. Hood Barrs. They purport to certify amounts of tax repayable to him in respect of losses incurred by him in operating his business of timber merchant. The four certificates relate respectively to the fiscal years 1947–48, 1948–49, 1949–50 and 1950–51. The matter was brought before the Court of Session by a note of appeal presented by the Commissioners of Inland Revenue under Section 17 of the Court of Exchequer (Scotland) Act, 1856. After sundry procedure Lord Walker quashed and set aside the four certificates, holding the appeal to be competent under Section 17 of the 1856 Act, and further holding that there had been a departure on the part of the General Commissioners from the fundamental principles of justice which entitled him to set them aside. Mr. Hood Barrs has reclaimed and has argued to us that the Lord Ordinary was wrong on both grounds, and that his Interlocutor should therefore be recalled.

There is in the background of this Case a long history of litigation between Mr. Hood Barrs and the Crown regarding assessments to Income Tax in respect

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of his timber merchants' business for each of the years in question. This has involved several appeals to this Court and finally an appeal to the House of Lords (reported 1957 S.C. (H.L.) (1)). The details of these processes need not be recounted here. But in the course of these disputes formal notices were given to the Inspector of Taxes on behalf of Mr. Hood Barrs of his intention to claim for adjustments of his liability to tax owing to alleged losses on this business; but these intimations were in quite general terms, and no figures of losses were sent with them. Beyond the formal sending of these notices, nothing further was done about them for some years. Meantime, the disputes about his liability to tax for profits on his business continued.

The material facts, so far as concerns the present question regarding relief for loss on the timber merchants' business, are as follows: 1. On 31st December, 1957, Mr. Hood Barrs' accountants sent to the Inspector of Taxes an "adjusted Income Tax computation" for the year 1947–48 bringing out a loss of £6,364 17*s.* 9*d.*, and informed the Inspector that a copy had been forwarded to the General Commissioners with a request to issue a certificate of loss under Section 341 of the Income Tax Act, 1952. Before us it was agreed that the 1952 Act did not apply to the year in question and the proper statutory reference was Section 34 of the Income Tax Act, 1918. The Crown are taking no point on this erroneous reference, which also found its way into all the certificates issued by the General Commissioners which are the subject of challenge in the present case. 2. By his reply on 6th January, 1958, the Inspector informed the accountants that he had intimated to the Clerk to the Commissioners that this computation was not accepted by the Revenue, as the basis upon which it was computed was erroneous. As will appear later, this computation was departed from by Mr. Hood Barrs. 3. At a meeting of the General Commissioners, at which both sides were represented, on 28th November, 1958, the Income Tax assessments upon Mr. Hood Barrs were considered. At this meeting Mr. Hood Barrs produced an entirely different computation of his loss for the year 1947–48 and three further computations of loss for each of the succeeding three years. The *cumulo* amount of all four computations was £4,221. At this meeting the assessments to Income Tax on Mr. Hood Barrs were discharged by the General Commissioners after hearing parties. But, at the request of both parties, the four new computations of loss were not considered by the General Commissioners. The purpose of these particular computations was to support the case made by Mr. Hood Barrs against the assessments to tax. They were designed merely to show that he was not making a profit, and they were not, and did not profess to be, computations of loss for the purposes of a claim under Section 34 of the 1918 Act. 4. On 7th January, 1959, the Clerk to the General Commissioners sent to the parties what he called a "directive" signed by the General Commissioners. This directive purported to make certain findings in law as to how losses were to be computed, and then directed

> "the parties to settle the amounts of the trading losses for the purposes of these applications in accordance with our findings as set out and referred to above".

5. It is a matter of admission between the parties that neither the Inspector of Taxes nor anyone else on behalf of the Commissioners of Inland Revenue ever received a copy of any application for a loss certificate for the four years in question, nor a computation of loss for the purposes of Section 34 of the 1918 Act other than the computation for 1947–48 sent on 31st December, 1957, and subsequently superseded. 6. Although the directive had directed

(1) Hoods Barrs *v.* Commissioners of Inland Revenue (No. 2), 37 T.C. 188.

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the parties to settle the amounts of loss, the General Commissioners without more ado proceeded to do so at their own hands without any intimation to the Inspector. The next the Revenue heard about it was when they received from Mr. Hood Barrs on 9th March, 1959, four loss certificates for the four years in question, all dated 20th February, 1959, and a demand for repayment of the tax therein certified to be repayable. The total amount of these losses had mysteriously risen from £4,221 to a total figure of over £34,000. These four certificates are the certificates with which this case is concerned.

The first question in the case is in regard to the competency of the present proceedings. Mr. Hood Barrs maintained that the present proceedings were incompetent, in respect that, in adjudicating upon losses in trading and in issuing the certificates in question, the General Commissioners were performing a purely administrative function from the exercise of which there was no appeal to a Court of Justice. In my opinion, however, this argument is unsound, and the present note of appeal is a competent method of securing the review of the certificates in question.

The present note of appeal to the Court of Session is presented under Section 17 of the Court of Exchequer (Scotland) Act, 1856. That Act was passed to make the Court of Session the Court of Exchequer in Scotland, and to transfer to the Court of Session the whole powers, authority and jurisdiction then belonging to the Court of Exchequer in Scotland. Section 17 lays down the procedure thereafter to be followed (namely, a note of appeal to the Lord Ordinary in Exchequer Causes in the Court of Session). This procedure is to be taken

> "In all Cases where, at the Date of the passing of this Act, a Writ of Habeas or a Writ of Certiorari might have competently issued from the Court of Exchequer to the Effect of removing any Proceedings before, or Warrant granted or issued by any Inferior Court or Magistrate or Public Officer of the said Court of Exchequer, in order to Examination".

In order to ascertain whether the present application is competent it is accordingly necessary first of all to ascertain what were the cases in which in 1856 a writ of Certiorari might competently have been issued from the Scottish Court of Exchequer, and secondly to ascertain whether the present application falls within that category.

The answer to the first question depends upon the Act of Parliament setting up a Court of Exchequer in Scotland after the Union. This is the Court of Exchequer (Scotland) Act, 1707 (6 Anne, c. 53). Under Section 6 of that Act the Court was given a jurisdiction in Scotland identical with that of the Court of Exchequer in England, and the forms of action, writs, practice, procedure and rules of the English Court of Exchequer were to be adopted and applied by the corresponding Court in Scotland. The writ of Certiorari was one of these writs, which remained competent in the Court of Exchequer in Scotland until 1856 when it was replaced by a different form of writ.

The next consideration is, what was the category of case in which such a writ was competent. There is little Scottish authority on this matter, and it has been recognised as legitimate in this connection to apply the law and practice of England (see *Dodsworth* v. *Rijnbergen* (1886), 14 R. 238, *per* Lord Fraser at page 241: compare *Advocate General* v. *Beattie*, 18 D. 378, *per* Lord Neaves at page 380). It is well settled, and it was not disputed before us, that a writ of Certiorari is competent where there is a judicial process or a process analogous to a judicial process. As Lord Radcliffe said in delivering the judgment in *Nakkuda Ali* v. *Jayaratne*, [1951] A.C. 66, at page 75:

> "But even in cases of certiorari and prohibition the English law does not

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> recognise any distinction for this purpose between the regularly constituted judicial tribunals and bodies which, while not existing primarily for the discharge of judicial functions, yet have to act analogously to a judge in respect of certain of their duties. The writ of certiorari has been issued to the latter since such ancient times that the power to do so has long been an integral part of the court's jurisdiction. In truth, the only relevant criterion by English law is not the general status of the person or body of persons by whom the impugned decision is made but the nature of the process by which he or they are empowered to arrive at their decision. When it is a judicial process or a process analogous to the judicial, certiorari can be granted."

(Compare *Regina* v. *Manchester Legal Aid Committee,* [1952] 2 Q.B. 413, *per* Parker, J., at page 428.) It follows, therefore, that a writ of Certiorari would be competent, prior to 1856, in the Court of Exchequer in Scotland in a judicial or semi-judicial process, but probably not in a purely administrative process.

This brings me to the next question, as to whether the present application falls within this category. That must depend upon what the nature of the process before the General Commissioners was. This in turn depends upon a consideration of Section 34 of the Income Tax Act, 1918, under which they purported to be acting. In my opinion the process therein envisaged was of a *quasi* judicial character. The General Commissioners (or the Special Commissioners) acting under this Section are deciding in the interests of the country at large what sum, if any, is repayable in accordance with the provisions of the Income Tax Acts to a particular taxpayer. Moreover, according to Section 34 (2) they can only do so "on proof to their satisfaction of the amount of the loss", and this clearly envisages the weighing up of adminicles of evidence and deciding upon their validity. Further, at the end of the same Sub-section they are empowered to give any exemption, abatement or relief, depending on the total income from all sources, which may be authorised by the Income Tax Acts. This clearly envisages a judicial function dependent upon statutory interpretation. Finally, Sub-section (1) contemplates a notice in writing to the surveyor by the taxpayer which would obviously enable him, if so advised, to oppose the amount of relief claimed. It seems to me that it is inherent in the operation of this Section that the Inspector should have an opportunity to be heard if he has any criticism of the figures or the claim to relief put forward by the tax-payer. His right to this opportunity is recognised and assumed already to be in existence in Section 15 (4) of the Finance Act, 1953, to which I shall refer later. But if such a right exists, then the proceedings certainly bear the character of a *lis* between two parties. I am confirmed in this conclusion by the fact that Lord Goddard, C.J., in *Rex* v. *General Commissioners of Income Tax* (ex parte *Hood Barrs*), 27 T.C. 506, describes the function of the Commissioners as being "an adjudication", and clearly regarded it as open to the taxpayer who is dissatisfied with a certificate issued by the Commissioners to apply for Certiorari (see page 509).

In my opinion, therefore, the attack upon competency fails. But before leaving it I must refer to three subsidiary contentions made on behalf of Mr. Hood Barrs. In the first place it was contended, at a late stage in the argument, that, by the Statute Law Revision Act, 1948, the Court of Exchequer (Scotland) Act, 1707, was repealed, and with that repeal the whole powers and jurisdiction of the Scottish Exchequer Court, including the process by writ of Certiorari, were abolished. The whole foundation, therefore, for an invocation of this method of reviewing the certificates of the General Commissioners was destroyed. But this argument is, in my opinion, fallacious. By the Court of Exchequer (Scotland) Act, 1856, the jurisdiction of the pre-existing Court of Exchequer was transferred to the Court of Session and the forms of process, including the writ of Certiorari, were changed into different forms (see Section

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17) which were required to be used in lieu of the pre-1856 forms of process. All that the Statute Law Revision Act, 1948, did was to repeal the now useless framework of the 1707 Act, the whole content of which had already been transferred to the Court of Session in 1856.

Secondly, it was said that Section 15 (4) of the Finance Act, 1953, introduced a right of appeal by Stated Case for the first time in cases of adjustment of tax liability in regard to business loss. The argument was that this provision converted what had hitherto been simply an administrative act by the Commissioners into a judicial determination. But I do not so interpret the Subsection. It provided, no doubt, a simpler and more direct method of review, but it left the nature of the actings and of the process before the General Commissioners precisely what it had always been. The fact that a new method of review is provided cannot change the nature of the process before the Commissioners—their function before and after 1953 is the same.

Lastly, what was admittedly a technical argument on competency was also advanced. It was said that the duties which the General Commissioners were performing were authorised by Section 34 of the Income Tax Act, 1918. The General Commissioners had no such jurisdiction to adjudicate upon loss claims in 1856, and consequently the argument was that the appeal procedure in Section 17 of the Court of Exchequer (Scotland) Act, 1856, could not be invoked. For that procedure only applied to cases where, at the date of the passing of the 1856 Act, a writ of Certiorari could competently be issued from the Scottish Court of Exchequer. But in my opinion this argument involves a misconstruction of the 1856 Act, and in particular of Section 17. The Act (see Section 1) does not restrict the jurisdiction of the Court in Exchequer cases: it merely transfers the functions hitherto exercised by the Court of Exchequer in Scotland to the Court of Session. Section 17 authorises new forms of writs in all these cases where prior thereto the old forms of writ might competently have been issued. To determine whether any particular case comes within the jurisdiction of the Court it is necessary to ascertain whether it was a matter regarding which, before 1856, a writ of Certiorari would have been competent. If so, all that Section 17 does is to substitute for a writ of Certiorari a note of appeal as being the proper form of process, after 1856, under which the case might be reviewed. In my opinion the present application is therefore competent.

I turn now to the merits. Two separate grounds are put forward for quashing the certificates. In the first place, it is said that there is involved in their having been granted a breach of the principles of natural justice on the part of the General Commissioners, and, secondly, that there is disclosed here an error in law on the face of the record. I shall deal with each of these questions separately.

As regards the first of them, it is not disputed that, if established, this would constitute a proper ground for quashing the four certificates of loss. I shall not, therefore, deal with the authorities on this matter. Moreover, it seems clear that where a taxpayer wishes to claim relief of tax in respect of loss under Section 34 of the Income Tax Act, 1918, he may, upon giving notice in writing to the Inspector within a certain time, apply to the General Commissioners under Section 34 (1)

> "for an adjustment of his liability by reference to the loss and to the aggregate amount of his income for that year estimated according to this Act."

Under Section 34(2) the Commissioners may grant a certificate

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> "on proof to their satisfaction of the amount of the loss, and of the payment of tax upon the aggregate amount of income,"

and the certificate

> "may extend to give any exemption, abatement or relief depending upon total income from all sources, authorised by this Act."

The Commissioners, therefore, must ascertain the amount of the loss claimed and must also be apprised of what tax the claimant has already paid before granting the certificates. It is presumably in view of these requirements that the claim of the taxpayer is, under the Section, to go through the Inspector to the General Commissioners (see Konstam's Income Tax, page 169; Simon's Income Tax, Volume 2, page 367). This is in fact the method adopted in practice, so we were informed, and it enables the issues between the parties to be focused by the time the matter comes before the General Commissioners.

In the present case, however, no computation of any claims of his losses in terms of Section 34 of the Income Tax Act, 1918, was ever submitted by Mr. Hood Barrs either to the Inspector or to the General Commissioners for the years 1948–49, 1949–50 or 1950–51. So far as the year 1947–48 was concerned, a computation of loss amounting to £6,364 17*s.* 9*d.* had been submitted as far back as 31st December, 1957, but the Inspector had immediately pointed out that it was computed on an erroneous basis and it was never subsequently referred to or founded upon by Mr. Hood Barrs. Moreover, no information about the amount of tax paid by Mr. Hood Barrs and which he was seeking to reclaim was ever asked for or put before the General Commissioners. Yet they proceeded to issue at their own hands certificates certifying much larger losses in each year than any of the statements lodged with them appears, *prima facie* at least, to justify. No intelligible explanation was given to us to how they could have reached the conclusions to which they came, and it certainly seems a most unjudicial way of disposing of an important matter of tax liability. But it does appear that the Commissioners appreciated that they could not issue certificates under the Act without the necessary figures upon which to base them and without knowing to what extent these figures were agreed. For they had issued a directive on 7th January, 1959, setting out their findings in law and ordering the parties to settle the amount of the trading losses in the four years in question. This would at least have enabled the claimant to submit his computations of loss for the four years to the Inspector and have given the Inspector an opportunity, which he had hitherto never been given, of adjusting the amounts or focusing the differences between the parties. But one of the extraordinary features of this case is that before any such figures were submitted, and before any opportunity had been afforded to the Inspector to agree or to contradict the correctness of any item of loss, the General Commissioners met in private and proceeded to sign and issue to Mr. Hood Barrs certificates for very substantial sums of loss in respect of which tax was certified to be repayable. These documents only reached the Inland Revenue in a letter dated 9th March, 1959, from Mr. Hood Barrs, accompanied by a demand for payment. It is an elementary principle of natural justice that a fair opportunity must be afforded to both parties (the Inspector and Mr. Hood Barrs) to correct or contradict any relevant statement prejudicial to the contentions of either (see *Board of Education* v. *Rice*, [1911] A.C. 179, *per* Lord Loreburn, L.C., at page 182). In my opinion, in proceeding as they did in this case the General Commissioners were in breach of that principle. They proceeded to their adjudication without ever having any proper computation of the taxpayer's loss from him, and without, therefore, affording the Inspector any opportunity to put before them any criticism of the taxpayer's computation.

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Moreover, having remitted to the parties the adjustment of the figures, they proceeded at their own hands, without any intimation to the Inspector, to adjust figures themselves, which brought out a far larger loss in each year than had ever been suggested by either of the parties. On this ground alone, therefore, common fairness demands the quashing of these certificates.

But, in the second place and alternatively, it was argued to us that there was here an error on the face of the record which would entitle the Court to quash the certificates. This matter was fully debated before us and it is proper that I should also deal with it, although, upon the view which I have formed of Mr. Hood Barrs' appeal, the cross-appeal by the Crown on this point strictly does not arise. It is now well settled that errors of law appearing on the face of the record will enable the Court to quash by Certiorari (see *Rex* v. *Northumberland Compensation Appeal Tribunal,* [1951] 1 K.B. 711; affirmed [1952] 1 K.B. 338). The question arises as to what, in a case like the present, constitutes the record. In the last-mentioned case Denning, L.J., (at page 352) gave a wide interpretation to that word, which he repeated in *Baldwin & Francis, Ltd.* v. *Patents Appeal Tribunal,* [1959] A.C. 663, at page 688. But in the latter case Lord Tucker, at page 687, put a narrower construction on the word. It is unnecessary for the purposes of the present case to determine precisely what is the ambit of the word "record", but it is worthy of note that in the Section under which the matter arises here (Section 17 of the Court of Exchequer (Scotland) Act, 1856) the word used is "proceedings". But the peculiarity of the present case, which absolves me from determining precisely what is covered by the word "record" or "proceedings", is the unusual way in which the General Commissioners dealt with the matter. They issued a formal directive on 7th January, 1959, laying down their finding as to how the loss was to be ascertained and what items were to be included. This directive has been properly brought before the Court in these proceedings, and fixes their basis for quantifying the loss. For the purposes of the present argument I assume that the Commissioners in thereafter making the necessary calculations themselves were proceeding in accordance with the principles of natural justice and had before them all the necessary figures, either agreed or properly intimated to both sides, so as to enable them at their own hands to quantify the loss. If so, then the ultimate certificates which they issued without any further assistance from either of the parties were merely executorial of their findings in the directive of 7th January, 1959. It seems to me, therefore, that in this case the certificates could be only simply consequential upon the directive, and that the directive can properly be described as an essential part of the record or proceedings. The directive is not an opinion but a finding which determines the issue. But, if this be sound, then it is clear that there is an error on the face of the directive, for it involves a complete mis-statement of the legal position (particularly in the second heading of it) and, indeed, a flagrant contradiction of what was decided in the case of *Hood Barrs* v. *Commissioners of Inland Revenue* [1], 1957 S.C. (H.L.) 1, to which I have already referred and consequent upon which the whole matter arises. In these circumstances I would in any event quash the certificates on the ground of error in law on the face of the proceedings.

On the whole matter I move your Lordships that we affirm the Interlocutor of the Lord Ordinary.

Lord Carmont. —This is a reclaiming motion seeking to reverse a decision of the Lord Ordinary in Exchequer Causes. He recalled four certificates granted

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[1] 37 T.C. 188.

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by the General Commissioners of the Mull Division in respect of the entitlement of the reclaimer Henry Rupert Hood Barrs, trading as the Killiechronan Sawmills & Joinery Works, to be repaid sums amounting to £14,353 13*s.* 8*d.* in respect of the losses sustained by him over the years from 6th April, 1947, to 5th April, 1951, amounting to £34,384.

I find the whole case in such confusion as to the facts on which the General Commissioners for Mull proceeded that I think the Lord Ordinary, when he found himself entitled to deal with the case, would have been justified in his recalling of the certificates, if only for the reason that there is no document produced showing that the reclaimer ever presented a claim for repayment which would warrant the issuing of certificates amounting to the figure mentioned and nothing stated by the Mull Commissioners supports the figures which appear on the face of their certificates. However that may be, I must first approach the reclaiming motion in a different way, for it is contended that the appeal to the Lord Ordinary in Exchequer Causes by the Commissioners of Inland Revenue was not competently brought.

The Court of Exchequer (Scotland) Act, 1856, by Section 1 vested the whole jurisdiction of the Court of Exchequer in Scotland in the Court of Session. The date of the passing of the Act was 21st July, 1856, but by Section 49 it did not come into operation until 12th November, 1856. By Section 2 a Lord Ordinary of the Court of Session falls to be appointed Lord Ordinary in Exchequer Causes. At the present time Lord Walker holds that Exchequer Commission from the Crown. In certain cases appeals can be taken to the Lord Ordinary in Exchequer Causes. In the present proceedings an appeal was presented to the Lord Ordinary by the Crown against the issuing by the General Commissioners for the Mull Division of the four certificates mentioned above. Mr. Hood Barrs challenged the competency of the appeal to the Lord Ordinary in Exchequer Causes, who, after hearing the parties, repelled the objection to his dealing with the appeal. After disposing of the other arguments put forward by Mr. Hood Barrs, the Lord Ordinary quashed and set aside the four certificates which had been obtained from the General Commissioners of Mull. The Interlocutor of the Lord Ordinary in Exchequer Causes has been reclaimed against to this Division, which has dealt with the matter in terms of powers conferred by Section 20 of the 1856 Act.

The question whether an appeal could competently be taken from the General Commissioners for Mull to the Lord Ordinary in Exchequer Causes depends upon the construction to be put upon Section 17 of the 1856 Act. Certain appeals can, without any doubt, be so taken. The Schedule F annexed to the Statute provides a form for such appeals. The appeal contemplated is from any inferior Court, or magistrate, or public officer, and the test to be applied to the making of the appeal is: Could a writ of Certiorari competently have issued from the Court of Exchequer at a certain date to the effect of removing the proceedings or warrant granted by the inferior Court? The date in question, as mentioned in Section 17, is "the date of the passing of this Act", i.e., the 1856 Act. The date of the passing of the Act was 21st July, 1856, and I do not think that it has any relevance that the Act did not (under Section 49, now repealed) come into operation until 12th November, 1856. The fact that the life of the old Court of Exchequer of Scotland was prolonged after the passing of the Act for three to four months did not affect the provisions of Section 17 when it provided a test as to what appeals could be taken to the new Court when it came into operation. The test was definitely stated to be what could have issued from the Court of Exchequer "at the date of the passing of this Act", and it seems to me quite unnecessary to complicate

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the matter by what could or could not have issued from that Court at any other date.

This brings the question down to consideration of the circumstances under which writs of Certiorari could competently have issued to an inferior Court. It is more easy to ask that question than to find a plain answer to it, for the principles on which the old Court of Exchequer in Scotland functioned are left in great obscurity. The writ did not issue in regard to the exercise of purely administrative, as opposed to judicial, functions, and the parties in this case are in agreement as to this.

The taxpayer in this case states that the General Commissioners for the Mull Division were exercising a purely ministerial function. When, however, a writ goes to a "Court", it is to be anticipated that judicial rather than administrative functions are being called in question. Within the scope of judicial matters the writ did not seek to hamper a lower Court on questions of fact or question the lower Court's preference for one set of facts rather than another. The object of the writ was to prevent injustice and to correct errors in law when such errors were patent on the face of the lower Court's decision.

Lord Fraser considered the application of Certiorari in Exchequer matters in the case of *Dodsworth* v. *Rijnbergen* (1886), 14 R. 238, and the Inner House approved of his judgment. One of the main items stated is that Certiorari will not issue unless the defect alleged appears on the face of the proceedings. In regard to the functions of the General Commissioners, Lord President Inglis said in the following year:

> "These General Commissioners are charged with quasi-judicial functions and have to determine whether any assessment is well laid on when it is objected to by the party assessed, and accordingly the statute says that whatever may be the determination of the Commissioners, whether it is favourable to one party or to the other, an appeal lies".

(*Surveyor of Taxes* v. *Northern Investment Co. of New Zealand, Ltd.*[1] (1887), 14 R. 734.)

I cannot accept the view that because the Act of 1953 allowed an appeal by Stated Case, applications for relief could not have been entertained by the old Court of Exchequer, or by the Court of Session when it took the place of the former Court, under the appropriate form of appeal, in particular by Certiorari; and what I have quoted above from Lord President Inglis seems to me to leave no real doubt in the matter. The argument of Counsel for Mr. Hood Barrs that the General Commissioners were merely quantifying in an administrative way a liability which they (the General Commissioners) had already found due seems to me to ignore the fact that the Surveyor is called to take part in the proceedings and that he and the taxpayer are truly taking a judicial or quasi-judicial decision from the General Commissioners, who have to judge fairly between the opposing interests appearing before them and presenting conflicting contentions as to at all events the quantum of liability.

I am far from clear, after perusal of the papers before us, as to what consideration was given to the contentions of the Crown by the General Commissioners for Mull or what opportunity was given to the Inland Revenue officials to appear and express views upon any properly stated claim for relief put forward by the taxpayer, but there is enough to show that there has been a denial of natural justice in the lower Court which would justify the Lord Ordinary in quashing the certificates. It is not necessary, however, to probe into the proceedings further than the Lord Ordinary has done. On his state-

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[1] Smiles v. Northern Investment Company of New Zealand, 2 T.C. 165, at p. 177.

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ment of what took place when the matter in dispute was before the General Commissioners for Mull, there is more than one ground for reaching his conclusion that the certificates should be quashed and set aside; and, as the matter was fully argued before us, I turn to the question of the alleged error in law committed by the General Commissioners.

There seems to be no doubt that errors in law appearing on the face of the record will enable the Court to quash by Certiorari. What does on the face of the record mean? In the broadest terms, it seems to me to mean what has been written down as a description of the issues, and result of what has taken place, before some tribunal. Not infrequently, the word "proceedings" is used as a brief way of saying the "record of proceedings"; but it not infrequently is used to represent what has, in fact, taken place in Court, some of which is put down in writing, but that often only as a summary of what has taken place. In Section 17 of the Court of Exchequer (Scotland) Act, 1856, the word "proceedings" appears about a dozen times with, as it seems to me, different shades of meaning, from action, or suit, in Court and the method of conducting the matter in hand. The meaning passes through "decision" or "Interlocutor", to "the process", and even to the items which go to make up a "process". I vouch what I say on this matter by pointing to what is said about a higher Court "quashing the proceedings" (i.e., the lower Court's decision) and giving "directions" to the inferior Court in regard to "his or their proceedings" (i.e., directing the lower Court as to something amiss in the conduct of the case). There is a reference to either of the parties to "the proceedings" before the lower Court which plainly means dealing with the question at issue. On the other plane, there is a reference to the Court of Exchequer ordering "the proceedings" to be transmitted from the lower Court, and a reference after transmission to what the Clerk of the lower Court has in his hands and under his control as "the proceedings". When the Clerk of the lower Court transmits "the proceedings", it is with a proper inventory thereof certified by him as correct. This reference to an "inventory of the proceedings" being transmitted along with the "proceedings", i.e., process itself, shows the elasticity of the word "proceedings", which primarily is used with reference to something the higher Court is entitled to quash, i.e., the lower Court's decision and, reaching down the scale, to items put into process.

By Section 47 of the 1856 Act "cause" is defined as comprehending, among other things, a "proceeding". It would not normally be permissible to reverse the definition and say that "proceeding" comprehended "cause", but in certain contexts in Section 17 that substitution would not be out of place. I find ample warrant in all this for saying that as error on the face of the "record" would warrant Certiorari, that phrase can be read as covering error which appears *ex facie* of the "proceedings", and the word "proceedings" is wide enough to cover not only the written decision of the lower Court, but parts of the transmitted process necessary for the proper understanding of the Interlocutor formally sought to be brought under the review of the higher Court. It is well recognised in our practice that reclaiming against a given Interlocutor opens up consideration of the previous Interlocutors, and one reason for that is that it may only be in the light of what has already been done in a case that an error in the last Interlocutor becomes fully apparent.

Taking the position in the present appeal, four certificates by the General Commissioners, which *ex facie* entitle the taxpayer to recover from the Inland Revenue more than £14,000 in respect of alleged losses by the taxpayer of £34,000, show no error in law *ex facie* of the certificates themselves. But if, by looking at the proceedings in the lower Court, it is seen that no claim for

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such an amount was made by the taxpayer, then it would be wrong for us to say that there is no error *ex facie* of the record, when a mere inspection of the proceedings as an inventoried process would disclose that no such claim was ever made. There is no entry in any inventoried item of process to warrant the certificates being accepted as even *prima facie* correct. I have before me a bundle of documents relied on during argument by both sides of the Bar as representing the position of the "proceedings", and from that record it appears not only that the certificates are not warranted by the claim, but were issued without giving the Inland Revenue an opportunity to challenge the figures. The course followed by the General Commissioners for Mull cannot, I think, be justified on the ground that the certificates themselves formed the sole record of the proceedings, for they issued what are called "directives" of an interlocutory character. There is, of course, no need for the General Commissioners to have before them formal pleadings by the parties, but in my opinion if they do not have such pleadings they must accept the loose procedure which they have made for themselves; and the record of their proceedings is to be found in the whole of the writs leading up to the issuing of the certificates. It is necessary to see these certificates in their setting; and so looked at, there is a plain error in law on the face of the proceedings made by the General Commissioners in granting the certificates.

I agree with your Lordship in the chair that it is our duty, for the several reasons given, to affirm the Lord Ordinary's decision.

Lord Russell.—I have had an opportunity of reading the opinion delivered by your Lordship in the chair. I concur with the result at which your Lordship arrived for the reasons your Lordship has given.

Lord Sorn.—The proceedings before the General Commissioners for the Division of Mull were made the subject of a note of appeal by the Commissioners of Inland Revenue under Section 17 of the Court of Exchequer (Scotland) Act, 1856, and the Lord Ordinary in Exchequer Causes ordered the proceedings to be transmitted. After the lodging of a statement of facts on behalf of the Crown and replies thereto on behalf of Mr. Hood Barrs, the Lord Ordinary heard parties and quashed the proceedings. Mr. Hood Barrs has reclaimed against this decision; and the Crown are also reclaiming against it in respect that, in their view, it does not go far enough. They wish certain directions in law to be addressed to the General Commissioners.

In the first place, it was maintained on behalf of Mr. Hood Barrs, whom I will call the taxpayer, that the note of appeal was incompetent. Under Section 17 of the Act of 1856 a note of appeal lies

> "In all cases where, at the Date of the passing of this Act, a Writ of Habeas or a Writ of Certiorari might have competently issued from the Court of Exchequer",

and it was pointed out that in 1856 there was no such thing as a loss adjustment under Section 34 of the Income Tax Act, 1918. But that is not material. What the Act of 1856 did was to transfer the whole powers and functions of the Court of Exchequer as then existing to the Court of Session, and to give our Court the double character of the Court of Session and the Court of Exchequer. This is all plainly set out in Section 1 of the Act. One of the transferred powers was the power to issue a writ of Certiorari and, accordingly, when any question arises as to whether we have power to issue a writ of Certiorari and to do whatever has to be done as a consequence thereof, the matter has to be considered just as if we were sitting as the old Court of Exchequer possessing the powers which that Court possessed in the year 1856. That is the effect

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of Section 1 of the Act, but of course we have also to look at the succeeding Sections and see what they have to say in the way of alteration, or, it may be, of curtailment, of the jurisdiction thus transferred to our Court of Session. This brings us back, in the present case, to Section 17. This Section, which at least initially is procedural in character, says, *inter alia*, that cases which under the existing Exchequer law and practice could have been brought up by means of a writ of Certiorari shall in future be brought up by means of a note of appeal. All that we have to ask ourselves, therefore, is whether the Exchequer Court sitting with its 1856 powers could have brought up the proceedings in the present case by way of Certiorari and, if the answer is yes, then they are competently brought up by the note of appeal.

A further point was raised on behalf of the taxpayer as to the meaning and effect of Section 17 and, for convenience, I will deal with it at this stage. Assuming, it was said, that the applicability of Certiorari is the test for the competency of bringing proceedings into this Court by means of a note of appeal, that is the only extent to which the writ of Certiorari comes into the matter at all. It was suggested that there was a break in the Section and that its intention was to provide that, once the proceedings had been got before us, we should deal with them according to our own Scottish law and practice; for we too have a superintending power over the proceedings of inferior tribunals, although its exercise is invoked in a different way. The argument is not without attraction because it would not be difficult to suppose that, in transferring the Exchequer jurisdiction to the Court of Session in 1856, Parliament had thought it appropriate that henceforward the superintendence of Exchequer tribunals and officials should be carried out by the Court of Session in its own way. But I do not think the Section can be read in this sense. It think it perpetuates the writ of Certiorari under another name and that we have to look to that writ, not only to determine whether the proceedings are competently brought before us, but also in order to determine the remedy to be given. An attempt was made to reinforce this argument by reference to the fact that Section 8 of the Court of Exchequer (Scotland) Act, 1707, had been repealed by the Statute Law Revision Act, 1948. Section 8 was the Section which defined the nature and extent of the Scottish Exchequer Court. The repeal of this Section, however, does not seem to me material in so far as concerns the meaning and effect of Section 17 of the Act of 1856. The preservation of Certiorari stands upon the terms of the 1856 Act itself, which transferred the then existing powers of the Exchequer Court and dealt specifically with this matter in Section 17. As I have said, I can only read that Section as meaning that Certiorari is preserved not only as a means of getting proceedings transmitted but also to the effect of prescribing the remedy. So, whether we like it or not, we must treat these proceedings just as if they had been brought before this Court by a writ of Certiorari, and we must apply the law relating to that writ as best we can.

On this basis, the first point taken for the taxpayer was that the General Commissioners were not amenable to Certiorari. It was argued that in adjusting a loss claim under Section 34 of the Act of 1918 they were acting in an administrative capacity. Their function under Section 34 was contrasted with their function in hearing appeals against assessments, in which case it was conceded that they were acting judicially. It was pointed out that, at a date later than the date which concerns us, there was legislation to bring Section 34 proceedings into line with proceedings in appeals against assessments—not only to the effect of introducing an appeal by Stated Case, but also to the effect of regulating proceedings before the General Commissioners and expressly

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giving the Surveyor the right to be present and to be heard in these proceedings (Finance Act, 1953, Section 15 (4), and Income Tax Act, 1918, Section 137 (2)). It was argued that the conferring of these rights upon the Surveyor in 1953 indicated that he had not possessed these rights before, and supported the view that, until that date, the adjustment of a loss claim was a process which took place between the General Commissioners on the one hand and the taxpayer on the other, the Surveyor having no right to intervene. It was conceded that, in a question with the taxpayer, the function of the General Commissioners might perhaps be regarded as judicial and that a Certiorari might be open; but this was not such a case and, as regards the Surveyor, there was no duty on the Commissioners to act judicially towards him. But, in spite of these arguments, one cannot get away from the fact that when the General Commissioners take up an adjustment under Section 34 they find themselves dealing with a question which has two sides and in which two parties have opposing interests. The taxpayer's interest is to present his loss claim at its maximum, and the Surveyor's duty and interest is to see that it is not overstated. In that situation it seems to me that the process of adjustment is a process of a judicial nature. I do not overstress the point that because Section 34 provides that the Surveyor has to receive notice in writing of the application he is therefore given the status of a party. The primary significance of the notice is that it provides the method by which the taxpayer transmits his application to the General Commissioners. But it is not without significance that he has to do this through the Surveyor. The General Commissioners are, accordingly, in my opinion, amenable to Certiorari.

Next comes the question whether the Commissioners were guilty of an excess of power. Before they took up the adjustment of Section 34 loss, the Commissioners had already had to deal with the accounts of the business for the relevant years in connection with assessments laid on by the Assessor and which they ultimately discharged. The two operations, so to speak, overlapped each other. In the statement of facts put in on behalf of the Crown, to which sundry letters and documents are attached, we have an account, step by step, of the course which these protracted proceedings took. All this was examined in detail before us with the object, I think, of persuading us that the Commissioners could have no material before them upon which to arrive at an adjustment and to issue the certificates which they did. But in my opinion the information before us does not establish this, and only goes the length of introducing an element of speculation as to how the final figures were arrived at. The argument really amounted to saying that unless we could see just how, and upon what information, the Commissioners had reached their results, we should hold that there had been an excess of power. This seems to me to be out of the question. But there was another and more pertinent argument. On 7th January, 1959, the Clerk to the Commissioners wrote letters to both the taxpayer and the Inland Revenue enclosing a "directive" issued by the Commissioners. In this document the Commissioners refer to a previous directive, set out the basis upon which in their opinion the losses ought to be computed, and conclude as follows:

> "We direct the parties to settle the amounts of the trading losses for purposes of those applications in accordance with our findings as set out and referred to above."

Then, without another word to the Surveyor or the Solicitor of Inland Revenue, the Commissioners, on 20th February, 1959, issued their certificates. In doing this it seems to me that they acted in a manner contrary to natural justice. To remit the matter to the parties and then to take it out of their

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hands without warning and arrive at a decision without giving the parties an opportunity of being heard was highly irregular. It is not even as if the Commissioners had been made aware that the parties were unable to reach agreement, or as if a long time had elapsed; and even then it would have been necessary for the Commissioners to act judicially when they took the matter back into their own hands. In quashing the proceedings on this ground the Lord Ordinary, in my opinion, followed the right course.

Up to this point the Crown supported the Lord Ordinary's decision, but they went on to say that he erred in not going further and holding that there was an error of law on the face of the record, to be corrected and made the subject of a direction to the Commissioners. There appears to be no doubt that the jurisdiction of the Court upon Certiorari extends to error in law. Whatever recent doubts there may have been, it would seem that the judgment of Lord Goddard, C.J., in *Rex* v. *Northumberland Compensation Appeal Tribunal,* [1951] 1 K.B. 711, subsequently affirmed in the Court of Appeal ([1952], 1 K.B. 338), put the writ firmly back on to its feet in this respect. But the error must appear on the face of the record, and what have we here? The order itself, that is to say the certificate, is not a "speaking" order and in no way reveals the alleged error. Is there anything else that we may look at? The only other possible thing is the "directive" issued to the parties on 7th January, 1959, in which the General Commissioners state the basis on which the computation should be made up (this being what is alleged to be wrong in law) and direct the parties to settle the figures on that basis. If this document can be looked at, the alleged error is clearly revealed. But can we look at it? Technically it is not before us at all, because it was not included in those things which were transmitted by the Clerk to the General Commissioners to this Court. We have only seen copies. But I have no doubt we could obtain the original document, and I am prepared to overlook this point. It was argued that we should treat the document as really forming part of the decision, giving, as it were, the reasons for the decision in advance. Or, that we should regard the "order" in this case as being made in two stages, the directive being the first part of it. The argument was not unattractive, but I have great difficulty in accepting it because to do so would, I think, be going further than the cases have hitherto gone. In *Rex* v. *Northumberland Compensation Appeal Tribunal,* [1952] 1 K.B. 338, Denning, L.J., said, at page 352:

> "I think the record must contain at least the document which initiates the proceedings; the pleadings, if any; and the adjudication; but not the evidence, nor the reasons, unless the tribunal chooses to incorporate them."

This expression of opinion would show that documents (or some of them) forming the framework within which an order is pronounced may be looked at, but it does not resolve my difficulty because the "directive" is not a document of that nature. *Regina* v. *Medical Appeal Tribunal,* [1957] 1 Q.B. 574, shows that the terms of an order may be such as to incorporate some other document and make it part of the record, but that situation does not arise here. In *Baldwin & Francis, Ltd.* v. *Patents Appeal Tribunal,* [1959] A.C. 663, the document in question was not of the same nature as the document in the present case; and the opinions of the majority only serve to show that it was not necessary to reach a decision upon the competency of looking at the document in question, and that the final word as to what is to be deemed to form part of the record has not yet been spoken. In the absence of direct guidance I must come to my own conclusion, and the conclusion I come to is that the "directive" does not form part of the record and that it may not be looked at. It is not linked with, or incorporated into, the order by anything contained in the order.

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If it were a pronouncement by which, once made, the General Commissioners were irrevocably bound and which necessarily fixed the basis upon which the final order followed, there might have been more to be said for treating it as part of the record. But what we are considering is merely a so-called "directive", and this, so far as the face of the record is concerned, may or may not have entered into the final decision. Let me test the matter in this way. Let us suppose that there had been no denial of a hearing (I use the word in its wider sense) to the Surveyor, and that events had taken the course which he says they should have taken. Given the opportunity, it might have happened that the Surveyor persuaded the General Commissioners, orally or otherwise, that the basis adopted in their directive was wrong with the result that they discarded it and issued their certificate upon another basis. Let us further suppose that the Surveyor was dissatisfied with the certificate for other reasons and wished the proceedings to be quashed. If the "directive" is to be regarded as part of the record it would be open to him to get the proceedings quashed on the ground of an error which the General Commissioners had never committed. It is idle to say that, in the situation which I have supposed, everything could have been kept right by offering explanations to the Court, because this would just be another way of saying that the face of the record can be interpreted by looking behind the record to various sources of information, a proposition which, I imagine, would find little support. It thus seems to me that, in the present case, we have nothing at which we can legitimately look except the order pronounced by the tribunal, or, in other words, the certificates. These reveal no error in law and, accordingly, I am of opinion that the Lord Ordinary rightly rejected this part of the Crown's case and that the way is not open for us to give directions in law to the General Commissioners.

The taxpayer having appealed against the above decision, the case came before the House of Lords (Lords Reid, Goddard, Tucker, Hodson and Guest) on 7th and 8th June, 1961, when judgment was reserved. On 6th July, 1961, judgment was given unanimously in favour of the Crown, with costs.

Mr. P. J. Brennan and Mr. Mervyn Heald appeared as Counsel for the taxpayer, and the Solicitor-General for Scotland (Mr. D. C. Anderson, Q.C.), Mr. Alan Orr and Mr. A. J. Mackenzie Stuart for the Crown.

Lord Reid.—My Lords, the Appellant has carried on a timber business in Mull since 1947. He was assessed to Income Tax in respect of this business for the five years 1947–48 to 1951–52. Maintaining that he had sustained trading losses in each of these years, he appealed against these Income Tax assessments, and he also applied to the General Commissioners for Mull under Section 34 of the Income Tax Act, 1918, in respect of each of the years 1947–48 to 1950–51, for an adjustment of his liability by reference to these losses and to the aggregate amount of his income for each year. These applications did not require to state the amounts of the alleged losses, and did not do so.

The first matter taken up by the General Commissioners was the Income Tax assessments. A Case Stated by them came before this House, and it was decided (1957 S.C. (H.L.) 1([1])) that certain payments made by the Appellant were capital payments and could not be taken into account in determining the Appellant's profit or loss. Another question about allowances for timber cut

([1]) 37 T.C. 188.

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by the Appellant and taken into stock was raised at a late stage, but not decided. Thereafter, these assessments to Income Tax were again considered by the General Commissioners, and the Appellant submitted various information and accounts to them. One set of accounts, submitted on 1st March, 1956, showed alleged losses for the four years 1947–48 to 1950–51 amounting to some £18,000. This is admittedly the largest trading loss for these years ever submitted to the Commissioners after the decision of this House to which I have referred. On 30th November, 1957, the General Commissioners gave a general direction to the parties, in which they set out their understanding of the decision of this House and stated that they were prepared to accept computations on that basis. On 4th December the Solicitor of Inland Revenue wrote to the Clerk to the Commissioners, desiring that the Crown should have an opportunity of making submissions with regard to any computations submitted by the Appellant and indicating that the Crown did not agree with the directions. After certain correspondence, the Commissioners heard the parties on 28th November, 1958. They then discharged the Income Tax assessments, apparently on the ground that there had been no profits, and (I quote the rest of their decision):

> "having further considered applications under Section 34, Income Tax Act, 1918, by the said Hood Barrs for adjustment of his tax liability by reference to trading losses sustained in the four years 1947–48 to 1950–51, hereby find:— 1. So far as relevant to the applications before us, we repeat our directive of 30th November, 1957. 2. The trading losses for the years under consideration should be computed on the basis of the said Directive, taking the severed timber into stock at cost price equivalent to the price of the corresponding trees as stated in the 1947 and 1948 contracts (applicant to provide necessary particulars of severed timber), and otherwise to conform to the computations submitted to us by the appellant in the Schedule D hearings. 3. We direct the parties to settle the amounts of the trading losses for purposes of those applications in accordance with our findings as set out and referred to above."

On 20th February, 1959, the General Commissioners made and issued determinations in respect of each of these four years in which they stated that the Appellant had proved to their satisfaction that losses had been sustained, amounting in all to £34,384, and certified that the Appellant was entitled to be repaid amounts of Income Tax totalling some £14,350.

Neither party had any communication with the Commissioners between the hearing on 28th November, 1958, and the making of these determinations. The Commissioners did not inform either party that they intended to make these determinations although they had, on 28th November, directed the parties to settle the amounts of the losses, and they had been made aware that the Crown desired an opportunity of making submissions with regard both to the basis on which losses should be computed and to any computations made by the Appellant. The hearing on 28th November had only been concerned with the Income Tax assessments. And I find it impossible to understand how they could hold that losses amounting to £34,384 had been proved to their satisfaction, when the largest amount ever shown as losses in any accounts ever submitted by the Appellant had only amounted to £18,000. It appears from the opinions of the learned Judges of the Court of Session that Counsel then appearing for the Appellant were unable to offer any explanation, and Counsel who appeared before your Lordships were equally unable to do so.

Section 34 of the 1918 Act replaced Section 23 of the Customs and Inland Revenue Act, 1890, and was in turn replaced by Section 341 of the Income Tax Act, 1952. Before 1953 there was no appeal from determinations under these Sections on any ground. This was remedied by Section 15 of the Finance

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Act, 1953, but this Section did not apply to determinations in respect of earlier years. Accordingly, in this case the Crown had recourse to Section 17 of the Court of Exchequer (Scotland) Act, 1856, which provided that in all cases where a writ of Certiorari might have issued from the Court of Exchequer a note of appeal might be lodged. This was consequent on the abolition of the Court of Exchequer and the transfer of its functions to the Court of Session. The Court of Exchequer had been set up immediately after the Union with English procedure: too little is known about its practice and decisions, but it has been assumed, and the parties to this case agree, that in determining whether a writ of Certiorari might have issued from that Court, the modern English law regarding Certiorari must be applied.

Before turning to the question whether a writ of Certiorari could issue in the circumstances of this case, I must note certain preliminary objections taken by the Appellant. They were: (1) that, because this type of case did not exist in 1856, the Act of that year cannot have conferred jurisdiction on the Court of Session to deal with it; (2) that the Statute Law Revision Act, 1948, had the effect of depriving the Court of Session of that jurisdiction if it ever had it; and (3) that note of appeal is not the proper remedy in this case. These points were not developed in argument before your Lordships, and I think it sufficient to say that I am entirely satisfied with the way they have been dealt with in the Court of Session.

The next point taken was that proceedings before the Commissioners under Section 34, Income Tax Act, 1918, are administrative and not judicial. If that were so, Certiorari would not lie. But I am satisfied that there is no substance in this point. The Section requires notice in writing to the Surveyor of any application under it with, as it appears to me, the obvious purpose of enabling him to contest the case put forward by the applicant: it is quite unreasonable to suppose that Parliament intended that the Commissioners, who have no means of checking statements which an applicant may choose to put forward, must decide an important matter of this kind on an *ex parte* application. It was argued to your Lordships that, in other Sections in the consolidating Acts of 1918 and 1952, more specific provisions occur when the Crown is to be entitled to appear and contest matters which come before the Commissioners. That is true, but these provisions originated in Acts much later in date than the Act of 1890. The procedure followed in passing consolidation Acts prevents substantial amendment of the provisions which are being consolidated, and there is a presumption that a consolidating Act does not alter the previous law. It is therefore, in my opinion, no more legitimate to argue from the language of one Section to that of another of a consolidation Act than it would have been, before consolidation, to have argued from one to another of the Acts later consolidated. The fact that Parliament, many years later, expressed its intention in more specific terms does not show that in 1890 Parliament did not intend that the Surveyor should be a party to proceedings under Section 23 of the 1890 Act. If Parliament did so intend, then it is not disputed that proceedings under that Section and its successors in later Acts were judicial, or at least quasi-judicial, and not administrative, and that they are therefore open to review by writ of Certiorari.

Two grounds on which proceedings before inferior tribunals can be reviewed by means of Certiorari are that the manner of conducting the proceedings was contrary to natural justice and that error in law appears on the face of the record. Both grounds were maintained by the Crown in this case. On the former ground, the learned Judges in the Court of Session were unanimous

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that the Crown must succeed. On the latter ground, the majority of the First Division (the Lord President, Lord Carmont and Lord Russell) held that the Crown succeeded, but the Lord Ordinary (Lord Walker) and Lord Sorn were of a contrary opinion. I do not think it necessary in this case to decide what degree of formality, if any, is required in proceedings before General Commissioners, for this at least is clear: no tribunal, however informal, can be entitled to reach a decision against any person without giving to him some proper opportunity to put forward his case. It may well be that these Commissioners acted in good faith and with the best intentions, but that is not enough. The facts which I have already stated show that the Commissioners had been informed that the Crown desired such an opportunity, but none was given. And further, as the Lord Ordinary points out, if the Commissioners had found new matter which they thought would justify so largely increasing the amount of loss to be determined, justice required that some notice of it should have been given to the Crown with an opportunity to state objections. It appears to me to be impossible to justify the course followed in this case, and I have no doubt that the First Division reached a right decision. It is, therefore, unnecessary to consider the second ground relied on by the Crown—that error in law appears on the face of the record. As your Lordships were unanimously of opinion, when Counsel for the Appellant had concluded their argument on the first ground, that the decision appealed from was correct, we informed Counsel that we would not hear argument on this second point. In view of certain submissions by Counsel, I wish to make it clear that I have formed no opinion as to whether the Commissioners' directions should be held to be part of the "record" or whether, if they should, they disclose any error in law.

I therefore move that the appeal be dismissed, with costs.

My noble and learned friend **Lord Goddard,** who is unable to be present this morning, asks me to say that he has read the speech which I have just delivered and agrees, and has nothing further to add.

Lord Tucker.—My Lords, I agree.

Lord Hodson.—My Lords, I also agree.

Lord Guest.—My Lords, I also agree.

Questions put:

That the Interlocutor appealed from be recalled.

The Not Contents have it.

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

The Contents have it.

[Solicitors:—Solicitor of Inland Revenue (England), for Solicitor of Inland Revenue (Scotland); Fyfe, Ireland & Co., W.S.; E. A. Wodehouse.]