HIGH COURT OF JUSTICE (CHANCERY DIVISION)—13 AND 14 FEBRUARY 1978

COURT OF APPEAL—6 AND 7 FEBRUARY AND 2 MARCH 1979

HOUSE OF LORDS—29 AND 30 APRIL AND 19 JUNE 1980

Lionel Simmons Properties Ltd. (in liquidation) and Others *v.* Commissioners of Inland Revenue[1]

Corporation tax—Shortfall—Finance Act 1965, *s* 77*—Acquisition and development of properties by group of associated companies—Decision to liquidate—Sales of properties—Whether trade or investment—Whether properties appropriated to trade.*

The five Appellant Companies, together with other associated companies had been formed over a period of seven years by the liquidator, a quantity surveyor, with the object of acquiring and developing various properties and ultimately floating a public company. In 1966 the liquidator, as chairman of the group, advised that, having regard to the Finance Act 1965, the changes in the field of property development and investment, and the general deterioration in the future prospects of the group, the portfolio of properties held should be sold as and when expedient, and the group liquidated. The properties were disposed of in due course. On appeal against assessments to corporation tax and shortfall, the Companies contended that the surpluses arising on the sales were not trading profits, as contended by the Crown, but proceeds on the realisation of investments. The Special Commissioners found that the composite intention to be attributed to the group was to aim at building a suitable portfolio but to allow the final decision to await on events. The decision to liquidate was not in their view inconsistent with the group's original aim to create investments for retention where possible or, where not possible, for turning to account by way of trade. They held that the profits on the sale of properties which were retained or likely to be retained as investments before liquidation was contemplated were not trading profits, but those arising on disposals of other developments as at this date were trading profits. The Companies appealed.

In the High Court the Companies contended, in the alternative, that the properties were appropriated to stock-in-trade when the decision to liquidate was taken.

The Chancery Division, allowing the three Companies' appeals and dismissing two others, held that the Special Commissioners' decision was inconsistent with their primary findings of fact, which showed that the properties were all acquired with a definite intention, going beyond a mere contingent hope, of building up a permanent investment; that they were not appropriated

(1) Reported (Ch D) [1978] STC 344; (CA) [1979] STC 471; (HL) [1980] 1 WLR 1196; [1980] 2 All ER 798; [1980] STC 350; 124 SJ 630.

to stock-in-trade when the decision to dispose of them was made. The Crown appealed: no appeal by the two companies. A

The Court of Appeal, unanimously reversing the decision below, held that until a decision was taken to treat a property as an investment the surplus on its sale was assessable as a trading profit and the Special Commissioners were entitled on the facts found to infer that no such decision had been taken as regards the properties in question. The Companies appealed. B

The House of Lords (Lord Scarman dissenting), allowing the Companies' appeals, held that the Special Commissioners' finding that the group's original aim was to turn to account "by way of trade" investments which it could not retain was inconsistent with their other findings. The proper conclusion from the primary facts found by the Special Commissioners was that the sales were a realization of capital. C

Per Lord Wilberforce (Viscount Dilhorne, Lord Salmon and Lord Roskill concurring): selling an investment to buy another is not trading. An investment may become trading stock, or *vice versa*, but an asset must be one or the other—it cannot be both, or have an indeterminate status.

CASE D

Stated under the Taxes Management Act 1970, s 56, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the High Court of Justice.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 5, 6, 7, 10 and 11 February 1975, Lionel Simmons (hereinafter called "Mr. Simmons") as liquidator of Lionel Simmons Properties Ltd. (hereinafter called "LSP") appealed against the following assessments to corporation tax: E

(*a*) Total profits (less losses)

Year	Amount
	£
Accounting period to 24 June 1968	133,079
Accounting period to 24 June 1969	Nil
Accounting period 25 June 1969 to 3 December 1969	8,620.

F

(*b*) Shortfall in distributions 1969–70 — £ 33,205.83 (tax).

2. By agreement between the parties we heard at the same time four other appeals by Mr. Simmons as liquidator of the following companies (in order of formation date) Polewin Properties Investments Ltd. ("Polewin"), Richhouse Properties Investments Ltd. ("Richhouse"), Centre Town Developments (Twickenham) Ltd. ("Twickenham"), Centre Town Developments (Barnet) Ltd. ("Barnet"). We have this day stated Cases in respect of our decisions in those four other appeals. LSP, the above four companies and two other companies Hector Properties Investments Ltd. ("Hector") and Centre Town Developments (Hampstead) Ltd. ("Hampstead") formed part of the Lionel Simmons Group (hereinafter called "the Group"). G H

A 3. Shortly stated the questions for our decision were: (*a*) whether the profits arising on the sales of the properties hereinafter mentioned were correctly assessable to corporation tax as trading profits; and (*b*) whether the assessment to shortfall distributions under s 77 of the Finance Act 1965 was correctly made.

4. The following witnesses gave evidence before us: Mr. Simmons; Anthony Alexander Phillips (Mr. Phillips) solicitor, in practice as F. J. Stewart & Co.; B Roger John Graham White (Mr. White), Fellow of the Institute of Chartered Accountants, Fellow of the Institute of Taxation and partner in Messrs. Peat Marwick Mitchell who were auditors to LSP and later to the Group; Donald Du Parc Braham (Mr. Braham) partner in Messrs. Edward Erdman & Co., surveyors and estate agents; John Daniel Spink (Mr. Spink), chartered surveyor, a director of Hambros Bank, also of Bishopsgate Property & General Invest- C ments Ltd., and formerly a director of LSP; Edward Lawson (Mr. Lawson), Fellow of the Institute of Chartered Accountants, and principal advisory accountant to the Inland Revenue.

5. The following documents were proved or admitted before us:

Produced by Appellants:

(1) Memoranda and articles of association of all companies in the Group.

D (2) Accounts of all companies in the Group.

(3) Bundle of correspondence.

(4) Bundle of agreements and deeds comprising: agreement under seal dated 25 April 1962; agreement under seal dated 17 May 1963; agreement under seal dated 4 October 1963; agreement under seal dated 4 October 1963; deed of debenture dated 4 October 1963; agreement under hand dated 10 November E 1964; agreement under hand dated 10 November 1964; share exchange agreement under hand dated 16 December 1964; deed (supplemental to deed of debenture) dated 19 May 1965.

(5) Bundle of minutes of all companies in the Group.

(6) Schedule of lettings.

Produced by Respondents:

F (7) A summary of the property transactions of the Group.

(8) A summary of accumulated profits (losses) on profit and loss account and surpluses on property transactions of the Group.

(9) Summaries of accounts of all companies in the Group.

Copies of such of the above as are not annexed hereto as exhibits are available for inspection by the Court if required.

G 6. As a result of the evidence both oral and documentary adduced before us we find the following facts proved or admitted:

(1) (A) Introductory

In 1949, Mr. Simmons set up his own business as a quantity surveyor. He was then 34 years of age and had been trained and employed by various firms of architects and quantity surveyors. His professional income was small and in H order to supplement it he purchased various small properties for investment. In 1955 he took up an option to buy for £7,500 a 40 years leasehold property in New Cavendish Street, which at the date of the hearing before us he still owned. He borrowed the purchase price and repaid it out of income from the property.

About that time he met Mr. Stevens, an architect who introduced him to the four Chung brothers, Leon, Dennis, Henry and Kenny. The latter were wealthy Malayans, all in London studying for various professions. A

(2) As a result of his association with the Chungs, and especially Leon, who was their spokesman, Mr. Simmons entered on what became a series of transactions through companies formed for the occasion. The companies were in order of formation: Polewin 15 May 1957, Richhouse 5 September 1957, Hector 19 June 1961, Twickenham 18 July 1962, Barnet 21 December 1962, LSP 19 September 1963 and Hampstead 20 May 1964. B

(3) (B) Company Formations and Property Developments

The first company was Polewin, incorporated on 15 May 1957, primarily as a property holding and investment company. Article 24 of the Company's articles of association provided that surplus moneys realised on the sale of properties investments should be treated for all purposes as capital moneys and not as profits available for dividend. The shareholders and directors were Mr. Phillips, as nominee for Mr. Simmons, and the Chungs (Leon, Dennis and Henry) who together held approximately 75 per cent. of the shares until December 1964 when all the shares were transferred to LSP. C

(*a*) Polewin was formed to acquire the lease of a war-damaged site in Wimpole Street, London W, and on which flats and maisonettes were built—14 at 40–41 Wimpole Street and four at 19–21 Wimpole Mews. Stages in the developments were: D

4 April 1957—	Agreement to acquire leasehold interest by Mr. Phillips at the price of £6,000 adopted 16 May 1957.
March 1960—	Building completed. E
20 April 1960—	Head lease (99 years) acquired.
31 August 1960—	Sale of 19–20 Wimpole Mews for £19,939.
28 February 1961—	Sale (for £100,000) to and lease back from Legal and General Assurance Society Ltd. of 40–41 Wimpole Street.
25 March 1961—	Lettings of 40–41 Wimpole Street completed. F

The price of the site (£6,000) was met by the shareholders of Polewin. Temporary finance for building costs initially estimated at £79,500 was raised by a loan of £40,000 from Lloyds Bank, overdraft facilities from the directors' bank, working capital of £30,000 (£7,500 from each director) and loans from directors. As building costs rose it was thought necessary (reluctantly—because it meant diminution of income) to sell 19–20 Wimpole Mews, which fetched £19,939. G The Revenue accepted that that was not dealing. Permanent finance to repay temporary loans was obtained through the sale and lease back transaction with Legal and General Assurance Society.

(*b*) The other property developed by Polewin was on another war-damaged site, in Deansgate, Manchester, and on which a block of offices and shops called Speakers House was built. Stages in that development were: H

27 April 1960—	Agreement to acquire leasehold interest from Manchester Corporation for £46,000.
1 August 1962—	Building completed.
1 August 1962—	Leasehold interest acquired.
14 March 1963—	Lettings completed.

The deposit of £23,000 payable under the agreement and a further £23,000 were advanced by Lombard Banking Ltd. on the security of a second mortgage of the Wimpole Street property (Lloyds Bank having a first mortgage thereon for £40,000). Building finance and the repayment of the £46,000 was provided by Coal Industries Nominees Ltd. (CIN) under an agreement whereby Polewin assigned to CIN the benefit of the agreement with Manchester Corporation and undertook to accept a lease from CIN when building and lettings were completed.

(4) The second company was Richhouse, incorporated on 5 September 1957 primarily as a property holding and investment company. Article 24 of the Company's articles of association was similar to that of Polewin. The shareholders were Mr. Simmons and the four Chung brothers in equal proportions, the directors being Mr. Simmons, Leon, Henry and Dennis. All the shares were transferred to LSP in December 1964.

(*a*) Richhouse was formed to acquire the lease of a site in Dean Street, London W.1, on which a block of offices called 9–11 Richmond Buildings was built. Stages in that development were:

25 September 1957—	Agreement to acquire lease.
11 March 1959—	Building completed.
1 April 1959—	99 year lease granted.
23 February 1960—	Lettings completed.
23 February 1960—	Leasehold sold for £78,000.

The cost of Richmond Buildings was approximately £40,000, of which £30,000 was met by the builders, Tersons Ltd., and the remainder (£10,000) by the Richhouse directors. Efforts were made to obtain a mortgage to retain Richmond Buildings as an investment, but without success. Meantime the Polygon site next mentioned had become available but the builders were pressing for repayment. Richmond Buildings was therefore sold and the proceeds were applied in repaying the builders, and the balance in acquiring from Avenue (Regents Park) Properties Investments Ltd. (an associated company of Richhouse having the same shareholders and directors) the freehold of the Polygon site, which was considered likely to prove a more satisfactory investment than Richmond Buildings.

(*b*) The Polygon site was the freehold of St. Paul's Church, Avenue Road, St. John's Wood, on which a block of 18 flats called The Polygon was built. Stages in that development were:

18 September 1958—	Contract to purchase by Avenue (Regents Park) Properties Investments Ltd. for approximately £36,000.
7 July 1960—	Pursuant to an agreement of 23 October 1959 property transferred to Richhouse for £39,250.
March 1961—	Building completed.
25 March 1962—	Lettings completed.

Building finance amounting to £55,000 was obtained from Lloyds Bank and permanent finance of £150,000 obtained from the Legal and General Assurance Society on a 30 year mortgage.

(5) The third company was Hector (not an appellant), incorporated on 19 June 1961 as a property holding and investment company, the shareholders and directors being Mr. Simmons and Mr. Phillips only. From October 1963 the

shares were held by LSP and Mr. Phillips. Article 23 of this company's articles of association was similar to article 24 of Polewin's articles of association. The Chungs were not involved in this company which was formed to acquire a leasehold site at 13–16 Craven Hill Gardens, Bayswater, on which a block of 49 flats was built. Stages in that development were:

20 June 1961—	Builders agreement with owners of site.
6 April 1964—	Building completed.
April 1964—	Lease granted.
2 March 1969—	Last letting completed.

No capital was required for acquisition of the site, which was acquired by means of a lease at a ground rent of £5,250 per annum. Short term finance for building was provided by Henry Ansbacher & Co. which was repaid on the granting of the lease out of £230,000 advanced by Bishopsgate Property and General Investment Ltd. ("Bishopsgate").

(6) The fourth company was Twickenham, incorporated on 18 July 1962 as a property holding and investment company. Article 24 of the articles of association precluded the distribution of surplus capital moneys as dividends. The shareholders and directors were Mr. Simmons and Mr. Phillips only. From October 1963 the shares were owned by LSP. Again the Chungs were not involved in this company which was formed to acquire a freehold site at 2 Holly Road, Twickenham, on which a block of offices was built. Stages in that development were:

5 February 1962—	Agreement to purchase site for £20,000 adopted 18 February 1962.
April 1963—	Conveyance of legal estate.
April 1964—	Building completed.
24 June 1966—	Lettings completed.

Mr. Simmons paid £2,000 deposit on agreement; the balance of the purchase price was paid out of loans from Richhouse, and building finance (£170,000) was advanced by Bishopsgate. The offices were let well and quickly, and no permanent finance was needed.

(7) The fifth company was Barnet, incorporated on 21 December 1962 as a property holding and investment company and was precluded from distributing surplus capital moneys by way of dividend. The shareholders were Mr. Simmons (35 per cent.), Leon Chung (40 per cent.), and Bishopsgate (25 per cent.) and the directors were Mr. Simmons and Mr. Phillips and later Mr. Charles Gordon, a director of Bishopsgate. (Subsequently Mr. Simmons and Bishopsgate transferred their shares to LSP (see sub-para (8) below) which then became the major shareholder (60 per cent.). Barnet was formed to acquire a freehold site in Barnet on which a block of offices called Kingmaker House was built. Stages in that development were:

15 October 1962—	Agreement to purchase by Richhouse on behalf of Barnet for £65,250 adopted 7 January 1963.
4 October 1963—	Freehold conveyed.
1 March 1965—	Building completed.
12 June 1969—	Lettings completed.

All finance for this development was put up by Bishopsgate.

A (8) The sixth company was **LSP**, incorporated on 19 September 1963, as a property holding and investment company and article 5 of the articles of association provided that surplus moneys on the sundry investments were to be treated as capital moneys and not as Revenue profits. The shareholders were Mr. Simmons (75 per cent.) and Bishopsgate (25 per cent.) and the directors Mr. Simmons, Mr. Phillips and Mr. Gordon. The Chungs were not involved in this B company. LSP acquired (*a*) the freehold site 153–155 East Barnet Road, Barnet on which a block of offices was built, and (*b*) 27 Greville Street, London E.C.2 which was an existing block of offices in dilapidated condition.

(*a*) 153–155 East Barnet Road—stages in that development were:

21 February 1964— Agreement to purchase for £26,000.
21 February 1964— Legal estate acquired.
C 26 February 1966— Building completed.
April 1966— Let as a whole for 21 years.

LSP bought the site and building finance was provided by the British and Continental Banking Co.

(*b*) 27 Greville Street—stages in that development were:

April 1964— Agreement to purchase for £57,500.
D 1 May 1964— Freehold conveyed.
June 1965— Building completed.
March 1968— Lettings completed.

Costs of the acquisition and modernisation of the premises (£25,000) were met out of an advance of £85,000 from Bishopsgate.

(9) The seventh company was Hampstead (not an appellant), incorporated E on 20 May 1964. The shareholders were Arnold Kershman (10 per cent.) and LSP (90 per cent.) and the directors were Mr. Simmons and Mr. Kershman. It was originally intended that Hampstead should trade in order to finance the other Companies, but in deference to the wishes of Mr. Kershman in case the property which Hampstead was formed to acquire was let rather than sold the objects as set out in the draft memorandum of association were amended to F represent those of an investment Company. Hampstead was, however, always regarded and treated within the group as a trading company. Hampstead acquired a lease of 2, 4, 6 and 8 Eton Avenue, London N.W.3 on which it built a block of 35 flats called Lowlands. Stages in that development were:

22 May 1964— Building agreement at premium of £20,000 (subject to revision as per agreement) and ground rent 98½ years.
G 30 April 1966— Building completed.
19 July 1966— Head lease granted.
19 November 1969— Sales completed.

Bishopsgate advanced £90,000 to pay the premiums and acquire the outstanding leasehold interests in the sites, and Lloyds Bank Ltd. advanced £180,000 to cover estimated cost of building, £173,750.

H (10) (C) The Chung's Period

The moving spirit in forming the early companies and carrying out the developments was Mr. Simmons, assisted mainly by Mr. Phillips and Mr. Braham of Messrs. Edward Erdman, surveyors. Mr. Phillips dealt with the formalities of company formation, conveyancing, drafting of agreements and

until Bishopsgate came on the scene negotiated finance, both short and long term. Mr. Braham advised in general on financing developments and in particular on rentals. The Chungs were useful financially in helping Mr. Simmons to establish Polewin and Richhouse in the property development field, but they knew nothing about property, except Leon, who manifested some interest in property matters.

(11) By about May 1961 Mr. Simmons envisaged the assembling of a portfolio of properties sufficiently attractive for the formation of a public quoted company. A year later (May 1962) Mr. Simmons and his associates probed Schroeders on the possibility of such a flotation but were advised that the value of the assets (Wimpole Street, Polygon and Speakers House) was too small. Between these two dates it became clear that the Chungs were reaching the end of their capital and Leon, who had by then dropped his architectural studies, wanted to have things more his own way. It then occurred to Mr. Simmons that his financial position could be jeopardised by the Chungs' joint action. So, when it came to the next projects—Hector (Craven Hill Gardens) and Twickenham (2 Holly Road) Mr. Simmons proceeded with Mr. Phillips alone, without the Chungs. No cash was raised for the acquisition of Craven Hill Gardens and building finance was procured on Mr. Braham's suggestion from Henry Ansbacher & Co. But after he had entered into the contract to purchase 2 Holly Road (5 February 1962) the problem of finding sufficient cash arose. One of Mr. Braham's partners was a director of Bishopsgate and he introduced Mr. Braham to Mr. Spink, then attached to Bishopsgate.

(12) (D) Bishopsgate Period

Bishopsgate became a public quoted company in 1962. It had a close link with Hambros Bank and was an authorised investment trust company specialising in property (mainly commercial), but also involved in backing unquoted property investments companies in order that they could be brought into the market and publicly floated. Bishopsgate did not bring property trading companies to the market. Mr. Spink and Mr. Simmons saw prospect in their future association. Mr. Simmons saw the opportunity of getting into the Hambros sphere and enlarging his portfolio, with the backing of Bishopsgate for short-term finances and the obtaining of long-term finance from institutions, (which were close to Bishopsgate). The upshot was Bishopsgate offered building finance if Mr. Simmons could find the purchase price (£29,450) of 2 Holly Road site. Partly with the object of being able to use Polewin and Richhouse as collateral security in raising money, and partly with the object of ensuring the carriage and control of a public flotation, Mr. Simmons obtained the Chungs' assent to an agreement under seal dated 25 April 1962, to which Mr. Phillips, who drafted it, was also a party. After naming the parties the agreement read as follows:

> "Whereas the parties hereto are entitled to all the issued share capital of Polewin Properties Investments Limited, Richhouse Properties Investments Limited and Hector Properties Investments Limited (hereinafter called 'the said companies') and particulars of the capital structure and assets owned by the said companies are set forth in the Schedules attached hereto and initialled by the parties hereto and Whereas the said Lionel Simmons is the owner of the equitable interest in the site at Grosvenor Road, Twickenham (hereinafter called 'the Grosvenor Road site') as set forth in page 1 of the said Schedules and Whereas it is the intention of the parties hereto to invite the public to subscribe for a specified proportion of the shares in the said companies or a holding company to be formed to acquire the shares in the said companies and Whereas it is intended that this Agreement shall be entered into by the parties hereto so that all

A necessary steps can be taken, advice sought and obtained and acts undertaken on behalf of the parties hereto to achieve the said intention of inviting the public to subscribe for shares as aforesaid and so that no party hereto shall be at liberty to deal with or retain his respective holding or holdings of shares in the said companies except as he or they may be advised in order to achieve the said object of inviting the public to subscribe B for shares as aforesaid Now it is Hereby Agreed and Declared by and between the parties hereto as follows:—1. The provisions of this Agreement and the covenants herein set out shall be enforceable by any one party to this Agreement against any other party or parties to this Agreement. 2. The parties hereto and each of them agree that:—(i) There shall be taken in accordance with the appointment hereinafter contained all necessary C advice and take all necessary steps to invite the public to subscribe for a specific proportion of the share capital in the said Companies or holding company (to be formed to acquire the shares of the said companies or the assets of the said companies (as the parties shall be advised)) such specific proportion to be the minimum permitted by the Council of the Stock Exchange. (ii) The respective proportions of the shares which shall be D allotted to the parties hereto in the Public Company shall be a proportion to the value of the assets (based upon the valuation of the assets made by the valuers instructed in connection with the Invitation to the Public to subscribe for the shares in the Public Company) in the said companies represented by the shares and interests now held respectively by the parties hereto less such proportion thereof as shall be offered to the Public Provided E that the said Lionel Simmons shall be entitled to take into account the value of the office block it is intended to erect on the Grosvenor Road site. (iii) Not to obstruct or place any impediment in the way of the negotiations and all other matters connected with and incidental to the Incorporation of the Public Company. 3. The said Lionel Simmons hereby covenants that he will convey to the Public Company or any other Company to which F he may be advised to convey the same the Grosvenor Road site and any buildings which at the date of the conveyance shall be erected thereon. 4. That the parties hereto shall not so as to prevent them transferring their respective holdings of shares in accordance with the terms of this Agreement transfer, deal with, mortgage, charge or otherwise encumber their shares in the said companies and shall transfer such shares to whomsoever G they shall be advised so to transfer them in connection only with the Incorporation of the Public Company and the Invitation to the Public to subscribe for Shares therein. 5. The said Lionel Simmons is hereby irrevocably appointed by the parties hereto to conduct all negotiations instruct such persons and seek such advice as he shall think fit for the purpose of incorporating a Public Company and inviting the public to subscribe for H shares therein and it is hereby agreed that the said Lionel Simmons shall be appointed chairman of the Public Company upon incorporation thereof. 6. The said Lionel Simmons hereby undertakes that he will take all reasonable steps to keep all other parties hereto informed with regard to the said negotiations. 7. In the event of the said intention of the parties hereto not being implemented this Agreement shall be void and of no effect. In I Witness whereof the parties hereto have hereunto set their hands and seals the day and year first above written."

The reference in the second recital and clauses 2(ii) and 3 to Grosvenor Road was or was intended to be a reference to 2 Holly Road.

(13) The formation of Barnet (21 December 1962) to develop the Kingmaker House site brought to a head the disagreements between Mr. Simmons

and the Chungs, especially Leon. Leon thought he ought to have the larger share. He obtained independent legal advice, to the effect that the agreement of 25 April 1962 (and in particular clause 5) was not binding. The parties smoothed over their differences by agreeing that whoever arranged the building finance would take 60 per cent. of the equity in Barnet and the other 40 per cent. Leon sought backing from Rothschild & Sons without success. Mr. Simmons having now the support of Bishopsgate and an initial loan of £81,000 was able to claim the 60 per cent.

(14) By the time it came to the formation of LSP (19 September 1963) Mr. Simmons was virtually independent of the Chungs and was working closely with Bishopsgate, through Mr. Gordon and Mr. Spink. Mr. Simmons had by now many connections with friends and others in public investment companies and he was bent on following their example. LSP was to be the vehicle or means of consolidating and expanding his portfolio. There followed a series of six agreements: (i) An agreement dated 4 October 1963 between (1) Mr. Simmons and (2) LSP whereby Mr. Simmons transferred his shareholdings in Hector (66·7 per cent.) Twickenham (100 per cent.) and Barnet (35 per cent.) valued at £95,702 to LSP for shares. (ii) An agreement also dated 4 October 1963 between (1) LSP (2) Mr. Simmons and (3) Bishopsgate, whereby, after reciting that LSP was beneficial owner of issued capital in Hector (66·7 per cent.), Twickenham (100 per cent.) and Barnet (35 per cent.), Bishopsgate was to become a 25 per cent. shareholder of LSP and to provide financial facilities secured by a debenture and Mr. Simmons undertook to procure the acquisition of Richhouse by LSP as soon as practicable. LSP and Mr. Simmons covenanted with Bishopsgate not to alter the memorandum or articles of association of LSP, Hector, Twickenham or Barnet nor alter their business from that of property holding. (iii) An agreement also dated 4 October 1963 between (1) LSP (2) Mr. Simmons and (3) Bishopsgate, being the deed of debenture consequent on (ii) above. (iv) An agreement dated 10 November 1964 between (1) Mr. Simmons and (2) LSP whereby Mr. Simmons transferred 1,500 of his shares in Polewin and 200 of his shares in Richhouse to LSP in exchange for other securities to be transferred to him by LSP. (v) An agreement also dated 10 November 1964 between (1) the Chungs and (2) LSP whereby the Chungs agreed to transfer all their shareholdings in Polewin and Richhouse to LSP in exchange for other securities to be transferred to them by LSP. That agreement, for Mr. Simmons, marked the final parting of the ways with the Chungs. (vi) Lastly, an agreement dated 16 December 1964 between (1) Mr. Simmons and (2) LSP, whereby Mr. Simmons agreed to transfer the remainder of his shares in Polewin and Richhouse to LSP in exchange for the allotment of 46,050 ordinary shares credited as fully paid £1 shares in LSP. For the purposes of its subscription for 25 per cent. of the issued shares in LSP, Bishopsgate valued the shares in the companies acquired by LSP as shares in property investment companies. Shares in property trading companies were valued on a different basis.

(15) On the formation of LSP (19 September 1963) the state of the portfolio (five companies and seven properties) was as follows:

Polewin: Wimpole Street (leasehold): the four mews maisonettes and flats had been sold in 1960 for £19,939, and the 14 flats had been sold for £100,000 and leased back in February 1961. By March 1961 the 14 flats were fully let. Deansgate (leasehold, office block): was by March 1963 fully let. Polewin's accounts for 1963 showed (*inter alia*):

	£
Income	58,775
Expenditure	59,611

	£
Loss	836
Fixed assets	63,565
Current assets	42,749
Capital reserve	1,000
Current liabilities	74,107.

Richhouse: Richmond Buildings (leasehold, office block): had been sold in February 1960 for £78,000. The Polygon (freehold, 18 flats) was fully let by March 1962, producing a gross income of £20,807. (£20,472) Richhouse's accounts for 1963 showed:

	£
Income	23,150
Less expenditure	18,377
Profit	4,773
Fixed assets	177,684
Current assets	7,765
Capital reserve	22,334
Mortgage 1st	150,000
Mortgage 2nd	26,887
Current liabilities	24,823.

Hector: Craven Hill Gardens (leasehold 49 flats) was still in the building stage, which was not completed until April 1964. Hector's accounts for 1964 showed:

	£
Income	138
Less expenditure	22,031
Loss	21,893
Fixed assets	203,103
Current assets	3,532
Loan from LSP	195,751
Interest	3,175
Current liabilities	7,023.

Twickenham: 2 Holly Road (freehold, office block) was still in the building stage and not completed until April 1964. Twickenham's accounts for 1964 showed:

	£
Income	131
Less expenditure	13,532
Loss	13,401
Fixed assets	164,020
Loan from LSP	153,133
Interest	9,605
Current liabilities	1,745.

Barnet: Kingmaker House (freehold, office block) was still in the building stage, which was not completed until March 1965. Barnet's accounts for 1964 showed:

	£
Income	Nil
Expenditure	
Loss	10,155
Fixed assets	171,349
Loan from LSP	160,941
Interest	9,598
Current liabilities	847.

(16) About mid-1966 the state of the portfolio (now seven companies and nine properties) was as follows: The Polewin and Richhouse properties (Wimpole Street, Deansgate and Polygon) were fully let, increasing in value and producing substantial income; the Hector, Twickenham and Barnet properties had been completed, but lettings were slow, especially Craven Hill, due partly to the novelty of the architectural design ("Duplex"); LSP's properties (both freehold office blocks) had been built; East Barnet Road was let as a whole to one lessee in April 1966, within two months of building completion; but lettings of 27 Greville Street were slow; Hampstead's Lowlands (leasehold, 35 flats) had been built, but during the building stage the Greater London Council had published plans for the construction of an adjacent motorway, a project which damped the sales of flats.

(17) (E) Disposals. On 27 October 1966 the decision in principle was taken to liquidate the group and to dispose of the properties. During the previous six months or so factors taken into consideration in reaching that decision were:

(*a*) The economic climate had turned less favourable. The Rent Act 1965 and the Finance Act 1965 created many new problems. There were restrictions on credit and office buildings. The property market had passed a peak and was tending to decline slightly. Institutions, rather than taking a share in the equity, had been finding it better to develop and hold their own properties, so that long term finance was even less easy to obtain.

(*b*) The group's borrowings were substantial, and stood in their accounts at 24 June 1966:

		£
Richhouse	Loan on mortgage	150,000
Twickenham	Loan on mortgage	161,495
	(accrued interest)	(21,544)
Barnet	Loan on mortgage	314,485
	(accrued interest)	(55,574)
LSP	Loan on mortgage	605,769
	(accrued interest)	(73,192)
Hampstead	Loan on mortgage (from Lloyds Bank)	167,028.

(*c*) Craven Hill, Kingmaker House, Lowlands and Greville Street were causing concern due to slow lettings or sales which were not completed until March, June and November 1969 respectively. Had those developments not stuck, there should have become available sufficient cash to pay builders and short-term creditors and to avoid breaking up the portfolio. From sales of Lowlands flats alone Lloyds Bank Ltd., the most pressing creditor, could have been repaid. Bishopsgate had agreed that interest on its loans should be rolled over, and while not pressing for repayment, was getting restive.

(*d*) Mr. Simmons realised that his ultimate objective of expanding the portfolio and floating a public company was receding in 1965; he and Mr. Spink had been prepared to wait and see, but they could not afford to wait indefinitely. Two other main investment companies in which Bishopsgate was interested were also liquidated during this period, although a third was in fact floated as a public company. There were a number of smaller Bishopsgate companies which were either liquidated or merged. An exchange of shares with one of the Bishopsgate subsidiaries was considered, but not pursued. The culmination of discussions between Mr. Simmons, Mr. Phillips, and Mr. Spink

were the minutes of directors meeting of LSP held on 27 October 1966, the material parts of which read as follows:

"Present:—L Simmons Esq., Chairman, Anthony Alexander Phillips Esq., Director and Secretary. Minutes The Chairman said that he had given very careful consideration to the position of the Group of Companies in the light of the prevailing conditions in the field of the property development and investment, especially after the Finance Act 1965. This of course had changed the whole complexion of our business and had caused many problems in respect of the raising of money and obtaining long term mortgages, on the basis of which the transaction with Bishopsgate Property and General Investments Limited had been entered into, that is to say, that Bishopsgate were to lend under their Debenture on a short term basis and the loans from Bishopsgate would be funded by long term mortgages. The Chairman referred also to the fact that in the case of Centre Town Developments (Hampstead) Limited, where a large temporary loan had been arranged with Lloyds Bank Limited, owing to the Government's credit squeeze, Lloyds Bank Limited were pressing for repayment and alternative sources of temporary credit were unobtainable also Bishopsgate Property and General Investments Limited were requiring certain repayments due to interest on the loans which had not been made, and therefore the Company was finding itself to be in a difficult financial position. Having given very great consideration to all problems the Chairman said that he regretfully felt that there was no alternative but to depart from the original intention of the Company and its subsidiaries, which was expressed in the Agreement entered into on 4 October 1963 between Lionel Simmons Properties Limited, the Chairman and Bishopsgate Property and General Investments Limited the ultimate object of which was to apply for quotation on the London Stock Exchange. The Chairman now felt that it was no longer possible or advisable to proceed as an investment Group and to offer the shares to the public because there was an extreme urgency to fund Lloyds Bank Limited and Bishopsgate Property and General Investments Limited as the Chairman had referred to above, and also owing to the new legislation the future prospects of this Company and its subsidiaries as Property Investment Companies had deteriorated. The Chairman therefore felt that, reluctantly, he should advise the Company that there was no alternative but to sell the various properties as and when it was expedient to do so and to liquidate the portfolio."

(18) Disposals of the properties were made in the following sequence: 9–11 Richmond Buildings was sold to the Oddfellows Friendly Society on 23 February 1960 for £78,000 realising a net surplus of £25,334. Holly Road was sold in April 1967 to Glaxo Trust for £360,000 realising a net surplus of £180,047. That early disposal enabled Mr. Simmons to relieve the heaviest financial pressure. Deansgate was sold in November 1967 to the Co-operative Society for £180,000 realising a net surplus of £112,240. East Barnet Road was sold in May 1968 to one F. Rind for £335,000 realising a net surplus of £183,047. 27 Greville Street was sold in June 1969 (one floor being still unlet) to Bishopsgate for £120,000 realising a net surplus of £32,576. Craven Hill (which was not fully let until March 1969) was sold in June 1969 to a subsidiary of Bishopsgate for £250,000 realising a deficit of £6,872. Kingmaker House was sold when the last office was let in June 1969 to Hambros Bank Nominees for £872,430 realising a surplus of £516,994. Lowlands flats were completely sold (but at lowered prices, from £10,500 to £8,500) by November 1969 to various sublessees for £330,722 and by December 1969 the head lease was acquired by Mr. Simmons as an investment for his son for £15,000 realising a net surplus of

£47,506. Wimpole Street was sold in December 1969 to Mr. Simmons' son for £30,000 which together with the £19,939 in 1960 and the £100,000 in 1961 (see sub-para (3)(*a*) above) totalled £149,939 realising a net surplus of £23,769. The head lease of Polygon was sold in December 1969 to Mr. Simmons for £217,500 realising a net surplus of £31,423. That property Mr. Simmons still retained as an investment. Total net surplus £1,146,064. Over the period of disposals there were numerous discussions between the parties. There were no special plans and market opportunities were considered as they arose. After the depression in 1966 the market improved in 1968 but then it was too late to reverse the decision, 2 Holly Road and Deansgate, two of the best properties, having been sold; and in any event Craven Hill, Kingmaker House and Lowlands developments were still floundering.

(19) The accounts of each company were the sort of accounts drawn up for an investment holding company, the main source of income credited to profit and loss account being rents receivable, with surpluses realised on disposals of properties being credited to capital reserve. The following figures are the accumulated totals, to 3 December 1969, of the net profits (losses) on profit and loss account and accumulated surpluses (deficits) on capital reserve for each of the companies.

	Accumulated profits (or losses) £	*Surplus* (or deficit) £	*Net surplus* (or loss) £
Polewin	47,721	136,009	183,730
Richhouse	12,539	56,757	69,296
Hector	14,569	(6,872)	7,697
Twickenham	(6,229)	180,047	173,818
Barnet	(108,963)	516,994	408,031
LSP	(86,886)	215,623	128,737
Hampstead	(69,219)	47,506	(21,713)
			949,584.

(20) It was common ground that if any assessment to corporation tax were upheld the corresponding assessment to shortfall under s 77 of the Finance Act 1965 was automatic and must also be upheld.

7. It was contended on behalf of the Appellant that: (1) the properties in question were acquired for retention as investments and this was supported by the facts that: (*a*) the nature of the properties in question (blocks of offices or flats) was eminently suitable for long term holding; (*b*) strenuous and protracted efforts were made to obtain long term finance and tenants; (*c*) the participation of Bishopsgate pointed to investment rather than dealing; (*d*) the aim of the group was the public flotation of a property investment company; (*e*) the reason for all the disposals was the reversal of previously favourable expectations; (*f*) six of the nine properties were in fact sold to shareholders for long term investment;

(2) the appeals should be upheld and the assessments discharged.

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

(*a*) each of the companies had failed to discharge the onus of showing that its properties had been acquired solely for retention as investments;

(*b*) all the acquisitions and disposals in question were trading transactions;
(*c*) the respective profits were correctly assessable to corporation tax;
(*d*) the appeals should be dismissed in principle, leaving figures to be agreed.

9. The following cases were cited: *Rellim, Ltd.* v. *Vise* 32 TC 254; *Shadford* v. *H. Fairweather & Co. Ltd.* 43 TC 291; *Eames* v. *Stepnell Properties Ltd.* 43 TC 678; [1967] 1 WLR 593.

10. We, the Commissioners who heard the appeal, took time to consider our decision and gave it in writing on 24 April 1975 as follows:

We have before us a number of appeals by the same liquidator against assessments to corporation tax and shortfall in respect of the above five companies, and we are asked to give a decision in principle, leaving final figures to be agreed between the parties.

The issue in the case of all the companies is whether the surpluses which arose on sales of the properties in question (see document 7) should be assessed as trading profits, as the Crown contends, or as proceeds on realisation of completed or uncompleted investments as the Appellant liquidator contends. The five companies were part of a group, which also included Hector Properties Investments Ltd. ("Hector") and Centre Town Developments (Hampstead) Ltd. ("Hampstead"). Appeals by the latter two companies are not before us, but it is common ground between the parties that we should pay regard to the acquisition development and sale of each property undertaken by each of the seven companies, in the context of the decision taken on 26 October 1966 to liquidate all the companies in the group and sell off their properties.

We accept the evidence of Mr. Simmons, Mr. Phillips and Mr. Spink, to the effect that the acquisitions with which they were respectively concerned were initially entered into primarily for the purposes of creating and retaining investments, and not primarily for the purposes of immediate sales after development. We also accept that the overall and eventual ambition or purpose of Mr. Simmons personally was the flotation of a public company when sufficient and suitable investments had been gathered together. However, we do not think acceptance of that evidence is an end of the matter and automatically puts the eventual disposals into the category of non-trading.

The pattern of Mr. Simmons and his associates was to acquire and develop sites with a view to creating permanent investments, relying on short- and long-term loans for the various stages. From the early transactions of Polewin and Richhouse, and also from the later transaction of Hampstead, it is evident that Mr. Simmons was or had to be prepared to realise one development or part thereof before it became a completed investment, in order to find or conserve funds for another development which he thought had better prospects. It was not until at a late stage in the process, or until after completion of lettings, that he could be in a position to decide finally whether to retain or not. We find that the composite intention to be attributed to the group was to aim at building up a suitable portfolio of investments but to allow the final decision whether to retain to await on events.

It was of the essence of the Appellant's case that the minutes of LSP dated 27 October 1966 incorporating the decision to liquidate gave effect to change of intention, due to reversal of expectations which until then had been favourable. By that date the difficulties and problems facing the group were such that it had

for some time appeared unlikely that the group could become suitable for public flotation, and the more advantageous course was to sell the group's properties. The decision to liquidate was in our view not inconsistent with the original aim—to create investments for retention where possible, or where not possible for turning to account by way of trade.

On the above view of the facts it seems to us that the decision to liquidate only saves surpluses on properties which were retained, or likely to be retained, as investments, before the liquidation was contemplated. It follows, in our view, that so far as the uncompleted investments are concerned the appeals of Barnet and LSP (in respect of 27 Greville Street) must fail, and we hold that the respective surpluses of £516,994 and £32,576 were trading profits.

With regard to the appeals of Twickenham and LSP (in respect of East Barnet Road) the final lettings of the properties were completed approximately only one month and seven months before the formal decision to liquidate. That decision had been under consideration for some time previously, making the retention of the properties, which had not begun to produce any surpluses on income accounts, unlikely. In all the circumstances we regard the respective surpluses of £180,047 and £183,047 as trading profits, and we so hold.

Taking the remaining companies, in the order in which their properties were wholly or partially disposed of, we find as follows:

Polewin

(*a*) Wimpole Street. The Revenue initially accepted (wrongly as it now believes) that the sale of the mews properties in 1960 for £19,939 was not dealing. The sale of the freehold in February 1961 for £100,000 was in our view a dealing transaction, being inconsistent with any steps taken to build up a portfolio. The leasehold, however, was retained as a completed investment from March 1961, and was sold in December 1969 for £30,000. We hold that the only part of the surplus (£23,769) not to be treated as trading profit is the appropriate fraction attributable to the £30,000, the Revenue being content not to claim the further fraction attributable to the £19,939.

(*b*) Deansgate. This property was an investment, completely created in 1963 and retained for a substantial period, i.e. until November 1967, when it was sold for £180,000, producing a surplus of £112,240, which we hold was not trading profit.

Richhouse

(*a*) Richmond Buildings. This property was sold in February 1960 for £78,000 shortly after completion. For the like reasons given in relation to the Wimpole Street property, we regard this as a dealing transaction and we hold that the surplus of £25,334 was trading profit.

(*b*) Polygon. This property was an investment completely created by March 1962, retained until its sale in December 1969 for £217,500, and taken over by Mr. Simmons. We hold that the surplus of £31,423 on realisation was not trading profit.

We have indicated the extent to which we uphold or dismiss the appeals in principle. We adjourn final determination of figures in all appeals pending agreement between the parties.

11. Figures were not agreed between the parties until 31 December 1975 and on 26 March 1976 we adjusted the assessments as follows: Corporation tax: Accounting period to 24 June 1968, assessment confirmed in £133,079

(£162,326 less losses £29,247). Accounting period to 24 June 1969, assessment confirmed in net nil (£32,576 less losses £32,576). Accounting period to 3 December 1969, assessment confirmed in £8,620 (£13,347 less losses £4,727). 1969–70 shortfall assessment reduced to £33,200 tax on £80,485.

12. The Appellant immediately after the determination of the appeal declared to us his dissatisfaction therewith as being erroneous in point of law and on 15 April 1976 required us to state a Case for the opinion of the High Court pursuant to the Taxes Management Act 1970, s 56, which Case we have stated and do sign accordingly.

13. The question of law for the opinion of the Court is whether our decision was erroneous in point of law.

B. James
J. B. Hodgson
} Commissioners for the Special Purposes of the Income Tax Acts

Turnstile House
94–99 High Holborn
London WC1V 6LQ

8 February 1977

The cases were heard in the Chancery Division on 13 and 14 February 1978 when judgment was given against the Crown on three appeals, with costs and judgment was given in favour of the Crown on two appeals, with costs.

Michael Nolan Q.C. and *D. A. Shirley* for the Companies.

Patrick Medd Q.C. and *Brian Davenport* for the Crown.

The cases cited in argument are referred to in the judgment.

Goulding J.—I have before me five appeals by way of Case Stated on the part of Lionel Simmons, as liquidator of five several companies, against decisions of the Special Commissioners. The five appeals are closely interrelated. The appeals before the Special Commissioners were brought against assessments on the five companies to corporation tax and "shortfall". The question in all cases was whether surpluses which arose on sales of certain properties belonging to the several companies should be assessed as trading profits, as the Crown contended, or as proceeds of the realisation of investments, as the Appellant liquidator contended. The five companies were part of a group of companies all now in liquidation. The parent company, one of the companies involved in the appeals, was Lionel Simmons Properties Ltd., which, in the Cases they have stated, the Commissioners refer to as "LSP". In that principal company Mr. Simmons, the Appellant, owned 75 per cent. of the issued capital and Bishopsgate Property and General Investments Ltd. owned the remaining 25 per cent. I shall follow the Special Commissioners in referring to the last mentioned company as "Bishopsgate". It is a quoted investment holding company associated in business with Hambros Bank. In the years 1967, 1968 and 1969 the companies in the group sold off nine blocks of offices or flats in circumstances that I shall be describing in a moment. Of the nine sales one resulted in a loss and one was a

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sale by a company that was admittedly a property trading company and accordingly yielded a sum assessable as trading profit. The Special Commissioners were not troubled by appeals in those two cases. They had to consider the remaining seven transactions effected when the group disposed of its properties and, having heard argument on both sides, they decided that three of them were to be treated as sales of permanent investments, resulting accordingly in a surplus on capital account, and that the remaining four were to be treated as resulting in a trading profit. In respect of those last four Mr. Simmons, as liquidator of the companies in the group, appeals to the Court.

It will be convenient if I first give details of the four transactions, to show what their character was in financial terms. I take first the freehold property called 2 Holly Road, Twickenham. A company was formed in 1962 under the name of Centre Town Developments (Twickenham) Ltd. for the purpose of acquiring that site and shortly after its incorporation the company adopted a contract which had been made for the purchase thereof. A conveyance of the legal estate to the Twickenham company was made in April 1963. It completed the building of a block of offices a year later and by midsummer 1966 the block was completely let. It was sold in April 1967 and the net surplus on the sale was £180,047.

The next property was another freehold site at Barnet and again a company was incorporated for the purpose of acquiring the site. The name of that company was Centre Town Developments (Barnet) Ltd. It was incorporated in December 1962 and adopted a contract for purchase made shortly before. The purchase was completed in October 1963; the building of an office block on the site was completed in March 1965 and it was completely let at some time before June 1969, when it was sold, yielding a net surplus of £516,994.

The other two properties with which I am concerned belonged to the parent company, Lionel Simmons Properties Ltd. One was in East Barnet Road at Barnet. It was a freehold site bought in February 1964. A block of offices was built and completed in February 1966 and it was let as a whole on a 21-year lease in April 1966. That East Barnet Road property was sold in May 1968 yielding a net surplus of £183,047.

Finally, Lionel Simmons Properties Ltd. had another property, 27 Greville Street, which I think is near Gray's Inn. It contracted to buy the freehold of that in April 1964 and completion was on 1 May; the building was finished in June 1965 and it was let by March 1968 except, I think, for one floor which remained unlet when the Greville Street property was sold in June 1969 yielding a net surplus of £32,576. Those were the transactions which led to the disputed assessments which are before the Court today.

The facts found by the Special Commissioners are narrated at length in one of the Cases which they have stated; namely, that referring to the parent company. It is not an easy document to summarise. I have endeavoured to make my decision on the full facts set out in the Case Stated, but I shall here give only an outline of it so far as necessary to make my views intelligible. Mr. Simmons, the Appellant, began his interest in the acquisition and development of landed properties as long ago as 1957. Originally his financial resources were comparatively slender and he was assisted with finance by four brothers of Asiatic origin called Chung. Through various companies he began to build up his

A interest in properties from that date. The beginning of the group as it developed is described by the Special Commissioners in their findings as follows:

> "By about May 1961 Mr. Simmons envisaged the assembling of a portfolio of properties sufficiently attractive for the formation of a public quoted company. A year later (May 1962) Mr. Simmons and his associates probed Schroeders on the possibility of such a flotation but were advised
> B that the value of the assets . . . was too small. Between these two dates it became clear that the Chungs were reaching the end of their capital."

About this time, I think in the early part of 1962, Mr. Simmons met a Mr. Spink, who was a director of Bishopsgate. The findings in the Case Stated about Bishopsgate are as follows:

> "Bishopsgate became a public quoted company in 1962. It had a close
> C link with Hambros Bank and was an authorised investment trust company specialising in property (mainly commercial), but also involved in backing unquoted property investments companies in order that they could be brought into the market and publicly floated. Bishopsgate did not bring property trading companies to the market. Mr. Spink and Mr. Simmons saw prospect in their future association. Mr. Simmons saw the opportunity
> D of getting into the Hambros sphere and enlarging his portfolio, with the backing of Bishopsgate for short-term finances and the obtaining of long-term finance from institutions (which were close to Bishopsgate)."

A step in Mr. Simmons's plans, which is set out at some length in the Case Stated but to which I shall refer only very briefly, was the execution of an agreement dated 25 April 1962, to which the Chung brothers were party and
E in which they agreed that Mr. Simmons should be authorised by them, practically speaking, to take such steps as he thought fit for the purpose of incorporating a public company to hold the shares of the group. The Special Commissioners mention that, I think, because it fixes a date at which the clear intention of Mr. Simmons was embodied in a formal document.

In September 1963 the parent company, LSP, was formed with the division
F of interests I have already mentioned, 75 per cent. and 25 per cent., and in due course it acquired controlling interests in all the other members of the group. The Special Commissioners say:

> "By the time it came to the formation of LSP (19 September 1963) Mr. Simmons was virtually independent of the Chungs and was working closely with Bishopsgate, through Mr. Gordon and Mr. Spink. Mr.
> G Simmons had by now many connections with friends and others in public investment companies and he was bent on following their example. LSP was to be the vehicle or means of consolidating and expanding his portfolio."

I interpolate that Mr. Gordon, there referred to, was one of the directors of Bishopsgate.

The Case Stated sets out a series of agreements entered into in 1963 and
H 1964 in the course of constituting the group in its final form. I do not think it necessary to recite them, but it is noticeable that there was in one of the agreements, in October 1963, a covenant by LSP and by Mr. Simmons personally with Bishopsgate "not to alter the Memorandum or Articles of Association of LSP", the Twickenham company, the Barnet company and one other, "nor alter their business from that of property holding". The Special Commissioners

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also found in connection with these agreements that, for the purpose of subscribing for 25 per cent. of the issued shares in LSP, "Bishopsgate valued the shares in the companies acquired by LSP as shares in property investment companies". "Shares in property trading companies", they say, "were valued on a different basis". At that time, in October 1963, the group had three properties that were completed, fully let and put on a permanent financial footing, and three others that were still in course of construction.

In 1965 the tide of circumstance began to turn against Mr. Simmons's ambition. It was not a good time in the property market and it was a time of changing law as regards taxation. The group, however, persevered. By the middle of 1966 the group had completed nine blocks of offices or flats, five of which were fully let. The letting of the other four, however, was (to use the colloquial word) "sticking" and short-term creditors were pressing for their money. In those circumstances, a decision was taken by Mr. Simmons and Bishopsgate to dispose of the properties. Of that, the Special Commissioners say:

> "On 27 October 1966 the decision in principle was taken to liquidate the group and to dispose of the properties. During the previous six months or so factors taken into consideration in reaching that decision were: (*a*) The economic climate had turned less favourable. The Rent Act 1965 and the Finance Act 1965 created many new problems. There were restrictions on credit and office buildings. The property market had passed a peak and was tending to decline slightly. Institutions, rather than taking a share in the equity, had been finding it better to develop and hold their own properties, so that long-term finance was even less easy to obtain. (*b*) The group's borrowings were substantial"

and then they give particulars of the loans. Then, in para 6(17)(*c*), four properties which are named "were causing concern, due to slow lettings or sales, which were not completed until" 1969. Then they say: "Had those developments not stuck, there should have become available sufficient cash to pay builders and short-term creditors and to avoid breaking up the portfolio", and some details are given of that situation.

> "(*d*) Mr. Simmons realised that his ultimate objective of expanding the portfolio and floating a public company was receding in 1965; he and Mr. Spink had been prepared to wait and see, but they could not afford to wait indefinitely. Two other main investment companies in which Bishopsgate was interested were also liquidated during this period, although a third was in fact floated as a public company."

I need not read that further to show the circumstances in which it was decided to sell. The nine properties of the group were in fact sold, as I have already said. The first three, which included the Twickenham property, were sold to purchasers outside the group in every respect; the remaining six to the two shareholders, Mr. Simmons and Bishopsgate, or persons associated with them. The Special Commissioners wind up the narrative by saying this:

> "Over the period of disposals there were numerous discussions between the parties. There were no special plans and market opportunities were considered as they arose. After the depression in 1966 the market improved in 1968 but then it was too late to reverse the decision, 2 Holly Road and Deansgate, two of the best properties, having been sold; and in any event" three others which they name "were still floundering."

A The one trading company in the group, to which I have referred, was formed late; namely, in the year 1964. It was called Centre Town Developments (Hampstead) Ltd. The Special Commissioners say of that: "It was originally intended that Hampstead should trade in order to finance the other Companies" and "Hampstead was . . . always regarded and treated within the group as a trading company". In fact, it had only one property, because it was overtaken B by the events I have mentioned. That was a site in Eton Avenue, Hampstead, where it built a block of 35 flats. The trading character of the company is not shown by its memorandum and articles of association, which are clearly appropriate to a property holding company, like the memorandum and articles of each of the other companies in the group. I think the Special Commissioners attached very little importance to the memorandum and articles of association C of the various companies, and I am doing the same.

I have stated the background, so far as possible in the language of the Case Stated itself, to the disposals of the four properties whereof I gave the facts and figures at the beginning of my judgment. I ought, however, to refer to two of the other properties whose history the Special Commissioners investigated for the purpose of the appeals before them, for they clearly attached some consider- D able significance to them. Both properties were in London. The first was a site in Wimpole Street which apparently had a frontage to Wimpole Street and mews at the back. It was acquired by one of Mr. Simmons's companies, called Polewin Properties Investments Ltd., in 1957, at the beginning of his career. The building was completed in March 1960 and it contained 14 flats on the Wimpole Street side and four in the mews. I say "flats", but some may have been E maisonettes. In August 1960 building costs had risen considerably and, in the words of the Special Commissioners,

> "it was thought necessary (reluctantly—because it meant diminution of income) to sell 19–20 Wimpole Mews, which fetched £19,939. The Revenue accepted that that was not dealing. Permanent finance to repay temporary loans was obtained through the sale and lease back transaction" F of the Wimpole Street flats "with Legal and General Assurance Society."

The other property I have to mention was in Dean Street. That was also acquired in 1957 by a company formed for the purpose, Richhouse Properties Investments Ltd., and a block of offices was built on the site. It was completed in March 1959 and was completely let a few months afterwards. The bulk of the cost of that enterprise, Richmond Buildings, was met by credit from the builders. G In the words of the Case Stated:

> "Efforts were made to obtain a mortgage to retain Richmond Buildings as an investment, but without success. Meantime the Polygon site next mentioned"—that was a site at St. John's Wood—"had become available but the builders were pressing for repayment. Richmond Buildings was therefore sold and the proceeds were applied in repaying the builders, and H the balance in acquiring . . . the freehold of the Polygon site, which was considered likely to prove a more satisfactory investment than Richmond Buildings."

The Case Stated does not, so far as I can find, mention the treatment for Revenue purposes of any profit on the sale of Richmond Buildings. I have ventured to look at the accounts of the company, which are among the documents I made available to the Court, and it rather looks as though some question was raised about it, but in the end it was not treated as giving rise to a trading profit. I observe that both the Wimpole Street and the Dean Street properties had been

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disposed of before Mr. Simmons began his association with Bishopsgate, which considerably eased his financial arrangements. I hope that what I have said is enough to make clear the facts as found by the Special Commissioners. In their decision, as it seems to me, the Commissioners built certain inferences of fact by way of superstructure on the findings that I have endeavoured to summarise. It is fairest, I think, to read the operative part of their decision at length. They say (and I should mention that Mr. Phillips, who is immediately referred to, was a solicitor associated with Mr. Simmons):

> "We accept the evidence of Mr. Simmons, Mr. Phillips and Mr. Spink, to the effect that the acquisitions with which they were respectively concerned were initially entered into primarily for the purposes of creating and retaining investments, and not primarily for the purposes of immediate sales after development. We also accept that the overall and eventual ambition or purpose of Mr. Simmons personally was the flotation of a public company when sufficient and suitable investments had been gathered together. However, we do not think acceptance of that evidence is an end of the matter and automatically puts the eventual disposals into the category of non-trading. The pattern of Mr. Simmons and his associates was to acquire and develop sites with a view to creating permanent investments, relying on short and long term loans for the various stages. From the early transactions of Polewin and Richhouse, and also from the later transaction of Hampstead, it is evident that Mr. Simmons was or had to be prepared to realise one development or part thereof before it became a completed investment, in order to find or conserve funds for another development which he thought had better prospects. It was not until at a late stage in the process, or until after completion of lettings, that he could be in a position to decide finally whether to retain or not. We find that the composite intention to be attributed to the group was to aim at building up a suitable portfolio of investments but to allow the final decision whether to retain to await on events. It was of the essence of the Appellant's case that the minutes of LSP dated 27 October 1966 incorporating the decision to liquidate gave effect to change of intention, due to reversal of expectations which until then had been favourable. By that date the difficulties and problems facing the group were such that it had for some time appeared unlikely that the group could become suitable for public flotation, and the more advantageous course was to sell the group's properties. The decision to liquidate was in our view not inconsistent with the original aim—to create investments for retention where possible, or where not possible for turning to account by way of trade.
>
> On the above view of the facts it seems to us that the decision to liquidate only saves surpluses on properties which were retained, or likely to be retained, as investments, before the liquidation was contemplated. It follows, in our view, that so far as the uncompleted investments are concerned the appeals of Barnet and LSP (in respect of 27 Greville Street) must fail, and we hold that the respective surpluses of £516,994 and £32,576 were trading profits. With regard to the appeals of Twickenham and LSP (in respect of East Barnet Road) the final lettings of the properties were completed approximately only one month and seven months before the formal decision to liquidate. That decision had been under consideration for some time previously, making the retention of the properties, which had not begun to produce any surpluses on income accounts, unlikely. In all the circumstances we regard the respective surpluses of £180,047 and £183,047 as trading profits, and we so hold."

A They then went on to examine the remaining property sales, with which I am not today concerned.

The question, of course, is whether the realised gains on the sale of the four properties in question were profits arising or accruing from any trade or adventure or concern in the nature of trade: see ss 122 and 526 of the Income Tax Act 1952, the Act in force at the material times. Mr. Nolan, on behalf of B the Appellant, submitted that the Special Commissioners had misunderstood the character in taxation law of the concept of "trade". Alternatively, he submitted that the inferences of fact contained in the actual decision of the Commissioners were inconsistent with their findings of the primary facts. Mr. Nolan submitted that trading requires an intention to trade: in the context of the present case an intention to lay out money on properties and to sell them C after development and so make a profit. He submitted, secondly, that an intention to trade cannot coexist with an intention to invest; and, thirdly, that there is no finding by the Special Commissioners that an intention to trade was ever formed. Mr. Nolan says that the intention of the companies in acquiring the assets in question is the crucial matter, referring me in support of that submission to *Edwards* v. *Bairstow*(1) 36 TC 207, at pages 229 and 230, and to *Taylor* v. D *Good*(2) 49 TC 277.

Mr. Medd and Mr. Davenport argued the case for the Crown. They naturally pressed the view that the question, "Trade or not trade?", is one of fact. They say, rightly, that the taxpayer cannot succeed if there was evidence before the Special Commissioners on which they could come to the conclusion which they did without disregarding any principle of law. They referred me to E helpful passages in the speeches in the House of Lords in *Ransom* v. *Higgs*(3) 50 TC 1. I will read two short passages from those speeches. One is from Lord Wilberforce, at page 88, where he said this:

> " '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. Some- F times 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 line is passed."

The other passage is from the speech of Lord Simon of Glaisdale, on page 96, where he made this point:

G > ". . . 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 a plain error shows that the instance tribunal must have misdirected itself in law."

Counsel for the Crown also referred me to *Pilkington* v. *Randall* 42 TC 662 and to *Shadford* v. *H. Fairweather & Co. Ltd.* 43 TC 291 as showing what the H Court's approach to such questions as the present should be. Mr. Medd pointed out that, on the facts and figures I have summarised in each case, the company concerned bought a piece of immovable property, not for its own occupation, and at a later date sold it at a profit after carrying out developments. A developer who was frankly a trader would have done, it is submitted, exactly the same thing. Further, it was argued, a possible view is that the decision to sell was due

(1) [1956] AC 14. (2) [1974] 1 WLR 556. (3) [1974] 1 WLR 1594.

(Goulding J.)

primarily to disappointment over the failure of the plan to float a public company and not the failure of an attempt to acquire investments as such. As was pointed out in the Case Stated, the sale of one property might have been enough at the critical point to meet pressing creditors and to retain the rest as investments. The primary thing in the whole of the case is, it was submitted for the Crown, a commercial situation of developing undeveloped land and subsequently selling it.

With regard to the tests suggested by the Special Commissioners at the end of their decision, Mr. Medd said that a decision to retain or not to retain a property stamped the character of trade or investment on the whole transaction at the point when the decision was taken: meaning, I think, though Mr. Medd did not say this in terms, that the decision casts a reflective light on the character of the original acquisition and, therefore, of the whole adventure. Mr. Davenport reminded me that many a developer who is admittedly a trader in land would like, if he could, to retain properties as permanent investments for himself or his companies, but can never do so because of lack of permanent finance.

In the end, the question is not long or complicated. I remind myself that it is easy for an appellate Judge to imagine an error of law when in truth he merely distrusts a decision of fact that he has no jurisdiction to correct. Nevertheless, I am of opinion that the Special Commissioners did here err in law, because I think their final view of the transactions was inconsistent with their findings of the primary facts. It is as though, having found the facts in favour of Mr. Simmons, the Special Commissioners felt they had been over-generous and then, instead of re-examining their findings, sought to modify the consequences by unverifiable inferences of their own regarding the intentions to be imputed to the companies. I can see nothing in the facts as found to warrant the theory of a composite or indefinite intention whereunder assets are held as it were in solution until, by a transformation unrecorded in their owners' books and invisible to outward observation, they suddenly crystallise either as investments or as stock-in-trade, the system of crystallisation being determined by the temperature of the market and the financial pressures of the time.

On the contrary, the findings show, in my judgment, that the properties were acquired with a definite intention, going beyond a mere contingent hope, of building up a permanent investment suitable for a public property investment company and that they were sold when, and because, changed circumstances prevented the execution of that plan. Their history is therefore, in my judgment, inconsistent with a transaction in the course of trade or an adventure in the nature of trade. Nor do I think the findings support the view, which was not argued before, or formulated by, the Special Commissioners but which has been suggested before me, that the properties were appropriated to become stock-in-trade when the decision to dispose of them was taken.

Accordingly, I shall allow the appeals of Lionel Simmons Properties Ltd., Centre Town Developments (Barnet) Ltd. and Centre Town Developments (Twickenham) Ltd. I have before me, however, Cases stated in respect of two other companies that I have mentioned, Polewin Properties Investments Ltd. and Richhouse Properties Investments Ltd. I was informed by Counsel that both those appeals were brought because of points made by the Special Commissioners regarding the earlier transactions that I have briefly mentioned. However, they are ancient history now and there is nothing before me on which

A the Appellant's contentions, if successful, would modify the subsisting assessments as regards the Polewin and Richhouse properties. Those two, accordingly, are dismissed.

Three appeals allowed, with costs. Two appeals dismissed, with costs.

The Crown's appeal against the above decision to allow three of the appeals
B came before the Court of Appeal (Orr, Bridge and Cumming-Bruce L.JJ.) on 6 and 7 February 1979, when judgment was reserved. On 2 March 1979 judgment was given in favour of the Crown, with costs.

Patrick Medd Q.C. and *Brian Davenport* for the Crown.

Michael Nolan Q.C. and *D. A. Shirley* for the Companies.

The following cases were cited in argument in addition to those referred
C to in the judgment:—*Californian Copper Syndicate* v. *Harris* 5 TC 159; *Turner* v. *Last* 42 TC 517; *Glenboig Union Fireclay Co. Ltd.* v. *Commissioners of Inland Revenue* 12 TC 427; 1922 SC (HL) 112; *Commissioners of Inland Revenue* v. *Budderpore Oil Co., Ltd.* 12 TC 467; *Salisbury House Estate, Ltd.* v. *Fry* 15 TC 266; [1930] AC 432; *Smithwick* v. *National Coal Board* [1950] 2 KB 335; *Sharkey* v. *Wernher* 36 TC 275; [1956] AC 58; *Ransom* v. *Higgs* 50 TC 1;
D [1974] 1 WLR 1594.

Orr L.J.—The judgment I am about to read is the judgment of the Court [Orr, Bridge and Cumming-Bruce L.JJ.].

This is an appeal by the Commissioners of Inland Revenue against an order of Goulding J. on 14 February of last year allowing, on a Case Stated,
E appeals by the liquidator, Mr. Lionel Simmons, of three companies, Lionel Simmons Properties Ltd. ("LSP"), Centre Town Developments (Twickenham) Ltd. ("Twickenham") and Centre Town Developments (Barnet) Ltd. ("Barnet"), against determinations of the Special Commissioners that sums received by those companies were, for the purposes of corporation tax and also shortfall arising under s 77 of the Finance Act 1965, trading receipts and not surpluses
F derived on capital account. By the same judgment appeals by the same liquidator on behalf of two other companies, Richhouse Properties Investments Ltd. ("Richhouse") and Polewin Properties Investments Ltd. ("Polewin") were dismissed and there has been no appeal against those dismissals. The five companies referred to belonged to a group of companies, the parent company being LSP, all of which are now in liquidation and the liquidator in each case
G is Mr. Simmons, who holds 75 per cent. of the issued capital of the parent company. Bishopsgate Property and General Investments Ltd. ("Bishopsgate") holds the remaining 25 per cent., the latter company being a quoted investment holding company. In the years 1967–69 companies in the group sold nine blocks of offices or flats. Of the sales one was effected by a company named Hector Properties Investments Ltd. and resulted in a loss, and the other,
H effected by Centre Town Developments (Hampstead) Ltd., was a sale by a company that was admittedly a property dealing company, with the result that in

those cases there was no appeal to the Special Commissioners, but the Commissioners were concerned with appeals as respects the other seven transactions and decided that three of them were to be treated as sales of permanent investments resulting in surpluses on capital account and that the other four were to be treated as giving rise to trading receipts, and it was in respect of those four transactions, one by Twickenham, another by Barnet and the other two by LSP, that the liquidator appealed successfully to the High Court.

Before turning to the transactions in question it will be convenient to refer to the background facts of the case as found by the Special Commissioners, which are set out in the Case Stated, with reference to the parent company and can be summarised as follows. The Appellant, Mr. Simmons, who is a qualified quantity surveyor and practised on his own account, had before 1955 purchased a number of small properties for investment and had in that year acquired by means of a loan an option to buy for £7,500 a 40-year leasehold of a property in New Cavendish Street of which he was still the owner at the date of the hearing by the Special Commissioners, and about the time of that acquisition he was introduced to four wealthy Malayans named Chung and thereafter, with their assistance for a time, entered into a series of transactions through companies formed for that purpose,the first of them, Polewin, incorporated in May 1957, and the last, Hampstead, which alone among the companies was always treated within the group as a trading company, in 1964. The Special Commissioners found as a fact that by about May 1961 Mr. Simmons envisaged assembling a portfolio of properties sufficiently attractive for the formation of a publicly quoted company and that about the same time he was introduced to Bishopsgate, an investment trust company specialising, *inter alia*, in backing unquoted property investment companies in order that they could be publicly quoted. In the result, in September 1963, the parent company, LSP, was formed with the division of interests already mentioned, and by that time the Special Commissioners concluded that Mr. Simmons was virtually independent of the Chung brothers. The group included at all material times Twickenham and Barnet and also Polewin and Richhouse, and one of the agreements entered into by LSP and Mr. Simmons with Bishopsgate included a covenant by them not to alter their business from that of investment holding.

The Special Commissioners found that on 27 October 1965 a decision in principle was taken to liquidate the group and dispose of its properties and that the considerations which had led to this decision were (*a*) an unfavourable economic climate embracing the Rent Act 1965 and the Finance Act of the same year and the fact that the property market was tending to decline had created many new problems; (*b*) the group's borrowings, which were substantial; (*c*) the fact that certain of the properties were causing concern due to slow lettings or sales, which prevented cash being available for short term creditors; and (*d*) the realisation by Mr. Simmons that he could not afford to wait indefinitely.

The facts as to the transactions in question on the present appeal were as follows. Twickenham had been incorporated in 1962 for the purpose of acquiring a freehold property, 2 Holly Road, Twickenham, and soon after its incorporation adopted a contract for the purchase of that property. The freehold was conveyed to Twickenham in April 1963, who completed a year later the building of a block of offices on the site, and by midsummer of that year this block was fully let. It was sold in April 1967 and the net surplus on sale was £180,047. Barnet was incorporated in December 1962 for the purpose of acquiring a site

in Barnet and adopted a contract for its purchase made shortly before. The purchase was completed in March 1963; an office block on the site was completed in October 1965 and was fully let before June 1969 when it was sold and produced a net surplus of £516,994. The other two properties in question belonged to the parent company, LSP incorporated in September 1963, the first, in East Barnet, being a freehold site bought by LSP in February 1964 on which an office block was completed in February 1966 and in April of the same year was let as a whole on a 21-year lease. In May 1968 the property was sold and produced a net surplus of £183,047. The other property was 27 Greville Street, of which LSP agreed to buy the freehold in April 1964, and the purchase was completed the following month. A building on the site was completed in June 1965 and, with the exception of one floor, was fully let by March 1968. In June 1969 the property was sold and produced a surplus of £32,576.

The facts as to the two appeals of Polewin and Richhouse, which Goulding J. dismissed but which formed part of the material on which the Special Commissioners based their determinations, were as follows. Polewin, the earliest of the companies, was incorporated in May 1957 to acquire the lease of a war-damaged site in Wimpole Street on which flats, including mews flats, were completed in March 1960, and the headlease (99 years) of the premises was acquired in the same year, but in August of that year the mews flats were sold for £19,939 to meet rising building costs, and it was accepted by the Revenue that this was not dealing. In February 1961 the flats on the main frontage were let to, and leased back from, the General Assurance Society. Polewin also developed another war-damaged site in Deansgate, Manchester, on which a block of offices and shops was completed in August 1962. Richhouse was incorporated in September 1957 to acquire the lease of a site in Dean Street, London, on which a block of offices was completed in 1959 and let by February 1960, when the leasehold was sold for £78,000, part of the proceeds being used to pay the builders and the balance in acquiring the freehold of a site called The Polygon in St. John's Wood which was retained until December 1969, and the Special Commissioners held that the surplus arising on its sale was not a trading profit.

On the material I have summarised the Special Commissioners accepted the evidence of the liquidator and other witnesses that the acquisitions with which those witnesses were respectively concerned were initially entered into primarily for the purpose of creating and retaining investments and not primarily for the purpose of immediate sales after development, and they also accepted the evidence of the liquidator himself that his own overall purpose had been the flotation of a public company as soon as sufficient investments had been accumulated. But they did not consider that these findings were an end of the matter since in their view it was clear on the evidence that Mr. Simmons was, or had to be, prepared to realise an investment or part of it before it became a completed investment in order to acquire funds for some other development which he thought had better prospects, and it was therefore not until a late stage in the process that Mr. Simmons could be in a position to decide finally whether to retain a property or not. In these circumstances the Commissioners found that the composite intention of the group was to aim at building up a suitable portfolio of investments but to allow the final decision, whether to retain a property, to await events, and on this basis they found that the decision to liquidate was not inconsistent with the original aim which had been to create investments for retention if possible or, where it was impossible, for turning to

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account by way of trade. They concluded that the decision to liquidate could only save the surpluses obtained on the sales of properties which were retained, or likely to be retained, as investments before the liquidation was contemplated, and on that basis they made the determinations already mentioned.

From that decision the liquidator appealed to the High Court and on 14 February 1978 Goulding J. allowed the appeal. In his judgment he made three specific criticisms of the Special Commissioners' reasoning, the first that in his view their final conclusions as to the transactions in question were inconsistent with their earlier findings of the primary facts; the second that they had made what he described as "unverifiable inferences" of their own as regards the intention to be attributed to the companies; and the third that he could see nothing in the facts as found by the Commissioners to warrant the theory of a composite or indefinite intention whereby the assets would be held "as it were in solution" until they eventually crystallised either as investments or stock-in-trade.

On appeal from that judgment we have heard very helpful arguments from Mr. Medd and Mr. Nolan, both of whom referred sparingly to the authorities. It is clear on the authority of *Edwards* v. *Bairstow*[1] 36 TC 207 that a decision of the Income Tax Commissioners can be reviewed only if the court is satisfied that they have made an error of law or that the only reasonable conclusion on the facts found by them is inconsistent with their determination. It is also clearly established that on appeal to the Commissioners the burden is on the taxpayer to displace the assessment, and in these circumstances the burden in the present case was clearly on the taxpayers to establish that the sales in question gave rise to a surplus on capital account and not to a trading profit (*Norman* v. *Golder* 26 TC 293, at page 297, and *Shadford* v. *H. Fairweather & Co. Ltd.* 43 TC 291, at page 300). On the other hand it is also clear that if an asset is acquired in the first instance as an investment the fact that it is later sold does not take it out of the category of investment or render its disposal a sale in the course of trade unless there has been a change of intention on the part of the owner between the dates of acquisition and disposal (*Eames* v. *Stepnell Properties Ltd.*[2] 43 TC 678). The question, moreover, whether an item is held as capital or as stock-in-trade is not concluded by the way in which it has been treated in the owner's books of account (*Commissioners of Inland Revenue* v. *Scottish Automobile and General Insurance Co., Ltd.*[3] 16 TC 381, at page 390) or by the Revenue in past years (*Rellim, Ltd.* v. *Vise* 32 TC 254).

The recent decision of this Court in *Taylor* v. *Good*[4] 49 TC 277 was relied on by Mr. Nolan for the Respondents but in our judgment it cannot assist in relation to the present case. In that case, which involved the purchase at an auction, by the tenant of a council flat, of a large country mansion in which his parents had been in service and its subsequent resale as a housing estate, there was evidence that the purchaser had contemplated living in the house but the Commissioners held that, having regard to the purchase and to the sale, the transaction was one of trade. On appeal it was accepted for the Crown that the purchase had not been by way of trade and this Court allowed the appeal on the basis that the only reasonable conclusion was that the disposal had not been by way of trade. That case therefore differs materially from the present case in which the Special Commissioners were not satisfied that the properties in question were bought as investments and the question is whether they were entitled on the evidence to come to that conclusion.

(1) [1956] AC 14. (2) [1967] 1 WLR 593. (3) 1932 SC 87. (4) [1974] 1 WLR 556.

A It has not been in dispute that the province of fact of which the Commissioners were the judges included not only the finding of facts upon the evidence of witnesses but also the drawing of inferences from the facts of the case as a whole, and it is clear from the Case Stated that the inference which the Commissioners drew was that, while it had always been an ambition of Mr. Simmons that the companies should build up a portfolio of investments B adequate for the flotation of an investment holding company, and while the Commissioners were able in the event to hold that particular properties were at the time of their respective disposals being held as investments, they were unable to reach the same conclusions as regards the bulk of the properties in question because they were satisfied that from an early date the reality of the matter was that, by reason of financial pressures and rising costs, it must have C been apparent to Mr. Simmons and his associates that there could be no basis for a firm intention to retain the properties and that a decision whether or not to retain them as investments could only await events. We would add that the existence of financial pressures in the early years is clearly revealed by the minutes of the board meetings of Polewin and Richhouse, and there were also indications of similar pressures within the group in the later years.

D In these circumstances it was for the Commissioners to determine in the case of each property whether they were satisfied on the evidence that it either became when acquired or had later become an investment on capital account and in these circumstances the Commissioners were bound to consider with what degree of certainty the directors were in a position to say that they intended any of the properties to be an investment.

E The Commissioners were not referred to the well-known passage in the judgment of Asquith L.J. in *Cunliffe* v. *Goodman* [1950] 2 KB 237, at page 253, where he gave the following explanation of the meaning of the word "intention":

> "X cannot, with any due regard to the English language, be said to 'intend' a result which is wholly beyond the control of his will. He cannot 'intend' that it shall be a fine day tomorrow: at most he can hope or desire or F pray that it will. Nor, short of this, can X be said to 'intend' a particular result if its occurrence, though it may be not wholly uninfluenced by X's will, is dependent on so many other influences, accidents and cross-currents of circumstance that, not merely is it quite likely not to be achieved at all, but, if it is achieved, X's volition will have been no more than a minor agency collaborating with, or not thwarted by, the factors which pre- G dominantly determine its occurrence. If there is a sufficiently formidable succession of fences to be surmounted before the result at which X aims can be achieved, it may well be unmeaning to say that X 'intended' that result."

That passage was directed to s 18(1) of the Landlord and Tenant Act 1927 but in our judgment is equally apt to the present context where the question for the H Commissioners was whether they were satisfied that Mr. Simmons and his associates had formed, in the case of each of the properties, an intention, as distinct from a mere hope, that it should be retained as an investment. In the result they clearly considered the matter with great care, holding that the sale of Wimpole Mews and that of the Polygon were sales of investments but that the sales of the properties with which this appeal is concerned were by way of I trade. There were obvious reasons why in the case of the Mews and the Polygon they might choose to give the vendors the benefit of any doubt since the sale of the Mews was at a very early stage of the financial pressure and the Polygon

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was retained for many years, and their decisions as to these properties show in our judgment the care they took in arriving at their determinations. A

Goulding J.'s reasons for reversing the Commissioners were those already referred to, but with great respect we find ourselves unable to accept them. There was, in our judgment, no inconsistency between the Commissioners' conclusions and their findings of primary fact. They had referred in those findings to the acknowledged ambition of Mr. Simmons, but came to the B conclusion that there could not have been in the circumstances any firm intention as regards most of the properties to retain them as investments. The Judge's reference to "unverifiable inferences" drawn by the Commissioners is in our judgment misconceived since it was their function to draw inferences of fact which might well be incapable of verification by any witness. Finally, the Commissioners having found as a fact that Mr. Simmons and his associates C were obliged to defer a decision as to whether the properties should be retained or sold, we are unable to accept the Judge's final criticism of what he described as "the theory of a composite or indefinite intention whereunder assets are held as it were in solution". The legal position was that until a decision was taken to treat a property as an investment it necessarily followed that the surplus realised on its sale was assessable as a trading profit and in our judgment there was D material on which the Commissioners could properly infer that no such decision had been taken as respects the properties in question.

For these reasons we would allow this appeal and restore the assessments.

Appeals allowed, with costs. Leave to appeal to House of Lords refused. Leave to appeal was granted to all three Companies by the Appellate Committee of the House of Lords. E

The Companies' appeals against the above decision came before the House of Lords (Lord Wilberforce, Viscount Dilhorne, Lords Salmon, Scarman and Roskill) on 29 and 30 April 1980 when judgment was reserved. On 19 June 1980 judgment was given against the Crown, with costs (Lord Scarman dissenting).

Michael Nolan Q.C. and *D. A. Shirley* for the Companies. F

Patrick Medd Q.C. and *Brian Davenport Q.C.* for the Crown.

The following cases were cited in argument in addition to those referred to in the speeches:—*Bowie* v. *Reg. Dunn Builders Ltd.* 49 TC 469; *Eames* v. *Stepnell Properties Ltd.* 43 TC 678; *Lily Harriet Ram Iswera* v. *Commissioner of Inland Revenue* [1965] 1 WLR 663; *Shadford* v. *H. Fairweather & Co. Ltd.* 43 TC 291; *Smithwick* v. *National Coal Board* [1950] 2 KB 335. G

Lord Wilberforce—My Lords, Lionel Simmons Properties Ltd. ("LSP"), whose liquidator, Mr. Lionel Simmons, is the appellant, is one of seven companies formed between 1957–64 which constituted the Lionel Simmons group of companies. Assessments having been made of profits and gains to corporation tax (under Case I of Schedule D) and "shortfall" in distribution, five appeals H were brought to the Special Commissioners on behalf of Lionel Simmons Properties Ltd. and other companies in the group, namely Polewin Properties

Investments Ltd. ("Polewin"), Richhouse Properties Investments Ltd. ("Richhouse"), Centre Town Developments (Twickenham) Ltd. ("Twickenham") and Centre Town Developments (Barnet) Ltd. ("Barnet"). In 1967–69 these companies and two others sold nine blocks of offices and flats. As to two no question arises, but as to the other seven the question was whether the transactions should be treated as sales of trading stock or as the sales of permanent investments giving rise to a surplus on capital account. Before the Special Commissioners the arguments seem to have been on the basis that all these transactions should be treated in the same way so that the surpluses should all be regarded as trading receipts or all as capital receipts. The Special Commissioners, however, decided that three (by Polewin and Richhouse) should be treated as sales of investments, and four (namely two involving Lionel Simmons Properties Ltd. and one each of Twickenham and Barnet) as sales of trading stock. The liquidator appealed to the High Court by way of Case Stated in respect of the latter and his appeals were allowed by Goulding J., but the Judge's decision was reversed by the Court of Appeal. The liquidator further appeals to this House and the present is his appeal as liquidator of Lionel Simmons Properties Ltd. Appeals in respect of Twickenham and Barnet have been held over.

The facts as regards the whole of the Lionel Simmons group are set out in full detail in the Case Stated. There is no question here of overruling, or disregarding, the Special Commissioners' findings of the primary facts. These, which involve the formation and history of each of the companies, the purchase, development and sale of the properties, are accurately and clearly stated. Nor is this, in my opinion, a case in which it is possible to say that the Commissioners have reached a decision which no reasonable body of Commissioners could have reached, and so have erred in law (cf. *Edwards* v. *Bairstow*[1] [1956] AC 14—a case itself concerned with "trading"). Nor, I think, is this a case which calls for discussion whether the conclusions which the Commissioners have reached are themselves findings of secondary facts, or inferences from primary facts: many cases involving the question whether or not there is a trade do so and often there are difficult lines to be drawn. What I think has to be considered here is, rather, precisely what the Commissioners have found as to the companies' intentions, and whether their findings are consistent or intelligible. I do this with, I hope, a proper appreciation of the Commissioners' presentation; and a disposition to uphold any decision of theirs on factual matters if I can properly do so.

One must ask, first, what the Commissioners were required or entitled to find. Trading requires an intention to trade: normally the question to be asked is whether this intention existed at the time of the acquisition of the asset. Was it acquired with the intention of disposing of it at a profit, or was it acquired as a permanent investment? Often it is necessary to ask further questions: a permanent investment may be sold in order to acquire another investment thought to be more satisfactory; that does not involve an operation of trade, whether the first investment is sold at a profit or at a loss. Intentions may be changed. What was first an investment may be put into the trading stock—and, I suppose, *vice versa*. If findings of this kind are to be made precision is required, since a shift of an asset from one category to another will involve changes in the company's accounts, and, possibly, a liability to tax (cf. *Sharkey* v. *Wernher*[2] [1956] AC 58). What I think is not

(1) 36 TC 207. (2) 36 TC 275.

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possible is for an asset to be both trading stock and permanent investment at the same time, nor to possess an indeterminate status—neither trading stock nor permanent asset. It must be one or other, even though, and this seems to me legitimate and intelligible, the company, in whatever character it acquires the asset, may reserve an intention to change its character. To do so would, in fact, amount to little more than making explicit what is necessarily implicit in all commercial operations, namely that situations are open to review.

I now approach the critical findings of the Commissioners. It must be borne in mind that these were preceded by a very complete description of the history of the group which, summarily, amounted to this. Mr. Simmons, a quantity surveyor, started his property operations in a very small way in the 1950s. About 1955 he came into contact with four brothers Chung, wealthy Malayans, who were in London. With their participation he formed the seven companies in 1957–1964 and through them set about acquiring properties for development. All the companies, except one which was a trading company, were formed as property investment companies. In 1962 an association was formed with a publicly quoted company, Bishopsgate Property and General Investments Ltd. ("Bishopsgate"), a company associated with Hambros Bank which specialised in bringing investment (but not trading) companies to the market, and by 1964 the association with the brothers Chung had virtually terminated. In 1965 adverse factors developed with the passing of the Rent Act 1965 and the Finance Act 1965 (introducing the capital gains tax) and the economic climate became unfavourable. On 27 October 1966 the decision in principle was taken to liquidate the group and to dispose of the properties. At this point, Lionel Simmons Properties Ltd., which had been incorporated in 1963 as a vehicle for going public with Bishopsgate's backing, had two properties. 153–155 East Barnet Road, Barnet, had been acquired in February 1964 and by April 1966 had been let as a whole for 21 years. 27 Greville Street had been acquired in May 1964 and building was completed in June 1965, but lettings had not been arranged. As regards the other two companies (their position is relevant for an understanding of the decision) Barnet had one property (Kingmaker House) which it was formed to and did acquire in October 1963 and completed, but not let, in March 1965, and Twickenham had one property (2 Holly Road, Twickenham) which it was formed to and did acquire in April 1963, completed in April 1964 and let by 24 June 1966. None of these companies had at any time acquired or sold any property other than those mentioned. All of these properties were acquired after the association with Bishopsgate had been arranged, and Bishopsgate, directly or through Lionel Simmons Properties Ltd., had an interest in each company. By an agreement dated 4 October 1963 (*inter alia*) Mr. Simmons agreed with Bishopsgate not to alter the memorandum or articles of association of Lionel Simmons Properties Ltd., Twickenham, or Barnet, nor to alter their business from that of property holding. In the light of this situation, the Commissioners came to their decision. I must reproduce the relevant passages:

> "We accept the evidence of Mr. Simmons, Mr. Phillips and Mr. Spink, to the effect that the acquisitions with which they were respectively concerned were initially entered into primarily for the purposes of creating and retaining investments, and not primarily for the purposes of immediate sales after development. We also accept that the overall and eventual ambition or purpose of Mr. Simmons personally was the flotation of a public company when sufficient and suitable investments had been gathered together. However, we do not think acceptance of that evidence is an end

A of the matter and automatically puts the eventual disposals into the category of non-trading.

The pattern of Mr. Simmons and his associates was to acquire and develop sites with a view to creating permanent investments, relying on short- and long-term loans for the various stages. From the early transactions of Polewin and Richhouse, and also from the later transaction
B of Hampstead, it is evident that Mr. Simmons was or had to be prepared to realise one development or part thereof before it became a completed investment, in order to find or conserve funds for another development which he thought had better prospects. It was not until at a late stage in the process, or until after completion of lettings, that he could be in a position to decide finally whether to retain or not. We find that the com-
C posite intention to be attributed to the group was to aim at building up a suitable portfolio of investments but to allow the final decision whether to retain to await on events.

It was of the essence of the Appellant's case that the minutes of LSP dated 27 October 1966 incorporating the decision to liquidate gave effect to change of intention, due to reversal of expectations which
D until then had been favourable. By that date the difficulties and problems facing the group were such that it had for some time appeared unlikely that the group could become suitable for public flotation, and the more advantageous course was to sell the group's properties. The decision to liquidate was in our view not inconsistent with the original aim—to create investments for retention where possible, or where not possible for turning
E to account by way of trade.

On the above view of the facts it seems to us that the decision to liquidate only saves surpluses on properties which were retained, or likely to be retained, as investments before the liquidation was contemplated. It follows, in our view, that so far as the uncompleted investments are concerned the appeals of Barnet and LSP (in respect of 27 Greville Street)
F must fail, and we hold that the respective surpluses of £516,994 and £32,576 were trading profits.

With regard to the appeals of Twickenham and LSP (in respect of East Barnet Road) the final lettings of the properties were completed approximately only one month and seven months before the formal decision to liquidate. The decision had been under consideration for some
G time previously, making the retention of the properties, which had not begun to produce any surpluses on income accounts, unlikely. In all the circumstances we regard the respective surpluses of £180,047 and £183,047 as trading profits, and we so hold."

The Crown, naturally, rely strongly upon the final sentence of the third paragraph. This they say is a finding of fact which ought not to be disturbed.
H If that is right, the appeal can be simply disposed of. But is it right? I must say that I cannot so read it. It does not profess, in itself, to be a finding as to the "original aim". Rather it assumes, as was the case, that the original aim has been established already and is concerned merely to state that the decision to liquidate was not inconsistent with it. Had they, then, already found that the original aim was, as stated, to invest for retention where possible, or, where not,
I to trade? I cannot find this. The initial intention is stated as "primarily for the purposes of creating and retaining investments" and "not primarily for the

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purposes of immediate sales after development". This is a clear finding of an investment purpose—confirmed by the opening of the next paragraph. Mr. Simmons, the Commissioners proceed, "was or had to be prepared to realise one development" (meaning, I think, any one development) "to find . . . funds for another development"—still quite clearly in the area of investment. In the latter part of the same paragraph it is said that, with the aim of building up an investment portfolio, the final decision might have to wait on events—very true—but far from a finding of an intention to trade. And again, as to the decision to liquidate; there is no finding that this involved a decision to trade: that would be a very odd finding indeed, and I find it neither expressed nor implied. So, when one reads this whole passage, and couples it with the record of each company formed as an investment company, in two cases to acquire a single property, associated with Bishopsgate Investment Trust Co. Ltd., a company only interested in property investment and having an agreement that the investment status of each company would not be altered, acquiring one property only, in two cases, and in LSP's two properties, under what is called a primary intention to create and build up a portfolio, I can only ask where is the finding or evidence of a trading intention? If there was such an intention, when was it formed? On the decision to liquidate? But this did nothing more than put an end to Mr. Simmons' investment plans. So I cannot avoid the conclusion that the reference to "turn to account by way of trade" is inconsistent with the whole history and with the previous finding, and involves an assumption—*per saltum*—as to what had been found, not supported by the latter, and in any case not itself a finding of fact. That this reference is illogical and illfounded appears very clearly from what follows. This draws a line (not contended for by either side) between properties retained, or likely to be retained, as investments before the liquidation was contemplated—which are investments—and those which had not reached that stage—which are trading stock. But on what principle, or rationale, can this be based? It seems to presuppose that the properties remained, as it were, in the air, or in limbo, until development and letting was completed, and that if the portcullis of liquidation came down while they were in this state they became trading stock. This I find, with respect, incomprehensible. Before liquidation they must either have been investments or trading stock: if the latter, *cadit quaestio*, but that is not what is found. If the former, how was their status changed? Frustration of a plan for investment, which compels realisation, even if foreseen as a possibility, surely cannot give rise to an intention to trade. Finally, the distinction, as drawn, does not even fit the facts. For in the case of Twickenham and LSP (East Barnet Road) development and letting *had* been completed before the liquidation (see above). But they are found to have been trading, because retention was "unlikely"—a further gloss upon a strange rationale.

My Lords, I regret to have to subject the reasoning of the Special Commissioners, over which they evidently took much trouble, to what may appear to be excessive analysis. I am less reluctant to differ from them because their solution was not contended for, nor it seems, tested by argument. If it had been, some of the anomaly in it might well have appeared and suffered reduction. For myself, having read the whole of the Case Stated, and having, as they did, followed the history of the group, I find the position, though complicated, reasonably plain. Mr. Simmons wanted to build up an investment portfolio; he formed investment companies; allied himself with an investment trust; caused each (relevant) company to acquire one property, or at most two properties, to develop and let it, and was forced into a realisation of these completed investments. This was simply a realisation of capital.

Finally, as to the decision of the Court of Appeal, the judgment, delivered by Orr L.J. contains a clear account of the facts, and, in my respectful opinion, a generally correct statement of the law. In particular, it is rightly recognised that a sale of an investment does not render its disposal a sale in the course of trade unless there has been a change of intention. They based their decision largely upon a passage from the judgment of Asquith L.J. in *Cunliffe* v. *Goodman* [1950] 2 KB 237, which was concerned with the making by a landlord of a provisional—as contrasted with a conditional—decision. This they sought to apply to a very different situation, for there is no basis, either in fact or in finding, for holding Mr. Simmons's intention to be provisional in the sense of that word in the judgment. This led to his critical conclusion(1)—"The legal position was that until a decision was taken to treat a property as an investment it necessarily followed that the surplus realised on its sale was assessable as a trading profit." This must mean that it was trading stock. But this is contrary to the whole history of the matter and goes even further than the Commissioners' findings. I regret that I cannot agree with it.

I would allow the appeal.

Viscount Dilhorne—My Lords, giving the Commissioners' conclusion that the sale of the properties in question was a sale of trading stock the most favourable consideration that I can, I am unable to find in the Case Stated and in their findings any justification for that conclusion.

I have had the advantage of reading in draft the speech of my noble and learned friend Lord Wilberforce. I agree with it and in my opinion for the reasons he gives, this appeal should be allowed.

Lord Salmon—My Lords, I gratefully adopt and will not repeat my noble and learned friend Lord Wilberforce's lucid summary of all the facts found by the Commissioners. Since I concur generally in the conclusions reached by my noble and learned friend, I shall only add a few observations of my own.

I do not believe that this appeal raises any question of law, nor any question as to whether the Commissioners' primary findings of fact can be overruled. Clearly they cannot. I do not, however, consider that all the inferences which the Commissioners drew from those findings can be accepted, especially the inference which led them to the conclusion that the sale of the relevant properties constituted a sale of trading stock. This conclusion was plainly wrong and should accordingly be rejected (*Edwards* v. *Bairstow*(2) [1956] AC 14, *per* Lord Radcliffe, at pages 35–6).

The Simmons group of companies, bar one, were formed as property investment companies. The Commissioners accepted that the acquisitions of the properties with which those companies were concerned

> "were initially entered into primarily for the purposes of creating and retaining investments, and not primarily for the purposes of immediate sales after development . . . [and that] the overall and eventual ambition or purpose of Mr. Simmons personally was the flotation of a public company when sufficient and suitable investments had been gathered together."

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(1) Page 490 *ante* (2) 36 TC 207, at p 229.

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In 1962 the Simmons property investment group of companies formed an association with Bishopsgate Property and General Investment Ltd. ("Bishopsgate"), an associate of Hambros Bank which specialised in bringing investment companies to the market. On 4 October 1963 the Simmons group of companies entered into an agreement with Bishopsgate not to alter their business from that of property holding. Bishopsgate had an interest of 25 per cent. in each of the properties acquired by the Simmons group after its association with Bishopsgate. It is plain that each of these properties was acquired as an investment. There is certainly no evidence that they were acquired as trading stock. The decision made in October 1966 to liquidate the Simmons group of investment companies was because the prospects of these investments had seriously deteriorated. In such circumstances, the realisation of capital and withdrawal of the investments certainly cannot constitute the sale of trading stock. There was no evidence and indeed no finding that any of the acquired properties were acquired or even treated as trading stock. They were acquired solely as investments which eventually turned out to be unsatisfactory. The final sentence of the third paragraph of the findings of the Commissioners was strongly relied on by the Crown. It reads: "The decision to liquidate was in our view not inconsistent with the original aim—to create investments for retention where possible, or where not possible for turning to account by way of trade." A strange concept indeed. An investment does not turn into trading stock because it is sold. I entirely agree with my noble and learned friend Lord Wilberforce that no such concept can be accepted.

My Lords, I would accordingly allow the appeal.

Lord Scarman—My Lords, I have the misfortune to differ from the majority of your Lordships in this appeal. I would dismiss it. But, since my difference of opinion arises not from any controversy of principle but only because I have formed a view of the facts found by the Special Commissioners and of the inferences to be drawn from them which differs from that of the majority, I shall be brief. There is no advantage to the parties and no good done to the law in developing a minority view of the facts at this stage of the case. There is no error of law in the actual statement of the Case by the Commissioners. If they did err in law, the error must be inferred in this sense: that their determination of the case is explicable only on the basis of some misconception of the law. To use the formula preferred by Lord Radcliffe in *Edwards* v. *Bairstow*[1] [1956] AC 14, at page 36, an appellate court must be satisfied that "the true and only reasonable conclusion [upon the facts found] contradicts the determination".

The issue is whether certain property transactions of sale carried out by a number of separate companies under the control of Mr. Lionel Simmons and his associates were trading transactions. Or were they sales negotiated reluctantly and under the pressure of financial difficulties by a property-investment business which was not engaging in trade or any adventure in the nature of trade? The appeal is that of one company only and relates to two transactions, both of which the Commissioners found to be trading transactions. But four other appeals by four other "Simmons companies" stand or fall by the decision in this case: and, rightly, the Commissioners examined (with a thoroughness which deserves the highest commendation), ten transactions entered into by seven companies, all of which were controlled

(1) 36 TC 207, at p 229.

A by Mr. Simmons and his associates. The essence of their findings is set out in three paragraphs, which I now quote:—

> "We accept the evidence of Mr. Simmons, Mr. Phillips and Mr. Spink, to the effect that the acquisitions with which they were respectively concerned were initially entered into primarily for the purposes of creating and retaining investments, and not primarily for the purposes of immediate
> B sales after development. We also accept that the overall and eventual ambition or purpose of Mr. Simmons personally was the flotation of a public company when sufficient and suitable investments had been gathered together. However, we do not think acceptance of that evidence is an end of the matter and automatically puts the eventual disposals into the category of non-trading.
>
> C The pattern of Mr. Simmons and his associates was to acquire and develop sites with a view to creating permanent investments, relying on short- and long-term loans for the various stages. From the early transactions of Polewin and Richhouse, and also from the later transaction of Hampstead, it is evident that Mr. Simmons was or had to be prepared to realise one development or part thereof before it became a completed
> D investment, in order to find or conserve funds for another development which he thought had better prospects. It was not until at a late stage in the process, or until after completion of lettings, that he could be in a position to decide finally whether to retain or not. We find that the composite intention to be attributed to the group was to aim at building up a suitable portfolio of investments but to allow the final decision whether
> E to retain to await on events.
>
> It was of the essence of the Appellant's case that the minutes of LSP dated 27 October 1966 incorporating the decision to liquidate gave effect to change of intention, due to reversal of expectations which until then had been favourable. By that date the difficulties and problems facing the group were such that it had for some time appeared unlikely that the
> F group could become suitable for public flotation, and the more advantageous course was to sell the group's properties. The decision to liquidate was in our view not inconsistent with the original aim—to create investments for retention where possible, or where not possible for turning to account by way of trade."

Mr. Simmons lacked capital. He entered the property business, as a
G poor man. He had to borrow: and on occasions he had to sell. He knew his own weakness and the Commissioners have found that he was prepared to sell in order to find or conserve funds for another development. They summed up the effect of their findings in words of recall at the end of the passage I have quoted. His aim was "to create investments for retention where possible, or where not possible for turning to account by way of trade". In other words,
H Mr. Simmons and his companies, which were the creatures and the instruments of his will, traded when he thought it necessary in the interest of his long-term objective, which was "to create investments for retention". I find nothing very extraordinary in such attitude, purpose, and conduct. Almost every trader looks to his profits to build up a capital position: the existence of Mr. Simmons' long-term objective is not therefore inconsistent with an intention to trade as
I part of his business when he should judge it necessary.

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Whether or not I would have reached the same conclusion as that of the Commissioners is not, of course, the question. The House must be satisfied that the true and only reasonable conclusion upon the facts is that the challenged transactions were not trading transactions, and is, therefore, contradictory of their determination. Notwithstanding the skilled and detailed analysis of the transactions which have been presented to your Lordships by Counsel at the bar of the House, I am not so satisfied. A B

I would, therefore, dismiss the appeal.

Lord Roskill—My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Wilberforce. For the reasons therein contained, I would allow this appeal.

Appeals allowed, with costs.

[Solicitors:—Amhurst, Brown, Martin & Nicholson; Solicitor of Inland Revenue.] C