COURT OF SESSION (FIRST DIVISION)—16TH AND 17TH FEBRUARY 1966

HOUSE OF LORDS—11TH JANUARY AND 16TH FEBRUARY 1967

Saxone Lilley & Skinner (Holdings) Ltd. *v.* Commissioners of Inland Revenue[1]

Income tax, Schedule D—Capital allowances—Industrial building or structure—Warehouse used for storing goods delivered to purchasers together with some goods not so delivered—Income Tax Act 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2, *c.* 10), *s.* 271.

Income tax—Procedure in Scotland—Appeal—Case Stated—Question of law not stated in the Case may not be argued in the Court of Session.

The Appellant Company was the parent company of a group. One of its subsidiaries traded as manufacturers and retailers of shoes, and others as manufacturers of shoes or as retailers of shoes respectively. The Company erected, and let to a subsidiary whose business was the warehousing of shoes, a central warehouse for shoes manufactured, or purchased for sale by retail, by members of the group. Shoes manufactured by the manufacturing and retailing company were stored in all parts of the warehouse, but the greater part of the shoes stored there had been delivered to purchasers, viz., the retailing companies.

The Inspector of Taxes objected to claims by the Appellant Company for initial, investment and annual allowances for the years 1959–60 *to* 1962–63 *in respect of the warehouse as an industrial building. On appeal, the Company contended,* inter alia, (a) *that the warehouse was not in use for any purpose ancillary to those of a retail shop within s.* 271(3), *Income Tax Act* 1952; (b) *that part of the trade for which it was in use consisted in the storage of shoes manufactured by the manufacturing and retailing company and not yet delivered to a purchaser within s.* 271(1)(*d*)(iii); (c) *that capital allowances were due in respect of the whole cost of the building, or, alternatively, an apportioned part of it. For the Crown it was contended,* inter alia, *that the warehouse was in use for a purpose ancillary to the purposes of retail shops, and that neither the warehouse as a whole nor any identifiable part of it was in use for the purposes of a trade consisting in the storage of shoes manufactured but not yet delivered to any purchaser. The Special Commissioners found that the warehouse was not in use for a purpose ancillary to those of retail shops, but disallowed the claims on the ground that neither the whole building nor any identifiable part of it was in use for part of a trade consisting in the storage of shoes manufactured but not yet delivered to a purchaser within the meaning of s.* 271(1)(*d*)(iii). *The Company demanded a Case; in stating the Case the Commissioners did not include the question whether the building was in use for a purpose ancillary to those of retail shops among the questions of law for the opinion of the Court of Session.*

In the House of Lords the Crown did not pursue the contention that the warehouse was in use for a purpose ancillary to the purposes of retail shops.

[1] Reported (C.S.) 1966 S.L.T. 200; (H.L.) [1967] 1 W.L.R. 501; 111 S.J. 177; [1967] 1 All E.R. 756; 1967 S.L.T. 81.

A Held, *in the Court of Session, that a question of law not put by the Commissioners in the Case could not be argued in the Court of Session.*

Held, *in the House of Lords, that the warehouse was in use for the purpose of a trade consisting in the storage of shoes manufactured but not yet delivered to a purchaser.*

B CASE

Stated for the opinion of the Court of Session, as the Court of Exchequer in Scotland under the Income Tax Management Act 1964, s. 12(5), and the Income Tax Act 1952, s. 64.

I. At meetings of the Commissioners for the Special Purposes of the Income Tax Acts held at London on 22nd and 23rd March 1965 Saxone Lilley & C Skinner (Holdings) Ltd. (hereinafter called "the Appellant Company") appealed against the objection by H.M. Inspector of Taxes to the following claims for the years 1959–60 to 1962–63: (1) initial allowances under s. 265(1) and (2) of the Income Tax Act 1952; (2) investment allowances under s. 16(1) and (2) of the Finance Act 1954; (3) annual allowances under s. 266(1) of the Income Tax Act 1952.

D The claims were made in respect of a building in Leeds, on the ground that it was, or that part of it was, an industrial building or structure, within the meaning of the relevant legislation. For simplicity we refer hereafter to this building as "the warehouse".

II. Shortly stated, the questions for our decision were: (1) whether the whole of the warehouse was an industrial building or structure such that the E allowances in question were due in respect of the whole of the capital expenditure incurred; (2) whether part of the warehouse was an industrial building or structure such that the allowances were due in respect of part of the capital expenditure incurred.

III. Mr. David Philip Farrer gave evidence before us on behalf of the Appellant Company. He has been a director of the Appellant Company since F May 1962; a director of Saxone Shoe Co. Ltd. ("Saxone Kilmarnock") since February 1958; a director of Jacksons Ltd. ("Jacksons") since October 1958.

IV. (1) The Apppellant Company is a holding company with many subsidiaries ("the group"). The names of the members of the group which have a connection with the questions in issue, and their functions inside the group, appear later.

G (2) The Leeds warehouse was built by the Appellant Company, and was let to and occupied by Jacksons, a member of the group, from June 1959. Jacksons' business was the warehousing of shoes.

(3) The principal manufacturer of shoes in the group was Saxone Kilmarnock. This company, in addition to manufacturing, bought shoes from manufacturers inside and outside the group. It also retailed shoes, whether manu- H factured by itself or by other manufacturers inside and outside the group, through approximately 145 retail shops of its own and through retail shops both inside and outside the group. Benefit Footwear Ltd. ("Benefit"), a member of the group, was a retailer only: it retailed some shoes manufactured by Saxone

Kilmarnock but mostly shoes manufactured outside the group. Lilley & Skinner (Sales) Ltd., a member of the group, was a retailer only: it bought shoes from Saxone Kilmarnock or from Saxone Kilmarnock's manufacturers, from George Green & Sons Ltd., a manufacturer within the group at Leicester, and from manufacturers outside the group. Lilley & Skinner (Stores Group) Ltd., a member of the group, was a retailer only; it operated departmental stores and departments in other stores, and bought most of its shoes from outside the group, but also some from Saxone Kilmarnock.

(4) The warehouse is a very large building. The object of the Appellant Company in building it was to provide a central warehouse for all the companies in the group. Before it was built the various companies had their own warehouses, and it was considered more economic to have this one central warehouse.

A copy of a brochure descriptive of the warehouse and its functions and containing various photographs is annexed hereto, marked "A", and forms part of this Case[1]: The building in the foreground of the photograph on page 6 is the headquarters of Benefit, but no question arises in respect of this building.

(5) The warehouse received shoes manufactured by Saxone Kilmarnock, and shoes which that company had bought from manufacturers, whether inside or outside the group; because there was no factory warehouse at Kilmarnock shoes manufactured by Saxone Kilmarnock were arriving from Kilmarnock every night and remained in the warehouse for about 10 to 13 weeks, while shoes from other manufacturers having factory warehouses remained for shorter periods.

The warehouse also received shoes from George Green & Sons Ltd. and Parker Shoes Ltd., which had become a subsidiary in 1961, and shoes manufactured for Benefit by manufacturers outside the group.

Shoes from Saxone Kilmarnock were despatched from the warehouse to Saxone Kilmarnock's own retail shops, to Lilley & Skinner (Sales) Ltd., Lilley & Skinner (Stores Group) Ltd., Benefit and retailers outside the group.

Shoes entering the warehouse from Saxone Kilmarnock and George Green came in transport belonging to Jacksons, and a small proportion of shoes bought outside also came in this transport, which conveyed about a third of all the deliveries to the warehouse. Jacksons' transport was also used for despatch from the warehouse, except that shoes for shops outside the group would be sent by post or train.

(6) There is annexed hereto a document marked "B", and forming part of this Case. Page 1 shows the numbers of pairs of shoes, and their value, stored in the warehouse at the ends of the years 1959 to 1961. Page 2 shows the respective proportions of pairs of shoes manufactured by Saxone Kilmarnock and George Green and not yet sold, and of other manufacturers' shoes at the same dates.

The numbers and values of the shoes stored in the warehouse in the year 1960 and the respective proportions of Saxone Kilmarnock's and George Green's manufactured shoes on the one hand, and other manufacturers' shoes on the other hand, represented a fair average for all years as anticipated at the time when the capital expenditure was incurred.

Since the shoes stored included shoes which had been delivered to purchasers (e.g., retailers who were storing their purchased shoes), it was admitted

[1] Not included in the present print.

A on behalf of the Appellant Company that Jacksons' trade did not consist in the storage of goods manufactured but not yet delivered to any purchaser, within the provisions of s. 271(1)(*d*)(iii), but without prejudice to the Appellant's contention that part of Jackson's trade did consist in such storage.

Pages 3 and 4 give details of despatches from the warehouse (numbers and values, and percentages of numbers and values).

B (7) Shoes arriving at the warehouse were put on a conveyor, and then into a trolley attached to a conveyor belt which drew the trolley to the particular part of the warehouse where they were to be stored.

Shoes manufactured by Saxone Kilmarnock were mainly men's or children's shoes. These shoes were stored where men's shoes, from whatever manufacturer, were normally stored, with the result that in the same rack would be C found shoes manufactured by Saxone Kilmarnock and shoes manufactured outside the group: e.g., two pairs of Saxone Kilmarnock brogues and then a similar pair which was not Saxone Kilmarnock's. During storage shoes, whether Saxone Kilmarnock's or those of other manufacturers, were moved from one part of a fixture containing racks to another part of the fixture. Accordingly it was not possible to go to any particular part of the warehouse and always find D there nothing but Saxone Kilmarnock shoes.

Although Saxone Kilmarnock shoes remained in the warehouse for about 10 to 13 weeks, other shoes remained for a much shorter time, so that there would be a continual change in a rack between the number of Saxone Kilmarnock shoes and the number of shoes of other manufacturers.

V. It was contended on behalf of the Appellant Company:

E A

(1) The warehouse was in use for the purposes of a trade of storage, the transport and handling of the goods being merely incidental to storage.

(2) The warehouse was not a building in use for any purpose ancillary to the purposes of retail shops (s. 271(3)).

B

F (1) Part (see s. 271(2)) of Jacksons' trade consisted in the storage of shoes manufactured by Saxone Kilmarnock but not yet delivered to any purchaser (s. 271(1)(*d*)(iii)).

(2) The warehouse was in use for the said part of Jacksons' trade, so that the proviso to s. 271(2) did not prevent the warehouse from being an industrial building or structure.

G (3) The whole of the warehouse was therefore an industrial building, within the meaning of s. 271(1)(*d*)(iii), and the allowances were due in respect of the whole of the capital cost of the warehouse.

C

In the alternative to B:

(1) Section 333(2) provides that "Any reference in this Part of this Act H to any building . . . shall be construed as including a reference to a part of any building. . . ."

(2) The part of the warehouse which was used for the storage of shoes manufactured but not yet delivered to any purchaser was in use for the pur-

poses of that part of Jacksons' trade which consisted in such storage; allowances were therefore due in respect of part of the capital cost of the warehouse. A

(3) The part of the warehouse which was used for the storage of shoes manufactured but not delivered to any purchaser could not be identified except at particular moments of time, but some method must be found of quantifying the capital cost of the part which under contention (2) above was so used.

(4) The preferable method was to take as the proportion of the capital cost the percentage of the value of shoes manufactured by Saxone Kilmarnock; alternatively, the percentage of the pairs of such shoes (page 2 of Exhibit "B"([1])); this percentage should, as regards the initial and investment allowances, be the percentage for the year 1960 (which the evidence showed represented anticipated use) and, as regards the annual allowances, be the actual percentages at the end of each basis period. B C

VI. It was contended on behalf of the Commissioners of Inland Revenue:

(1) that the warehouse was a distribution centre for all the companies in the group;

(2) that the warehouse was a building in use for a purpose ancillary to the purposes of retail shops, within the meaning of s. 271(3);

(3) that, on the evidence, the warehouse as a whole was not in use for the purposes of a trade consisting in the storage of shoes manufactured but not yet delivered to any purchaser (s. 271(1)(*d*)(iii)); D

(4) that "part of a building" in ss. 271 and 333(2) means a physically identifiable part of a building: on the evidence no physically identifiable part of the warehouse was in use for the storage of shoes manufactured but not yet delivered to any purchaser; E

(5) that the claims for the allowances were correctly objected to by the Inspector of Taxes, and the appeal should be refused.

VII. We, the Commissioners who heard the appeal, reserved our decision and gave it on 4th May 1965, as follows:

We have come to the conclusion that these claims fail.

Although our rejection of two of the Crown's contentions does not affect our decision, we think it right to deal with them. We reject the contention that the Leeds building was merely a distribution centre and that consequently there was no trade of storage. We reject the contention that under s. 271(3) the building was in use for a purpose ancillary to the purposes of retail shops. F

It was admitted on behalf of the Appellant that Jacksons' trade did not *consist* in the storage of goods which, having been manufactured, had not yet been delivered to a purchaser, within the meaning of s. 271(1)(*d*)(iii): the greater proportion of the shoes in the Leeds building had in fact been delivered to purchasers. G

The Appellant's main contention was that part of Jacksons' trade was the storage of shoes which had been manufactured by Saxone Kilmarnock and which had not been delivered to any purchaser; and that, under s. 271(2), the whole of the Leeds building was in use for that part of its trade. While we accept that part of Jacksons' trade was the storage of such shoes, we reject this contention. We do not think it can be said that, by reason of movements over some period of time of shoes manufactured by Saxone Kilmarnock, during the H

([1]) *See* page 128 *post*.

various processes of delivery, storage and dispatch, the whole of the Leeds building was in use for the storage for such shoes.

In the alternative it was contended on behalf of the Appellant that part of the Leeds building was in use for the storage of such shoes. Section 333(2) provides that any reference to any building shall be construed as including a reference to a part of any building; there should, therefore, be an apportionment of the allowances by reference to that part of the Leeds building which was in use for the storage of such shoes. The suggested bases of apportionment were the percentage, preferably of the value of these shoes, or, failing that, the percentage of the shoes.

We reject this contention. Without attempting to give a definition of "part of a building", we think that in its context in this legislation the phrase indicates a part or an area physically identifiable over some period of time. In this sense there is on the facts of this case no part of the Leeds building which was in use for the storage of such shoes. It is therefore impossible to make any apportionment of the capital cost of the building: since it is by reference to capital cost that the allowances in question have to be calculated, we hold that there can be no apportionment of these allowances. If we are wrong in so holding, we would hold that neither of the suggested bases of apportionment is a correct method of apportioning either capital cost or the allowances dependent on such cost.

We hold that the claims fail entirely.

VIII. The Appellant Company immediately after the determination of the appeal declared to us its dissatisfaction therewith as being erroneous in point of law, and on 6th May 1965 required us to state and sign a Case for the opinion of the Court of Session as the Court of Exchequer in Scotland, which Case we have stated and signed accordingly.

The questions of law for the opinion of the Court are:

(1) whether we were right in finding that the warehouse was not in use for the purposes of part of a trade which consisted in the storage of shoes which had been manufactured but not yet delivered to any purchaser;

(2) whether we were right in holding that no part of the warehouse was in use for the purposes of such part of the trade as aforesaid;

(3) if we were right under (1) but wrong under (2), whether the Appellant was right in its contention for apportionment of capital cost by reference to percentages of values of shoes or by reference to percentages of pairs of shoes.

R. W. Quayle, B. James — Commissioners for the Special Purposes of the Income Tax Acts.

Turnstile House,
94–99 High Holborn,
London W.C.1.
16th November 1965.

EXHIBIT B

PROPORTIONS OF FOOTWEAR STORED IN LEEDS WAREHOUSE

Manufacturer	*Pairs* End 1959	End 1960	End 1961	*Value* End 1959	End 1960	End 1961
				£	£	£
Saxone	175,500	230,750	162,250	508,875	622,875	433,625
George Green	5,000	5,000	14,500	11,000	11,000	28,625
Total Group	180,500	235,750	176,750	519,875	633,875	462,250
Other Manufacturers ..	235,229	378,225	460,968	400,971	879,393	907,740
Grand Total	415,729	613,975	637,718	920,846	1,513,268	1,369,990

PROPORTIONS OF FOOTWEAR STORED IN LEEDS WAREHOUSE BY PERCENTAGES

Manufacturer	*Pairs* End 1959	End 1960	End 1961	*Value* End 1959	End 1960	End 1961
	Per cent.	Per cent.	Per cent.	Per cent.	Per cent.	Per cent.
Saxone	42·2	37·6	25·4	55·3	41·2	31·6
George Green	1·2	0·8	2·3	1·2	0·7	2·1
Total Group	43·4	38·4	27·7	56·5	41·9	33·7
Other Manufacturers ..	56·6	61·6	72·3	43·5	58·1	66·3
Grand Total	100·0	100·0	100·0	100·0	100·0	100·0

DESPATCHES OF FOOTWEAR FROM LEEDS WAREHOUSE

Despatched from		*Pairs* 1959	1960	1961	*Value (estimated from average prices)* 1959	1960	1961
					£	£	£
Saxone	Saxone	936,135	2,675,400	3,155,415	1,938,127	6,834,471	8,524,396
	Benefit	4,319	146,897	170,929	14,659	404,257	492,011
	Lilley & Skinner (Sales) Ltd. and Lilley & Skinner (Stores Group) Ltd.	58,471	384,681	480,594	157,307	1,213,068	1,528,480
	Total from Saxone	998,925	3,206,978	3,806,938	2,110,093	8,451,796	10,544,887
Benefit	Benefit	535,000	1,742,568	1,714,472	1,043,250	3,398,011	3,350,078
Saxone and Benefit	Total to Group	1,533,925	4,949,546	5,521,410	3,153,343	11,849,807	13,894,965
Saxone	Others outside the Group	84,737	218,745	250,092	121,028	332,659	378,219
Saxone and Benefit	Grand Total	1,618,662	5,168,291	5,771,502	3,274,371	12,182,466	14,273,184

DESPATCHES OF FOOTWEAR FROM LEEDS WAREHOUSE BY PERCENTAGES

Despatched		*Pairs*			*Value (estimated from average prices)*		
From	*To*	1959	1960	1961	1959	1960	1961
		Per cent.	Per cent.	Per cent.	Per cent.	Per cent.	Per cent.
Saxone	Saxone	57·8	51·9	54·7	59·2	56·1	59·8
	Benefit	0·3	2·8	3·0	·4	3·3	3·4
	Lilley & Skinner (Sales) Ltd., and Lilley & Skinner (Stores Group) Ltd.	3·6	7·4	8·3	4·8	10·0	10·7
	Total from Saxone	61·7	62·1	66·0	64·4	69·4	73·9
Benefit	Benefit	33·1	33·7	29·7	31·9	27·9	23·5
Saxone and Benefit	Total to Group	94·8	95·8	95·7	96·3	97·3	97·4
Saxone	Others outside the Group	5·2	4·2	4·3	3·7	2·7	2·6
Saxone and Benefit	Grand Total	100·0	100·0	100·0	100·0	100·0	100·0

A The case came before the First Division of the Court of Session (the Lord President (Clyde) and Lords Guthrie, Migdale and Cameron) on 16th and 17th February 1966, when judgment was given unanimously against the Crown, with expenses.

E. J. Keith Q.C. and *A. M. M. Grossart* for the Company.

The Solicitor General for Scotland (*H. S. Wilson Q.C.*) and *C. K. Davidson* B for the Crown.

The following cases were cited in argument in addition to those referred to in the judgments: *Ellerker* v. *Union Cold Storage Co. Ltd.* (1938) 22 T.C.195; *Commissioners of Inland Revenue* v. *Leith Harbour & Docks Commissioners* 24 T.C. 118; 1942 S.C. 101; *Dale* v. *Johnson Bros.* (1951) 32 T.C. 487.

C **The Lord President (Clyde)**—This is an appeal from the Special Commissioners, who disallowed a claim for initial and other allowances in respect of a building belonging to the Appellants. The building was erected by them and is let to and occupied by one of their subsidiaries, Jacksons Ltd., whose business is the warehousing of shoes. It is a large up-to-date building which provides a central warehouse for all the companies in the Appellants' group. The ware- D house has a very substantial turnover of shoes per annum. Each of the pairs of shoes remain in the warehouse only for a few weeks. The shoes fall into two categories: (1) those which have been manufactured by a member of the group but not yet delivered to a purchaser, and (2) those which have been bought by a member of the group from a manufacturer, whether inside or outside the group.

To qualify for the allowances in question the warehouse must be an indus- E trial building or structure, and in terms of s. 271(1)(*d*)(iii) of the Income Tax Act 1952, it must be a building or structure in use for the purposes of a trade which consists in the storage of goods or materials which have been manufactured but not yet delivered to any purchaser. Section 271(2) provides, *inter alia*, that:

> "The provisions of subsection (1) of this section shall apply in relation to a part of a trade or undertaking as they apply in relation to a trade or F undertaking".

It is clear that in this warehouse the first category of shoes which I mentioned above falls within s. 271(1)(*d*)(iii), and I shall refer to them hereafter as qualified goods. The second category of shoes does not fall within sub-para. (iii), and I shall refer to them as unqualified goods.

The Special Commissioners reached the conclusion that to enfranchise the G building for the purpose of the allowances it must be wholly used for the purpose of a trade which consists in the storage of qualified goods, and as this building was also used for storing unqualified goods, it did not to any extent fall within the definition of industrial building or structure. It would follow that, as there was no provision for apportioning the use for storing qualified and unqualified goods, the building would therefore be disfranchised even if a very substantial part of its use was for a qualifying purpose. For on this view to be H entitled to be treated as an industrial building or structure it must be wholly in use for the purpose of a trade which consists in the storage of shoes manufactured but not yet sold.

(The Lord President (Clyde))

In my opinion this conclusion is not warranted by the provisions of s. 271(1) of the Act. On a proper construction of that subsection, in my opinion, a building may be an industrial building or structure if it is used for the purpose of a trade for storing qualified goods, even although it is in addition used for the purpose of a trade of storing unqualified goods as well, subject always of course to the rule regarding *de minimis*, which obviously does not arise in the present case. There is nothing in the section about exclusive use, and it does not seem to me that a building can be said not to be used for the purpose of a trade of storing one set of goods merely because in addition to use for that purpose it is also used for the purpose of storing other types of goods. The test in the section is not actual occupation of the building but use for the purpose of a trade of storing certain kinds of goods. Merely because it is also used for another purpose it does not cease to be used for the qualifying purpose.

The arguments presented on behalf of the Crown took a somewhat surprising line. No real attempt was made to support the ground upon which the Special Commissioners have proceeded, but a series of quite separate and independent reasons were put forward for justifying the conclusion to which the Special Commissioners had come. Some of these arguments proceeded in the absence of the necessary findings in fact by the Special Commissioners, and some upon reference to other sections in the Statutes which do not appear to have been argued before the Commissioners. To proceed in this way is a misuse of this form of appeal. The procedure by way of a Case stated for our opinion as the Court of Exchequer in Scotland is not an open appeal from the Special Commissioners, but an appeal on facts stated to us by the Commissioners in which we can only answer the questions put to us by the Commissioners in the light of the facts found proved by them. If the Crown wish to raise other questions they have available to them statutory machinery to enable them to get these questions put, and if they wish further facts stated in the Case by the Commissioners they must lay the necessary foundation for this by leading evidence before the Commissioners and getting the necessary findings by the Commissioners on that evidence. To try to introduce new issues by a side wind in the course of a hearing before us is not fair to the Commissioners, whose views upon them have not been fully stated in the Case, and it is not fair to the taxpayer, who is at least entitled to proper notice of the contentions which he has to meet. I have mentioned these matters because this is the second case this week in which this misuse of the statutory appeal procedure has been made. It is to be hoped that it will not be repeated. I therefore do not propose to say anything regarding the matters which are not properly raised in the Case and to which no proper question is directed.

The main argument for the Crown on the first question put to us was that, although the warehouse was used for the purposes of a trade which did consist in storing qualified goods, it would only be an industrial building or structure within s. 271(1) of the Act if it was predominantly so used. This argument was not apparently presented to the Special Commissioners, and in any event I can find no justification for it in the Statute. If Parliament had so intended it would have been quite simple to have inserted words such as "wholly or mainly", but they are not to be found in s. 271(1). I see no justification for our reading them in when they are not to be found there. After all, the test is not whether the building is used for storage of qualified goods. The test is whether the building is used for the purposes of a trade which consists in the storage of qualified goods. If it is, it is enfranchised under the subsection, and the mere

(The Lord President (Clyde))

A fact that it is also used for the purpose of storing other goods will not take it out of the category of an enfranchised building.

Question (1) in the Case accordingly falls, in my view, to be answered in the negative. Questions (2) and (3), which are directed to questions of apportionment, consequently do not arise.

Lord Guthrie—This case relates to a building in Leeds, built by the Appel-
B lants and let to and occupied by Jacksons Ltd., a subsidiary company of the Appellants. The building is a warehouse, a central warehouse for all the companies associated with the Appellants, and is used for the storage of shoes. The Appellants contend that they are entitled to certain allowances in respect of the warehouse, because it is an industrial building or structure within the meaning of s. 271 of the Income Tax Act 1952 or, at any rate, that part of it is.
C The relevant portion of s. 271(1) is in these terms:

> "'industrial building or structure' means a building or structure in use . . . (*d*) for the purposes of a trade which consists in the storage . . . (iii) of goods or materials which, having been manufactured or produced or subjected, in the course of a trade, to any process, have not yet been delivered to any purchaser".

D Counsel for the Crown contended that the warehouse was not in use for the purposes of a trade which consisted in the storage of goods or materials, but was a distribution centre for the group of companies. Whatever may be the meaning of a distribution centre, the contention, which was rejected by the Special Commissioners, cannot be upheld, because there are no findings in fact in the Case to support it, and it is contrary to the express findings that Jacksons'
E business was the warehousing of shoes, and that the warehouse was used for the storage of shoes. Junior Counsel for the Crown also stated that he wished to submit formally an argument that in any event the Appellants' claim was defeated by s. 271(3), because the building was in use for a purpose ancillary to the purposes of a retail shop. He said that he would not elaborate the submission in view of the decision of this Court in *Kilmarnock Equitable Co-*
F *operative Society, Ltd.* v. *Commissioners of Inland Revenue*(1), but wished to keep the matter open in the event of a further appeal. The contention was urged before the Special Commissioners and rejected by them. Their rejection of it involved a decision by them on a matter of law. That matter of law is not covered by any question stated in the Case, and if the Crown had intended to raise it before this Court, it should have been the subject of a specific question
G of law. I agree with your Lordship that, in the absence of such a question, the matter cannot be competently argued on the Case as stated.

The first question stated by the Special Commissioners is:

> "whether we were right in finding that the warehouse was not in use for the purposes of part of a trade which consisted in the storage of shoes which had been manufactured but not yet delivered to any purchaser".

H The question is stated in that form because of a concession made by the Appellants before the Special Commissioners. The facts elicited show that the shoes stored included shoes which had been manufactured in the course of trade and had not yet been delivered to a purchaser, and also shoes which had been delivered to retailers who had purchased them. The Case, therefore, records

(1) (1966) 42 T.C. 675.

(Lord Guthrie)

that it was admitted on behalf of the Appellant Company that Jacksons' trade did not consist in the storage of goods manufactured but not yet delivered to any purchaser, within the provisions of s. 271(1)(*d*)(iii), but without prejudice to the Appellants' contention that part of Jacksons' trade did consist in such storage. The effect of that concession is that the Appellants' claim is founded on s. 271(2), which is in these terms:

> "The provisions of subsection (1) of this section shall apply in relation to a part of a trade or undertaking as they apply in relation to a trade or undertaking: Provided that where part only of a trade or undertaking complies with the conditions set out in the said provisions, a building or structure shall not, by virtue of this subsection, be an industrial building or structure unless it is in use for the purposes of that part of that trade or undertaking."

The Special Commissioners accepted that part of Jacksons' trade was the storage of shoes which had been manufactured but had not yet been delivered to any purchaser, but decided against the Appellants on the ground that the whole of the building was not in use for the storage of such shoes. The Lord Advocate submitted for the Crown that no part of the trade complied with the provisions of s. 271(1). He maintained that the trade consisted in the storage of shoes, both shoes delivered to a purchaser and shoes undelivered. Although part of the goods was within the scope of s. 271(1)(*d*)(iii), that did not mean that part of the trade consisted in the storage of such goods. On this matter I agree with the Special Commissioners. It seems to me in accordance with the natural meaning of the words of s. 271(2) to hold that, if the trade consists in the storage of shoes delivered to a purchaser and shoes undelivered, then part of the trade consists in the storage of undelivered shoes. But I differ from the Special Commissioners on their ground for deciding against the Appellants. Shoes which had been manufactured but not yet delivered to a purchaser were stored within the warehouse to a material extent, according to the productions in the Case. It seems to me to follow that the building was in use for the purposes of that part of the trade which consisted in the storage of such shoes. Section 271(2) does not say "unless it is in use wholly or solely for the purposes of that part of that trade", and I do not think that it is legitimate to read such a qualification into the subsection. Furthermore, I think that, on the facts found, the whole of the building was in use for the storage of undelivered shoes, since they were stored in any convenient part of the building.

Counsel for the Crown cited the opinion of Lord President Cooper in *Commissioners of Inland Revenue* v. *Lambhill Ironworks Ltd.*[1] 1950 S.C. 331 in support of a contention that it was necessary for the application of s. 271(2) that the use for the purposes of that part of a trade which complied with the provisions of s. 271 (1) had to be the predominant use. The passage in the Lord President's opinion does not support the contention, since the Lord President was dealing with a different topic, whether the purpose of the use of a building was ancillary to the purposes of an office in terms of a prior enactment corresponding to s. 271(3). In my opinion it is enough for the application of s. 271(2) in favour of the Appellants that there was storage to a material extent in the warehouse of undelivered shoes, so that such storage would not fall under the *de minimis* principle.

Accordingly I have reached the conclusion that question (1) in the Case should be answered in the negative, and that the other questions do not arise.

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(1) 31 T.C. 393.

A **Lord Migdale**—I agree with your Lordships that the Special Commissioners have erred in the way in which they have dealt with the first question in this case. The difficulty arises because the various consignments of shoes arriving at the warehouse from manufacturers are put on to conveyors and sent to parts of the building where that type of shoe is normally stored. Thus, a pair of shoes manufactured by Saxone Kilmarnock would be stored on a shelf
B next to a pair of the same type from another manufacturer. Some of these pairs had been bought by a purchaser and so were stored on his behalf, but others had not been sold and so were stored without being delivered to a purchaser. Moreover, the storage arrangements were such that the shoes did not remain for long in one part of the building, but would be moved to shelves in another part. Some stayed for thirteen weeks and others for a shorter time. It was not
C possible to go to any particular part of the warehouse and find there nothing but Saxone Kilmarnock shoes or shoes which had not yet been sold. Moreover, there was a continual change in the racks between the number of Saxone Kilmarnock shoes and shoes from other manufacturers.

To come within the provisions of s. 271(1)(*d*)(iii) the purpose of the trade or part of the trade must consist in the storage of shoes which have not yet been
D delivered to any purchaser. Many of the pairs of shoes in the warehouse fulfilled these conditions, but they were immixed with others which fell outside these requirements because they were held on behalf of the purchaser. The Special Commissioners accepted that part of the trade carried on by Jacksons Ltd. was storing shoes which had not been delivered to any purchaser, but rejected the contention that the whole of the building was in use for the storage of such
E shoes and accordingly held that it was not an industrial building or structure. The only reference to the whole of a building occurs in s. 271(4), where the term is used in contrast to a part of a building.

The question is a short one. To be "an industrial building" within the meaning of the section it must be in use for the purposes of a trade which consists in part in the storage of goods which have been manufactured but not
F yet delivered to any purchaser. The building was in fact in use for such a purpose. True, it was also in use for another purpose—storing shoes for customers. If these two categories of shoes, which I will describe as the "franked" shoes and the "unfranked" shoes, had been put up in separate parts of the building and left there until finally removed, there would have been no problem. But that is not the way in which this business is in fact carried on.
G The whole building was in use for the purpose of storing "unfranked" shoes, as well as for storing "franked" shoes. These shoes were dispersed all over it and were being moved about within the building from time to time. The whole building was in use for the storage of both "franked" and "unfranked" shoes, but I do not think that weakens the Appellants' contention. If at any one time the purchasers withdrew their "unfranked" shoes and left nothing but
H "franked" shoes on the shelves there would be no answer to the Appellants. The "franked" shoes would then be the only ones there, and even if there were empty shelves the whole building would be in use for the storage of such shoes. Let me then suppose "unfranked" shoes are again introduced. Could it be said that the building is no longer used for the storage of "franked" shoes. It might be said, as was contended by the Crown, that the building is no longer used
I exclusively for the storage of "franked" shoes. But s. 271(1) does not say that the building must be used exclusively or predominantly for the enumerated purposes. Section 271(1)(*d*), read along with s.271(2), recognises that the user

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may be for the purposes of part of the trade, which clearly implies that there may be other parts of the trade of storage being carried on, and s.271(4) shows that, if a building consists of different parts devoted to different uses, one part may qualify for relief while another does not because of the use to which it is put. In my view it is enough that the Appellants have shown that the building was in use for the purpose of storing shoes which had not yet been delivered to any purchaser.

The proviso to s. 271(2) deals in express terms with different parts of a trade, and provides that the building is not regarded as an industrial building unless it is in use for the part of the trade which complies with the provisions in s. 271(1)(*d*)(iii), that is, unless it is in use for the storage of "franked" shoes. But here again, nothing is said about exclusive or predominate use. The building is not to be an industrial building by virtue of s. 271(2) unless it is in use for the purposes of the recognised part of the trade. Owing to the kind of operations carried on in this warehouse in fact all parts of the building were in use for the purpose of storing "franked" shoes, and I do not think it matters that parcels of "unfranked" shoes were also in the building.

In my opinion the Commissioners were wrong in reading the section as requiring the Appellants to establish that the whole of the building was in use for the storage of shoes which had not been delivered to any purchaser. I would accordingly answer question (1) in the negative.

In view of the concession given by the Lord Advocate it is not necessary to answer the other questions. I agree with what your Lordship in the Chair has said about the necessity of founding arguments on a question of law before this Court on statements of that proposition in the form of questions framed by the Commissioners.

Lord Cameron—It is a matter of admission that part of the trade for which this building was used was storage of footwear purchased but not yet delivered. It also appears from the Case that no specific part of the building could at any one time be identified or isolated as being devoted or used for this qualified purpose. In these circumstances the Special Commissioners have rejected the Appellants' contention that the building is used for a qualifying purpose, or at least in the alternative that there should be apportionment as to the use made of the building for qualifying and non-qualifying trade. The ground of rejection of the primary contention by the Special Commissioners appears to have been that, as the building was not wholly used for the purpose of a qualified trade, the claim must fail.

It is in light of these facts, to which I have referred, that the statutory provisions have to be construed and applied. Section 271(1)(*d*)(iii) provides, *inter alia*, that:

> "'industrial building or structure' means a building . . . in use . . . (*d*) for the purposes of a trade which consists in the storage . . . (iii) of goods . . . which, having been manufactured or produced or subjected, in the course of a trade, to any process, have not yet been delivered to any purchaser"

The structure of the subsection is important. It starts with a building or structure and goes on to consider the use of that building or structure. *Prima facie*, therefore, it is to the trade carried on by the party claiming allowance in respect of the building or structure that attention is to be directed, and not to the general trade which is carried on by the party. In the next place, there is nothing

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A in this subsection to qualify the extent of use by the addition of such words as "wholly or mainly" or "predominantly"—words which figured largely in the submission on behalf of the Crown but which do not anywhere appear in the section of the Act under review. Now, a building may be used for a particular trade, e.g., storage, but not necessarily in fact occupied by articles stored at any one time. Equally a dock, which is covered in the section, may be empty of B ships for an appreciable period of time by reason, for example, of a trade depression, but this does not mean it is not in use. Thus a building or structure used for storage purposes might well at any given moment either be totally empty or only partly filled. But in these circumstances no one could effectively deny that the building was in use and in use for the purpose of storage, if that was the object of the trader who owned it. If that view be correct, as I think C it is, then the circumstance that the building may not be wholly occupied for a qualified purpose at one time, and is in fact occupied and simultaneously used for other non-qualifying purposes, seems to me to be irrelevant as determining the issue, unless the disparity of actual use between qualified and non-qualified purposes become so extreme as effectively to negative the proposition that the building is in use for a qualified purpose. Further, there is nothing in the Case D to suggest that at any given time the whole storage space would not be devoted to a qualifying purpose, or that at some time or other all the storage space was in fact so used. In these circumstances, and if the matter had stopped there, I should have been inclined to the view that the Special Commissioners erred in their construction of s. 271(1)(*d*), in so far as their decision appeared to require that the building should be wholly devoted to its qualifying use.

E The matter, however, does not end there, because s. 271(2) requires to be taken into account and read along with s. 271 (1). The Lord Advocate, in the final speech for the Crown, pressed the argument that the trade referred to in s. 271(2) was the trade of the taxpayer considered as a whole and not limited to the trade related to the particular building. If he was right in this argument I can see great force in the contention that the provisions of s. 271 (2) are not F available in this case to assist the Appellant. I am not satisfied, however, that the Lord Advocate's argument is correct. The descriptive words used are "trade or undertaking", and the use of the latter word shows conclusively to my mind that the trade or undertaking is one or other of those enumerated in paras. (*a*) to (*f*) of s. 271(1), i.e., the trade or undertaking for which the particular building or structure is in use. The words of s. 271(2) are specifically designed G to enable part of a trade or undertaking to be treated as a trade or undertaking, and "part" as there used can only mean, as I read the subsection, part of the trade or undertaking referred to in s. 271(1). But that trade or undertaking is clearly a trade for which the building or structure is in use, and not the overall trade of the taxpayer as the Lord Advocate's argument contended. As I see it, this makes it very clear that it is not fatal to a statutory claim that the same H building or structure is in use for a qualified or non-qualified trade at the same time, provided always that the building or structure is in use, i.e., actually rather than nominally, at the same time for a qualified purpose.

In this case also I think the issue turns upon a matter of statutory construction, and for the reasons I have given I think that the Special Commissioners misdirected themselves as to the construction of s. 271(1) and (2). I am I fortified in this opinion by the provisions of s. 271(4), which appear to me to make it quite clear that part of a building means an identified or divided part of

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a building, as contrasted with a building whose total space is available for use, and from time to time, as here, is in fact occupied, for example, for the storage of qualified articles or materials.

Being of this opinion, I would answer question (1) as proposed by your Lordship in the Chair and find it unnecessary to answer the remaining questions.

I would only add, agreeing with your Lordship, that I decline to entertain even formally the formal contention advanced by Junior Counsel for the Crown upon the construction of s. 271(3), a contention which was rejected by the Commissioners but is not made subject of a separate question in this Case. In these circumstances I think that in the absence of a specific question it would be both improper and incompetent even formally to entertain this contention.

The Crown having appealed against the above decision, the case came before the House of Lords (Lords Reid, Morris of Borth-y-Gest, Hodson, Pearce and Upjohn) on 11th January 1967, when judgment was reserved. On 16th February 1967 judgment was given unanimously against the Crown, with costs.

The Lord Advocate (*the Rt. Hon. Gordon Stott Q.C.*), *J. Raymond Phillips* (of the English Bar) and *C. K. Davidson* (of the Scottish Bar) for the Crown.

The Hon. H. S. Keith Q.C. (of the Scottish Bar), *C. N. Beattie* (of the English Bar) and *A. M. M. Grossart* (of the Scottish Bar) for the Company.

No cases were cited in argument apart from the case referred to in Lord Reid's opinion.

Lord Reid—My Lords, the Respondents have a number of subsidiary companies which manufacture and retail shoes. This group of companies have a large number of retail shops in various parts of Britain which sell both shoes made by one of the group at Kilmarnock and shoes bought from manufacturers outside the group. The Respondents have found it convenient to have a single large warehouse in Leeds to which all their shoes are brought. They are then stored there until sent out to the retail shops. The question in this case is whether that warehouse is an industrial building within the meaning of s. 271 of the Income Tax Act 1952. If it is, the Respondents are entitled to intial allowances, investment allowances and annual allowances under that Act. The Special Commissioners rejected claims for these allowances, but the First Division of the Court of Session on 17th February 1966 allowed an appeal against this decision.

The relevant parts of s. 271 are:

"271.—(1) Subject to the provisions of this section, in this Chapter, 'industrial building or structure' means a building or structure in use—(*a*) for the purposes of a trade carried on in a mill, factory or other similar premises; or (*b*) for the purposes of a transport, dock, inland navigation, water, electricity, hydraulic power, tunnel or bridge undertaking; or (*c*) for the purposes of a trade which consists in the manufacture of goods or

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A materials or the subjection of goods or materials to any process; or (*d*) for the purposes of a trade which consists in the storage—(i) of goods or materials which are to be used in the manufacture of other goods or materials; or (ii) of goods or materials which are to be subjected, in the course of a trade, to any process; or (iii) of goods or materials which, having been manufactured or produced or subjected, in the course of a trade, to B any process, have not yet been delivered to any purchaser; or (iv) of goods or materials on their arrival by sea or air into any part of the United Kingdom; or (*e*) for the purposes of a trade which consists in the working of any mine, oil well or other source of mineral deposits, or of a foreign plantation; or (*f*) for the purposes of a trade consisting in all or any of the following activities, that is to say, ploughing or cultivating land (other than C land in the occupation of the person carrying on the trade) or doing any other agricultural operation on such land, or threshing the crops of another person; or (*g*) for the purposes of a trade which consists in the catching or taking of fish or shellfish . . . (2) The provisions of subsection (1) of this section shall apply in relation to a part of a trade or undertaking as they apply in relation to a trade or undertaking: Provided that where part only D of a trade or undertaking complies with the conditions set out in the said provisions, a building or structure shall not, by virtue of this subsection, be an industrial building or structure unless it is in use for the purposes of that part of that trade or undertaking. (3) Notwithstanding anything in subsection (1) or subsection (2) of this section, but subject to the provisions of subsection (4) of this section, 'industrial building or structure' does not E include any building or structure in use as, or as part of, a dwelling-house, retail shop, showroom, hotel or office or for any purpose ancillary to the purposes of a dwelling-house, retail shop, showroom, hotel or office".

The shoes manufactured at Kilmarnock come within the scope of s. 271 (1)(*d*)(iii) because, when in this warehouse, they have not yet been delivered to any purchaser. But the other shoes in the warehouse have already been F delivered to the Respondents or one of their subsidiary companies, having been purchased from other manufacturers. During the relevant period there were generally some 500,000 pairs of shoes in the warehouse at any one time, of which a third or so had come from Kilmarnock and the remaining two-thirds or so from outside manufacturers. While in the warehouse these shoes were not kept separate. They were classified so that in each part of the warehouse one would G generally find some of the Kilmarnock shoes and some of the others.

The trade of this warehouse keeper is storing shoes from both these sources, and the contention of the Respondents is that, within the meaning of s. 271 (2), storing the Kilmarnock shoes is a part of his trade. The Commissioners so found, and I think that this is clearly right. I reject the argument that there is no sufficient distinction between the ways in which the two kinds of shoes are H treated to enable one to say that storing the one kind is one part of the trade and storing the other kind is another part. If a trader stores or sells or otherwise deals with two kinds of goods, A and B, I think that it is the ordinary use of language to say that dealing with A is one part of his trade and dealing with B is another part, and I see nothing in the context here to justify giving any other interpretation to "a part of a trade" in s. 271 (2). The question therefore comes I to be whether this warehouse is in use for the purposes of that part of the warehouseman's trade which consisted in the storing of Kilmarnock shoes.

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Again taking the ordinary use of language, it appears to me that it clearly was. Premises can be and often are in use for more than one purpose, and I think that the whole of this warehouse was in use for both parts of the warehouseman's trade, because both kinds of shoes could generally be found stored in every part of it.

The Crown's main argument was that "in use for the purposes of a trade" or of a part of a trade means wholly or mainly in use for such purposes. But that involves writing in words which are not there, and I can see nothing in the context to make that necessary. Moreover, it requires no feat of imagination in a draftsman to see that cases may arise where the same building or the same part of it is being used for two purposes, and if it were intended to exclude such cases I would expect that to be made clear. The Act does deal with the case where one part of a building is used for one purpose and another part is used for a different purpose, but it contains no machinery for dealing with dual use of the same part. Of course there can be cases where the use for a statutory purpose is only intermittent or small and such cases could not reasonably be brought within the Act; but here the use for a statutory purpose was regular and substantial. I think that underlying the Crown's contention is the idea that it is not fair that the trader should get full allowances if the building is used in part for non-statutory purposes. But logically that would lead to the result that substantially the whole use must be for statutory purposes before allowances are due. There would still be injustice, though smaller, if even 40 per cent. was non-statutory use. The Crown did not shrink from the alternative contention that substantially the whole use must be for a statutory purpose, but that would mean doing still greater violence to the words of the Act.

The Crown founded on Lord President Cooper's observations in *Commissioners of Inland Revenue* v. *Lambhill Ironworks Ltd.*(1) 1950 S.C. 331. There an engineering company claimed allowances in respect of its drawing office. The main contention of the Crown, which failed, was that the drawing office was an "office" within the meaning of what is now s. 271(3), but a subsidiary question arose because two of a total of 20 to 35 men who worked there were engaged in work more akin to office work than to industrial work. Dealing with this matter Lord Cooper said(2):

> "... it is obvious that the quality or character of the drawing office as an industrial building or structure can only be determined by looking at the building as a whole, and by reference to its predominant purposes or use, and that it is quite impracticable to attempt to impart to such a building a different character or more than one character because a small proportion of the men employed in it at a given moment may be engaged in work in regard to which a different argument might be applicable."

The Crown say that the test must be the same under both s. 271 (1) and (3), and that the *Lambhill* case is therefore authority for the proposition that under subs. (1) it is the predominant use which determines whether allowances are due. The test could be different, because subs. (3) refers to use "as" an office, and it may be more difficult to hold that a building is in use as two different things than for two different purposes. But even if the test is the same I think that on either view the drawing office in the *Lambhill* case was not in use for non-industrial purposes. This matter must be dealt with on broad commonsense lines, and I think that the presence of two men doing non-industrial work was

(1) 31 T.C. 393. (2) *Ibid.*, at page 399.

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such a relatively small matter that it could not reasonably be said that the building was being used for two purposes, one industrial and the other not. I have some doubt whether Lord Cooper would have reached the same result if a third of the men in the building had been engaged in non-industrial work, because he does mention the possibility of imparting to a building more than one character. But if he did mean that predominant purposes or use must be the test in all cases he went farther than was necessary for the decision of that case and I would not agree with him.

I would therefore dismiss this appeal.

Lord Morris of Borth-y-Gest—My Lords, I concur.

Lord Hodson—My Lords, I concur.

Lord Pearce—My Lords, I concur.

Lord Upjohn—My Lords, I concur.

Questions put :

That the Interlocutor appealed from be recalled.

The Not Contents have it.

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

The Contents have it.

[Solicitors:—Titmuss, Sainer & Webb, for Steedman, Ramage & Co., W.S.; Solicitor of Inland Revenue (England), for Solicitor of Inland Revenue (Scotland).]