

selves against this risk, and the applicant in the present case alleges that incapacity from the same injury did so supervene after about three months. On the other hand the employers deny that the supervening incapacity was due to the original injury. Accordingly the arbiter assumed and decided without inquiry in favour of the employers a question upon which the parties were, and still are, at issue, viz., whether or not there was on 12th December a risk of incapacity supervening from the same injury, or whether the employers would at that date have been entitled to an award terminating the compensation once and for all. I express no opinion upon the question whether the employers' contention is not foreclosed by the terms of the agreement. Of course the burden of proving that incapacity did in fact supervene from the original injury would rest upon the workman.

The memorandum of agreement further demonstrates that the agreement was one which in certain events might, and which in the events which happened in fact did, restrict the workman's compensation to less than 10s. a-week. Of course if it so happened that he suffered not more than twelve weeks' incapacity during the rest of his life after 12th December 1916, then of course the lump sum of £6 would give him compensation at the rate of 10s. a-week or upwards, and if the employers chose to run the risk of this happening, they were right not to intimate the agreement. But if they proposed to use the agreement, as they have in fact used it, and used it successfully, as a bar to the workman getting compensation, however long he may be incapacitated—and at the date when the application was made he had been incapacitated for more than twelve weeks—then they are using this agreement for the purpose of establishing that in respect of all incapacity, however prolonged, arising after 12th December 1916, and consequent on the injury of 2nd October, this man must be content with a lump sum of £6. It follows that the agreement has, in the events which the workman avers to have happened, restricted his compensation to less than 10s. a-week. Although it is not necessary to decide the point, my impression is that the agreement may also be described as one for the redemption of a weekly payment by a lump sum. While I assume that the workman's right to a continuance of a weekly payment of £1 a-week was suspended in respect of his returning to his work and receiving his former wage, I see no reason why parties should not agree to redeem a weekly payment which, *ex hypothesi*, has not been finally terminated but only suspended. I understand the opposite view, but I regard it as unduly strict and technical. Your Lordships do not I believe agree with the arbiter that unless a redemption agreement falls under paragraph 17 of the First Schedule of the Workmen's Compensation Act 1906 it cannot be properly described as an agreement "under the Workmen's Compensation Act 1906" within the meaning of section 11 (1) (c) of the National Insurance Act 1911.

This opinion seems to me to be clearly wrong.

For the foregoing reasons I think that there was a contravention on the part of the employers of the statutory procedure which it was their duty to observe, and that the consequences already stated ought to follow.

The Court answered the question of law in the affirmative and found the Amalgamated Society of Steel and Iron Workers of Great Britain (the appellants' society) liable in expenses.

Counsel for the Appellant—Constable, K.C.—Ingram. Agents—J. Douglas Gardiner & Mill, S.S.C.

Counsel for the Respondents—Gentles. Agents—Drummond & Reid, W.S.

Thursday, July 4.

## FIRST DIVISION.

[Exchequer Cause.]

### SUTHERLAND v. INLAND REVENUE.

*Revenue—Excess Profits Duty—Profits of Trade or Business—Steam Drifter Taken Compulsorily on Charter by Admiralty—Finance (No. 2) Act 1915 (5 and 6 Geo. V, cap. 89), Part iii, and Fourth Schedule.*

A new steam drifter for fishing was taken from a joint adventure by the Admiralty under compulsory powers, and was thereafter held by the Admiralty upon charter from the joint adventure. Excess profits duty upon the earnings, including therein the payments made under the charter-party, was claimed. The defence was that the chartering was not a trade or business, alternatively that it was not comparable with anything pre-war. *Held* that the joint adventure in letting the drifter to the Admiralty were engaged in a trade or business upon the profits of which they were liable in payment of excess profits duty under the Finance (No. 2) Act 1915, in respect that they were after the charter merely using the same commercial asset to obtain a return in a different way from the former use of it, and there was not sufficient dissimilarity between the two modes of use to render the profits under the charter profits from a different business than that formerly carried on.

The Finance (No. 2) Act 1915 (5 and 6 Geo. V, cap. 89) enacts—Section 38—“(1) There shall be charged, levied, and paid on the amount by which the profits arising from any trade or business to which this part of this Act applies . . . exceeded by more than two hundred pounds the pre-war standard of profits . . . a duty (in this Act referred to as ‘excess profits duty’) . . .” Section 39—“The trades and businesses to which this part of this Act applies are all trades or businesses (whether continuously

carried on or not) of any description carried on in the United Kingdom, or owned or carried on in any other place by persons ordinarily resident in the United Kingdom, excepting (a) husbandry in the United Kingdom; and (b) offices or employments; and (c) any profession the profits of which are dependent mainly upon the personal qualifications of the person by whom the profession is carried on and in which no capital expenditure is required, or only capital expenditure of a comparatively small amount; but including the business of any person taking commissions in respect of any transactions or services rendered, and of any agent of any description (not being a commercial traveller or an agent whose remuneration consists wholly of a fixed and definite sum not depending on the amount of the business done or any other contingency)."

Alexander Sutherland, managing owner of the steam drifter "B. Sutherland," appellant, being dissatisfied with an assessment to excess profits duty made upon him by the Commissioners of Inland Revenue, respondents, took a Case.

The Case stated—"No question was raised as to the correctness of the assessment on the assumption that the payments received from the Admiralty as after mentioned were properly included as profits arising from a trade or business.

"1. The following facts were admitted or proved:—1. The appellant is the managing owner of the steam drifter 'B. Sutherland,' which is owned by the appellant and his two sons John and Alexander. 2. The appellant and his said two sons had, prior to November 1915, owned and worked a sailing boat for the purpose of catching fish for sale. The drifter, which was built in 1915 (having been completed in October of that year), was acquired by them for use for this same purpose, and was engaged in the herring fishing for a few weeks until 15th December 1915, when it was requisitioned for use by the Admiralty, on terms fixed by the Admiralty and embodied in a charter-party dated 12th January 1916. 3. The charter-party provides, *inter alia*, as follows:—(1) The owners have let and the Admiralty have hired and taken to freight the good ship under mentioned, viz., steam drifter "B. Sutherland," tonnage 96, guaranteed to be in seaworthy condition and in good working order throughout for service and employment on monthly hire from the 15th day of December 1915 for the space of one calendar month certain, and thenceforward until the Admiralty shall cause notice to be given to the owners that she is discharged from His Majesty's service, such notice to be given when the said ship is in the port in the United Kingdom at which she was taken over by the Admiralty. (2) The Admiralty may at any time while the said ship is so on hire as aforesaid, upon giving notice to the owners of their intention so to do, purchase her at the price of £3048. (3) The Admiralty may at any time alter or remove all or any of the fittings or arrangements on board the said ship, and may erect

any new fittings which may be required to render the ship available for service as a trawler auxiliary, and may remove the same, provided that the said ship, her outfit and machinery, shall at the cost of the Admiralty, if so desired by the owners, be restored to and be given up to the owners in the same condition in which they were when taken by the Admiralty, ordinary wear and tear alone excepted. The fishing gear, with the exception of trawl warps and dan-buoys, to be removed from the said ship by the owners before her entry into pay. (4) The said ship shall, while she is so on hire as aforesaid, be at the absolute disposal of the Admiralty and under their complete control in every respect. (5) The Admiralty shall pay in manner following for the hire of the said ship, at the rate of £45, 14s. 5d. per calendar month during such term as the said ship shall be continued in His Majesty's employ, this sum representing 18 per cent. per annum of the agreed estimated value of the ship at the time of hiring as inserted in clause 2. . . . (7) All risk and expense of ship and stores shall be borne by the Admiralty during the continuance of the ship's service under this charter-party.' 4. By an agreement dated 31st October 1916 between the appellant and the Admiralty the terms set forth in the charter-party were altered. Article I. of the agreement provided 'that for the words "at the price of £3048" in paragraph 2 of the said charter-party of affreightment there shall be substituted the words "paying therefor the market value of the said ship at the date of such notice."' Article 2 provided 'that the compensation payable by the Admiralty in respect of loss of the said ship shall be computed upon the basis of the said ship's market value at the time of such loss.' Article 3 provided 'that as from the 15th day of December 1915 the rate of hire fixed in clause 5 of the said charter-party of affreightment shall be increased to £60, 17s. 8d. per calendar month.' 5. For the short period during which the said steam drifter was engaged in the business of herring fishing, certain profits were earned, which, in accordance with the custom of trade, accrued in certain shares to the boat, the nets, and the crew. The appellant, as representing the owners of the boat, received one-third of the profits for the period ended the 15th day of December 1915 as the boat's share thereof. 6. Accounts for the period of five months ended 31st March 1916 were made up by the appellant and furnished to the Surveyor of Taxes in response to an application for a return for the purpose of assessment to income tax. In those accounts the amount received from the Admiralty in respect of the hire of the boat was included in the credit side together with the amount of the boat's share of the profits from fishing. 7. The assessment was arrived at by taking the profits of the accounting period as the receipts from the fishing (*i.e.*, the share accruing to the boat and excluding the shares accruing to the nets and to the crew) plus the Admiralty hire, less expenses and depreciation, and the pre-war standard

as a percentage standard based on prime cost, less loans. The details of the assessment are as follows:—

*Pre-War Standard.*

1. Prime cost of boat	-	£3050	
2. Loans	-	1039	
		£2011	
7 per cent thereon			£141

*Profits.*

1. Accounting period five months ended 31st March 1916—			
(1) Receipts fishing	-	£149	
(2) Admiralty hire	-	213	
		£362	
<i>Less—</i>			
(1) Expenses	-	£20	
(2) Interest	-	22	
(3) Depreciation	-	51	
		93	
		£269	

*Duty Assessed.*

1. Profits as above	-	£269	
2. Pre-War standard	-	£141	
Add Statutory allowance		200	
		£341	
5/12ths of £341			142
		£127	
60 per cent.	-	£76	

“Mr A. J. F. Wedderburn, S.S.C., Edinburgh, on behalf of the appellant, contended that the owners of the drifter had not during the accounting period, or in any event subsequent to 15th December 1915, carried on any trade or business within the meaning of the ‘Finance (No. 2) Act 1915’; that when the drifter was compulsorily acquired by the Admiralty the owners thereof were thereby deprived of the only means they had of carrying on their trade or business; and that the payments received by the owners from the Admiralty in respect of such compulsory acquisition did not form any part of the owners’ receipts from a trade or business, but represented compensation to them for being compulsorily deprived of the means of carrying on their trade or business, and that such payments cannot legitimately be taken into account in assessing for excess profits duty. With regard to the decisions founded on by the Surveyor, it was maintained that they had no application to the present case, as it was no part of the trade or business of the owners of the said drifter to let their vessel for hire, but on the contrary their sole business was to use the drifter for the prosecution of the fishing industry, and because in any event, as the owners had no option in the matter, the acquisition of the drifter by the Admiralty did not have the result of creating a trade or business carried on by the owners in the letting of the boat. It was further maintained that the said decisions were inapplicable, in respect they were not concerned with the question raised by the appeal.

“III. Mr P. T. Horton, surveyor of taxes, on behalf of the Commissioners of Inland Revenue, contended that the ownership of a vessel for the purpose of profit is a trade or business, and that the freight or hire received from the Admiralty was rightly

included in the profits arising to the appellant from such trade or business. Reference was made to the cases of *Attorney-General v. Borrodaile*, (1814) 1 Price 148; and *Watson Brothers v. Lothian*, (1902) 4 F. 795, 4 T.C. 441.

“IV. The Special Commissioners, on consideration of the facts and arguments submitted to them, were of opinion that they were bound by the judgment in the case of *Attorney-General v. Borrodaile*, and the passage quoted therein from the judgment in the case of *Doddington v. Hallett*, 1 Ves. 497, to hold that the letting of the drifter to the Admiralty under the terms of the charter-party and supplemental agreement was a trade or business, and they accordingly confirmed the assessment.”

Argued for the appellant—The appellant was not carrying on any trade or business. From being a fisherman he had become a mere owner of a vessel taken upon hire compulsorily by the Admiralty. He now passively collected from them the hire of the ship which was of the nature of rent or a return upon an investment. His whole control of the vessel was gone, and what he received was not the product of any individual effort on his part. In such circumstance he could not be regarded as engaging in any trade or business the profits of which were taxable—*Doddington v. Hallett*, 1750, 1 Ves. Sen. 496; *Attorney-General v. Borrodaile*, 1814, 1 Price 148; *Watson Brothers v. Inland Revenue*, 1902, 4 F. 795, 39 S.L.R. 604. But excess profits duty was laid upon the profits of a trade or business—Finance (No. 2) Act 1915 (5 and 6 Geo. V, cap. 89), sections, 38, 39 and 45, and Fourth Schedule.

Argued for the respondents—All that was necessary was that the appellant should carry on a trade or business in the United Kingdom. Section 38 applied to all trades and businesses, and the exceptions showed that that section was not to be limited in application unless the case in question had been expressly mentioned. Here the appellant had used a commercial asset in the pre-war period in one way to make a profit while in the later period he used it to make a profit in a different way. The joint adventure which ran the drifter before the war had come to charter her after the war. The compulsory nature of the charter made no difference—*Tweedie v. Inland Revenue*, 1916 S.C. 502, 53 S.L.R. 753; section 40 of the Act was referred to.

*At advising—*

LORD PRESIDENT—The argument of the Lord Advocate in this case appears to me to be sound, and the determination of the Commissioners to be correct. No question was raised regarding the amount of the excess profits duty which the appellant is called upon to pay. The sole controversy arises upon the question of whether or no excess profits duty is payable. This as it appears to me is a question of circumstances and degree, and not of principle on which any absolute rule can be laid down.

The appellant is the owner of a drifter which he acquired for and employed in the prosecution of the fishing industry. She was adapted especially for that purpose,

but with certain alterations upon her equipment she was also suitable for Admiralty purposes, and accordingly by a charter-party which is before us, dated 12th January 1916, the appellant hired out the drifter to the Admiralty to be used for Admiralty purposes, empowering the charterers at the same time to make the alterations and adaptations necessary to suit her for her changed employment.

The question we have to consider and decide is whether the hire paid by the Admiralty to the appellant is profit or gain which is assessable to the excess profits duty. The appellant plausibly contends that his fishing industry was brought to an end by the intervention of the Admiralty, and that the hiring by the Admiralty subsequently must be viewed as compensation to him for the stoppage of his business. That is the argument set out in the Stated Case, but it was more plausibly contended by his counsel that when the charter-party was effected the fishing trade came to an abrupt termination, and that under the hiring a new and entirely different business was commenced, and hence that there was no pre-war standard available on which to base the charge of excess profits duty. I did not understand it to be disputed that if the fishing industry came to an end and an entirely new and distinct industry was commenced by hiring under this charter-party, then the Crown claim for duty would fail, but I am not disposed to view the case in that light.

When the appellant acquired this ship he acquired her as an instrument, or as the Lord Advocate put it, a commercial asset susceptible of being put to a variety of different uses in which gain might be acquired, and whichever of these uses it was put to by the appellant and profits earned, he was carrying on the same business even although alterations were necessary on the vessel for the changed purpose, provided that each of these uses was one for which she as a ship was adapted. It is true in a sense that fishing is a different industry from mine-sweeping, or trading, or patrolling, or watching a gap in a boom, or the like, but viewed from the standpoint of the shipowner they are the same business, because in each his vessel if she earns profits is employed for gain. It is the same piece of machinery, or implement, or commercial asset which is used to acquire profit. In short, the business is that of the employment of a ship for gain in ordinary shipowning business. In other words, if this drifter were put to a purpose for which she as a ship is suitable, then, whatever alterations might be necessary in order to adapt her for that use, if she earns profits therein, these profits are I think assessable to the excess profits tax.

In the case of *Doddington v. Hallet*, 1750, 1 Ves. Sen. 496, cited to us, the Lord Chancellor, Lord Hardwicke, observed — "It must be admitted the ship may be the subject of partnership as well as anything else, the use and earnings thereof being proper subjects of trade, and the letting a ship to freight as much a trade as any other." It follows from this determination

I think that it matters not for what purpose the ship is let or what alterations may be required to adapt her for that particular purpose, the owner is engaged in the same trade or business, and his gains therein are chargeable to the excess profits duty provided the purpose to which the ship is put is a purpose for which she as a ship is suitable. On these grounds I am for refusing this appeal and affirming the determination of the Commissioners.

**LORD MACKENZIE**—This case as presented by the Lord Advocate involves a question of degree, and like many other cases involving such a consideration is by no means unattended with difficulty. I agree with your Lordship in the conclusion reached. In the first place I think that the leading argument stated by the appellant in the case is plainly wrong, that is, that the owners of the drifter had not during the accounting period carried on any trade or business within the meaning of the Act. It is clear I think from what has already been read from the judgment of Lord Hardwicke in the case of *Doddington v. Hallet*, 1 Ves. Sen. 496, and from a series of subsequent cases, that the letting of a ship to freight is just as much a trade as any other.

The next point taken is that the drifter was taken compulsorily. I do not think that the mode by which possession of the drifter was obtained matters at all. The question is, to what purpose was she being put after she was taken over by the Admiralty. It is here that the difficulty of the case lies. I have come to be of opinion that this is a case in which the same commercial asset is being employed for profit during the accounting period. Though the profit is not being derived from fish but from the freight earned, I do not think that sufficient to prevent the case coming within the sweep of the Act. It does not in the present case matter that there is the substitution of a different product from the use of the commercial asset in the accounting period. There are many analogies which suggest themselves, but I do not think it would be safe to embark on a consideration of what may be considered as similar cases, as it was apparent from the course of the argument and the illustrations that were put that this case may by no means end the question of what trades and businesses fall within the Act and what will be held to fall outside. Each case must be decided on its own circumstances. I do not consider that in disposing of the case in the way your Lordship suggests we lay down any general principle.

**LORD SKERRINGTON**—I agree with your Lordships and have nothing to add.

**LORD JOHNSTON** was absent.

The Court affirmed the determination of the Commissioners and sustained the assessment.

Counsel for the Appellant—Chree, K.C.—Macquisten. Agents—Alex. Morison & Company, W.S.

Counsel for the Respondents—The Lord Advocate (Clyde, K.C.)—R. C. Henderson. Agent—Sir Philip J. Hamilton Grierson, Solicitor of Inland Revenue.