A

[HOUSE OF LORDS]

* PICKERSGILL AND ANOTHER . . . . . APPELLANTS

AND

MOTLEY (INSPECTOR OF TAXES) . . . . . RESPONDENT

RANSOM (INSPECTOR OF TAXES) . . . . . APPELLANT B

AND

HIGGS . . . . . RESPONDENT

LEES AND ANOTHER . . . . . APPELLANTS

AND

GRANT (INSPECTOR OF TAXES) . . . . . RESPONDENT C

DICKINSON (INSPECTOR OF TAXES) . . . . . APPELLANT

AND

DOWNES . . . . . RESPONDENT

KILMORIE (ALDRIDGE) LTD. . . . . APPELLANTS

AND D

DICKINSON (INSPECTOR OF TAXES) . . . . . RESPONDENT

[On appeal from RANSOM (INSPECTOR OF TAXES) *v.* HIGGS]

1974 June 13, 17, 18, 19, 20, 24, 25, 27; Nov. 13 — Lord Reid, Lord Morris of Borth-y-Gest, Lord Wilberforce, Lord Simon of Glaisdale and Lord Cross of Chelsea E

Revenue—Income tax—Profits of trade—Sale of land by companies owned by taxpayer to partnership of taxpayer's wife and other companies at undervalue—Settlement of interest in partnership on discretionary trust for taxpayer and family—Sale by trustees of partnership interest—Sale of land by partnership at purchase price—Development of land by company in which taxpayer shareholder—No recognised description or title to activities—Whether activities "adventure or concern in the nature of trade" by taxpayer—No profit accruing to taxpayer—Whether taxpayer engaged in trading—Income Tax Act 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2, *c.* 10), *ss.* 122 (1) (*a*) (ii), 123 (1), 526 (1) F

Revenue—Income tax—Expenses of trade—Contract for development of land—Contract part of scheme for development and for minimising tax payable on profits—Whether "wholly and exclusively laid out . . . for the purposes of the trade"—Whether deductible in computing profits—Income Tax Act 1952, *s.* 137 (*a*) G

The first group of appeals consisting of two cases involved Mr. and Mrs. Higgs, a group of companies under their control (Higgs companies) and certain other companies. A group of Higgs companies agreed to sell land to a newly formed property dealing partnership for £87,000, an undervalue. The partnership was comprised of Mrs. Higgs (90 per cent.) and two non-Higgs companies (5 per cent. each). Mrs. Higgs then settled her 90 per cent. interest on discretionary trusts for herself, Mr. Higgs and his issue. The trustees immediately sold the 90 per cent. interest to a non-Higgs company for £170,000 by means of the grant and oral exercise of an option. Mrs. Higgs then resigned from the partnership, being replaced by H Ltd., the purchasing company. The partnership then sold the land to H Ltd. for £87,000. H Ltd. then sold both the land and the 90 H

per cent. interest to HS Ltd., another non-Higgs company, for £286,000. HS Ltd. sold the land for £286,000 to D Ltd. (a non-Higgs company) and the 90 per cent. interest to P Ltd. (a non-Higgs company), for £275. In 1961, D Ltd. appointed C Ltd., a Higgs company sole agent, to lay out, develop and sell or lease the land, in such a way that C Ltd. was to produce for D Ltd. from sales or leases, a total of £287,000. C Ltd. for that purpose was financed by a loan from the trustees of the settlement of £170,000 received by them on the sale of the 90 per cent. interest, at 6 per cent. and repayable on demand. Mr. Higgs was assessed to income tax under Case I of Schedule D, on profits of the trade of land dealer and developer for the years 1960–61 and 1961–62, and the trustees on profits in connection with the partnership profits for 1960–61. Mr. Higgs and the trustees of the settlement appealed on the ground that no trade had been carried on by Mr. Higgs. The special commissioners held that Mr. Higgs had initiated and controlled schemes which had the flavour of trade and had engaged in an adventure in the nature of trade. They upheld the assessment to tax on Mr. Higgs in principle but reduced it to nil on the basis that the trustees had received the £170,000. They allowed the trustees' appeal on the grounds that there was no evidence that they had at any relevant time carried on trade. On the Crown's appeal, Megarry J. held that Mr. Higgs had initiated and controlled the transactions in the scheme which had the flavour of trade and the fact that the sum of £170,000 was capital in the hands of the trustees did not prevent it from being " income " of Mr. Higgs for the purpose of section 148 of the Income Tax Act 1952. Accordingly it was Mr. Higgs and not the trustees who was liable to be assessed to income tax on the profit of £170,000.

On appeal by Mr. Higgs against the assessment on him and by the Crown from the decision refusing an alternative assessment on the trustees, the Court of Appeal held that in the circumstances the special commissioners were entitled to find that Mr. Higgs was carrying on a trade or adventure in the nature of trade, but that since the profits accruing from the transactions were received by the trustees and Mr. Higgs never became legally entitled to them, it was on the trustees that the assessment should be made.

In the first case the trustees, in the second case the Crown, appealed:—

Held, allowing the trustees' appeal (the Crown abandoning their appeal against Mr. Higgs), that there was no characteristic of trading in anything that Mr. Higgs did, nor in requesting or procuring or persuading or cajoling or " behesting " the companies concerned or others to play their part so as to achieve the purpose and objects of the scheme was Mr. Higgs doing anything that could be graced with the description of being a trading activity or of being an adventure or concern in the nature of trade; so to hold could lead to double taxation of the profits of one and the same transaction (post, pp. 1601C—1602B, 1603A, 1607C–F, 1612H—1613E, 1619F–G, 1621E–G, 1622B–E).

Quaere (*per* Lord Simon of Glaisdale and Lord Cross of Chelsea) whether *Smith Barry* v. *Cordy* [1946] 2 All E.R. 396, C.A. was rightly decided (post, pp. 1620A–C, 1622F).

Decision of the Court of Appeal [1973] 1 W.L.R. 1180; [1973] 2 All E.R. 657 reversed.

In the three other cases under appeal a similar system of transactions was carried out. All the issued capital in Kilmorie (Aldridge) Ltd., a property dealing company, was owned by Mr. and Mrs. Downes. The scheme ended with a contract between Kilmorie and a company, O Ltd., which was not under the control of Mr. and Mrs. Downes. O Ltd. had become entitled to an agreement made by the original owner of certain land whereby one of the Downes companies was to

build houses on the land and sell under-leases of them. Kilmorie agreed with O Ltd. to carry out the building and to sell the leases. Under the contract premiums were made payable by Kilmorie to O Ltd. Kilmorie deducted those premiums in computing their taxable profits for the year 1964–65. The special commissioners found that neither Mr. nor Mrs. Downes nor the trustees took any part in the transactions and discharged the assessments. They held that the agreement between Kilmorie (Aldridge) Ltd. and O Ltd. was an essential prerequisite to the development and to the scheme for avoiding liability to income tax and that therefore the premiums were not expended wholly and exclusively for the purposes of trade within the meaning of section 137 (*a*) of the Income Tax Act 1952 and dismissed the appeal. Megarry J. held that Mr. Downes was carrying on a trade within the statutory definition and allowed the appeal restoring the assessment to tax against him in an adjusted amount. Accordingly he dismissed the Crown's appeal against the trustees. He dismissed the appeal of Kilmorie (Aldridge) Ltd. holding that the premiums were paid for a dual purpose, one of which was the avoidance of liability to tax, and were not therefore made wholly and exclusively for the purposes of trade.

On appeal by Mr. Downes against the assessment on him and by the Crown from the decision refusing an alternative assessment on the trustees, the Court of Appeal held that, looking at the scheme as a whole, Mr. Downes personally exploited the agreements for his and his family's benefit and not for the benefit of the companies involved and that as such he was carrying on a trade or an adventure in the nature of trade, but that since the profits accruing from the transaction were received by the trustees, and Mr. and Mrs. Downes never became legally entitled to them, it was on the trustees that the assessment should be made.

On appeal by the trustees in the first case and by the Crown in the second case of this group of appeals:—

Held, allowing the trustees' appeal and dismissing the Crown's appeal, that for the reasons given in the *Higgs* cases (supra) Mr. Downes was neither trading nor engaged in an adventure in the nature of trade (post, pp. 1603C, 1607F, 1614D–E, 1619F–G, 1621E–G, 1622B–E).

Decision of the Court of Appeal [1973] 1 W.L.R. 1180; [1973] 2 All E.R. 651 reversed.

On appeal by Kilmorie (Aldridge) Ltd. from the decision of the Court of Appeal affirming Megarry J:—

Held, dismissing the appeal, that a part of the amount paid as premiums was expenditure made to reduce the profits of the company and that, accordingly, they were not payments expended wholly and exclusively for the purposes of trade within the meaning of section 137 (*a*) of the Income Tax Act 1952 (post, pp. 1605A, 1608H, 1616D, 1620G, 1623G–H).

Decision of the Court of Appeal [1973] 1 W.L.R. 1180; [1973] 2 All E.R. 657 affirmed.

The following cases are referred to in their Lordships' opinions:

Buchler v. *Buchler* [1947] P. 25; [1947] 1 All E.R. 319, C.A.

Cozens v. *Brutus* [1973] A.C. 854; [1972] 3 W.L.R. 521; [1972] 2 All E.R. 1297, H.L.(E.).

Edwards v. *Bairstow* [1956] A.C. 14; [1955] 3 W.L.R. 410; [1955] 3 All E.R. 48; 36 T.C. 207, H.L.(E.).

Graham v. *Green* [1925] 2 K.B. 37; 9 T.C. 309.

Griffiths v. *J. P. Harrison (Watford) Ltd.* [1963] A.C. 1; [1962] 2 W.L.R. 909; [1962] 1 All E.R. 909, H.L.(E.).

Heydon's Case (1584) 3 Co.Rep. 7a.

A *Inland Revenue Commissioner* v. *Europa Oil (N.Z.) Ltd.* [1971] A.C. 760; [1971] 2 W.L.R. 55, P.C.
Inland Revenue Commissioners v. *Duke of Westminster* [1936] A.C. 1, H.L.(E.).
Inland Revenue Commissioners v. *Livingston*, 1927 S.C. 251; 11 T.C. 538.
Lupton v. *F.A. & A.B. Ltd.* [1972] A.C. 634; [1971] 3 W.L.R. 670; [1971] 3 All E.R. 948, H.L.(E.).
B *Petrotim Securities Ltd.* v. *Ayres* [1964] 1 W.L.R. 190; [1964] 1 All E.R. 269; 41 T.C. 389, C.A.
Rex v. *Hampden, Ship-Money Case* (1637) 3 St.Tr. 826.
Sharkey v. *Wernher* [1956] A.C. 58; [1955] 3 W.L.R. 671; [1955] 3 All E.R. 493; 36 T.C. 275, H.L.(E.).
Smith Barry v. *Cordy* [1946] 2 All E.R. 396; 28 T.C. 250, C.A.

C The following additional cases were cited in argument:
Bentleys, Stokes and Lowless v. *Beeson* [1952] 2 All E.R. 82; 33 T.C. 491, C.A.
Bowden v. *Russell & Russell* [1965] 1 W.L.R. 711; [1965] 2 All E.R. 258; 42 T.C. 301.
Cecil Bros. Pty. Ltd. v. *Commissioner of Taxation of the Commonwealth of Australia* (1964) 111 C.L.R. 430.
D *Copeman* v. *William Flood & Sons Ltd.* [1941] 1 K.B. 202; 24 T.C. 53.
Craddock v. *Zevo Finance Co. Ltd.* [1946] 1 All E.R. 523; 27 T.C. 267, H.L.(E.).
Currie v. *Inland Revenue Commissioners* [1921] 2 K.B. 332; 12 T.C. 245, C.A.
Finsbury Securities Ltd. v. *Inland Revenue Commissioners* [1966] 1 W.L.R. 1402; [1966] 3 All E.R. 105; 43 T.C. 621, H.L.(E.).
E *Greenberg* v. *Inland Revenue Commissioners* [1972] A.C. 109; [1971] 3 W.L.R. 386; [1971] 3 All E.R. 136; 47 T.C. 240, H.L.(E.).
Johnson Brothers & Co. v. *Inland Revenue Commissioners* [1919] 2 K.B. 717; 12 T.C. 147.
Pearn v. *Miller* (1927) 11 T.C. 610.
Ridge Securities Ltd. v. *Inland Revenue Commissioners* [1964] 1 W.L.R. 479; [1964] 1 All E.R. 275.
F *Skinner* v. *Berry Head Lands Ltd.* [1970] 1 W.L.R. 1441; [1971] 1 All E.R. 222; 46 T.C. 377.
Taylor v. *Provan* [1974] 2 W.L.R. 394; [1974] 1 All E.R. 1201, H.L.(E.).
Thomson v. *Gurneville Securities Ltd.* [1972] A.C. 661; [1971] 3 W.L.R. 692; [1971] 3 All E.R. 1071, H.L.(E.).
Williams v. *Davies* [1945] 1 All E.R. 304; 26 T.C. 371.

G APPEALS from the Court of Appeal.

Pickersgill and Another v. *Motley (Inspector of Taxes)*

The first of these consolidated appeals was an appeal by the appellants, Gwendoline Stella Pickergill and Harold Josiah Jenkins ("the trustees"), in relation to an assessment made upon them in the sum of £170,000 for the year 1960–61 in respect of "profits of trade, etc., of profits in connection H with partnership interest in H. L. N. Properties." The special commissioners allowed the trustees' appeal against the assessment; the High Court of Justice (Megarry J.) by an order dated November 26, 1971, dismissed an appeal by Her Majesty's Inspector of Taxes; the Court of Appeal (Russell, Stamp and Roskill L.JJ.) by an order dated April 12, 1973, allowed the inspector of taxes' appeal, upholding the assessment in principle in the sum of £170,000, but remitted the case to the special commissioners to find what expenses, if any, were deductible.

Ransom (Inspector of Taxes) v. *Higgs*

The second of these consolidated appeals was an appeal by Her Majesty's Inspector of Taxes in relation to an assessment made on the respondent, Alan Edward Higgs, in the sum of £170,000 for the year 1960–61 in respect of "profits of trade, etc., of land dealer and developer." The special commissioners upheld the assessment in principle but reduced the amount to nil. The High Court of Justice (Megarry, J.) by an order dated November 26, 1971, allowed an appeal by the inspector of taxes restoring the assessment to the sum of £170,000; the Court of Appeal by an order dated April 12, 1973, reversed Megarry J.'s decision and discharged the assessment.

Lees and Another v. *Grant (Inspector of Taxes)*

In the first appeal the trustees of a settlement created in 1962 by Mrs. Margaret Joan Downes the wife of Albert James Downes (hereinafter called "Mrs. Downes's 1962 settlement") appealed against an order of the Court of Appeal (Russell, Stamp and Roskill L.JJ.) dated April 12, 1973, allowing an appeal by the respondent from an order of the Chancery Division of the High Court (Megarry J.) dated November 26, 1971. The order of the Chancery Division had dismissed an appeal by the respondent by way of case stated against a determination of the Commissioners for the Special Purposes of the Income Tax Acts (hereinafter called "the commissioners"). By their said determination the commissioners discharged an assessment to income tax made on the trustees of Mrs. Downes's 1962 settlement under Schedule D for the year 1961–62.

Dickinson (Inspector of Taxes) v. *Downes*

In the second appeal the appellant appealed against an order of the Court of Appeal dated April 12, 1973, allowing an appeal by the respondent from an order of the Chancery Division of the High Court (Megarry J.) dated November 26, 1971. The order of the Chancery Division had allowed an appeal by the appellant by way of case stated from a determination of the commissioners. By their said determination the commissioners had discharged an assessment to income tax made on the respondent under Schedule D for the said year 1961–62.

Kilmorie (Aldridge) Ltd. v. *Dickinson (Inspector of Taxes)*

In this appeal Kilmorie (Aldridge) Ltd. (hereinafter called "Kilmorie") appealed from an order of the Court of Appeal (Russell, Stamp and Roskill L.JJ.) dated April 12, 1973, dismissing an appeal by Kilmorie from an order of the Chancery Division of the High Court (Megarry J.) dated November 26, 1971. That order had dismissed an appeal by Kilmorie by way of case stated against a determination of the Commissioners for the Special Purposes of the Income Tax Acts (hereinafter called "the commissioners"). By their said determination the commissioners confirmed an assessment to income tax made on Kilmorie under Schedule D for the year 1964–65 in the sum of £19,240 in respect of "profits arising from property development."

C. N. Beattie Q.C., P. Rees Q.C. and *J. Gardiner* for Mr. Higgs and the trustees of the Higgs settlement.

D. C. Potter Q.C. and *A. R. Thornhill* for Mr. Downes, the trustees of Mrs. Downes's 1962 settlement and Kilmorie (Aldridge) Ltd.

R. A. MacCrindle Q.C., Patrick Medd Q.C. and *H. K. Woolf* for the Crown.

A Their Lordships took time for consideration.

November 13, 1974. LORD REID. My Lords, your Lordships heard five appeals in two groups: first two which I shall call the Higgs cases and then three which I shall call the Downes cases. All arose out of two elaborate schemes devised by the same finance company for the purpose of tax avoidance.

B In the Higgs' cases there was argument about the proper interpretation of the findings of fact of the special commissioners. I do not think it necessary to deal with this matter. I shall try to state the facts in the manner most favourable to the revenue because even so I am of opinion that their case cannot succeed on the issues which we have to determine.

Mr. and Mrs. Higgs owned and controlled a number of companies.
C Several, which I shall call the Higgs companies, owned parcels of land ripe for development. Another, called Coventry, was engaged in land development. If there had been no scheme for tax avoidance the natural course would have been for the Higgs companies to have transferred the land to Coventry which would then have carried out the development. The lands held by the Higgs companies had been bought by them at prices amounting in all to about £80,000. It was expected that development would yield a
D profit of about £200,000. In the absence of this scheme tax would have had to be paid on this profit.

But it was suggested to Mr. Higgs by a representative of a finance company, Harlox, that matters could be arranged in such a way that after paying to Harlox a fee of £30,000 the remaining £170,000 would come into the hands of trustees of a discretionary trust for the Higgs family free of
E liability to tax.

Mr. Higgs, who had no connection with Harlox, agreed to carry out their scheme. He did not fully understand it but he must be held responsible for its implementation, in that he procured the co-operation of all those companies and individuals who played parts in the scheme.

The case for the revenue as presented to your Lordships was that in procuring the steps taken by the companies and individuals, Mr. Higgs was
F carrying on a trade within the meaning of the Income Tax Acts and that the £170,000 which under the scheme was to go to the family trustees was a profit of that trade which was assessable to tax. So the question to be determined is whether that contention can be sustained.

I must now briefly describe the operation of the scheme. Admittedly, Mr. Higgs took no direct part in its operation. He never owned any of the
G land and he never handled any of the money. First he obtained the consent of his wife to his acting on her behalf in respect of her interests.

The first step in the scheme was to form a partnership called H.L.N. consisting of Mrs. Higgs and two of Harlox's subsidiary companies in which Mrs. Higgs had a 90 per cent. interest. The capital of this partnership was I think £100 and then the partnership entered into some trifling transactions.

Next Mrs. Higgs assigned to the family trustees her whole interest in the
H partnership. The validity of the assignment has not been questioned. Then the Higgs companies sold their lands to the partnership for £87,000 which was considerably less than the market value. But we do not know what the true market value then was. No money was paid to the Higgs companies.

Then Harlox bought from the trustees their interest in the partnership for £170,000, a sum far in excess of its value at that time. It was part of the scheme that the trustees should receive a cheque for that amount but should immediately give their cheque for that amount to Coventry. The trustees

accordingly received no money but Coventry owed them £170,000. Harlox then joined the partnership in place of Mrs. Higgs. The partnership then sold the land to Harlox for £87,000 the price which they had paid for it. Again it seems that no money was paid.

Then Harlox sold their whole interest to a subsidiary, Harley Street, for £286,000. There were some other transactions between subsidiaries of Harlox the purpose of which is not very clear. In the end another Harlox subsidiary, Downry, bought the land for £286,750.

Downry then made what is called an agency agreement with Coventry. The special commissioners say that they did not fully understand this, and I do not quite understand how it dealt with the cheque which the trustees had given to Coventry, but its main purpose seems to have been that Coventry were to develop the land by building houses on it and when from time to time they sold these houses they were to pay the sums which they received less their own expenses to Downry up to a maximum of £287,000. If the development yielded more than that Coventry were to keep the excess.

I hope that I have described the operation of the scheme accurately but the details do not matter. The net result is clear enough. If all went well Downry were to receive and to pass on to Harlox £287,000. That would enable Harlox to retain their fee of £30,000, to pass on £87,000 to the Higgs companies and to pass on £170,000 to the Higgs family trust. If the development brought in less than was expected the family trust would not receive the full sum of £170,000.

Confronted by this labyrinth the revenue were in some difficulty. Whom should they assess? For what profit? In what year of assessment? It was said in argument that there were five possibilities apart from the course which they ultimately took. The Higgs companies had sold below market value. So they might be assessable. The partnership, the trustees, Harlox and Coventry were also possibly liable to be assessed. I do not think it right to say more about these possibilities than that if the revenue fail in the present appeal it by no means follows that the scheme was a successful attempt to evade tax.

The revenue decided to take a bold and novel course, based on the view that Mr. Higgs had engaged in trade and that the trustees were assessable as having received the profits of his trading. They do not now seek to defend an assessment on Mr. Higgs himself. But the revenue strenuously support an assessment made on the Higgs family trustees for the year 1960–61 in the sum of £170,000 in respect of "profits in connection with partnership interest in H.L.N. properties." It is admittedly an essential part of their case that Mr. Higgs was engaged in trading and that this sum was a profit of that trading. If Mr. Higgs was not engaged in trade or an adventure in the nature of trade then the assessment cannot stand. So I turn to consider whether Mr. Higgs' activities can in law be regarded as trading within the meaning of Schedule D.

The Income Tax Acts have never defined trade or trading farther than to provide that trade includes every trade, manufacture, adventure or concern in the nature of trade. As an ordinary word in the English language "trade" has or has had a variety of meanings or shades of meaning. Leaving aside obsolete or rare usage it is sometimes used to denote any mercantile operation but it is commonly used to denote operations of a commercial character by which the trader provides to customers for reward some kind of goods or services.

The contexts in which the word "trade" has been used in the Income Tax Acts appear to me to indicate that operations of that kind are what

A the legislature had primarily in mind. If I go back to the Act of 1842 I find that Schedule D covered inter alia the annual profits or gains arising from any profession, trade, employment or vocation and that Rule 1 of Case I provided that the tax was to be charged on the balance of the profits and gains of such trade, manufacture, adventure or concern in the nature of trade. And I find nothing in later legislation to alter the fundamental conception of trade in that old Act.

B As there is no limiting definition trade has been held to include cases where some element is absent which is normally present in trading. Normally it is a question of law whether the provisions of an Act apply to the facts of a particular case. There may be a difference where the question is whether provisions with regard to trading apply to particular facts. I shall not repeat what I said on the matter in *Griffiths* v. *J. P. Harrison* C (*Watford*) *Ltd.* [1963] A.C. 1 because in this case I have come to the conclusion that it would be unreasonable to hold that Mr. Higgs was trading.

Mr. Higgs did not deal with any person. He did not buy or sell anything. He did not provide anyone with goods or services for reward. He had no profits or gains. Under this scheme he never could have had any, and it was I think for that reason that it was admitted in this House that he could not be assessed personally. I can find no characteristic of trading in D anything which Mr. Higgs did.

The case for the revenue is that he procured others to enter into transactions most, if not all, of which were trading transactions. "Procuring" appears to include compelling where he had a power to compel, or making an agreement or merely persuading where he had no such power or did not use it. I could understand an argument that if A compels B or E gets B to agree to carry out a trading operation then A and not B is the trader. But that is not what is now said in this case. And if A merely persuades B to conduct a trading operation I do not see how A could be said to be the trader. The revenue made no attempt to show that when Mrs. Higgs and the other parties entered into the H.L.N. partnership, when she assigned her interest to the trustees, when the Higgs companies sold their land, when the trustees sold to Harlox, when Harlox manipulated its subsi- F diaries, and when Downry made the agreement with Coventry all were acting as his agents so that he, and not they, did the trading. The case for the revenue seemed to me to be that all these others did their own trading so that receipts and expenditure by them would enter their own profit and loss accounts, but that Mr. Higgs carried on a separate trade of procuring them to do what they did.

G I do not understand the basis of this argument. Is it to be said that whenever A persuades B to do some trading which yields a profit, A as well as B is liable to pay tax on that profit? That would be ridiculous. But it has never been made clear what it is that distinguishes the present from such a case. Mr. Higgs procured a number of people and not merely one to act as he wished: but that is not said to make a difference. He got an indirect benefit out of the scheme because he was one of the possible H beneficiaries and he had a moral if not a legal obligation to provide for the other beneficiaries. But that has never been said to make the difference. It appears to me that the case for the revenue is totally misconceived.

Besides Mrs. Higgs and the trustees there were perhaps a dozen companies which played parts in the scheme, each carrying out one or more transactions with one or more of the others. Most if not all of these transactions were trading transactions. As I understood it the revenue case was that, in addition to the participants in any one transaction trading with

each other, Mr. Higgs also traded by procuring them to trade. As I understood it he did not trade with them. He just traded. It was said that in dealing with Mr. Higgs we must treat the scheme as a whole and not seek to break it up. I do not understand that. If procuring a dozen participants to play a dozen parts is trading then procuring each one of them must be a part of that trading.

No one appears to have realised that this could lead to double taxation of the profits of one transaction. It will enter the profit and loss account of the participants and in so far as procuring it contributed to the profit of Mr. Higgs' " trade " it will be taxed again.

The further one analyses this matter the more novel and anomalous does the case for the revenue become. I find some difficulty in discovering what precisely were the grounds of judgment below. The special commissioners do not appear to have thought that the trading of Mr. Higgs was something apart from the trading of the participants in the transactions. They say:

> " In approaching the question whether, in all this, Mr. Higgs embarked on an adventure in the nature of trade, we think it immaterial that part of the object was to avoid tax on £170,000; that was the explanation of the method employed, but the substance of the matter is that what we have in front of us is Mr. Higgs' chosen method of making £170,000 out of the exploitation of the properties.
>
> " Apart from one small piece of land, Mr. Higgs did not venture any property or capital of his own; it all belonged initially to Higgs' companies, but as we see it, it was in reality he who ventured it, and he did so for the purpose of this scheme. There seems to us no other explanation of the action of the Higgs companies in selling the land at what was quite patently a very substantial under-value; no other explanation was offered to us. There is here undoubtedly a background of trade. Although the reported cases afford no example of an activity of this nature being held to be trading, they do indicate that a wide variety of different methods of money-making may constitute trades. Our conclusion is that Mr. Higgs engaged in an adventure in the nature of trade in exploiting the properties in this manner."

That appears to me to mean that the land the development of which yielded the profit was really the property of Mr. Higgs because he owned the companies which owned it, and that the transactions which constituted the scheme were really his transactions and not those of the apparent participants. If that is what the special commissioners meant I need not deal with it farther because that view was not argued to your Lordships. But that I think was the view of Megarry J. He adopted the reasoning of the special commissioners ([1973] 1 W.L.R. 1180, 1187) and he said, at p. 1199, with regard to the Downes cases which in this matter are indistinguishable: " It cannot be that a trader ceases to trade merely because he leaves to others the organisation and execution of his trading."

It never seems to have been pointed out that if the trading of the others was his trading then he was trading with himself because he had procured the actions of both parties to each transaction. That a man can trade with himself is indeed a novelty. I rather think that that was also the view of the Court of Appeal [1973] 1 W.L.R. 1180, 1209:

> " . . . the reason why Mr. Higgs is to be held to have been trading or engaged in an adventure in the nature of trade is because of what he personally did and procured and not because of what the Higgs companies did or were procured to do by him and those acting with

him. I therefore reach the same conclusion on this issue as did the special commissioners and Megarry J."

No doubt Mr. Higgs engaged in an adventure but for the reasons which I have given I cannot agree that it was an adventure in the nature of trade. I am therefore of opinion that the appeal by the Higgs trustees must be allowed.

I can deal very briefly with the first two Downes cases. They also arise under a scheme prepared by Harlox for the purpose of tax avoidance. The general nature of the scheme was the same as that of the scheme in the Higgs cases, and the object was that the Downes trustees should get from the development of the land involved a sum of £60,000 in such a way that no tax was payable. The Court of Appeal sustained an assessment on the trustees. Again it is admitted that this assessment can only stand if Mr. Downes can be held to have been trading in procuring the various transactions required by Harlox's scheme. For the reason which I have given in the Higgs case, I am of opinion that he was neither trading nor engaged in an adventure in the nature of trade. I would therefore allow the appeal of the Downes trustees.

The third Downes case, referred to as the Kilmorie case, raises an entirely different question. It arises because the final stage in the Downes scheme differed from the final stage in the Higgs scheme.

On March 21, 1962, Downes, a company owned by Mr. Downes, made an agreement with the owner of the Landywood estate under which Downes was to pay £67,500 for the right to develop the land. This sum was to be paid by instalments as Downes sold leases of the houses built by them. Sums received by Downes in excess of that sum and certain others were to be kept by Downes as a profit.

Then Mr. Downes put in operation the Harlox scheme. The first step is important. Downes sold their right to Sproul for £2,250 and on March 31 Sproul sold those rights for £2,500 to a partnership of Mrs. Downes and two Harlox companies in all material respects similar to the H.L.N. partnership in the Higgs case. Sproul had no connection with Mr. Downes or his companies and this sum of £2,500 is accepted as a fair price at the time. In other words the sum of £67,500 paid for the development rights on March 21 was little short of a full commercial price.

Then similar transactions to those in the Higgs scheme took place and the development rights came into the ownership of a Harlox company called Opendy. But the last stage of the scheme differed from the last stage of the Higgs scheme.

On April 5, 1962, Opendy sold their rights to Kilmorie which was a Downes company for £77,250. It is not suggested that the market or commercial value of these rights had altered between March 31 and April 5. So this sum of £77,250 was a gross over-valuation. But the scheme under which £60,000 was to reach the Downes trustees free of tax made it essential that Kilmorie should undertake to pay this large sum.

This sum of £77,250 was paid by Kilmorie to Opendy during the three years ending on March 31, 1966. The first part of it, £19,240, was paid during the year ending March 31, 1964, and we are only concerned with that sum in the present case which arises out of an assessment of Kilmorie for the year 1964–65.

Kilmorie claim that this sum is a proper deduction, in determining their profit for that year, under section 137 of the Income Tax Act 1952, because it was "money wholly and exclusively laid out or expended for the

purposes of" their trade. The sole question in the case is whether that claim is justified.

The special commissioners decided against Kilmorie. They held that their agreement with Opendy

> ". . . was an essential prerequisite to the carrying out by Kilmorie of the development of the estate. It proved, moreover, in the event to be very much to the advantage of Kilmorie to enter into the first-mentioned agreement (hereinafter referred to as 'the Kilmorie-Opendy agreement') on the terms specified therein. We have, however, to consider the position at the time when the Kilmorie-Opendy agreement was made, and against the background of the series of transactions which led up to it. So approaching the matter we are of opinion that the Kilmorie-Opendy agreement was entered into by Kilmorie with the objects both of enabling that company to develop the Landywood Estate and of facilitating the scheme for avoiding liability to income tax referred to in paragraph 2 (2) above. In our view the latter object was on the facts of the case one of the main purposes, and not a mere secondary consequence, of the entering into by Kilmorie of the agreement, and the outlay totalling £19,240 was thus incurred by Kilmorie for dual purposes being purposes one of which was, and one of which was not, a trading purpose."

There was considerable argument about the meaning of this finding. I think that it plainly means that Kilmorie would not have paid so large a sum to Opendy but for their non-trading purpose of enabling the tax avoidance scheme to succeed. Neither party to the agreement was acting as a free agent in its own interest. Opendy was a Harlox subsidiary and Kilmorie was a Downes company. Both had been procured to play their part in the scheme. The price was dictated by the scheme, and plainly had nothing to do with the market value of the rights sold. It was argued that we must presume that the directors or whoever made the agreement on behalf of the two companies acted properly in what they believed to be the interests of the companies. In the ordinary course we would presume that in the absence of evidence to the contrary. But here it is quite obvious that neither the Downes nor the Harlox companies acted in their own interests. They did just what Mr. Downes and Harlox wanted. I would agree that if a trader is actuated by none but commercial motives the revenue cannot merely say that he has paid too much. He may have been foolish or he may have had what could fairly be regarded as a good commercial reason for paying too much. But if it is proved that some non-commercial reason caused the trader to pay more than he otherwise would have done, then it seems to me quite clear that the payment can no longer be held to have been wholly and exclusively expended for the purposes of the trade. No authority is needed for so obvious a proposition.

But what happens if even without the non-trading purpose the trader would have spent part of the sum for the purposes of his trade? On one view section 137 is so unreasonable that it forbids deduction even of that part which would in any case have been expended for trading purposes. It seems to me that the section could well be read as meaning that if it can be shown that a part of the expenditure was in fact wholly and exclusively for trading purposes, then that part is a proper deduction. But we do not have to decide that question because the revenue have agreed that in this case £2,500 of the £77,250 paid will be allowed as a deduction being the then market value of the rights.

In the Kilmorie case I am of opinion that the decision of the Court of Appeal was clearly right so I would dismiss the appeal.

LORD MORRIS OF BORTH-Y-GEST. My Lords, in the appeals relating to what may be called the "Higgs" transactions the short question which arises is whether Mr. Higgs carried on a trade. It is said that annual profits or gains arose or accrued from a trade carried on by him or from an adventure or concern in the nature of trade in which he was engaged.

Though the question can be stated with a succinctness which seems disarming there was nothing succinct about the truly remarkable transactions which in ordered sequence were woven by ingenuity into the pattern of a tax avoidance scheme.

The facts which are fully set out in the stated case and which therefore I need not recapitulate show that the Higgs companies owned properties which quite clearly had become worth vastly more than they had cost. The companies carried on the trades of dealing in or developing land. Mr. and Mrs. Higgs were the main or sole shareholders and directors in the companies. The problem that someone sought to solve was how the profits and gains which would result from dealing in or developing the properties could be spared from being diminished or partly dissipated by being taxed. The plan which was devised and adopted was to interpose between ownership of the properties by the Higgs owning companies and the later development of the properties by another company (also a Higgs company) a sequence of elaborate and complicated transactions as a result of which, at a cost of £30,000 payable to the Harlox companies as the price of their co-operation, a sum of £170,000 would be floated away into what was hoped would be a tax-free backwater. The £170,000 would be received by trustees and would be held on discretionary trusts to pay, divide or apply the capital or income among the following beneficiaries—Mr. Higgs and the children or remoter issue of Mr. Higgs, his daughter and his son.

There was, however, considerable risk that at various junctures the scheme would misfire. What would be the tax position of the Higgs companies if the properties which on March 30, 1961, they sold for £87,135 (which was just a little over what they had paid for them) were then worth a very great deal more? Would the market value have to be substituted for the agreed sale price? (Compare *Petrotim Securities Ltd.* v. *Ayres* [1964] 1 W.L.R. 190.) The Higgs companies are not before us and we do not have to decide as to their tax liability. Nor do we have to decide as to the tax position of the intermediaries involved in the plan adopted.

Our problem, having patiently traced a path, step by step, through the transactions pressurised to take place within the space of quite a few days (but all having been planned in advance at one and the same time and planned so that each one was to be carried through upon the understanding that all the subsequent ones also would be carried through) is first to look at Mr. Higgs' part in it all and then to ask the question—Was he trading? or Was he engaged in an adventure or concern in the nature of trade? It is not suggested that the trustees carried on any trade or any adventure in the nature of trade.

A preliminary and not unreasonable inquiry to submit to those asserting that Mr. Higgs was trading or was engaged in an adventure or concern in the nature of trade might well be to ask the name of the suggested trade. Mr. Higgs had been assessed under Case 1 of Schedule D in respect of

profits of the trade of "Land Dealer and Developer." However, it was not sought to say that that name or description could in reference to Mr. Higgs be justified. In turn it was not suggested that the case was advanced merely because the adoption of that name or description of his alleged trade was not defended and was abandoned. Could any revised or substituted name or description be given or suggested? None could be. But, so it was said, the categories of trading are not closed and if trading there was, it matters not that it was innominate. So the question arises whether the facts as set out in the case stated reveal a form of activity which, though nameless, and defying the process of being named, and though one the like of which has never before been identified, should yet be graded or upgraded as being a trade or an adventure or concern in the nature of trade.

The findings of fact of the special commissioners as recorded in the case stated must be accepted. Appeal from the commissioners lies only on law. It is, however, in my view a question of law as to what is the meaning of "trade" as that word is referred to in sections 122 and 123 of the Income Tax Act 1952. By section 526 of that Act "trade" includes every trade, manufacture, adventure or concern in the nature of trade.

In considering whether a person "carried on" a trade it seems to me to be essential to discover and to examine what exactly it was that the person did. The case stated sets out and describes certain transactions. The special commissioners drew an inference as to what was the scheme of the transactions and as to what was the broad object of the scheme. That object was that properties belonging to "the Higgs companies" would be profitably developed by a "Higgs company" but would be developed in such a way that it was hoped that a large slice of the expected profit would escape tax. But what part did Mr. Higgs play? What did he do? One finding was in the following terms:

> "(3) the person who put the scheme into operation and was in control of it throughout was Mr. Higgs: we do not mean by this that he planned or even understood the details, which he left to his professional advisers; what we mean is that we regard the whole scheme as his operation. We regard Mrs. Higgs and the trustees, as well as the Higgs companies, as persons who acted at his behest and in accordance with his wishes, and we regard the Harlox companies as participating with his agreement and because he was prepared to make it profitable to them."

Another finding was that Mr. Higgs was not himself a party to any of the transactions in the chain. He was however "the person who initiated and controlled them, and so far as concerned the parties who constituted the Higgs interest he procured them to act as they did." If the activities of the particular Higgs company (Coventry) that was to develop the properties prospered, then Mr. Higgs would "have placed £170,000 where it suited him to place it." "The substance of the matter" was that "what we have in front of us is Mr. Higgs' chosen method of making £170,000 out of the exploitation of the properties."

So we have various phrases which express the conception which is presented. Mr. Higgs was said to be in control because there were persons who "acted at his behest." He "initiated and controlled" the transactions in that though he was not a party to them (the transactions) he "procured" parties to act as they did. The transactions represented

his " chosen method " of getting a sum of money to a destination that suited him.

Bearing all this in mind the question still arises—what did Mr. Higgs do? To be engaged in trade or in an adventure in the nature of trade surely a person must do something and if trading he must trade with someone. In *Inland Revenue Commissioners* v. *Livingston* (1926) 11 T.C. 538, the Lord President (Lord Clyde) said, at p. 542:

> " I think the test, which must be used to determine whether a venture such as we are now considering is, or is not, ' in the nature of trade,' is whether the operations involved in it are of the same kind, and carried on in the same way, as those which are characteristic of ordinary trading in the line of business in which the venture was made."

All that Mr. Higgs did was to pay heed to an idea which was suggested to him (see paragraph 5 (16) (*a*) of the case), to take advice about it, to understand the purpose of it, though not to comprehend all the details of the scheme which embodied the idea, and then somehow to contrive that his wife and certain limited companies and others would act " at his behest " and play their part in effecting the transactions which the scheme necessitated. But can this in any rational or realistic sense be described as trading or as being an adventure in the nature of trade? Quite lacking are the indicia which are common to so many forms of trading activity. Mr. Higgs was not himself concerned in any buying or selling activity. He gave no services. He supplied nothing. Nor, in any real sense, was he introducing anyone or acting as a broker. What the companies did were the acts of the companies. What they did cannot be regarded as Mr. Higgs' acts. The scheme that was being furthered was an artificial and unnecessary one: its sole purpose was to avoid tax. Even if Mr. Higgs initiated the scheme and if he did persuade or procure the companies to act, his suggested " trading " only consisted in persuading or procuring them to make certain elaborate arrangements for his expected benefit by the contemplated withdrawal of large sums of money from their taxable profits. I cannot think that in requesting or procuring or persuading or cajoling or " behesting " the companies concerned or others to play their part so as to achieve the purpose and objects of the scheme, Mr. Higgs was doing anything that could be graced with the description of being a trading activity or of being an adventure or concern in the nature of trade.

The views which I have expressed apply equally in the *Downes* case. In each case I would allow the appeal.

In the case relating to Kilmorie (Aldridge) Ltd. an entirely separate point arises. The Kilmorie company played its part in what I may call the " Downes " transactions the general pattern of which followed the earlier Higgs or Harlox prototype. The main difference in the pattern was that in the *Downes* case the asset of value was a building agreement made at arms' length on March 21, 1962, under which A. J. Downes & Sons Ltd., as builders, acquired the right, on certain terms as to payment to K. J. Roodhouse Ltd. to develop an estate known as the Landywood Estate. The sale on March 30, 1962, of that building agreement to a Harlox company (Sproul Bros. (Builders) Ltd.) was the start of its journey along a route comparable to that which the Higgs' properties had had to follow. The price (£2,250) payable on that sale was one which the directors of the Downes company (Mr. and Mrs. Downes and Mr. Southall) considered to be a good one as fully reflecting the value of the building agreement. It was towards the end of the sequence of the pre-planned transactions that

the Kilmorie company joined in. By April 5, 1962, the building agreement was in the ownership of a Harlox company called Opendy Building Co. Ltd. The Kilmorie company was a company concerned with estate development. Its shares were owned as to nine-tenths by Mr. Downes and as to one-tenth by Mrs. Downes. On April 5, 1962, the Kilmorie company acquired the building agreement from Opendy at a price which in aggregate amounted to £77,250. That sum was of course separate from and was additional to the sums which under the building agreement had to be paid to K. J. Roodhouse Ltd. The reason why an agreement which reasonably was sold by a Downes company on March 30, 1962, for £2,250 had to be acquired by a Downes company on April 5, 1962, for £77,250 was that the intervening transactions had been those devised for profit-siphoning-tax-avoiding purposes.

In computing their gross profits the Kilmorie company deducted the sums which in aggregate amounted to £77,250. In the year ended March 31, 1964, the amount deducted was £19,240: that was such part of the £77,250 as was paid to Opendy in that year. Could that deduction be made?

The finding in the case stated is as follows:

> " As regards the question before us relating to Kilmorie, the agreement entered into by that company with Opendy in relation to the Landywood Estate building agreement was an essential prerequisite to the carrying out by Kilmorie of the development of the estate. It proved, moreover, in the event to be very much to the advantage of Kilmorie to enter into the first-mentioned agreement (hereinafter referred to as the 'Kilmorie/Opendy agreement') on the terms specified therein. We have, however, to consider the position at the time when the Kilmorie/Opendy agreement was made, and against the background of the series of transactions which led up to it. So approaching the matter we are of opinion that the Kilmorie/Opendy agreement was entered into by Kilmorie with the objects both of enabling that company to develop the Landywood Estate and of facilitating the scheme for avoiding liability to income tax referred to in paragraph 2 (2) above. In our view the latter object was on the facts of the case one of the main purposes, and not a mere secondary consequence, of the entering into by Kilmorie of the agreement, and the outlay totalling £19,240 was thus incurred by Kilmorie for dual purposes being purposes one of which was, and one of which was not, a trading purpose. We find accordingly that that outlay is, having regard to the provisions of section 137 (*a*) of the Income Tax Act 1952, not allowable as a deduction in computing the profits of the trade of Kilmorie. We therefore conclude that the appeal made by that company fails, and hereby confirm the additional assessment to income tax against which it was made, that is to say, the additional assessment on the company for the year 1964/65 in the sum of £19,240."

That clear finding and the emphatic language of section 137 of the Income Tax Act 1952 that

> " no sum shall be deducted in respect of—(*a*) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession or vocation; . . ."

seem to me to make the decisions of Megarry J. and of the Court of Appeal clearly right.

A It was strongly argued that by the use of the words "essential prerequisite" the commissioners had found that Kilmorie could not have made its profits on developing the Landywood Estate save by agreeing to the terms of the Kilmorie agreement and that therefore the intention of Kilmorie was single. It was said that the intention or purpose of expending the money was to obtain the Kilmorie agreement on terms on which profits were thought to be obtainable and were in fact obtained. But in my view B the meaning of the finding of the commissioners is clear. It was necessary in order that the scheme should be carried out that the building agreement should be back in the hands of a Downes company after what I may call the Harlox excursion, but the whole basis of the scheme was that money should be taken away from anticipated profits and that the sum paid by Kilmorie to Opendy should cover and provide that money so taken C away. Opendy only came into the story in order to facilitate the scheme and the amount of £77,250 had to be paid, not wholly and exclusively for the purpose of developing the Landywood Estate, but mainly in furtherance of and in order to facilitate the scheme for avoiding liability to income tax.

It is true, as Megarry J. pointed out, that section 137 (*a*) may be Draconian in its operation and the point was taken that as the building agreement was admittedly of value (as was shown when the Downes D company sold it and as was appreciated by the directors of the Downes company) the disallowance of the whole of the £19,240 bore somewhat hardly. But on the findings in the case stated I think that the result is that the appeal of Kilmorie fails.

LORD WILBERFORCE. My Lords, I do not think that any extended E narrative of the transactions which have led to the present appeals is needed: indeed a complete immersion in the details tends to confuse rather than to clarify. A brief outline summary is sufficient to enable the argument to be understood: for further particulars the case stated and the judgments below can be consulted.

The appeals relate to operations of "stock stripping" the design of which is to take properties held as trading stock which are ripe for F development, arrange for their development at a profit, and to convert the profits into a capital asset by turning them into the purchase price for other assets. Thus the recipient of the profits, who is not the developer, gets them in a tax free form. In order to enable this to be done a series of preplanned transactions was carried out between March 1 and April 5, 1961, involving the following cast: (i) a number of companies (the "Higgs G companies") owning the properties and controlled by Mr. Higgs and his wife (the precise shareholdings and directorships were not proved); (ii) a number of companies (the "Harlox Group") not associated with Mr. Higgs but brought in to provide finance and execute the stripping; (iii) a partnership in which Mrs. Higgs and certain Harlox companies were concerned; (iv) trustees of a discretionary settlement for the benefit of Mr. Higgs and H his family.

The operation consisted broadly of the sale by Higgs companies of properties at an undeveloped value: their ultimate development by another Higgs company and the passing of the profits of development through companies of the Harlox Group so that ultimately they reached the trustees as purchase consideration for Mrs. Higgs' interest in the partnership which she had previously assigned to them.

The actors in these transactions were (i) the Higgs companies; (ii) Mrs.

Higgs; (iii) the trustees; (iv) the partnership, consisting of Mrs. Higgs and Harlox companies; (v) companies of the Harlox Group.

It will be seen that this enumeration does not include Mr. Higgs. But Mr. Higgs' involvement was the subject of certain findings by the special commissioners. These were criticised by counsel appearing for the appellants and perhaps in some respects they go beyond the facts, but for the purpose of these appeals I take them in the manner most favourabe to the revenue.

The commissioners found that the whole of the transactions were planned in advance on the basis that they would be executed as one whole. Mr. Higgs did not himself devise them or wholly understand them; they were suggested to him and he accepted and authorised them. In the commissioners' words he put the scheme into operation and was in control of it throughout. They regarded Mrs. Higgs and the trustees as well as the Higgs companies "as persons who acted at his behest and in accordance with his wishes" and the Harlox companies "as participating with his agreement and because he was prepared to make it profitable to them." The commissioners also found that Mr. Higgs was not himself a property developer, and it appeared from their findings that he personally received nothing out of the scheme.

Mr. Higgs was assessed for the year 1960–61 under Case I of Schedule D "in respect of profits of the trade of land dealer and developer." The trustees were also assessed under section 148 of the Income Tax Act 1952 as having received profits of Mr. Higgs' trading. Before this House the revenue limited their contentions to the claim against the trustees on the basis of Mr. Higgs' trade. They did not claim that the trustees had traded themselves: it was essential to their case to establish trading by Mr. Higgs.

As the above summary demonstrates, we are concerned with some sophisticated transactions, evidently the product of expert intellects in the tax avoidance business. To resolve the problems which they create, we are not called upon, as has usually happened since 1965, to apply correspondingly sophisticated tools of legislation. We have rather to apply to the facts the legal concept of "trade." (Income Tax Act 1952, sections 122, 123 and 526 (i).) This may be called a concept of common law. Trade has for centuries been, and still is part of the national way of life: everyone is supposed to know what "trade" means: so Parliament, which wrote it into the Law of Income Tax in 1799, has wisely abstained from defining it and has left it to the courts to say what it does or does not include.

Trade is infinitely varied; so we often find applied to it the cliché that its categories are not closed. Of course they are not: but this does not mean that the concept of trade is without limits so that any activity which yields an advantage, however indirect, can be brought within the net of tax. Some systems tax in general terms all profits or income arising from personal exertion; some also tax the produce of any profit-making enterprise; but English law does not do this. It names the commonest and most recognisable forms of personal exertion or enterprise in Schedules D and E of the Code and, apart from special provisions which are not invoked here, each case must be brought within one of them.

"Trade" cannot be precisely defined, but certain characteristics can be identified which trade normally has. Equally some indicia can be found which prevent a profit from being regarded as the profit of a trade. Sometimes the question whether an activity is to be found to be a trade becomes a matter of degree, of frequency, of organisation, even of intention, and in such cases it is for the fact-finding body to decide on the evidence whether

A a line is passed. The present is not such a case: it involves the question as one of recognition whether the characteristics of trade are sufficiently present. I do not think that we need here to get enmeshed in the intricacies —I am tempted to say sophistries—of primary or secondary facts or inferences. We are clearly in the realm of principle and of law.

Trade involves, normally, the exchange of goods, or of services, for reward, not of all services, since some qualify as a profession, or employ-
B ment, or vocation, but there must be something which the trade offers to provide by way of business. Trade, moreover, presupposes a customer (to this too there may be exceptions, but such is the norm), or, as it may be expressed, trade must be bilateral—you must trade with someone. The "mutuality" cases are based in part at least upon this principle, and it was the existence of it that made *Sharkey* v. *Wernher* [1956] A.C. 58 an
C interesting problem: could Lady Zia trade with herself?

Then there are elements or characteristics which prevent a trade being found, even though a profit has been made—the realisation of a capital asset, the isolated transaction (which may yet be a trade). In recent years a transaction, even one of property dealing, which amounts to no more than a planned raid on the revenue (see *Lupton* v. *F.A. & A.B. Ltd.* [1972] A.C. 634), has been held not to be by way of trade—a sophistication which I do
D not reject, but which must be carefully watched for illegitimate extension. Although these are general characteristics which one cannot state in terms of essential prerequisites, they are useful benchmarks, so when one in faced with a novel set of facts, as we are here, the best one can do is to apply them as tests in order to see how near to, or far from, the norm these facts are. I attach no importance to the fact that, if there was trade, there
E is a difficulty in knowing what to call it. Christening normally follows some time after birth, and if Mr. Higgs' activities were found to be trading activities, a description would soon be found. Are they trading activities?

Now Mr. Higgs, whose trading is in question, the trade being described as the trade of land dealer and developer, had not previously engaged in property deals (the two houses he had sold he held as long-term investments). Mrs. Higgs, too, if that is relevant, had never dealt in land (with
F the same exception). Mr. Higgs had no trading stock. In the whole course of these transactions he bought nothing, sold nothing, and ventured nothing. Taking each individual transaction, from first to last, not one was performed by Mr. Higgs: so far as relevant, two only were carried out by Mrs. Higgs; she made the settlement on discretionary trusts; she was concerned in the partnership with two Harlox companies, her interest in
G which she assigned to the trustees of the settlement. There are nowhere here any of the indicia of trade so far as Mr. Higgs, or, if relevant, Mrs. Higgs is concerned. The negative indicia are not strong but more present than absent. The overall object was certainly to procure a fiscal advantage —though it was to do so out of what would otherwise be development profits. The transaction was isolated, but that is not decisive. The test of "capital profit" does not arise because Mr. Higgs disposed of no asset—
H relevantly he had no asset to dispose of. Mr. Higgs (and Mrs. Higgs) had no apparent customer out of whom any profit was made: I say "apparent" for one line of argument seems to suggest that he dealt with the Harlox Group; I shall comment on this later. Where, then, does the revenue seek the necessary indicia?

First, the commissioners found, and the Court of Appeal relied on this, that there is throughout these transactions the "flavour of trade." Such metaphors are suspicious, in fact the scheme as a whole has to me another

flavour altogether, but what it means here is clear enough, and it works against the revenue, not for it. There are clearly enough elements of trade, such classical elements as selling and developing properties. But these acts of trading were done by the companies, or just possibly by the trustees. Their attribution to these entities, which is indisputable, makes it impossible to attribute them to Mr. Higgs. The same trade cannot be located in two different places. Then it is said that Mr. Higgs provided services: he acted as a quasi broker between his companies and the Harlox Group and the " profit " was the reward for his services. Again the Court of Appeal took up the analogy. But, in my opinion, this contention bears no relation to the facts—indeed is inconsistent with what the commissioners did find (see the next paragraph below), namely, that Mr. Higgs organised the exploitation of " his " companies' properties with a view to extracting their profits in a tax free form. To regard the £170,000 development profit as a brokering commission seems to me quite unreal and even bizarre. Thirdly, it is contended that Mr. Higgs organised the whole scheme with a view to profit, i.e., with a view to the financial benefit of himself and his family. This is the basis of the commissioners' findings, and is the real foundation of the judgments below. The transactions, so it is put, were planned in advance and together; the scheme must be regarded as a whole; its purpose and result was to secure the development of properties belonging to the Higgs' companies in such a way as to produce tax free profits for the trustees of the settlement and for the Harlox Group. Mr. Higgs initiated the scheme and controlled it throughout in his financial interest.

My Lords, I have already said that I am willing for the purposes of these appeals to accept in full the findings of the commissioners reflected above. Moreover, I accept that it is legitimate to consider the " scheme as a whole " where there is evidence, as there is here, that each separate step is dependent on others being carried out. An example of the same process —right or wrong on the facts—was the Privy Council case of *Inland Revenue Commissioner* v. *Europa Oil (N.Z.) Ltd.* [1971] A.C. 760. But the question remains whether this organisation or control by Mr. Higgs of a complex process involving, possibly, or probably, trading by others can possibly constitute trading by himself.

To say that it does, obviously raises novel and difficult problems. There is no basis, and it is not so found, upon which the acts of the other persons involved in the scheme can be imputed to Mr. Higgs, so that he becomes a vicarious trader. Even in relation to Mrs. Higgs there is no finding that she was his agent, or that he was hers, or indeed that she herself traded at all. And so far from the Higgs companies being Mr. Higgs' agents, if anything he was theirs. The Harlox Group was independent, and came into the scheme for its own interest. The case has never been put on the basis of vicarious trading.

Nor has the argument been put on Mr. Higgs' shareholding in the Higgs companies or on his directorship of those companies; to do so would invite difficult questions how either of these factors can make Mr. Higgs responsible for his companies' trading. Unless under specific statutory provisions English law has never made individuals, on the basis of control or shareholding, fiscally responsible for companies' activities.

The revenue's case was in the end quite candidly rested on Mr. Higgs' " procurement " of the actions of the trading actors—procurement by persuasion, by bargaining (with the Harlox Group), by the natural influence he had over his wife and his fellow directors, and, so far as relevant, shareholders. This approach has at least the merit of some concordance with

A the facts, though one would doubt whether Mr. Higgs played so Napoleonic a role; but once it is so stated it reveals its nakedness in law. How can a man who procures others to do acts which amount to trading by them with their own assets be said to trade, within any conception, however wide, one may have of trading? None of the characteristics of trading are present—the implications of so wide and vague an extension are alarming. If procuring persons to trade were itself to be a trade, it is obvious that B the Commissioners of Income Tax would be faced with a multitude of cases where there is some sort of relation between the trade and the person sought to be taxed and with the necessity of deciding whether the former was procured by the latter. Since "procurement" has no statutory warrant, or, this case apart, basis in authority, this would open a new and completely uncharted field, placing the taxpayer at the mercy of findings C of fact which he could not challenge. In particular this doctrine would lead inevitably to claims being made, over a wide range, resulting in individuals being assessed in respect of the profits of companies.

Secondly, the result would in many cases be that the same profits in respect of the same activity would be taxed twice, once in the hands of the actual trader, again in the hands of the procurer. Admittedly, in the present case, it is said that the trustees' "profits" were, apart from the D present claims, tax free; certainly it was the object of the scheme that they should be so. I express no opinion about that: but what is clear is that, on the revenue's argument, tax would be leviable on these profits as profits of Mr. Higgs' trade, even if any of the participators in the scheme were themselves assessable as traders. So wide an extension of the concept of trading, to a set of facts which contains none of the normal ingredi- E ents of trade, is one that I find unacceptable. It was argued, indeed, that there was some authority for taxing a man on "organisation"—the cases cited were *Smith Barry* v. *Cordy* (1946) 28 T.C. 250 and *Graham* v. *Green* [1925] 2 K.B. 37. But the use of these cases is just an example of the familiar process of extracting a word or a phrase from particular decisions and converting it into a proposition of law. From the fact that a man was held to trade in insurance policies from having organised the buying and F surrender of them, from the fact that a man who organised a betting business might be thought to be in trade, it does not begin to follow that "organisation" as such is a principle of taxation—or many estimable ladies throughout this country would be emperilled. All depends on what you organise.

It may be said that profits of a scheme such as this ought to be taxed G and that, since some parts of the transactions are "artificial," and not genuinely trading transactions, and since the badge of trade must be placed somewhere, it ought to be placed on Mr. Higgs. This, it may be claimed, represents the reality behind all the artificiality.

But this will not do. In the first place, I do not accept that no tax (under Schedule D) was recoverable against any of the companies or persons directly involved in the trading. To assess the original vendor H companies on the basis of the market value of the properties sold might well be possible (cf. *Petrotim Securities Ltd.* v. *Ayres* [1964] 1 W.L.R. 190); and I am not persuaded that assessments were not capable of being made on the trustees. There is no stark alternative between taxing Mr. Higgs' profits in the hands of the trustees and getting no tax at all.

Secondly, if schemes such as these succeed in taking trading stock profits —by a stripping process—outside the net, the remedy, as in the case of dividend stripping, lies in legislation. Indeed, if one asks for a description

of what this scheme is, if it is not trade, the answer is to be found in the Finance Act 1969, section 32—a section passed eight years after these transactions and so too late to catch them. It is (I take my words directly from the section) an artificial transaction in land by which land held as trading stock is disposed of by an arrangement or scheme which enables a gain to be realised by an indirect method by a person who is a party to or concerned in the scheme. The fact that it can, indeed can only, be so described seems to me to confirm that this case is not one of trading.

I have a genuine sympathy with the numerous courts whose time has been occupied in analysing these transactions. To endeavour to reach a positive result is understandable. But the conclusion seems to me clear that, if a successful attack is to be made, it cannot be by use of the concept of trade. Or, putting it another way, if tax were gained by the use of it that would be at the cost of a serious distortion of a plain concept which would have far-reaching implications. The judgments so holding cannot, in my opinion, be sustained.

I would dismiss the first appeal (that of Ransom (Inspector of Taxes)) and allow the second (that of the trustees).

The Downes appeals

These appeals involve a scheme very similar to that considered in the two Higgs appeals. It is conceded by the revenue that if the Higgs appeals are decided against it, the revenue must fail in the present cases. Indeed, it is clear that in several respects, which need not be gone into, the taxpayers' position in these cases is stronger than that of the taxpayers in the Higgs cases. Accordingly, I do not think it necessary to examine the facts in the instant cases or to do more than conclude that both must be decided in the taxpayers' favour.

The Kilmorie appeals

This case arises out of the transactions considered by the courts and this House in the appeals of *Downes* v. *Dickinson* and *Grant* v. *Trustees of Mrs. Downes' 1962 Settlement*. It is necessary to state some of the separate facts which give rise to this appeal.

The Downes' transaction involved a similar scheme of forward stock stripping to that which I briefly summarised in the Higgs' appeals—similar but with some differences. The subject matter, i.e., the stock, in the Downes case, consisted, not of properties as in the Higgs cases, but of a building agreement made on March 30, 1962, between a Downes company and an outside concern (not connected with the Downes interests) called K. J. Roodhouse Ltd. for the development of the Landywood Estate belonging to the latter company. As consideration for this agreement A. J. Downes & Sons Ltd. paid the sum of £67,500, a commercial price. Shortly after this contract was made, the benefit of it was assigned by A. J. Downes & Sons Ltd. to an outside company for £2,250. Various further transactions followed, similar to those considered in the Higgs appeals, involving a partnership and the trustees of a discretionary settlement made by Mrs. Downes, the object of which was to strip the agreement of its prospective profits so as to enable £60,000 to reach the trustees of the settlement. At the end of the chain was an agreement, dated April 5, 1952, between Opendy Building Co. Ltd. (" Opendy ") which had acquired the building agreement, and the appellant company Kilmorie (Aldridge) Ltd. (" Kilmorie ") which was a " Downes " company. By this agreement

A Kilmorie agreed to carry out the development of the Landywood Estate and to pay (i) all money owing under the building agreement (i.e., the £67,500); (ii) premiums amounting to £77,250—these to be paid as leases if the developed properties were granted. This £77,250 in due course was to provide the £60,000 for the trustees of the discretionary settlement, and a profit for the intermediate finance group. Kilmorie engaged A. J. Downes & Sons Ltd. to do the actual work on the Landywood Estate. B This work was carried out and made good profits—apparently larger than had been foreseen. Kilmorie, in the years ended March 31, 1964, to March 31, 1967, made £83,450 gross. These profits were arrived at after deducting the premium of £77,250 due to Opendy. Of these premiums £19,240 were paid in the year ended March 31, 1964. The question in this appeal is whether the deduction of this sum, in computing Kilmorie's C trading profits, was justified. In order to be so, the deduction must satisfy the requirement of section 137 of the Income Tax Act 1952:

> "Subject to the provisions of this Act, in computing the amount of the profits or gains to be charged under Case I or Case II of Schedule D, no sum shall be deducted in respect of—(*a*) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession or vocation; . . ." D

The special commissioners made, as regards this sum, the following finding:

> "As regards the question before us relating to Kilmorie, the agreement entered into by that company with Opendy in relation to the Landywood Estate building agreement was an essential prerequisite E to the carrying out by Kilmorie of the development of the estate. It proved moreover, in the event to be very much to the advantage of Kilmorie to enter into the first-mentioned agreement (hereinafter referred to as the 'Kilmorie/Opendy agreement') on the terms specified therein. We have, however, to consider the position at the time when the Kilmorie/Opendy agreement was made, and against the background of the series of transactions which led up to it. So F approaching the matter we are of opinion that the Kilmorie/Opendy agreement was entered into by Kilmorie with the objects both of enabling that company to develop the Landywood Estate and of facilitating the scheme for avoiding liability to income tax referred to in paragraph 2 (2) above. In our view the latter object was on the facts of the case one of the main purposes, and not a mere secondary G consequence, of the entering into by Kilmorie of the agreement, and the outlay totalling £19,240 was thus incurred by Kilmorie for dual purposes being purposes one of which was, and one of which was not, a trading purpose."

On this basis they disallowed the deduction and their decision has been upheld by both courts below.

H My Lords, I so entirely agree with the reasoning, as to this matter, of Roskill L.J. that I can deal with this matter shortly: anything more would merely repeat his reasoning on which I cannot improve. Counsel for the taxpayer, in an attractive argument, naturally placed much emphasis on the words "an essential prerequisite to the carrying out by Kilmorie of the development of the estate." This, he said, amounted to a finding that the payment of the £77,250 (£19,240 in the relevant year) had to be made in order to secure the trading stock out of which the profits were made.

If this is so it is not for the courts to examine or even to consider whether the consideration was excessive: how a trader conducts a trade is his business, and it is no concern of the taxing authorities to see whether he could have made more profits than he did.

In my opinion, the commissioners' phrase will not bear the weight sought to be put on it and fails to lay the necessary foundation for the legal proposition which is said to follow from it. What the commissioners meant by "an essential prerequisite" is clear in this context: that is that the agreement with Opendy was a necessary step *in the scheme* which started with the acquisition of the building agreement and ended with the development by Kilmorie/Downes. The scheme required—almost as its lynchpin—an agreement by which the prospective profits, to be made by Kilmorie/Downes, should be passed back through Opendy, so as to reach, as to £60,000, the trustees. The agreement was an essential prerequisite in this sense only: and what is not being said is that it was necessary in a commercial sense. The contrary to that is clearly found in the latter part of the paragraph.

Once then these words are properly understood, the commissioners' finding is fatal to the taxpayers' claim. To have found that to agree to pay £77,250 for the benefit of an agreement which barely a week earlier had been assigned for £2,250 was a commercial purpose would have been simply perverse. After all, the directors of A. J. Downes & Sons Ltd. had considered that, on March 30, 1962, £2,250 was a good price fully reflecting the value of the building agreement. The price Kilmorie paid was 34 times that good price.

Adopting, as I do, the argument more fully developed by Roskill L.J., I am of opinion that the commissioners were right to disallow the deduction.

I would dismiss this appeal.

LORD SIMON OF GLAISDALE. My Lords, these five conjoined appeals arise out of two blatant tax avoidance schemes. Their object was so to develop property that the increment would not attract income tax but be placed as capital in the hands of trustees on discretionary trusts for Mr. Higgs and his issue (in the first scheme) and Mr. Downes and his issue (in the second scheme). In some fiscal systems there is a general provision that any transaction the paramount object of which is the avoidance of tax shall be void for that purpose though valid for all other purposes. Our own fiscal system has no such provision, but rather attempts to deal with tax avoidance schemes specifically as they come to notice. The inevitable result of this and of other matters is a fiscal code of such complexity that many ordinary citizens, particularly those engaged in commerce and industry, seek the aid of experts in handling the tax affairs of themselves and the corporations for which they have responsibility; and, since the burden of taxation is heavy (in some circumstances punitive), and since there is generally some delay before tax avoidance schemes come to light (during which time a rich windfall may be garnered), there is a strong incentive for such experts to devote their talents to devising tax avoidance schemes for clients, actual or potential, and for such clients to adopt the schemes devised. That is what appears to have happened in the instant cases: Mr. Higgs and Mr. Downes themselves did not, on the respective commissioners' findings, fully understand the schemes in which they were involved; while the same group of finance companies played a crucial role in both schemes and drew handsome profits thereby. It may seem hard that a cunningly advised taxpayer should be able to avoid what

A appears to be his equitable share of the general fiscal burden and cast it on the shoulders of his fellow citizens. But for the courts to try to stretch the law to meet hard cases (whether the hardship appears to bear on the individual taxpayer or on the general body of taxpayers as represented by the Inland Revenue) is not merely to make bad law but to run the risk of subverting the rule of law itself. Disagreeable as it may seem that some taxpayers should escape what might appear to be their B fair share of the general burden of national expenditure, it would be far more disagreeable to substitute the rule of caprice for that of law. The most famous warning in the history of our fiscal law is constituted by *Rex* v. *Hampden, Ship-Money Case* (1637) 3 St.Tr. 826. It could be strongly argued that it was contrary to fiscal equity that the financial burden of providing warships (or their money equivalent) for the defence C of the whole realm should fall exclusively on the inhabitants of maritime towns and districts, to the exoneration of inland citizens: yet such, it seems, was the law of the land; and the judges who appear to have stretched that law have not escaped the censure of history. So I think that counsel for the taxpayers was justified, when frankly admitting that your Lordships were concerned with unmeritorious tax avoidance schemes, in drawing attention to *Inland Revenue Commissioners* v. *Duke* D *of Westminster* [1936] A.C. 1. There Lord Tomlin (p. 19) cited Coke (4 Inst. 41), on the danger of "substituting 'the incertain and crooked cord of discretion' for 'the golden and streight metwand of the law.'"

And Lord Russell of Killowen (p. 24) cited Lord Cairns (*Partington* v. *Attorney-General* (1869) L.R. 4 H.L. 100, 122):

> "If the person sought to be taxed comes within the letter of the law E he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be"

—although I do not take either great judge as meaning that the "letter" F of the law was to be interpreted in exclusion of the resolutions in *Heydon's Case* (1584) 3 Co.Rep. 7a.

The letter of the law which falls for primary consideration in the instant appeals is the word "trade" in paragraph 1 (*a*) (ii) of section 122 of the Income Tax Act 1952, which provides that tax under Schedule D "shall be charged in respect of—(*a*) the annual profits or gains arising or G accruing—. . . to any person residing in the United Kingdom from any trade, profession, employment or vocation, . . ."

The Crown alleged that, in the circumstances summarised in the judgments of the Court of Appeal and by my noble and learned friends and fully set out in the cases stated, the sums to which Mr. Higgs and Mr. Downes were respectively assessed were profits or gains which accrued from their respective trades; and, since they were *entitled* to such sums H they were chargeable under section 148 of the Act. Alternatively, the Crown alleged, the trustees of the respective discretionary settlements *received* such profits or gains, so that it was they who were chargeable under section 148. In either alternative the crucial question was whether the sums were profits or gains from any trade carried on by Mr. Higgs and Mr. Downes. But it was common ground before your Lordships that, if any charge to tax arose at all, it was the trustees who were assessable as having *received* the profits or gains.

In the Higgs cases counsel for the Crown advanced the familiar argument that the question whether or not the relevant activity is trade or an adventure or a concern in the nature of trade is one of fact for the commissioners (*Edwards* v. *Bairstow* [1956] A.C. 14), and that the special commissioners had made a finding that Mr. Higgs' relevant activities constituted an adventure in the nature of trade. When faced with the fact that the special commissioners in the Downes cases had found Mr. Downes' similar activities were not an adventure in the nature of trade, counsel for the Crown maintained stoutly, in effect, that sufficient to the appeal is the advantage thereof, and that the Downes appeal was another case. When he came to that he argued that the commissioners were wrong in law in holding that Mr. Downes' activities were not trade.

The meaning of a word or phrase in an Act of Parliament is a question of law not fact; even though the law may then declare that the word or phrase has no statutory meaning beyond its common acceptance and that it is a question of fact whether the circumstances fall within such meaning (*Cozens* v. *Brutus* [1973] A.C. 854). But many words and phrases in English have many shades of meaning and are capable of embracing a great diversity of circumstance. So the interpretation of the language of an Act of Parliament often involves declaring that certain conduct must as a matter of law fall within the statutory language (as was the actual decision in *Edwards* v. *Bairstow* [1956] A.C. 14); that other conduct must as a matter of law fall outside the statutory language; but that whether yet a third category of conduct falls within the statutory language or outside it depends on the evaluation of such conduct by the tribunal of fact. This last question is often appropriately described as one of "fact and degree."

Perhaps I may approach the relation of these propositions to the fiscal law by an example from the matrimonial law. Various statutes used the word "desertion." The meaning of the word was a question of law. So courts were able to hold that, although the ordinary meaning of "desertion" signified A leaving B, the statutory word "desertion" extended as a matter of law to cases where A compelled B to leave him ("constructive desertion"). On the other hand it was long held that, notwithstanding the ordinary meaning, the statutory word "desertion" did not extend to cases where A left B whilst of unsound mind. But this left a large area where the question was one of fact and degree—particularly in relation to constructive desertion, where the judicial decision depends not only on the findings of fact but also on an assessment of degree (i.e. judgment whether the conduct complained of was of such intensity that the other spouse would be acting reasonably in withdrawing from cohabitation). As Asquith L.J. said in *Buchler* v. *Buchler* [1947] P. 25, 46:

> "It is, I think, possible to say of certain courses of conduct that they could not amount to constructive desertion, and of certain other courses that they could not fail to do so. This would appear to be a question of law, involving, as it does, the issue whether there was any evidence or no evidence to support the judge's conclusion. But between the extremes indicated there is obviously a no-man's land where the issue is one of fact. This does not debar an appellate tribunal from disturbing the judge's findings if in the view of that tribunal they are plainly wrong."

A To apply these observations to the instant cases requires two riders. First, where an appeal lies only on a point of law, the appellate tribunal ought only to interfere with a decision falling within " the no-man's land " of fact and degree if the plain error shows that the first instance tribunal must have misdirected itself in law. Secondly, I respectfully agree with Roskill L.J. in the instant case ([1973] 1 W.L.R. 1180, 1204) as to the proper formulation of a case stated where it is alleged that the evidence B does not support a tribunal's finding.

As with " desertion " in the matrimonial statutes, so with " trade " in the Income Tax Act. Its meaning is a matter of law. One of the ordinary meanings of " trade " is " any commercial activity." But for a number of reasons the courts have held that this is wider than the statutory meaning. Within the meaning of the Act a man cannot trade C with himself (cf. *Sharkey* v. *Wernher* [1956] A.C. 58); so that " mutual trading," although a commercial activity, as a matter of law is not " trade " for the purpose of income tax. On the other hand, " trade " in ordinary parlance suggests (as its etymology indicates) some degree of continuance or recurrence; but the law says (this time by statutory definition) that for the purpose of income tax " trade " extends to an isolated adventure or concern in the nature of trade. But between these two extremes there D lies a " no-man's land " of fact and degree where it is for the commissioners to evaluate whether the activity amounts to trade.

In the instant appeals, however, there is no disputed question of fact, nor is there any aspect where the evaluation of degree is in question. There is no material difference, so far as concerns " trade," between the respective activities of Mr. Higgs and Mr. Downes. Either both were E trading, or neither was. The courts below, in reversing the decision of the commissioners in the Downes case, were recognising that a question of law not fact was involved. I respectfully agree. It is immaterial if the formulation of the question of law is whether the activities found were capable of being statutory " trade " on the part of Mr. Higgs and Mr. Downes, or whether the decision in one or the other case discloses a plain F error indicative of misdirection as to the statutory meaning of " trade "— though I myself prefer the latter way of considering the matter.

For the reasons given by my noble and learned friends, I am clearly of opinion that neither Mr. Higgs nor Mr. Downes was, in the transactions in question in these appeals, engaged in trade or in an adventure or in a concern in the nature of trade within the meaning of the Act. The two G matters which most impress me are, first, the extraordinary implications which arise if " trade " is extended to embrace procuring others to trade, and secondly and particularly, the resulting liability to multiple taxation of exactly the same profit of exactly the same transaction. Counsel for the taxpayers in the Higgs cases stated categorically that the Higgs vendor companies were assessable to tax on the basis of the market value of H the assets that they sold: see *Sharkey* v. *Wernher* [1956] A.C. 58 and *Petrotim Securities Ltd.* v. *Ayres* [1964] 1 W.L.R. 190. Counsel for the Crown, in the odd forensic quadrille, was not prepared to concede that tax was necessarily exigible on this basis. Since your Lordships were told that assessments had been raised, it is undesirable to express a concluded opinion; though I should be surprised if steps had not been taken to guard against payment of tax, whether exigible or not. It is sufficient to say that it is easy to envisage circumstances where more than one person

or body would be liable to pay tax on the identical profit of exactly the same transaction, if the Crown is right in asserting that "trade" within the meaning of the Income Tax Act extends to procuring others to trade.

Counsel for the Crown relied on *Smith Barry* v. *Cordy*, 28 T.C. 250, as showing (p. 261) that mere organisation of commercial or mercantile activity can amount to trade. Scott L.J., delivering the judgment of the Court of Appeal, said, at p. 259:

> "There is hardly any activity for gaining a livelihood and not covered by other Schedules, which does not seem to us to be swept into the fiscal net by Schedule D."

So it was held that profits arising from the sale of endowment insurance policies were the profits of trade within Case I of Schedule D. I think there is a logical flaw in the argument. It may well be true that Schedule D *as a whole* is an omnium gatherum Schedule; it by no means follows that all activities for gaining a livelihood not covered by other Schedules are "trade" *within Case I* of that Schedule. I think that today the increment would be taxable as a capital gain, and not as the profit of a trade. In short, I doubt the correctness of the decision.

The conclusion that neither Mr. Higgs nor Mr. Downes, in the transactions in question in these appeals, were trading within the meaning of "trade" in the Income Tax Act makes it unnecessary to consider whether, if they had been trading, there were in the Higgs cases any profits of that trade in the year of assessment. The commissioners held that there were none, since the "trade" produced no profit until the land was developed by Coventry (and sums repaid to Downry and thence finally to the family trust): Megarry J. and the Court of Appeal reversed the commissioners on the point. Out of deference to the full argument before your Lordships I state my conclusion. I agree with the special commissioners. The essence of the case for the Inland Revenue was that the whole composite scheme whereby the land should be so developed that the increment could be taken in a particular way was a trade or an adventure or a concern in the nature of trade on the part of Mr. Higgs. I do not think the Crown can claim in these circumstances that the scheme should be notionally halted at a particular point before its completion, so that a notional profit, which had not yet arisen, could be assessed to tax.

I would therefore hold for the taxpayers in the main Higgs and Downes appeals.

As for the Kilmorie case, I entirely agree with the judgment of the Court of Appeal and with the speeches of my noble and learned friends. I would therefore dismiss this taxpayer's appeal.

LORD CROSS OF CHELSEA. My Lords, the details of the two tax avoidance schemes which were "sold" by Harlox to Mr. Higgs and Mr. Downes respectively are set out in the stated cases and are summarised in the judgments in the courts below. I will not repeat them here. So far as concerns the point at issue in the first two of these three appeals no distinction is to be drawn between the two schemes; but the findings as to the relation of Mr. Higgs and Mr. Downes to the persons other than Harlox and the companies controlled by Harlox—who took part in the schemes and as to the parts played by Mr. Higgs and Mr. Downes respectively in putting the schemes into operation are somewhat more favourable to the

Crown in the Higgs case than in the Downes case. If the Crown cannot succeed in the first it certainly cannot succeed in the second and I will give my opinion on the basis of the findings in the Higgs case. They are that all those who took part in the various transactions (other than Harlox and the companies controlled by Harlox)—that is to say, the Higgs vendor companies, Mrs. Higgs, the trustees of the settlement and Coventry—simply did without question what Mr. Higgs told them to do and that the Harlox companies agreed with Mr. Higgs to play their parts in the scheme because he made it worth their while to do so. Whether Mr. Higgs was himself a shareholder in or a director of the vendor companies or of Coventry is irrelevant to the Crown's argument which would have been—for better or worse—just the same if all the shares in those companies had been held by Mrs. Higgs and she had been their sole director. What is said is that although Mrs. Higgs, the trustees and the various companies were not Mr. Higgs' agents, he was in fact able to cause them and did cause them to play the various parts assigned to them; that his object was financial gain for himself and his family in the shape of the £170,000 paid by Harlox to the trustees of the settlement; that his putting the scheme into operation by virtue of his control over the actors was "an adventure in the nature of trade"; and that the £170,000 was a profit of that trade. This line of argument if pressed to its logical conclusion would, as I see it, lead to some very odd results. It might, for example, be said that a man who expended time and trouble in establishing an ascendancy over a wealthy relative with the object of causing him to settle some property on him and his family was engaged in an adventure in the nature of trade the profit of which would be the sum settled if the scheme succeeded—with the corollary, I suppose, that if the scheme misfired and the relative refused to make the settlement the "trader" could claim any expenses to which he had been put as a trading loss. It may be, however, that counsel for the Crown meant his argument to apply only to cases—such as this—where the "adventurer" procures others to enter into transactions with one another some of which are trading transactions. Procuring others to enter into trading transactions which incidentally throw up a benefit to the procurer may be said to have a flavour of trade about it which is absent from the procuring of direct gifts. But even if so limited the Crown's argument involves some startling consequences. The benefit accruing to the adventurer which is said to be taxable as a profit of his trade may have already borne tax as a result of the transactions in the course of which it arose. Indeed in this very case, it is well arguable that some if not all the £170,000 may have been taxable at one or other stage in the scheme. Those who embark on elaborate tax avoidance schemes cannot of course fairly complain if the result of their efforts is that in the end they pay tax twice over—but the Crown's argument cannot be limited to cases in which the "adventurer" was hoping to avoid tax. If it is right it must apply to any procuring of trading transactions which throw up a benefit to the procurer. What then was the line of reasoning which led Megarry J. and the Court of Appeal to the result to which they came? It may be summarised as follows: "Trade" is a vague word which covers a multitude of diverse activities; as Scott L.J. said in *Smith Barry* v. *Cordy*, 28 T.C. 250, 259: "There is hardly any activity for gaining a livelihood and not covered by other Schedules, which does not seem to us to be swept into the fiscal net by Schedule D"; many of the transactions into which the various actors entered in the course of the scheme were trading transactions in the ordinary sense of the word and this gives "a flavour of

trade " to the activities of Mr. Higgs; there is no case which says that what he was doing does not constitute trade; it is obviously desirable that the £170,000 in question should be subjected to a charge for tax, and so there is no reason why we should not hold that what Mr. Higgs was doing constituted trading.

One can sympathise with their desire to prevent Mr. Higgs from " getting away with it " but that desire has, I think, blinded them to the consequences to which their decision might lead in cases where there was no question of tax avoidance and led them to extend the meaning of the word " trade " beyond all reasonable bounds.

A man cannot be trading or engaged in an adventure in the nature of trade unless there is someone with whom he is trading—someone to whom he supplies something such as goods or services for some return. Here there was no one with whom Mr. Higgs can fairly be said to have " traded." Counsel for the Crown said that his " role " was analogous to that of a broker. A broker procures other people to enter into transactions with one another and that—he submitted—is what Mr. Higgs did. But a broker has a customer; one or other or both of the parties to the transaction in question pays or pay him for bringing them together. Mr. Higgs, by contrast, simply told the parties concerned to carry out the transactions which the scheme which he had adopted required them to carry out. In his reply counsel suggested that Mr. Higgs might be regarded as having " traded " with Harlox by arranging that they should buy the properties belonging to the vendor companies for £286,000 on the terms that they paid £170,000 to the trustees of the settlement; but this suggestion overlooks the fact that under the scheme the properties ended up under the control of Coventry and it is a wholly unrealistic way of describing what happened. Harlox by suggesting the scheme to Mr. Higgs and agreeing for a fee to co-operate with him in carrying it out may have been " trading " with Mr. Higgs; but Mr. Higgs supplied them with nothing. He simply agreed that they should receive their £30,000 fee in the way which the scheme provided. For these reasons I would allow the appeal in the Higgs case and the Downes case. I would only add that though the facts in *Smith Barry* v. *Cordy*, 28 T.C. 250 bear no resemblance to the facts in this case and the decision itself—as opposed to the reasoning of Scott L.J.—is of no assistance to the Crown here—I doubt very much whether the case itself was rightly decided.

The question at issue in the Kilmorie appeal is whether the premiums amounting to £19,500 paid by Kilmorie to Opendy in the year 1963–64 under the agreement between them made on March 21, 1962, was money wholly and exclusively laid out or expended by Kilmorie for the purposes of its trade within the meaning of section 137 (*a*) of the Income Tax Act 1952. The special commissioners held that the £19,500 was not allowable as a deduction on the ground that the agreement was entered into by Kilmorie with a dual purpose—one being to enable Kilmorie to develop the Landywood Estate under the agreement between Roodhouse and one of the Downes' companies to the benefit of which Opendy had become entitled and the other being to facilitate the carrying out of Mr. Downes' scheme.

> " In our view " they said " the latter object was on the facts of the case one of the main purposes and not a mere secondary consequence of the entering into by Kilmorie of the agreement and the outlay totalling £19,500 was thus incurred by Kilmorie for dual purposes one of which was and one of which was not a trading purpose."

In so far as this language suggests that the fact that one of the purposes for which a payment is made is not a trading purpose necessarily leads to the conclusion that the payment must be disallowed it may be open to criticism. Suppose that a retailer is in the habit of buying certain articles from a wholesaler for £10 each which is a fair commercial price, that his son-in-law sets up in business as a wholesaler dealing in similar articles and that thenceforth the retailer deserts the other wholesaler and buys the articles from his son-in-law for £10 each. One of the purposes for which the retailer is entering into the transactions with his son-in-law is to help him in business but nevertheless the cost would be properly allowable because the transactions though entered into in a sense for a dual purpose are bona fide commercial transactions. But though the language used by the commissioners may be open to misunderstanding I have no doubt whatever that their conclusion that the £19,500 was not an allowable deduction was right —and that any other conclusion would have been wholly unreasonable. Suppose that, in the example which I have given, the retailer bought articles from his son-in-law for £15 each which he could have bought from other wholesalers for £10 each then the expense would not have been allowable —at all events to the extent of the extra £5—because the purchases were not genuine commercial transactions but purchases at a fancy price entered into to benefit the vendor. In this case the benefit of the agreement with Roodhouse for which Kilmorie agreed to pay Opendy premiums totalling £77,000 had been sold for £2,500 only a few days previously and Mr. Downes himself had said in evidence that that was a fair price. £77,000 was in truth a fancy price fixed by Downes and Harlox for the purposes of the scheme. Counsel for Kilmorie laid great stress on the fact that Kilmorie —even though it had to pay £77,000 for the benefit of the agreement—nevertheless derived a substantial profit from the transaction and also on the fact that the special commissioners found that Kilmorie's agreement with Opendy " was an essential prerequisite to the carrying out by Kilmorie of the development of the estate." But these facts do not show that the price of £77,000 was a commercial price. It is, of course, true that Kilmorie could not develop the estate unless it acquired the benefit of the agreement from Opendy and that in order to acquire it it had to pay £77,000. Further, it is true that the fact that a price paid is extravagant does not necessarily show that the purchase is not a genuine commercial transaction. A purchaser dealing at arm's length with a vendor may say to himself " The price which he is asking is absurdly high but I cannot get him to take less and I believe that even at that price I can make a profit on the deal. So I will agree to pay what he is asking." But Kilmorie was not dealing at arm's length with Opendy. It was controlled by Downes and it agreed to pay the £77,000 not because its directors other than Downes decided in the exercise of an independent judgment that it was worth Kilmorie's while to agree to pay that price but because the scheme provided for that price being paid. For these reasons I would dismiss the appeal by Kilmorie. The commissioners were not asked to decide whether if the whole £19,500 was not allowable as a deduction a part of it bearing the same proportion to the whole as £77,000 bore to the commercial value of the agreement with Roodhouse ought not to be allowed notwithstanding the word " wholly " in the subsection. When this question was raised before us counsel for the Crown while making no admission said that the revenue authorities would

be willing in this case to allow such a deduction. It is not, therefore, necessary for us to express any opinions on the point of principle which was, indeed, not fully argued.

Appeal of trustees of Higgs settlement allowed.
Crown's appeal in Higgs's case dismissed.
Appeal of trustees of the Downes 1962 *settlement allowed.*
Crown's appeal in Downes's case dismissed.
Appeal of Kilmorie (Aldridge) Ltd. dismissed.

Solicitors: *Pickering, Kenyon & Co.; Solicitors of Inland Revenue.*

J. A. G.

[CHANCERY DIVISION]

* PITT (INSPECTOR OF TAXES) *v.* CASTLE HILL WAREHOUSING CO. LTD.

1974 July 8, 9

Megarry J.

Revenue—Corporation tax—Profits of trade—Expenditure on new access road to company's premises—Previous access through residential area given up as bad for trade—New road providing access no better or worse than previous route—Whether expenditure of capital or revenue nature—Whether deductible from profits—Income and Corporation Taxes Act 1970 (*c.* 10), *s.* 130 (*f*) [1]

The taxpayer company traded by providing warehousing space for manufacturers. Prior to 1966 access to the premises at which most of its business was carried on was along a residential road, and the residents of the road complained to the company and to the local authority of the disturbance caused by heavy lorries travelling to and from the premises. The company considered the nuisance and complaints bad for its trade, and the local authority was anxious that the company should stop using the residential road. In 1965 the local authority proposed building a ring road near to the company's premises, and the company and the local authority entered into an agreement whereby the company would give up its access to the residential road and in return would have two lengths of roadway constructed on land belonging to the local authority, one of which would link its premises with the new ring road and the other of which would run temporarily along the line of the

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[Reported by MRS. HARRIET DUTTON, Barrister-at-Law]

[1] Income and Corporation Taxes Act 1970, s. 130: "Subject to the provisions of the Tax Acts, in computing the amount of the profits or gains to be charged under Case I or Case II of Schedule D, no sum shall be deducted in respect of— . . . (*f*) any capital withdrawn from, or any sum employed or intended to be employed as capital in, the trade, . . ."