NO. 1047—COURT OF SESSION (FIRST DIVISION)—6TH, 7TH AND 27TH FEBRUARY, 1936

HOUSE OF LORDS—1ST AND 24TH JUNE, 1937

MOSS' EMPIRES, LTD. *v.* COMMISSIONERS OF INLAND REVENUE[1]

Income Tax—Annual payment—Payments under contract to guarantee fixed dividend by company—Income Tax Act, 1918 (8 & 9 *Geo.* V, *c.* 40), *General Rule* 21; *Finance Act*, 1927 (17 & 18 *Geo.* V, *c.* 10), *Section* 26.

Under a guarantee the Appellant Company and another company jointly and severally covenanted to pay to the trustees for the Ordinary shareholders of a third company, Dominion Theatre, Ltd., for each of the first five financial years of that Company a sum equivalent to the amount by which for any of those years that Company's available profits fell short of the amount required to pay the fixed dividend of 7½ per cent. (less Income Tax) on the Ordinary shares. Any sums paid under the guarantee were to be distributed by the trustees, directly or through the Dominion Company, to the shareholders, and were to be deemed, to the extent of the amounts distributed, to be payments by that Company of the fixed dividend. The guarantors were entitled to recoupment out of the Dominion Company's surplus profits over a period of years and out of surplus assets on a winding-up.

For each of the five years the Appellant Company was called upon to make payments under the guarantee. For the first three years the payments were made to the Dominion Company and the distributions to shareholders were made by that Company with certificates shewing the sums distributed as net amounts after deduction of Income Tax. For the last two years the payments were made to the trustees, who distributed the sums to shareholders with similar certificates.

In computing its profits for the purpose of assessment under Case I, *Schedule D, the Appellant Company was allowed, under a decision of the Special Commissioners on appeal, a deduction of the actual sums paid by it under the guarantee as a necessary trade expense.*

Assessments were made on the Appellant Company under General Rule 21, *based on the amounts paid by it under the guarantee for the relevant years, against which it appealed.*

Held, *that the sums payable under the guarantee were annual payments from which Income Tax was deductible, and that the Appellant Company had been correctly assessed under General Rule* 21.

(1) Reported (C. of S.) 1936 S.C. 531; (H.L.) [1937] A.C. 785.

CASE

At a meeting of the Commissioners for the Special Purposes of the Income Tax Act held at Edinburgh on 28th February, 1935, for the purpose of hearing appeals, Moss' Empires, Limited, theatre and music hall proprietors, of 4, Charlotte Square, Edinburgh (hereinafter called "the Appellant Company") appealed against assessments made upon it under Rule 21 of the General Rules applicable to All Schedules of the Income Tax Act, 1918, as amended by the Finance Act, 1927, Section 26, in respect of annual payments not payable or not wholly payable out of profits and gains brought into charge to Income Tax, as under :—

for 1928–29	on the	sum of	£3,322
for 1930–31	,,	,,	£7,438
for 1931–32	,,	,,	£1,655
for 1932–33	,,	,,	£6,797
for 1933–34	,,	,,	£7,031

The annual payments above mentioned were payments made under a guarantee to or on behalf of the shareholders of Dominion Theatre, Limited, in the circumstances hereinafter mentioned.

I. The following facts were admitted or proved :—

(1) The Appellant Company carries on business as theatre and music hall proprietor, and during the period covered by the assessments it owned, managed or booked thirty-five theatres in London and the provinces. Its profits were mainly derived from the provinces, and thus depended upon finding plays or shows which would be attractive in the provinces. It also owned the Hippodrome Theatre in London.

The Company's business was subject to competition in the provinces from the independent proprietors of other theatres, and from one other big firm who owned or managed a chain of theatres. For the successful working of a provincial theatre business it was necessary either to own a chain of theatres in which the same piece "on tour" could be shown successively, or to make separate but continuous arrangements with individual theatre owners so that a piece could go "on tour" and not lose days owing to having no engagements.

In recent years the practice of sending a piece on tour had become more and more confined to pieces owned or controlled by the Appellant Company, or the competitor referred to, both of whom owned chains of theatres. Suitable pieces for provincial tours were, however, produced from time to time at the Drury Lane Theatre by the Theatre Royal, Drury Lane, Limited (hereinafter called "the Theatre Royal Company"), and sent on tour under arrangements made independently by the management of that theatre, but such arrangements were becoming more and more difficult to make.

The pieces suitable for a provincial tour were of the "super-show" nature, and originated often in America. They required to be tried out in a large theatre like Drury Lane or the Hippodrome.

(2) In 1927 the building of a new theatre in London was in contemplation. The management of the Theatre Royal Company was interested in this venture and the Appellant Company came to hear of it. After some discussion, and with a view to preventing competition between themselves in the super-show business, the Appellant Company and the Theatre Royal Company agreed to form a company called the United Producing Corporation, Limited (hereinafter called "the Producing Company"), so as to get control of certain plays and shows by mutual arrangements between the Theatre Royal Company, the proprietors of the Hippodrome Theatre and the new theatre. The Producing Company had a nominal share capital of £100,000, and issued shares to the nominal value of £60,000, which were held as to £20,000 by the Appellant Company, as to £20,000 by the Theatre Royal Company and as to £20,000 by the new theatre company, subsequently called the Dominion Theatre, Limited (and hereinafter referred to as "the Dominion Company"). The Producing Company was intended to get the rights to plays and shows, and to allocate them to the Appellant Company, the Theatre Royal Company and the Dominion Company.

(3) On 30th January, 1928, the Dominion Company was incorporated. Its nominal capital was £280,000, divided into 250,000 Ordinary Shares of £1 each, and 600,000 Deferred Shares of 1*s*. each.

(4) By an agreement, a copy of which, marked "A", is annexed to and forms part of this Case, made the 31st day of January, 1928, between the Appellant Company and the Theatre Royal Company (therein and hereinafter called "the Guarantors") of the first part George Bertie Brooks and William Herbert Chantrey on behalf of themselves and all other holders of Ordinary Shares of the Dominion Company (and therein and hereinafter called "the Trustees") of the second part and the Dominion Company of the third part the Guarantors jointly and severally covenanted with the Trustees that in case the profits of the Dominion Company which might be available for distribution as dividend on its 250,000 Ordinary Shares should be insufficient to pay a dividend at the fixed rate of 7½ per cent. (less Income Tax at the current rate) for each of its first five financial years ending on the 30th day of January, 1933, the

Guarantors would make up and pay to the Trustees in respect of each and every of such five years a sum equivalent to the amount by which the profits available as aforesaid should fall short of the sum required to pay the aforesaid dividend (less tax) for any year during the said period of five years or in case there should be no profits available for distribution as aforesaid in respect of any of such years then the Guarantors would pay to the Trustees a sum equivalent to the sum required to pay the fixed dividend at the rate of 7½ per cent. per annum (less tax) on such Ordinary Shares for that year provided that in such last mentioned event the liability of the Guarantors was to be limited to a sum equivalent to the sum which would have been payable by way of fixed dividend at the rate of 7½ per cent. per annum on the Ordinary Shares for that year if there had been profits of the Dominion Company available for distribution in respect thereof.

(5) On 2nd February, 1928, the Dominion Company issued a prospectus inviting applications for its Ordinary and Deferred Shares. The following are extracts :—

" The Ordinary shares confer the right to a fixed preferential dividend at the rate of 7½ per cent. per annum on the capital paid up thereon, calculated from the date of allotment and the respective dates fixed for payment of subsequent instalments.

" The fixed dividend of 7½ per cent. per annum on the Ordinary shares for a period of five years from the incorporation of the Company is jointly and severally guaranteed by Moss' Empires, Limited, and Theatre Royal, Drury Lane, Limited, whose average annual net profits for the past three years have in the aggregate been more than seven times the amount required to pay the annual guaranteed dividend.

" The United Producing Corporation, Limited, undertakes by Contract No. 3 to provide suitable plays for the above-mentioned theatres, and will be interested in such plays as well as its other productions, with the result that Dominion Theatre, Limited, will as a shareholder in the United Producing Corporation, Limited, participate in the profits arising from the productions by that Company at Drury Lane, the Hippodrome and elsewhere, including more particularly the provincial circuit of Moss' Empires, Limited.

" In consideration of the allotment to each of them for cash at par of 158,334 Deferred shares, Moss' Empires, Limited, and Theatre Royal, Drury Lane, Limited, have undertaken jointly and severally to guarantee the fixed dividend of 7½ per cent. (less tax at the current rate) on the Ordinary capital for a period of five years from the date of the Company's incorporation ".

(6) The above mentioned Guarantee was considered necessary to induce the public to subscribe for shares in the Dominion Company. The Appellant Company, as already explained, took part in setting up the Dominion Company, took up shares therein and joined in the Guarantee. We are satisfied that by the arrangements above mentioned the Appellant Company did in fact obtain the rights to the use of plays and shows in its provincial business.

(7) The Dominion Theatre opened on 3rd October, 1929, at the beginning of a trade depression and it did not meet with much success.

(8) In or about February, 1929, the directors of the Dominion Company decided, in accordance with the terms of the prospectus hereinbefore mentioned, that the guaranteed dividend of 7½ per cent. on its Ordinary Shares for the period from the date of allotment (11th February, 1928) to the end of the first year from its incorporation, namely, 30th January, 1929, should be paid.

In accordance with the Articles of Association of the Dominion Company, the dividend was calculated on the amounts for the time being paid up on the Ordinary Shares. The total dividend so payable for the period ended 30th January, 1929, amounted to £8,373 5*s*. 3*d*.
and after deduction of Income Tax at 4*s*. in the £, namely - - - £1,674 13*s*. 0*d*.

there was payable to the Ordinary shareholders the net sum of - - £6,698 12*s*. 3*d*.

As the Dominion Company made no profits available for dividend during such period ended 30th January, 1929, the Dominion Company by letter dated 23rd February, 1929, a copy of which, marked "B", is annexed to and forms part of this Case(1), gave written notice to the Appellant Company as Guarantors in terms of Clause 5 of the said Guarantee specifying the sum which was required to pay the said dividend for the said period (less tax). The Appellant Company was asked by said notice to pay the sum of £3,349 6*s*. 2*d*., being one half of the sum required to pay the said dividend (less tax). On 1st March, 1929, the Appellant Company paid the said sum of £3,349 6*s*. 2*d*. (which is the subject matter of the first assessment under appeal) direct to the Dominion Company, who thereupon distributed it among the Ordinary shareholders entitled thereto in terms of the said Guarantee. A copy of a voucher attached to the dividend warrant issued to one

(1) Not included in the present print.

of the shareholders of the Dominion Company, which shows the manner in which payment was made to the shareholders, is annexed hereto, marked " C ", and forms part of this Case(1).

(9) On 7th April, 1930, a certificate, a copy of which, marked " D ", is annexed to and forms part of this Case(1), was sent by the auditors of the Dominion Company to the Appellant Company intimating that the Dominion Company had earned no profits for the year ended 30th January, 1930, and that the actual net amount of the dividend for the year ended 30th January, 1930, was £14,876 14*s*. 2*d*., after deduction of tax, one half of which, £7,438 7*s*. 1*d*., was declared to be due by the Appellant Company.

(10) On 10th April, 1930, the Dominion Company received payment of the said sum of £7,438 7*s*. 1*d*. from the Appellant Company, and on 11th April, 1930, a payment representing the dividend of 7½ per cent. was paid by the Dominion Company to its Ordinary shareholders. A copy of a voucher attached to a dividend warrant issued to one of the shareholders on 11th April, 1930, is annexed hereto, marked " E ", and forms part of this Case(1).

(11) By a deed made on 20th May, 1931, between the Dominion Company of the first part, the Trustees of the second part, and the Guarantors of the third part, it was narrated that the profits of the Dominion Company available for distribution as dividend on the Ordinary Shares for the financial year ended 30th January, 1931, as certified by the auditors, less Income Tax, fell short of the amount required to pay the aforesaid dividend by the sum of £3,310 7*s*. 9*d*., which sum the Dominion Company had called upon the Guarantors to pay in equal shares to the Trustees. A copy of the written request of the Dominion Company to the Appellant Company on 22nd May, 1931, is annexed hereto, marked " F ", and forms part of this Case(1). The Appellant Company paid the £1,655 3*s*. 11*d*. demanded (and being one half of the £3,310 7*s*. 9*d*. above mentioned) on 29th May, 1931, and on 4th June, 1931, a payment representing the dividend of 7½ per cent. was made by the Dominion Company to its Ordinary shareholders. A copy of a voucher attached to a dividend warrant then issued to one of the Ordinary shareholders is annexed hereto, marked " G ", and forms part of this Case(1).

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(1) Not included in the present print.

(12) On 26th April, 1932, the auditors of the Dominion Company certified that no profits available for dividend were made by the Dominion Company for the year ended 30th January, 1932. On 27th and 29th April, 1932, the secretary of the Dominion Company, by letters to the Appellant Company, requested payment to be made to the Trustees for the Ordinary shareholders under the said Guarantee by the Appellant Company of one half of the amount necessary to pay the dividend on the Ordinary Shares for the year ended 30th January, 1932. Copies of the said certificate and letters, marked respectively "H", "I" and "J", are annexed hereto and form part of this Case(1). The sum required to pay the dividend (less Income Tax) on the Ordinary Shares for the year ended 30th January, 1932, amounted to £13,593 15*s*., one half of which, namely, £6,796 17*s*. 6*d*., was paid by the Appellant Company to the Trustees on 3rd May, 1932. On 24th May, 1932, a payment representing the dividend of 7½ per cent. to the Ordinary shareholders was made by the Trustees to such Ordinary shareholders. A copy of a voucher attached to a dividend warrant is annexed hereto, marked "K", and forms part of this Case(1).

(13) On 30th May, 1932, the Dominion Company went into liquidation, and on 3rd February, 1933, the Trustees by letter, a copy of which, marked "L", is annexed to and forms part of this Case(1), requested payment from the Appellant Company of the sum of £7,031 5*s*., being the amount required to pay the dividend, less Income Tax, for the year ended 30th January, 1933. On 15th February, 1933, the Appellant Company paid the sum of £7,031 5*s*. to the Trustees, and on 16th May, 1933, a payment representing the dividend of 7½ per cent. was made by the Trustees to the Ordinary shareholders of the Dominion Company. A copy of a voucher attached to a dividend warrant then issued to the Ordinary shareholders is annexed hereto, marked "M", and forms part of this Case(1).

(14) In computing the profits of the Appellant Company in its assessment to Income Tax under Schedule D for the year 1930–31, no deduction was made for the sum of £3,349 6*s*. 2*d*. paid by it under the said Guarantee on 1st March, 1929. The Appellant Company appealed against the said assessment, and contended that the

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(1) Not included in the present print.

said sum should be allowed as a deduction in computing its profits assessable to Income Tax on the ground that the said payment was wholly and exclusively incurred in earning the profits.

(15) At an appeal meeting held on 28th February, 1934, the Special Commissioners who heard the appeal decided that the said payment of £3,349 6*s*. 2*d*. under the Guarantee was a necessary trade expense of the Company's business, deductible in calculating its profits for the purpose of Income Tax, and accordingly reduced the assessment by the sum of £3,349 6*s*. 2*d*. This decision was acquiesced in by the Commissioners of Inland Revenue. We are satisfied that the subsequent payments under the Guarantee are in a similar position.

(16) In computing the profits of the Appellant Company chargeable to Income Tax for subsequent years, the actual sums paid by it under the said Guarantee for the relevant years were also allowed as deductions.

(17) The following amounts of Income Tax were paid by the Appellant Company in respect of its profits taxable under Schedule D :—

for 1928–29	...	...	£20,080
for 1929–30	...	...	£21,205
for 1930–31	...	...	£12,747
for 1931–32	...	...	£13,872
for 1932–33	...	...	£730
for 1933–34	...	...	£15

The assessments for each of these years upon the Company's properties under Schedule A (deductible in calculating profits under Schedule D) exceeded £50,000, and more than £30,000 yearly was payable by the Company in rents, mortgage and debenture interest.

(18) For the years ended 5th April, 1932, 1933 and 1934, the Appellant Company incurred losses as adjusted for Income Tax purposes, and Income Tax was repaid as follows :—

for 1931–32, £5,213 on loss of £20,853
for 1932–33, £9,547 ,, ,, ,, £38,189
for 1933–34, £9,829 ,, ,, ,, £39,314.

Included as part of the Appellant Company's income which for the purpose of the said repayment was treated as having had Income Tax deducted before receipt were the dividends received by it from its holding of Ordinary Shares in the Dominion Company.

II. On behalf of the Appellant Company it was, *inter alia*, contended (*a*) that the payments under the Guarantee were not annual payments assessable under Rule 21 of the General Rules of the Income Tax Act, 1918, as amended by the Finance Act, 1927, Section 26; (*b*) that the payments to the shareholders of the Dominion Company were not made by or through the Appellant Company; (*c*) that the payments of dividend to the shareholders of the Dominion Company were made by the Dominion Company or by the Trustees for its shareholders under deduction of tax for which the Dominion Company is accountable; (*d*) that the payments made under the Guarantee, having been allowed as a trading expense of the Appellant Company, are not subject to liability to tax; (*e*) that the Appellant Company did not in point of fact deduct tax from the payments made under the Guarantee.

III. On behalf of the Commissioners of Inland Revenue it was contended, *inter alia* :—

(1) That the sums paid by the Appellant Company under the Guarantee were annual payments;

(2) That Income Tax had in fact been deducted and retained by the Appellant Company in making the said payments, which represented the net sums remaining after the deduction of Income Tax;

(3) That, a deduction having been allowed in computing the profits of the Appellant Company chargeable to Income Tax of the sums paid by it under the said Guarantee, the payments made were not made out of profits or gains brought into charge to tax notwithstanding the fact that in certain years the balance of profits charged to Income Tax exceeded the payments under the Guarantee, and

(4) That the Appellant Company was correctly assessed under Rule 21 of the General Rules applicable to All Schedules of the Income Tax Act, 1918, in respect of the said payments under the Guarantee.

IV. We, the Commissioners who heard the appeal, held that the appeal failed, and subject to certain amendments of figures we gave our decision accordingly.

V. Immediately upon our so determining the appeal the Appellant Company expressed to us its dissatisfaction with our decision as being erroneous in point of law and having duly required us to state and sign a Case for the opinion of the Court of Session as the Court of Exchequer in Scotland, this Case is stated and signed accordingly.

VI. The questions of law for the opinion of the Court are :—

(1) Whether the sums payable under the said Guarantee by the Appellant Company were annual payments from which Income Tax was deductible, and if so

(2) Whether the Appellant Company was correctly assessed under Rule 21 of the said General Rules, as amended by the Finance Act, 1927, Section 26.

W. J. BRAITHWAITE, { Commissioner for the Special Purposes of the Income Tax Acts.

Mr. P. Williamson, who also sat to hear this appeal, has since then retired from the public service.

York House,
23, Kingsway,
London, W.C.2.

1st January, 1936.

EXHIBIT A

This Deed made the 31st day of January 1928 between Moss' Empires, Limited, whose Registered Office is at 23 York Place, Edinburgh, and Theatre Royal, Drury Lane, Limited, whose Registered Office is at Theatre Royal, Drury Lane, London (hereinafter called "the Guarantors") of the first part, George Bertie Brooks of 10 Old Cavendish Street, in the County of London, Solicitor, and William Herbert Chantrey of 61–62 Lincolns Inn Fields, in the County of London, Chartered Accountant (on behalf of themselves and all other holders of Ordinary Shares in Dominion Theatre, Limited) (hereinafter called "the Trustees") of the second part and Dominion Theatre, Limited, whose Registered Office is at 61–62 Lincolns Inn Fields, London, W.C.2 (hereinafter called "the Company") of the third part.

Whereas the Company was incorporated on the 30th day of January 1928 as a Company limited by Shares under the Companies Acts 1908 to 1917 with a Share Capital of £280,000 divided into 250,000 Ordinary Shares of £1 each and 600,000 Deferred Shares of One Shilling each, with the objects set out in the Memorandum of Association thereof and more particularly to acquire a freehold property at the junction of Tottenham Court Road and New Oxford Street and to erect thereon a Theatre and carry on the business of Theatre Proprietors and Managers and is about to make a public issue of the whole of its Ordinary Shares and 125,000 Deferred Shares at the request of the Guarantors And whereas the Ordinary Shares in the original Capital of the Company confer upon the holders thereof

(*a*) The right to receive a fixed preferential dividend at the rate of 7½ per cent. per annum on the capital paid up on the said Ordinary Shares calculated from the date of allotment and the respective dates fixed by the terms of issue for the payments of the amounts subsequently payable in respect thereof down to the end of the first financial year of the Company ending on the 30th day of January 1929 and such dividend is cumulative and until satisfied is payable out of the profits of the Company available for distribution and determined to be distributed by way of dividend (whether carried in for such year or in any subsequent year or period) in priority to any other payment by way of dividend on the said Shares or any other Shares of the Company;

(*b*) Subject as aforesaid the right to receive out of the profits of each year subsequent to the first financial year available for distribution and determined to be distributed by way of dividend a fixed non-cumulative preferential dividend at the rate of 7½ per cent. per annum on the capital paid up on the said Ordinary Shares as from the commencement of the second financial year of the Company;

(*c*) The right to such further participation in the profits of the Company available for distribution and determined to be distributed by way of dividend as is specified in the Articles of Association of the Company.

And whereas the Company has agreed to issue and allot to the Moss' Empires Limited 158,334 Deferred Shares and to Theatre Royal Drury Lane Limited 158,334 Deferred Shares in the Capital of the Company at par, payable in cash, And whereas it is one of the terms of the issue of such Deferred Shares that the Guarantors shall jointly and severally guarantee in manner hereinafter appearing the said dividend of 7½ per cent. (less tax at the current rate) on the Ordinary Shares in the original Capital of the Company for a period of five years from the said 30th day of January 1928.

Now it is hereby Witnessed and Declared as follows :—

1. In pursuance and in consideration of the premises and of such agreement as aforesaid, the Guarantors jointly and severally guarantee and covenant to and with the Trustees as Trustees for and on behalf of the holders for the time being and from time to time of the said 250,000 Ordinary Shares in the original Capital of the Company that in case the profits which may be available for distribution as dividend as aforesaid on the said 250,000 Ordinary Shares of the Company shall be insufficient to pay the said fixed dividend at the rate of 7½ per cent. (less income tax at the current rate) for each of the first five financial years of the Company ending on the 30th day of January 1933 the Guarantors will make up and

pay to the Trustees in respect of each and every of such five years a sum equivalent to the amount by which the profits available as aforesaid shall fall short of the sum required to pay the aforesaid dividend (less tax) for any year during the said period of five years or in case there shall be no profits available for distribution as aforesaid in respect of any of such years then the Guarantors will pay to the Trustees a sum equivalent to the sum required to pay the fixed dividend at the rate of 7½ per cent. per annum (less tax) on such Ordinary Shares for that year Provided and it is hereby declared that in such last mentioned event the liability of the Guarantors shall be limited to a sum equivalent to the sum which would have been payable by way of fixed dividend at the rate of 7½ per cent. per annum on the Ordinary Shares for that year if there had been profits of the Company available for distribution in respect thereof and the Guarantors shall not nor shall either of them be liable or accountable for any loss of capital which might have to be made good before the Company could lawfully declare a dividend and further that in arriving at the amount of profits of the Company available for distribution as aforesaid for the purposes of this Agreement the preliminary expenses of the Company shall be written off over a period of not less than five years and expenses prior to the opening of the Theatre of the Company over a period of not less than three years in such manner as the Directors of the Company shall think fit and no deduction shall be made for reserves or depreciation.

2. All sums paid by the Guarantors as aforesaid or either of them shall be distributed amongst the holders of Ordinary Shares at the date of such distribution in the proportions to which they would have been entitled thereto if the same were then distributed by way of fixed dividend on the Ordinary Shares. The Trustees shall not be bound to make such distribution themselves but may pay the amounts for the time being in their hands to the Company for distribution amongst the persons entitled thereto and shall not be responsible for any default of the Company in or in relation to such distribution and the receipt of the Company for any sums paid to them by the Trustees for the purpose of distribution as aforesaid shall be a good and sufficient discharge therefor to the Trustees Provided always that—

(1) Any sums paid to the Company as aforesaid shall be applicable and allocated exclusively to making the payment and distribution to the holders of the Ordinary Shares entitled thereto and shall not form part of the assets of the Company for any purpose nor shall any creditor or liquidator of the Company or any member or past member thereof other than the Ordinary Shareholders entitled thereto under this Agreement have any claim thereto or interest therein in any circumstances whatsoever;

(2) Any sum distributed amongst the Ordinary Shareholders under this Agreement shall as between the Ordinary Shareholders and the Company be deemed a payment by the Company to the extent of the sum so distributed of the said fixed dividend at the rate of 7½ per cent. per annum on the said Ordinary Shares and a satisfaction thereof accordingly as though the sum so distributed were profits of the Company available for distribution and determined to be distributed by way of dividend under the Articles of Association of the Company.

3. The Company covenants with the Trustees and each of them and as a separate covenant with the Guarantors and each of them that the Company will forthwith after receipt of any sum from the Trustees hereunder pay and distribute the same amongst the Ordinary Shareholders entitled thereto.

4. The Company covenants with the Guarantors and each of them that the Company will in respect of each of the aforesaid five years and without setting aside any sum to reserve or depreciation pay and distribute amongst the holders of the said 250,000 Ordinary Shares out of the profits available for distribution as aforesaid so far as the same will extend the fixed dividend at the rate of 7½ per cent. per annum payable on the said Ordinary Shares in respect of each of such five years computed from the date of allotment and the respective dates fixed for payment of subsequent instalments under the terms of issue thereof.

5. In case the profits available for distribution as aforesaid shall not be sufficient to pay the said dividend at the rate of 7½ per cent. per annum on the said Ordinary Shares in respect of any year during the said period, the Company shall within twelve calendar months after the expiration of such year give notice in writing to the Guarantors specifying the sum which is required to make up the said fixed dividend to 7½ per cent. per annum (less tax) or to pay the said fixed dividend and demanding payment thereof to the Trustees and the Guarantors shall not be liable to pay any sum or sums under this guarantee unless the same shall be demanded by notice in writing as aforesaid Provided always that the Company shall not be entitled to any payment in respect of the first financial year of the Company until the expiration of thirteen calendar months from the end of such first year. The Trustees shall not be bound to see to the payment of any moneys payable under the provisions of these presents or to take any proceedings to enforce payment thereof, except upon the request and at the expense of the Company, and before incurring any expenses or taking any proceedings they shall be entitled to be indemnified against all costs, losses, expenses, claims and demands either by a deposit of money or by the bond of one or more substantial persons or companies to their satisfaction.

6. The Guarantors and each of them and the Trustees and each of them and their respective Solicitors and Accountants shall at all times be entitled to full and free access to the Books of Account, Vouchers and papers of the Company and to take copies and extracts therefrom free of charge and to have the same produced in any Court or before any tribunal on demand and the Company covenants to give to them or any of them full information with reference to its accounts and affairs so long as the Guarantors or either of them is under any liability hereunder.

7. In case in respect of any year or years during the aforesaid period of five years the Guarantors or either of them shall have made any payment under this Guarantee then the Guarantors or Guarantor making such payment shall be entitled to be recouped and repaid out of any surplus profits of the Company available for distribution in respect of any subsequent year or years during the said period of five years in excess of the sum sufficient to pay the fixed dividend hereby guaranteed and out of the profits of the Company in any of the three years following the expiration of such period of five years and out of the surplus assets of the Company in a winding up remaining after repayment of the capital paid up on the Ordinary Shares and Deferred Shares in the original capital of the Company the amount which may have been paid by the Guarantors under this Guarantee in respect of such previous year or years or such part thereof as such surplus profit or profits or surplus assets as the case may be may be sufficient to repay and the Company hereby covenants with the Guarantors and as a separate covenant with each of them to repay such amounts accordingly on demand out of such surplus profits or surplus assets as the case may be.

8. As between the Guarantors all sums payable hereunder shall be paid in equal shares but the right of contribution in equity in the event of either being called upon to pay more than a half share and all other rights *inter se* are reserved.

9. The Certificate of the Auditor of the Company for the time being as to the amount of the profits of the Company available for distribution in respect of any year shall be conclusive.

10. The Trustees shall not be bound to act personally but may employ and pay Solicitors, Agents, Accountants or other persons to transact all business and do all acts required to be done in the trusts of these presents including the receipt and payment of money and so that any Trustee hereunder being a Solicitor, Accountant, Banker, Stockbroker or other person engaged in any profession or business or any firm in which he may be a partner shall be entitled to charge and be paid and retain all usual professional or business charges and any profits made by him or his firm in respect of business transacted and acts done by him or his firm in connection with the trusts hereof.

In Witness whereof the Guarantors and the Company have caused their respective Common Seals to be affixed hereto and the Trustees have set their hands and seals the day and year first before written.

The Common Seal of Moss' Empires, Limited, was hereunto affixed in the presence of :—

L.S. (*Signed*) WILLIAM HOULDING, } Directors.
,, ARTHUR G. THORNTON, }
,, DAVID SIMPSON, Secretary.

The Common Seal of Theatre Royal, Drury Lane, Limited, was hereunto affixed in the presence of—

(*Signed*) LURGAN, } Directors. L.S.
,, SIDNEY SMITH, }
,, J. ROBINSON, Secretary.

Signed, Sealed and Delivered by the above named George Bertie Brooks in the presence of—

(*Signed*) G. B. BROOKS. L.S.

(*Signed*) H. J. W. HALL,
10, Old Cavendish Street,
Cavendish Square,
London, W.1.
Solicitor.

Signed, Sealed and Delivered by the above named William Herbert Chantrey in the presence of—

(*Signed*) W. H. CHANTREY. L.S.

(*Signed*) H. J. W. HALL,
10, Old Cavendish Street,
Cavendish Square,
London, W.1.
Solicitor.

The Common Seal of Dominion Theatre, Limited, was hereunto affixed in the presence of—

(*Signed*) ALFRED BUTT, } Directors. L.S.
,, J. J. GILLESPIE, }
,, C. A. ROBSON, Secretary.

The case came before the First Division of the Court of Session (the Lord President and Lords Morison, Fleming and Moncrieff) on the 6th and 7th February, 1936, when judgment was reserved. On the 27th February, 1936, judgment was given in favour of the Crown (Lord Moncrieff dissenting), with expenses.

Mr. James Keith, K.C., and Mr. R. H. Sherwood Calver appeared as Counsel for the Appellant Company, and the Solicitor-General (Mr. Albert Russell, K.C.) and Mr. T. B. Simpson for the Crown.

I.—INTERLOCUTOR

Edinburgh, 27th February, 1936. The Lords having considered the Case and having heard Counsel for the parties, Answer the Questions of Law in the Case both in the Affirmative; Affirm the determination of the Commissioners and Decern; Find the Appellants liable to the Respondents in the expenses of the Stated Case on Appeal and remit the Account thereof, when lodged, to the Auditor to tax and to report.

(*Signed*) W. G. NORMAND, I.P.D.

II.—OPINIONS

The Lord President (Normand).—The question in this case is whether the Appellants were bound to deduct and account for Income Tax in making certain payments under contract. The Appellants on 31st January, 1928, entered into an agreement of guarantee by which they and the Theatre Royal Company agreed that in case the profits which might be available for distribution as dividend on the Ordinary shares of a company which was incorporated as Dominion Theatre, Limited, should be insufficient to pay the fixed dividend at the rate of 7½ per cent. (less Income Tax at the current rate) for each of the five financial years of the Company ending on the 30th day of January, 1933, the guarantors would make up and pay to trustees acting for and on behalf of the holders of the Ordinary shares in respect of each and every of such five years a sum equivalent to the amount by which the profits available as aforesaid should fall short of the sum required to pay the aforesaid dividend (less tax) for any year during the said period of five years, or, in case there should be no profits available for distribution as aforesaid in respect of any of such years, then the guarantors would pay to the trustees a sum equivalent to the sum required to pay the fixed dividend at the rate of 7½ per cent. per annum (less tax) on such Ordinary shares for that year.

In fact, in each of the five years the Dominion Company failed to earn sufficient profit to pay the fixed dividend, and in some of them it earned no profit, and the guarantors were called upon to fulfil their obligation under the agreement. Assessments have

(The Lord President (Normand).)

now been made on the Appellants under Rule 21 of the General Rules applicable to All Schedules of the Income Tax Act, 1918, as amended by the Finance Act, 1927, Section 26, in respect of the sums actually transferred by the Appellants under the guarantee. These sums are the amounts in each year required to pay the Ordinary shareholders a sum equal to one half of the net dividend receivable by the shareholders if a dividend of 7½ per cent., less tax, had been declared by the Dominion Company.

The Special Commissioners have held that the Appellants are correctly assessed. Against that determination this appeal is taken on the ground that they are not, within the meaning of Rule 21, persons making an annual payment charged with tax under Schedule D, or that the payment is not an annual payment payable as a personal debt or obligation by virtue of a contract within the meaning of Rule 1 (*a*) of the Rules applicable to Case III of Schedule D.

It is not necessary to enter minutely into the circumstances which induced the Appellants to enter into the guarantee. They are fully set out in the Case. The guarantee was considered necessary to induce the public to subscribe for shares in the Dominion Company. The Appellants themselves took part in setting up the Dominion Company and took shares in it, and the Dominion Company was intended to play an important part in enabling the Appellants to carry on their own business successfully. The hopes which led to the incorporation of the Dominion Company were disappointed and after an unsuccessful career it went into liquidation on 30th May, 1932.

A question arose on the construction of the obligation in the contract of guarantee which turned out to be of less importance than at first appeared. The Solicitor-General argued that the guarantors' obligation was to make up and pay a sum equivalent to the gross dividend. Counsel for the Appellants contended that it was an obligation to pay only a sum equivalent to the net dividend when Income Tax had been deducted. The former construction may seem to support the contention that the Appellants were bound to deduct Income Tax and account to the Revenue. But neither construction is in any way conclusive on that point. On either construction the Solicitor-General maintained that the Appellants were bound to deduct and account for Income Tax when they made payments under the contract, and Mr. Keith maintained the opposite. I have formed the impression that the construction put upon the obligation by the Solicitor-General is the proper construction. But as it affects the rights of the Appellants and the shareholders *inter se* and does not affect the rights of the Revenue I do not propose to enter further into the question. It was at first difficult to understand why, if the Crown's view is that the obligation is to make up and pay a sum equivalent to the gross dividend,

(The Lord President (Normand).)

the assessments made on the Appellants in each year were not for half of that sum. This difficulty is explained by the way in which the Appellants' own profits have been computed for Income Tax purposes. As their profits for the year 1930-31 were originally calculated no allowance was made for the deduction of the sum paid under the guarantee. The Appellants appealed and claimed to deduct the actual sum paid over by them as a necessary trade expense deductible in calculating their profits for the purpose of Income Tax. The Special Commissioners sustained the claim, and the principle thus affirmed has received effect in computing the Appellants' profits in the four subsequent years also. Logically, if the obligation in the guarantee was to pay and make up a sum equivalent to the gross dividend, the Appellants were entitled to deduct half that sum. But then, if they had done so, the assessments in the present case would have been increased to that amount. The construction of the guarantee therefore does not affect even the amount of the assessments in the present case. If the more onerous construction of the guarantee is right and if the Appellants are held bound to deduct and account, the result will be that the total tax will be accounted for by the Appellants in two parts, one part having been included when they paid tax on their own profits, and the other and larger part being accounted for under the present assessments. But it is important for the present case to note that the Appellants, having regard to the deduction allowed in computing their own profits, admitted that the sums assessed were not paid out of profits brought into charge.

Whichever view be taken of the construction of the contract, the Crown's case is simple. Here, the Solicitor-General says, is an obligation under contract to make up and pay annually to trustees for shareholders a sum equivalent to shortage of dividend. Such a payment in the hands of shareholders is as much income of the shareholders as the dividend itself. The Appellants are the persons by whom such payments are made, therefore under the Rule they must deduct and account. The principle is that the shareholders' income is subject to the tax and that the Appellants are collectors of the tax on that part of their income which they pay under the contract.

Mr. Keith for the Appellants admitted that the sums paid to the shareholders were taxable income. His answer to the Crown was therefore limited to two points. He maintained that the payment was made by the Appellants to the Dominion Company and by it to the trustees for the shareholders, and not by the Appellants to the shareholders' trustees; and he maintained that the payment was not an annual payment of the kind intended by Rule 21, and not an annual payment under Rule 1 applicable to Case III of Schedule D. His first contention is irreconcilable with the terms of the obligation already quoted. It is true that *de facto* in three of

(The Lord President (Normand).)

the five years the Dominion Company sent out to the shareholders a sum received from the guarantors equal to the net dividend. When the Company did this, the payment was made just as if it were a dividend and was accompanied by a certificate of deduction of Income Tax in ordinary form. In the remaining two years the trustees sent out the payment to the shareholders accompanied by a letter which narrated that they had received from the guarantors the sum equivalent to the fixed dividend of 7½ per cent., less Income Tax, and the letter showed the gross income effeiring to the individual shareholder, the Income Tax and the net sum receivable by him. The explanation of the payments by the Company is to be found in clause 2 of the guarantee, under which the trustees are permitted to pay the amount in their hands to the Company for distribution among shareholders. If they do so they are not to be liable for any default of the Company, but the Company is taken bound to allocate the sums exclusively to making the payment to the shareholders, and it is expressly stipulated that the sums shall not form part of the assets of the Company for any purpose. It is clear therefore that the sums, even when in fact distributed by the Company, are not dividends, nor distribution of any assets belonging to it, but sums payable by the guarantors to the trustees for the shareholders and earmarked for distribution among shareholders. The effect of this is not taken away either by the provision that the trustees are not to be liable for the Company's default, or by the provision that as between the shareholders and the Dominion Company the payment made to the shareholders is to be deemed a payment of dividend. The shareholders, whether they received it through the channel of the trustees alone or through the channel of the trustees and the Company, received payment from the guarantors. When they received it through the Company, the payment had first passed under the contract to the trustees for them. In these circumstances, if it was an " annual payment " within the meaning of the Rule, the persons making the payment were the guarantors and they should have deducted tax and accounted for it. The trustees for the parties beneficially entitled to the payment actually received the payment, but it is not doubtful that a payment in the sense of Rule 21 is made when it is made to trustees. It may be said, incidentally, that the Crown's construction of the guarantee is consistent with the terms of the certificate of deduction of Income Tax issued by the Company, and also with the corresponding letters issued by the trustees.

The only remaining answer to the Crown's claim is that the sum is not an annual payment within the meaning of the Rules, and that leads to a consideration of the second branch of Mr. Keith's answer. He argued that the payments were made in consideration

(The Lord President (Normand).)

of services and that such payments are no more "annual" payments" under the Rule than are payments made annually to a company which carries on the business of hiring out motor cars under a contract for the hire of a car. But the payments which were made to the trustees for the shareholders were not made in return for services to be rendered to the Appellants by the trustees or by the shareholders. The services which were consideration for the guarantee were services to be rendered by the Dominion Company. Moreover, as pointed out by Scrutton, L.J., in *Earl Howe* v. *Inland Revenue Commissioners*, [1919] 2 K.B. 336, at page 352(1), and in *Rossdale* v. *Fryer*, [1922] 2 K.B. 303, at page 313, the hire of a motor car is not subject to tax as a whole in the hands of the car owner, and for that reason it is not subject to deduction of tax. But this cannot be said of the payments to shareholders in this case, and it was conceded that these payments were income of the shareholders, and subject to tax in their hands if the tax had not been deducted before payment. This point therefore fails.

It was next said that there was an inconsistency in allowing the Appellants to deduct the payments in computing their own profits for Income Tax purposes and then requiring them to deduct tax when they made the payments to the recipients. This contention also is unfounded. Annuities paid by an insurance company are paid by it under deduction of Income Tax, yet a company dealing in annuities may deduct the annuities in arriving at the amount of its own profits for Income Tax purposes (*Gresham Life Assurance Society* v. *Styles*, [1892] A.C. 309(2)).

It was also maintained for the Appellants that the contract of guarantee was a contract of financial accommodation or loan, and clause 7, which provides for recoupment by the Dominion Company out of subsequently earned profits, was founded on. Counsel argued that such loans could not be annual payments within the meaning of the Rules, and that, if they were, the repayments under the obligation to recoup must equally be annual payments, and that the Dominion Company would be entitled to deduct and retain tax on them under Rule 19. The result would be that the Appellants would pay Income Tax twice. This is fallacious. Even if the payments had fallen to be made under the contract to the Dominion Company subject to such an obligation of recoupment as is found in clause 7, it does not follow that they ought to be dealt with as loans (*Nizam's State Railway Co.* v. *Wyatt*, 1890, 24 Q.B.D. 548(3)). And in this case it is impossible to say that the payments were loans to the shareholders. Nor would the payments of the Dominion Company under the recoupment clause be of the same character as the payments under

(1) 7 T.C. 289, at p. 303. (2) 3 T.C. 185. (3) 2 T.C. 584.

(The Lord President (Normand).)

consideration. The recoupments could not have been subject to tax as a whole in the Appellants' hands. The payments to the shareholders are subject to tax as a whole in their hands, and I think they are subject to tax by way of deduction. Assuming recoupment, there is no reason why the ultimate incidence of taxation should work out unfairly.

Whether the payments are considered from the point of view of the Appellants who made them or of the shareholders who received them, my conclusion is that they were annual payments. Under the contract of guarantee the obligation was a continuing obligation for the whole of the five years and there was a liability which arose, subject to a contingency, in each one of the five years. The contingency on which the liability depended in each year was a shortage of the Dominion Company's profits, just as the dividends of that Company in each year depended on the earning of profits. Though the payment of dividends depends on the hazards of a trading year of the Dominion Company, they are, nevertheless, when paid, annual payments. Why should not these payments be annual payments though they also depend on the hazards of a trading year of the Dominion Company? In fact also the payments were made annually and they were unmistakably income of the recipients. I do not know what more is required to make them annual payments within the meaning of the Rules.

I therefore move your Lordships to confirm the assessments.

Lord Morison.—By an agreement dated 31st January, 1928, between the Appellants and their co-guarantors on the one hand, and certain trustees and the Dominion Theatre Company on the other hand, the guarantors bound themselves, if the Dominion Company's profits were insufficient to pay the fixed dividend of 7½ per cent. on its Ordinary shares in each of five financial years, to "make up and pay to the Trustees in respect of each and every of "such five years a sum equivalent to the amount by which the "profits available as aforesaid shall fall short of the sum required to "pay the aforesaid dividend (less tax) for any year during the said "period of five years or in case there shall be no profits available for "distribution . . . . then the Guarantors will pay to the Trustees "a sum equivalent to the sum required to pay the fixed dividend "at the rate of 7½ per cent. per annum (less tax) on such Ordinary "Shares for that year".

I think that in the passage from the contract which I have quoted there is an obligation upon the Appellants to make for revenue purposes the annual payment to the trustees during a period of five years specified. The obligation is, however, conditional. It is also the counterpart of certain other stipulations. The annual payments are also to be devoted by the trustees to certain revenue purposes. The amounts of the respective annual

(Lord Morison.)

payments are not specified, but they are easily ascertainable for each year. And when ascertained each annual payment is to be made less the appropriate sum of Income Tax chargeable.

The question of law which this case raises is whether the Crown is entitled to charge and assess the Appellants in Income Tax on the annual payments actually made under this contract. In my view the solution of the case depends entirely on the application of the Rules applicable to Case III of Schedule D to the actual terms of this agreement.

Rule 1 of Case III, *inter alia*, says : " The tax shall extend to— " (*a*) any . . . . annual payment, whether such payment is pay- " able . . . . either as . . . . or as a personal debt or obligation " by virtue of any contract. . . . ." The charge is thus, *inter alia*, a charge on all annual payments within the meaning of the Case payable under any obligation contained in any contract. It is quite immaterial whether the annual payment is conditional or is the counterpart of other stipulations or whether it is fixed in amount at the date of the contract. And I think it is also irrelevant to inquire what purpose such an annual payment is to serve to its recipients or whether the stipulated purpose is carried out. The tax is fixed upon the payments themselves. I am of opinion that Rule 1 of the Rules applicable to Case III definitely fixed the tax upon each of the annual payments made by the Appellants under their personal obligation, and the tax is a debt due to the Crown by the Appellants and recoverable as such from them in terms of the Statute.

By Section 17 of the Statute of 1922 the tax is to be computed " on the full amount of the profits or income arising within the year " preceding the year of assessment ", and Rule 21 of the General Rules required the Appellants to deduct the appropriate tax before making each annual payment and also required the Appellants to deliver to the Special Commissioners an account of the annual payments made. It is clear that the Appellants did not discharge this duty as they ought to have done, though the draftsmen of the agreement were aware that the tax had to be deducted. Had the Appellants delivered the account required and made the necessary deduction no question could have arisen and the Crown would have received the tax on its due date. It would, in my opinion, be quite impossible for the Special Commissioners to assess the tax in any other way, and it is no part of their duty to investigate or consider any of the various stipulations in the contract relating to the disposal of the annual payments made by the trustees under the contract in question.

I think the questions of law should be answered in the affirmative and the determination of the Commissioners affirmed.

Lord Fleming.—The first question which arises for consideration is the extent of the obligation undertaken by the Appellants under the agreement between them, the Theatre Royal, Drury Lane, Limited, the trustees for the shareholders of the Dominion Company and the Dominion Company itself. The relevant provision of the agreement, omitting immaterial words, is as follows:—"The "Guarantors [the Appellants and the Theatre Royal, Limited] "jointly and severally guarantee and covenant to and with the "Trustees . . . . that in case the profits which may be available "for distribution as dividend . . . . shall be insufficient to pay the "said fixed dividend at the rate of 7½ per cent. (less income tax "at the current rate) for each of the first five financial years of "the Company ending on the 30th day of January 1933 the "Guarantors will make up and pay to the Trustees in respect of "each and every of such five years a sum equivalent to the amount "by which the profits available as aforesaid shall fall short of the "sum required to pay the aforesaid dividend (less tax) for any year "during the said period of five years or in case there shall be no "profits available for distribution as aforesaid in respect of any of "such years then the Guarantors will pay to the Trustees a sum "equivalent to the sum required to pay the fixed dividend at the "rate of 7½ per cent. per annum (less tax)".

The Appellants' contention is that this clause imposed upon them liability for the net sum which would have been actually payable to the shareholders if a dividend of 7½ per cent. (less tax) had been declared by the Company, and that it did not impose upon them liability to pay the gross sum required to meet (1) the tax on the gross sum and also (2) the amount actually payable to the shareholders. I am unable to agree with this view. The meaning of the expression "a dividend at the rate of 7½ per cent. "(less tax)" is well understood. It means that the shareholder receives 7½ per cent. on his shareholding, under deduction of the tax thereon, which is retained by the Company and for which it is accountable to the Inland Revenue. The sum required to pay the guaranteed dividend of 7½ per cent., less tax, may be regarded as consisting of two parts—(1) the Income Tax thereon, and (2) the net sum remaining after tax has been deducted, which is the part payable to the shareholder, and in my opinion the liability of the guarantors included both these parts. This interpretation of the agreement is consistent with and confirmed by the contemporary correspondence and actings of the parties. In requests for payment from the Dominion Theatre, Limited, and from the trustees the amount payable by the Appellants is arrived at after deducting tax from the gross amount. In the dividend warrants issued to the shareholders by the Dominion Company and also by the trustees the amount payable to each shareholder is stated at the gross amount of 7½ per cent. and then the Income Tax is deducted therefrom. Two of the warrants inform the shareholders that the Inland Revenue authorities will accept the state-

(Lord Fleming.)

ment as a proof of the deduction of tax. This implies that the tax had been or would be accounted for to the Inland Revenue, but neither the Company nor the trustees had funds available to pay it. If the statement was made *bonâ fide*, and I see no reason to suppose that it was not, the inference is that it was made on the assumption that the Appellants had deducted tax from the gross amount payable by them and had accounted or would account to the Inland Revenue for it.

If the meaning which the Appellants ascribe to the agreement is right, I find it difficult to understand how the agreement is to be worked out. On the assumption that the guarantors' liability is limited to payment of the net amount of a 7½ per cent. dividend, where is the money to come from to satisfy the claims of the Crown for tax? That tax must be paid in respect of the sums paid to the shareholders is incontrovertible. Let me take the years in which the Dominion Company earned no profits. The Company had no funds available for the payment of tax and neither had the trustees. The shareholders accordingly received merely the net amount of the guaranteed dividend of 7½ per cent. under deduction of tax. If the shareholders are thereafter required to pay tax in respect of the net sum received by them it is obvious that they have not received the guaranteed dividend of 7½ per cent. and the declared object of the agreement is defeated. On the view of the transaction taken by the Crown there is no such difficulty. If, as I hold, the obligation of the guarantors was to pay the gross amount of 7½ per cent., including the tax, that circumstance tends to support the Crown's contention that they were bound, when making payments under the guarantee to any person, to deduct and account for the tax.

On the other hand, if the Appellants' view of the matter is correct, it does not at all follow that the Crown's claim fails. Whatever may be the precise extent of the guarantors' liability, the question of whether the case comes under Rule 21 of the All Schedules Rules remains to be considered. In my view, if Rule 21 applies, the tax should have been deducted from the payments made by the Appellants to the Dominion Company and to the trustees. The persons who ultimately received the beneficial benefit of the payments were the shareholders. But I do not think it is doubtful that a payment in the sense of Rule 21 takes place though the payee is merely a trustee or an agent for the person beneficially entitled to the money paid. On the assumption that Rule 21 applies, this is a case of taxation at source. The source of the payments was the Appellants' money and the deduction should have been made before payment was made by them. The Appellants contend, however, that the payments—to whomsoever they were made or must be deemed to have been made —were not annual payments in the sense of Rule 21. Viewing this

(Lord Fleming.)

question from the standpoint of the persons making the payment, there are a number of circumstances which appear to me to indicate that they were annual payments. The obligation was imposed upon the guarantors for a period of years and it might have become prestable in any of these years. In fact it became prestable in all of them. Their liability as regards any year depended upon the results of the trading of the Dominion Company in that year, and if it became exigible it was discharged by a payment applicable to a particular year. The basis upon which the amount of the payment was measured was a yearly percentage on a fixed sum. The liability was no doubt contingent, but it was a contingency of the same character as attaches to payment of dividends, and dividends may, I think, be regarded as typical annual payments. In effect the agreement provided that if profits were available the guaranteed dividend was to be paid by the Company, but if not it was to be paid by the guarantors. The Appellants founded upon the fact that the payments were held by the Special Commissioners to be a trade disbursement by them for tax purposes and that the Crown acquiesced in this determination. I cannot regard this circumstance as being in the Appellants' favour. It precludes them from maintaining that the payments were made out of capital or out of profits or gains brought into charge. It implies that they were taken out of the receipts of the Company for the year in which they were made. A payment may properly enter the trading account of the payer as a disbursement and yet also come under Rule 21. Annuities are specifically mentioned in that Rule. Nevertheless they may be a permissible deduction in the trading account of an insurance company which deals in them, as was held in *Gresham Life Assurance Society* v. *Styles*, [1892] A.C. 309(1).

It was said, however, that the guarantee was undertaken by the Appellants in respect of services rendered to them. There is no finding to this effect in the Case, and the agreement does not impose any obligation on the Dominion Company or the shareholders to render any service to the Appellants. No doubt in the circumstances set out in the Case they anticipated that the existence of the Dominion Company would ultimately be of service to them. This may have been their motive for entering into the agreement, but it has little bearing on the character of the payments made under it.

It was also said that the payments were loans, or at all events of the nature of financial accommodation. They were certainly not loans in the ordinary sense, as the obligation to repay them was of an extremely qualified character. The guarantors were entitled to recoupment and repayment only out of any surplus

(1) 3 T.C. 185.

(Lord Fleming.)

profits of the Dominion Company in any year of the quinquennium remaining after payment of the guaranteed dividend or in the three years thereafter, and in a winding-up out of any surplus assets remaining after repayment of the original share capital. In *Nizam's State Railway Co.* v. *Wyatt*, 1890, 24 Q.B.D. 548(1), a payment of a somewhat analogous character was held not to be a loan and to be subject to Income Tax.

I think it is material to consider how these payments fell to be dealt with after they passed out of the Appellants' hands. This was regulated by the terms of the agreement and was therefore in the Appellants' knowledge. I do not think it matters whether the Appellants made these payments to the trustees or to the Dominion Company or to the shareholders. Payments made to the trustees or the Company were specifically earmarked to be used in paying to the shareholders the amount of the dividend to which in terms of the prospectus they were entitled. The payments were declared not to be assets of the Company, but they took the place of the dividend which would have been payable by the Company if profits had been available and so gave the shareholders an annual income on their shareholding. I do not think it was seriously disputed that these payments were income in the hands of the recipients, and it seems to me plain that they were. I quite accept the view that there may be payments which would ordinarily be described as annual payments but which yet do not fall within Rule 21. An illustration of such a payment may be found in the case of *Earl Howe* v. *Inland Revenue*, [1919] 2 K.B. 336(2). That case related to annual premiums on life policies which the taxpayer was under obligation to pay in connection with a mortgage which he had granted over a life interest he had in certain estates. It was held that such payments did not fall under Rule 21 because they did not form part of the income of the payee for which he was necessarily assessable to Income Tax. It was pointed out, however, that they would no doubt form items in the account on which the profits and gains of the payee for the year would be arrived at. Scrutton, L.J., gave the following instances(3) of annual payments which would not fall under the Rule, namely, (1) an agreement to pay a motor garage £500 a year for five years for the hire and upkeep of a car; (2) a contract with a butcher, for an annual sum, to supply all one's meat for a year. He pointed out that in such cases the annual instalments would not be subject to tax as a whole in the hands of the payee but only that part of them which was profits. But here the ultimate payees were the shareholders and in their hands the sums paid by the Appellants were necessarily subject to tax as a whole if tax had not been deducted before payment to them.

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(1) 2 T.C. 584. (2) 7 T.C. 289. (3) *Ibid.*, at p. 303.

(Lord Fleming.)

I am accordingly of opinion that these sums were annual payments within the meaning of Rule 21 and that the appeal fails.

Lord Moncrieff.—Differing from your Lordships with regret, I am of opinion that these assessments should be discharged.

The payments in respect of which the Appellants have been assessed, as being annual payments charged under Case III of Schedule D of the Income Tax Act, 1918, and the relative Rules, were payments made in name of dividends to certain Ordinary shareholders of the Dominion Theatre, Limited, which is now in liquidation. The question of the chargeability of the Appellants arises from their having made repeated contributions towards payment of these dividends in answer to calls by the Company which were made on them as guarantors. In making these contributions for distribution under their guarantee, the Appellants did not pay dividends to the shareholders. As strangers to the Company they were indeed not qualified to do so. Their payments to the shareholders were emergency payments which were received by the shareholders in lieu of the dividends which the Company found itself unable to pay.

In the beginning of 1928 the Dominion Theatre, Limited, immediately after its incorporation, issued a prospectus inviting applications for shares. The Ordinary shares were to carry a fixed preferential dividend at the rate of 7½ per cent. It was stated in the prospectus that this dividend had been guaranteed for the first five years by, *inter alios*, the Appellants. The liability of the Appellants, if any, to be charged with tax on the dividends which were afterwards paid results from the fact, as further stated in the prospectus, that this guarantee was arranged to cover the dividend of 7½ per cent., less tax at the current rate, and from the particular machinery for giving effect to the guarantee which was adjusted between the parties in terms of the deed of guarantee itself. Following upon the issue of the prospectus, Ordinary shares were issued by the Company in considerable number; and, throughout the five years following on the issue of the shares, dividends were paid to the shareholders as guaranteed at the rate of 7½ per cent., less Income Tax. It was assumed in the absence of a proper contradictor that Income Tax was chargeable upon the whole of the sums so paid to the shareholders in name of dividend; and it was not disputed that the tax chargeable upon these payments had only in part been paid. The question which has arisen for decision in this appeal is whether the Appellants, when making payment under the guarantee towards the payment of these dividends, had a duty to collect the tax by deduction before payment, and were liable to account for the tax so deducted to the Inland Revenue as a debt to the Crown under the provisions of Rule 21 of the All Schedules Rules.

(Lord Moncrieff.)

In order to enable it to discharge its undertakings in the prospectus, the Dominion Theatre, Limited, obtained to be granted by the Appellants the deed of guarantee which was executed on 31st January, 1928, and which is printed as an appendix to the Case. There were four parties to this deed, which was executed not only by the Dominion Theatre, Limited, and by the Appellants and their co-guarantors, but also by two individuals on behalf of themselves and of other holders of Ordinary shares, as trustees for the shareholders. In place of providing that the guarantors should put the Dominion Theatre, Limited, in funds as required to enable it to pay the dividends it had undertaken to pay, it was agreed in this deed of guarantee by direct agreement between the Appellants and their co-guarantors and the trustees that, in the event of a shortage of available profits which should disable the Company from paying the dividends at the agreed-on rate (less Income Tax at the current rate) in any of the first five financial years of the Company, the Appellants and their co-guarantors should make up and pay to the trustees in each such year a sum equivalent to the amount by which the profits available should fall short of the sum required to pay the aforesaid dividend, less tax. It was further provided in the deed of guarantee that all sums so paid by the guarantors should be distributed amongst the holders of Ordinary shares in the proportions in which they would have been entitled thereto on a distribution of the same amount as dividend. The trustees were empowered to distribute these sums themselves or pay them over to the Company for distribution. It was provided that in the latter event the Company should apply and allocate these sums exclusively to payment and distribution among the holders of the Ordinary shares, and that the sums should not form part of the assets of the Company. It was further provided that any sum so distributed by the Company among the shareholders should be deemed, as between the shareholders and the Company, to be a payment by the Company of an instalment of the dividend.

The affairs of the Company did not prosper. In certain years, however, some profits were earned, and these were distributed among the Ordinary shareholders to account of their claims for dividend. In none of the first five years were sufficient profits earned to allow of the dividend being paid in full out of profits. In each of these years calls were accordingly made upon the Appellants as guarantors. In answer to these calls the Appellants made payments year by year as required, in most cases making these payments direct to the Company but, upon two occasions, making payment to the trustees. The sums so provided by the Appellants were in fact distributed among the shareholders as dividends. Except in the last year and in one other year this distribution was made, in ordinary course, by the Company itself. In these

(Lord Moncrieff.)

two years the distribution was made by the trustees. In each year, whether the distribution was made by the Company or by the trustees, it was stated on the face of the dividend warrant that the distribution was being made after deduction of Income Tax. In certain cases the warrants issued by the Company notified the shareholders that the Inland Revenue authorities would accept the warrant as proof, in case of claims for repayment of Income Tax, that the tax had been deducted.

As regards the years in which the distribution was made among the shareholders by the Company itself, it is clear that the circumstances which affected any duty of the Company to collect the tax were entirely dissimilar as applying to the instalments of the payments which represented dividends proper on the one hand, and on the other hand to the remaining instalments which represented money provided by the guarantors in response to calls upon them. In so far as dividends were paid out of profits, these profits had been taxed as between the Company and the Crown before any distribution was made to the shareholders. As regards this part of the dividend, the Company when deducting tax did not accordingly discharge a duty under Rule 21 of the All Schedules Rules, but merely exercised a right under Rule 20 of these Rules. The tax having been already paid by a general assessment on the Company itself, the Company made the deduction of tax as a statutory creditor of the shareholder whose tax, in substance if not in form, the Company had already paid. In so far, however, as the remaining instalment of the dividend was concerned, the funds which had provided this instalment had not been charged with tax, in any event in the coffers of the Company. As regards the shareholders, it was conceded by the Appellants that this part of the dividend was an income payment to them, and may therefore have been chargeable with tax against them in so far as tax had not been paid, or might still be payable, by the Company. The question of any duty of collection of the tax is, however, an entirely separate one. It is only in so far as the payment was an " annual payment " falling within Case III of Schedule D that the maker of the payment was under obligation to collect and account for the tax. If such a duty did not apply, it only resulted, as the Appellants maintained, that the Company or the shareholder himself became chargeable therewith.

If the Dominion Theatre, Limited, had been assessed as liable in respect of an obligation to deduct and collect the tax, it might not have been easy for it to dispute that payments *de facto* made by it in name of dividend were other than annual payments, in the making of which, in so far as not already charged against its profits, it was bound to deduct and collect the tax. Such a liability (which is still open to be asserted) is not, however, alleged or under consideration in this case, but only a corresponding liability

(Lord Moncrieff.)

on the part of the Appellants. It was maintained for the Crown that on a proper construction of the deed of guarantee these payments, although passed to the shareholders in name of dividend by the Company, had truly been made to the shareholders by the Appellants themselves as guarantors; and seeing that they were made out of funds other than profits of the Company already charged with tax, they could not as regards the present question be looked upon as payments of dividends at all. In my opinion this contention is well founded. I read the deed of guarantee as having been carefully framed to avoid any possibility of sums contributed by the guarantors entering the coffers or forming part of the assets of the Company. On my construction of this deed the Appellants were taken bound, in the event of a call being made on them as guarantors, to make payment direct to the shareholders, and to make these payments direct to the shareholders none the less because they were in form taken bound to make the payments to the trustees, or because the trustees might in turn charge the Company with the duty of distribution among the shareholders.

In so far as the Appellants in making these payments were bound to deduct and collect Income Tax, it is clear that this had not been done, seeing that the whole of the sums contributed by them under the guarantee were allowed by the Revenue as a deduction from their trading profits on the footing that the contribution had been a trading outlay before these profits were assessed for tax. Incidentally I may say that, notwithstanding the fact of such an allowance having been made, I find myself unable to regard the payments made by the Appellants under the guarantee as having been made by them to the Company instead of to the shareholders.

But although I regard the Appellants in each of the five years as having themselves made each year's payment to the shareholders, it is necessary, before they can be assessed in respect of a liability to deduct and account for tax, that the payments so made should have been " annual payments " within the meaning of Rule 1 of the Rules applicable to Case III of Schedule D. In my opinion each several payment so made by the Appellants, although repeated in each of five successive years, was a separate and individual payment in each year, and did not combine with those which preceded or followed it to form a succession of annual payments over a period of years. An annual payment in my opinion is one which, for all its successive recurrences, is conditioned by, or is dependent on, a single initial undertaking or event. So far from this being the case as regards the payments made by the Appellants, each several payment was dependent on a separate shortage of the profits earned by the Dominion Theatre, Limited, as resulting from the separate hazards of each of five separate trading years. In this sense the payments made by the Appellants under the guarantee, like payments of dividend, were of course dependent

(Lord Moncrieff.)

on profits, and none the less were so dependent because, in contrast with dividends, the profits concerned were those realised by a third party. But, for the present purpose, this interaction with profits appears to me to present no parallel with the interaction of dividends, and indeed to be entirely opposite. The payment of dividends is conditioned to be an annual payment, and therefore remains such even should its uniformity of recurrence be defeated by failure of profits. Payments under the guarantee were on the contrary conditioned to be occasional payments, and therefore remained occasional although, upon failure of profits, in fact repeated in succeeding years. It may be that the payments received by the shareholders from the Company or the trustees were received by them as income, and in this sense were annual payments. As such, although this question is not before the Court, they may of course have been subject to tax; but this fact would not in any event solve *per se* the question of any duty of collection of the tax. It is only as collectors of the tax that it is sought to charge the Appellants. I find myself unable to regard as " annual payments " the successive individual payments made by them merely because, under an obligation which did not provide for annual payments, they were made by the Appellants as an independent contribution towards the making of an annual payment by a third party. In my opinion the Appellants in making these payments did not make annual payments which fall within the definition in the Statutory Rules, and as makers of these payments had accordingly no duty to deduct or collect the tax.

In the passing of these payments to the shareholders, albeit in name of dividends, I regard the Dominion Theatre, Limited, as having acted as agent for the Appellants. The Appellants are accordingly subject to be affected by any representation or act of their agent which was made or performed within the scope of its authority. It was while acting as agent for the Appellants when making these payments that the Dominion Theatre, Limited, professed, and even certified on occasion, that it had deducted and would account for the tax. It did not in fact do so, and had indeed no funds available on revenue account to enable it to do so. Had such a certificate been granted by the Company as agent for the Appellants while acting within the scope of its authority, the Appellants might have become liable to make good the representation. Seeing, however, that in making these successive individual payments the Appellants had, as I have already indicated, no liability to deduct or collect tax, I regard any such representation on the part of their agent, in so far as directed to affect its principals, as having been patently a representation made by it outwith the scope of its authority. By such a representation on the part of an agent, a principal is not bound.

(Lord Moncrieff.)

It was suggested in the course of the argument that, on a proper construction of their obligation under the deed of guarantee, the Appellants might, even if inadvertently, have rendered themselves liable to provide the Company or the trustees with funds sufficient to make up the dividend not only as regards the amount payable to the shareholders but also as regards the further amount payable as tax to the Crown. The argument proceeded on the view that, in the case of annual payments, an agreement avoiding deduction of the tax (as is declared by Rule 23 of the All Schedules Rules) is to be void. I regard it as a sufficient answer to this argument that the agreement as I construe it is one for single payments and not for annual payments. In any event this wider meaning could not, as a matter of process, be given to the guarantee in the absence of a claim by the trustees for the shareholders or by the liquidator of the Dominion Theatre, Limited. As the deed of guarantee was construed by these parties as well as by the Appellants as having a more limited outlook, and as calls were made and payments rendered on a correspondingly limited scale, it would not in any event be proper to consider, in the absence of these interests, what would be the consequence upon the present question of " avoiding ", in place of reframing, the agreement.

An appeal having been entered against the decision of the Court of Session, the case came before the House of Lords (Lords Atkin, Thankerton, Macmillan, Wright and Maugham) on the 1st June, 1937, when judgment was reserved. On the 24th June, 1937, judgment was given unanimously in favour of the Crown, with costs, confirming the decision of the Court below.

Mr. A. M. Latter, K.C., and Mr. R. H. Sherwood Calver appeared as Counsel for the Appellant Company, and Mr. J. R. Wardlaw Burnet, K.C., Mr. Reginald P. Hills and Mr. T. B. Simpson for the Crown.

JUDGMENT

Lord Atkin.—My Lords, I have had the advantage of reading in advance the opinions about to be delivered by my noble and learned friends Lord Macmillan and Lord Maugham. I entirely agree with them, and I have nothing to add.

Lord Thankerton.—My Lords, I have had the same privilege of considering those opinions, in both of which I concur.

Lord Macmillan.—My Lords, the question is whether certain payments made by the Appellants in fulfilment of an obligation undertaken by them in an agreement dated 31st January, 1928, were " annual payments charged with tax under Schedule D " within the meaning of Sub-rule (1) of Rule 21 of the General Rules applicable to All Schedules of the Income Tax Act, 1918. If so, then it was the duty of the Appellants, under the Rule, on making the payments to deduct therefrom Income Tax at the current rate and to account to the Commissioners of Inland Revenue for the tax so deducted.

The parties to the agreement in question were (1) the Appellants and Theatre Royal, Drury Lane, Limited, thereinafter called " the Guarantors "; (2) two named gentlemen on behalf of themselves and all other holders of Ordinary shares in Dominion Theatre, Limited, thereinafter called " the Trustees "; and (3) Dominion Theatre, Limited, thereinafter called " the Company ". It is unnecessary to detail the circumstances which led up to the agreement or the business reasons which induced the parties to enter into it. In the recitals it is stated that the holders of the Ordinary shares of Dominion Theatre, Limited, were entitled to receive a fixed preferential dividend at the rate of 7½ per cent. per annum on the capital paid up thereon out of the profits of the Company available for distribution and determined to be distributed by way of dividend. The purpose of the agreement was to ensure the payment of this return on the Ordinary shares for five years, and with this object the Appellants and Theatre Royal, Drury Lane, Limited, jointly and severally guaranteed and covenanted to and with the Trustees as trustees for and on behalf of the holders for the time being and from time to time of the said 250,000 Ordinary shares of the Company " that in case the profits which may be " available for distribution as dividend as aforesaid on the said " 250,000 Ordinary Shares of the Company shall be insufficient to " pay the said fixed dividend at the rate of 7½ per cent. (less income " tax at the current rate) for each of the first five financial years " of the Company ending on the 30th day of January 1933 the " Guarantors will make up and pay to the Trustees in respect of " each and every of such five years a sum equivalent to the amount " by which the profits available as aforesaid shall fall short of the " sum required to pay the aforesaid dividend (less tax) for any " year during the said period of five years or in case there shall " be no profits available for distribution as aforesaid in respect of " any of such years then the Guarantors will pay to the Trustees " a sum equivalent to the sum required to pay the fixed dividend " at the rate of 7½ per cent. per annum (less tax) on such Ordinary " Shares for that year Provided and it is hereby declared that in " such last mentioned event the liability of the Guarantors shall " be limited to a sum equivalent to the sum which would have been " payable by way of fixed dividend at the rate of 7½ per cent.

(Lord Macmillan.)

" per annum on the Ordinary Shares for that year if there had been " profits of the Company available for distribution in respect " thereof ".

Clauses followed providing that all sums paid by the Guarantors should be distributed by the Trustees or by the Company amongst the Ordinary shareholders in the same proportions as if they were distributions by way of fixed dividend, that any sums so distributed were to be deemed to be *pro tanto* payment and satisfaction of the 7½ per cent. dividend, and that in case in any year the profits available for distribution should not be sufficient to pay the 7½ per cent. dividend, the Company should notify the Guarantors of the sum " required to make up the said fixed dividend to 7½ per cent. " per annum (less tax) or to pay the said fixed dividend ".

In each of the five years covered by the agreement the Appellants were called upon to make payments under their obligation. In some of the years the Company made no profits, in others the profits made were insufficient to pay the 7½ per cent. dividend in full. The sums so paid by the Appellants (as now adjusted) were as follows (shillings and pence discarded) : 1929, £3,322; 1930, £7,438; 1931, £1,655; 1932, £6,797; 1933, £7,031. It is to be noted that the sum which the Appellants paid in each case was their share of the amount, less tax, required for the payment of the 7½ per cent. Thus in the last instance, where the Company made no profits, the sum of £7,031 which the Appellants were called upon to pay was calculated as follows :—

	£	s.
250,000 Ordinary shares at 7½ per cent.	18,750	0
Less tax at 5*s.* per £	4,687	10
	14,062	10
Whereof one-half	7,031	5

In each of the five years the Appellants, in computing the amount of their profits and gains for tax purposes, were permitted to deduct the sum paid under the agreement as being a disbursement or expense wholly and exclusively laid out or expended for the purposes of their trade. Consequently the payments were not " payable out " of profits or gains brought into charge ", and thus satisfied one of the conditions of the applicability of Rule 21.

The sums paid by the Appellants and their co-obligants were duly utilised in paying to the Ordinary shareholders a return of 7½ per cent., less tax, on their shares. In at least two instances dividend warrants in ordinary form were sent out by the Company to the shareholders with the usual certificate that Income Tax had been deducted and had been or would be duly accounted for to the proper officer.

(Lord Macmillan.)

For the five fiscal years 1928–29 and 1930–31 to 1933–34 assessments were made in respect of the sums paid by the Appellants under the agreement. The Appellants appealed to the Special Commissioners, who affirmed the assessments and at the Appellants' request stated for the opinion of the Court the two following questions :—"(1) Whether the sums payable under the said " Guarantee by the Appellant Company were annual payments from " which Income Tax was deductible, and if so (2) Whether the " Appellant Company was correctly assessed under Rule 21 of the " said General Rules, as amended by the Finance Act, 1927, " Section 26 ". The First Division of the Court of Session (Lord Moncrieff dissenting) answered both questions in the affirmative.

At your Lordships' bar it was argued for the Appellants that the payments were not annual payments inasmuch as they were casual, independent, not necessarily recurrent and throughout subject to a contingency. This argument commended itself to Lord Moncrieff(1), but I am unable to accept it. There was a continuing obligation extending over each and all of the five years to make a payment to the Trustees for the shareholders in the event of the Company earning no profits or insufficient profits. The fact that the payments were contingent and variable in amount does not affect the character of the payments as annual payments. Rule 21 is not primarily a charging section but is part of the machinery of collection. The charging enactment is to be found in Rule 1 of Case III, Schedule D, whereby tax is imposed on " any interest of money, whether yearly " or otherwise, or any annuity, or other annual payment, ... " payable . . . . . as a personal debt or obligation by virtue of any " contract ". I am of opinion that the payments in question fall within these words.

Mr. Latter sought to argue (contrary to the admission recorded in the Lord President's opinion(2)) that the sums paid were not payments of income inasmuch as they were payments made in lieu of income or by way of compensation for not receiving income, but I am quite unable to accept this view. The payments were indisputably income in the hands of the recipients.

There was some discussion as to the correct interpretation of the obligation undertaken by the Appellants. Was it to pay one-half of the gross sum required to pay or make up the dividend, with the right (and duty) to deduct the tax when making payment? Or was it to pay one-half of the net sum required to pay or make up the dividend after deduction of tax? To take the last year as an illustration : was the obligation to pay one-half of £18,750, with the right to deduct tax, or was the obligation to pay one-half of £14,062? It is unnecessary to determine this point, for whichever

(1) *See* pages 293/4 *ante*. (2) *See* page 281 *ante*.

(Lord Macmillan.)

be the true reading the Appellants were in my opinion bound when making payment on either basis to deduct and account for tax. It may, however, be pointed out that on the first basis the sums allowed to be deducted by the Appellants as disbursements, as also the sums assessed, would have been different from those actually allowed and assessed; while on the second basis the agreement would not achieve its purpose, for the payments, if the Appellants retained out of them the tax payable, would not be sufficient to put the Company in funds to make a distribution of 7½ per cent., less tax, among the shareholders.

Being of opinion, as I am, that the payments in question were " annual payments charged with tax under Schedule D " and it being admitted that they were not " payable out of profits or gains " brought into charge ", I move your Lordships to affirm the Interlocutor of the First Division of the Court of Session and dismiss the appeal with costs.

Lord Wright.—My Lords, I agree with the opinion which has just been delivered by my noble and learned friend Lord Macmillan. I have also had the advantage of reading in print the opinion about to be delivered by my noble and learned friend Lord Maugham, in which I also concur.

Lord Maugham.—My Lords, I also have had the advantage of reading the opinion of my noble and learned friend Lord Macmillan, with which I entirely concur. I will only add for myself some brief observations. The sole difficulty in the case, as I see it, is the question whether sums paid under the agreement of the 31st January, 1928, were annual payments within the language of Rule 21 of the General Rules of the Income Tax Act, 1918. The sentence runs : " Upon payment of any interest of money, annuity, " or other annual payment ", etc., and the charging section is to be found in Schedule D, 1 (*b*), taken with the words of Rule 1 applicable to Case III of that Schedule as stated by my Lord.

It is, I think, to be noted that we are not concerned here with the case of annual profits or gains arising from a trade, as to which the decision in *Martin* v. *Lowry*, [1927] A.C. 312(1), would be decisive to show that in that context " annual " means " in any " one year ". In Rule 21 " annual " must be taken to have, like interest on money or an annuity, the quality of being recurrent or being capable of recurrence. The payments we are concerned with were to continue for five years, subject to their being required to make up the guaranteed annual dividend, and were plainly payments intended to supplement so far as necessary the income of the recipients during each of the years in question. In these circumstances I am of opinion that they had the necessary quality of recurrence and are within the terms of Rule 21. In so deciding

(1) 11 T.C. 297.

(Lord Maugham.)

I apprehend that your Lordships are not travelling in any way beyond the existing decisions with regard to " annual payments " in that Rule. On the other points I cannot usefully add anything to what has fallen from my noble and learned friend.

Questions put:

That the Interlocutor appealed from be reversed.

The Not Contents have it.

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

The Contents have it.

[Solicitors:—Burton & Ramsden, for Allan, Dawson, Simpson & Hampton, W.S., Edinburgh; Solicitor of Inland Revenue, England, for Solicitor of Inland Revenue, Scotland.]

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