HIGH COURT OF JUSTICE (CHANCERY DIVISION)—3RD, 5TH AND 6TH DECEMBER, 1957

COURT OF APPEAL—21ST, 22ND, 23RD, 24TH APRIL, AND 7TH MAY, 1958

HOUSE OF LORDS—13TH, 14TH AND 29TH JULY, 1959

Young (H.M. Inspector of Taxes)

v.

Racecourse Betting Control Board

Racecourse Betting Control Board

v.

Young (H.M. Inspector of Taxes)

Commissioners of Inland Revenue

v.

Racecourse Betting Control Board

Racecourse Betting Control Board

v.

Commissioners of Inland Revenue[1]

Income Tax, Schedule D, and Profits Tax—Trade—Expenses—Payments made under scheme for application of moneys in totalisator fund—Runners' allowance—Whether payments deductible as expenses in computing profits—Racecourse Betting Act, 1928 (18 & 19 *Geo.* V, *c.* 41), *Section* 3 ; *Income Tax Act,* 1952 (15 & 16 *Geo.* VI & 1 *Eliz.* II, *c.* 10), *Section* 137 (*a*).

The Racecourse Betting Control Board was established by the Racecourse Betting Act, 1928, *to operate totalisators at approved racecourses. A percentage of the moneys staked with the totalisators was required to be deducted from the distributions among winners of bets and paid (with any other moneys received by the Board) into a fund known as the totalisator fund. Subject to the payment of all taxes, rates, charges and working expenses, the retention of sums to meet contingencies and the making of payments to charity, this fund was to be applied, in accordance with a scheme to be approved by the Secretary of State, for the improvement of breeds of horses or the sport of horse racing or the advancement of veterinary science.*

Under the approved scheme for the years 1952 *to* 1954 *the Board made payments* (a) *to racecourse owners for improving the amenities of racecourses*

[1] Reported (Ch. D.) [1958] 1 W.L.R. 122; 102 S.J. 85; [1958] 1 All E.R. 274; 225 L.T. Jo. 59; (C.A.) [1958] 1 W.L.R. 705; 102 S.J. 468; [1958] 2 All E.R. 385; (H.L.) [1959] 1 W.L.R. 813; 103 S.J. 755; [1959] 3 All E.R. 215; 228 L.T. Jo. 55.

and augmenting prize money; (b) *to owners and trainers to reduce the cost of bringing horses to meetings;* (c) *to the organisers of meetings at which totalisators were operated, to meet the salaries of racing officials, etc. In* 1954 *a runners' allowance was also paid to owners and was charged (in order to test the matter) as a working expense in arriving at the amount subject to the approved scheme. These payments were made with the object of increasing the receipts of the totalisator by attracting the public to race meetings, increasing the number of runners and ensuring proper supervision.*

On appeal to the Special Commissioners against assessments to Income Tax under Schedule D for the years 1953–54 *and* 1954–55 *and Profits Tax for the chargeable accounting periods ended* 31*st December,* 1952, 1953 *and* 1954, *the Board claimed that the payments in question should be deducted in computing its profits. The Commissioners allowed the appeals, except as regards expenditure on the provision of certain physical installations at racecourses, which they held to be of a capital nature. Both sides demanded Cases.*

Held, *that it would be inconsistent with the Act of* 1928 *to treat the payments as expenditure made for the purpose of the Board's trade, and that the runners' allowances, unless approved by the Secretary of State, were paid* ultra vires.

CASES

(1) *Young (H.M. Inspector of Taxes)* v. *Racecourse Betting Control Board*
Racecourse Betting Control Board v. *Young (H.M. Inspector of Taxes)*

CASE

Stated under the Income Tax Act, 1952, Section 64, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the High Court of Justice.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 28th, 29th and 30th November, and 1st December, 1955, the Racecourse Betting Control Board (hereinafter called "the Board") appealed against assessments to Income Tax made under Schedule D of the Income Tax Act, 1952, for the years 1953–54 and 1954–55 in respect of its trade as totalisator operator.

2. For the purposes of the appeal it was admitted on behalf of the Board that it carried on such a trade, and the question for our decision was whether it was entitled, in computing its profits of such trade, to deduct as expenses certain payments, details of which are hereinafter set out. The answer to such question depended on two issues: firstly, whether such payments were wholly and exclusively laid out or expended for the purposes of the trade, within the meaning of Section 137 (*a*) of the Income Tax Act, 1952, and secondly, whether such payments or any of them were of a capital nature whose deduction would be prohibited by paragraph (*f*) or (*g*) of the same Section.

3. The following facts were proved or admitted:

(*a*) The Board was established as a body corporate under the provisions of Section 2 of the Racecourse Betting Act, 1928 (hereinafter called

" the Act of 1928 "), with a chairman appointed by the Secretary of State for the Home Department and the following other members :

By the Secretary of State for the Home Department	1
By the Secretary of State for Scotland	1
By the Minister of Agriculture and Fisheries	1
By the Chancellor of the Exchequer	1
By the Jockey Club	3
By the National Hunt Committee	2
By the Racecourse Association Ltd.	1
By the Committee of Tattersalls	1

Under Section 1 of the Act the Board was empowered to operate a totalisator on racecourses when horse races took place. Since it was established it had operated totalisators on many racecourses each year.

(*b*) Briefly stated, the operation of a totalisator consists in the acceptance of bets at a building on the course from members of the public. When the race is decided the whole of the money staked is, in accordance with Section 3 (3) of the Act of 1928, distributed to persons who have won their bets on that race, after deducting such percentage of the money staked as the Board might determine. In practice the Board only deducts a percentage from the money staked on losing horses, except as to special pools, accounting for only some 17 per cent. of all money staked, when the percentage deduction is calculated on the whole pool. For the purpose of setting up buildings on racecourses in which the totalisator is to operate, the Board enters into agreements with racecourse owners providing, *inter alia*, for the demise to the Board of the sites of such buildings. A typical agreement, that made with the Redcar Race Co., Ltd., is hereto annexed, marked " A "(1).

(*c*) The Board has thus left in its hands the above-mentioned percentage of the bets made, and such percentage is, by Section 3 (4) of the Act of 1928, termed " the totalisator fund ". Out of such fund the Board pays the working expenses of running the totalisator and such other administration expenses as are necessary. From time to time, and in particular during the years material to this appeal, the Board has made certain voluntary payments to the owners of racecourses, to the owners of racehorses entered for races, to the Jockey Club and the National Hunt Committee, to the Pony Turf Club, and to the organisers of point-to-point meetings. It is these payments which the Board seeks to deduct in computing its profits. Details of the amounts of such payments for the years ended 31st December, 1952, 31st December, 1953, and 31st December, 1954, are conveniently set out as deductions in Income Tax computations copies of which are hereto annexed and marked " B," " B1 " and " B2 "(1). Details of the facts relating to each payment are set out in the next succeeding sub-paragraphs, taking first the items in the schedule for the year ended 31st December, 1953.

(*d*) (i) " To racecourse executives from the racecourse fund £230,977 ". In 1947 the Board established a fund, then termed " the central racing reserve fund " but now termed " the racecourse fund ", and allocated each year a round sum to such fund. Each of the 73 racecourses at which the Board operated totalisators was allocated a proportion of such sum, the proportion being determined by the post-war cost of maintenance of each racecourse as a fraction of the total cost of maintaining all the racecourses. The owner of each racecourse was invited to put forward proposals to the Board as to how it was proposed to expend the amount allotted to it. Such proposals are considered first by the Jockey Club or the National Hunt

(1) Not included in the present print.

Committee, as the authority concerned with horse-racing, and then they are considered by the Board and finally approved by the Home Secretary. When the racecourse owner has paid the sum in question he applies for reimbursement out of the racecourse fund. If the racecourse owner so desires, the amount credited to him in the racecourse fund may be carried forward from year to year until it incurs approved expenditure. Details of the scheme are set out in a circular letter issued to the owners of racecourses on 31st October, 1947, a copy of which is hereto annexed, marked "C"(1). For the first few years the amount allotted was normally utilised by the racecourse concerned in the rehabilitation of its buildings and amenities consequent upon their deterioration due to the war, and in the provision of further amenities such as a new stand or restaurant. In 1952, however, the Board, impressed by the difficulty of getting owners to run horses in races, gave a general authority to the racecourses to use up to 25 per cent. of the total amount appropriated to each racecourse for the purpose of augmenting the prize money which was provided for the races. The prize money for a race is constituted in part by funds made available by the racecourse proprietors, and in part out of the entrance moneys paid by the owners of horses running in the races. In 1954 the amount which could be so used for prize money was increased to 50 per cent. of the grant to each racecourse from the racecourse fund. There is annexed hereto, marked "D"(1), an analysis of payments to racecourses by the Board during the calendar year 1952, which shows details of how such payments were expended by 73 racecourses upon, *inter alia*, rehabilitation of the course, the improvement of amenities for the public and stable lads and jockeys and the provision of prize money. There is also annexed, marked "E"(1), as an illustration in detail of how the sum granted was expended by one of the racecourses, a schedule of the improvements carried out in 1951 at the Brighton racecourse. Such analysis, although for one year only, may be regarded as furnishing a general idea of payments for all the years in question. The small amount of £1,200 paid in the year ended 31st December, 1952, to the executive of Edinburgh racecourse towards expenditure on improvements to the racetrack was provided for in 1939 but not paid until 1952 because the work was postponed owing to the war.

(ii) "To owners and trainers in reduction of the cost of travelling racehorses to racemeetings £168,555." The cost of maintaining a racehorse has, even before the war, largely exceeded any amount that on an average is obtained by an owner in prize money, and the excess of such cost over the prize money has very largely increased in the years with which the appeal is concerned. In order to assist racehorse owners in meeting the expenses of bringing their horses to racecourses, the Board makes grants to such owners. A contribution towards such expenditure is also made by the racecourse owners and there is annexed hereto, marked "F"(1), particulars of amounts so paid. The amount contributed by the racecourse owner varies with each course, but the amount paid by the Board is based entirely on a mileage basis. It was hoped by this means to increase the number of runners in the various races, since it was felt that owners would be prevented by the heavy expenditure involved from taking their horses to racecourses some distance from where the horse was kept. The small amount of £1,500, shown in Exhibit B2(1) as fee paid to Weatherby & Sons

(1) Not included in the present print.

for administration of the "travelling horses scheme", was paid by the Board as a commission to that firm for their assistance in administering the scheme of payment of the travelling allowances described in this sub-paragraph. Messrs. Weatherby & Sons were in a position to give such assistance, as they were in account as stakeholders with the various racehorse owners and were thus in a position to give them credit for the amounts of travelling allowances earned.

(iii) "Runners' allowance, amount attributable to 1954 £3,087." This item appears in the schedules for the year ended 31st December, 1954, exhibit B2. In 1954 the Board introduced an additional allowance to owners of horses who ran their horses in any race, the amount being a fixed one of £1 per runner. The object of this allowance was the same as that of the travelling allowance mentioned in the last preceding sub-paragraph, namely, to induce owners to enter and run their horses in races.

(iv) "Towards the administrative expenses of the Jockey Club and National Hunt Committee, and the cost of the race finish recording camera £62,050." These payments were made by the Board to the Jockey Club and the National Hunt Committee. They were used to meet the salaries of racing officials, starters, judges and clerks of the course, who were provided by the Jockey Club or the National Hunt Committee to supervise the racing at flat races and point-to-point meetings respectively. If this amount had not been paid by the Board it would have to have been paid by the racecourse owners, or the hunts which organised the point-to-point meetings. The supervision by officials of the Jockey Club and the National Hunt Committee ensured that the racing was properly conducted.

(v) "Amount paid for assistance in 1953 of point-to-point meetings £24,233". The Board operates totalisators at some point-to-point meetings, and these payments, which amount to 5 per cent. of the turnover of the totalisator at such meetings, were made to the hunts which ran such meetings, usually once a year, because without such a subvention the hunt might not have been able to run meetings at all. Some of the meetings were profitable to the Board and some were not.

(vi) "For the assistance of racing under the rules of the Pony Turf Club £1,975". The Pony Turf Club ran only two meetings in the years under consideration and neither meeting was a financial success. The Board operated totalisators at these two meetings and gave the subvention in question to the club to try to ensure that such meetings should not be discontinued, but in fact pony racing thereafter ceased, so that the Board lost the receipts from totalisators at pony club meetings.

(*e*) The facts relating to the payments in the years ended 31st December, 1952 and 1954, are similar to those relating to the year ended 31st December, 1953.

4. It is the experience of the Board that the amount of money staked with the totalisator on any race increases with the number of runners in such race. There is annexed hereto, marked "G"[1], a statement showing the average turnover per race with various numbers of runners, together with other details. It will be seen, for example, that the Board's average revenue from a race with only two runners is £76, but from a race with ten runners it is £827. It is thus very much in the interests of the Board, considered as a trader, that the number of horses running in any race should be as high as possible. It is also in the Board's interests as a trader that as many members of the public as possible should attend a race meeting,

[1] Not included in the present print.

since the receipts of the totalisator will usually be thereby increased. The Board obtained its funds principally from the large racecourses and racecourses near populous areas, particularly around London. Approximately two-thirds of the total bets laid with the totalisator are made "on-course", and one-third are made "off-course" through Tote Investors, Ltd., and London & Provincial Sporting News Agency (1928), Ltd., which companies carry on the business of relaying bets made off the course to the totalisators on the course and are remunerated for this service by a commission paid by the Board. The relative amounts of off-course and on-course bets are set out in the Board's annual reports and accounts for 1952, 1953 and 1954, which are annexed hereto, marked "H", "H1" and "H2"(1). It is in the Board's interest that the buildings and other amenities of a racecourse should be as attractive as possible, and that the racing public should have confidence in the fair and proper conduct of the racing and in the accuracy of the official results of races. The supervision of racing by officials of the Jockey Club, National Hunt Committee and of the Pony Turf Club, and the provision of a race finish recording camera, ensure so far as possible such fair and proper conduct and such accuracy.

In these respects the interests of the Board coincide with the interests of the bookmakers, who also benefit by increased attendances, improvements of amenities and proper supervision of racing.

5. Under the provisions of Section 3 (6) of the Act of 1928, the Board is required

> "(subject to the payment out of the totalisator fund of all taxes, rates, charges, and working expenses, and to the retention of such sums as they think fit to meet contingencies, and to the payment out of the said fund of such sums as they think fit to charitable purposes) [to] apply the moneys from time to time comprised in the totalisator fund in accordance with a scheme prepared by the Board and approved by the Secretary of State for purposes conducive to the improvement of breeds of horses or the sport of horse racing".

By the Betting and Lotteries Act, 1934, Section 18 (5), the purposes towards which the said moneys could be applied were extended to include veterinary science and education. All the payments now in question, details of which are set out in paragraph 3, were included in schemes prepared by the Board in accordance with the above provisions and approved by the Secretary of State, with the exception of the "runners' allowances" referred to in paragraph 3 (*d*) (iii) and the small payment to Messrs. Weatherbys of £1,500 referred to in paragraph 3 (*d*) (ii), which were included among the Board's working expenses in its accounts. The "runners' allowances" were included by the Board in their accounts as working expenses and not included in any scheme prepared under Section 3 (6) in order to test the question whether inclusion in such a scheme was material for tax purposes. The amounts included in such schemes were the amounts set aside each year for that purpose out of the totalisator fund, whereas the amounts now claimed as deductions were, except as regards assistance to point-to-point meetings, the amounts actually expended in succeeding years.

Copies of minutes of the Board approving the scheme of distribution under the above-mentioned Section 3 (6) of the surplus for the years 1951 and 1952, together with copies of letters to the Home Office asking the Secretary of State for approval of such schemes and letters from the

(1) Not included in the present print.

Home Office approving them, were in evidence before us and can be referred to by the Court if desired.

6. If the Board had not made contributions, as above shown, to the prize-money paid by the racecourses, and had not paid rent and admission fees for its staff to enter the racecourse, as it did, the total profits for the year 1954 made by 72 racecourses would have dropped from £275,130 to £58,062, the total profits of 9 racecourses where profits exceeded £10,000 would have dropped from £159,800 to £108,850, and the total profits of the 63 racecourses whose profits were below £10,000 would have been turned into losses totalling £50,788. The average attendance at race-meetings has dropped from 10,219 per day in 1948 to 8,425 per day in 1953, and the net amount received by racecourses (i.e., the admission fee less entertainment tax) has only increased between 2*d*. and 9*d*. On the other hand, the expenses of racecourses were estimated to have increased by 200 or 300 per cent. It is the opinion of two witnesses who gave evidence before us, namely, the secretary of the Board and a representative of Messrs. Weatherbys, which we have no reason to doubt, that putting up the admission fees by racecourse owners would result in a drop in attendance, and the diminution of prize-money would result in less runners and consequently a diminution in the attendances.

7. We were satisfied on the evidence that all the payments set out in exhibits B, B1 and B2 were made by the Board with the object of increasing the receipts of its totalisators, although such payments might, and in all cases did (in the words of Section 3 (6) of the Act of 1928), improve the breeds of horses or the sport of horse racing, and although the increase in such receipts was not in all cases expected to be exactly proportionate to the expenditure.

8. Under the provisions of Section 3 (6) of the Act of 1928 the Board is empowered to make payment out of the totalisator fund for charitable purposes. By a deed of covenant and trust made on 1st September, 1950, a copy of which is available to the Court if desired, the Board covenanted to pay to certain trustees annually sums which after deduction of tax would be equal to 8 per cent. of the totalisator fund after paying expenses, rates and taxes (including Income Tax) and providing for contingencies and repaying borrowed moneys. The trustees were to stand possessed of such moneys so paid to them to apply the same for such charitable purposes and in such amounts and manner as might be prescribed by resolution of the Board. The Board has each year directed the application of the trust fund for purposes conducive to the improvement of the breeds of horses, for the advancement of veterinary science and education, and for various other charitable purposes, but the societies to which donations were made concerned themselves with the breeding of horses other than racehorses. Details of such payment are to be found in the Board's annual reports and accounts, copies of which are available to the Court if required.

9. The following documents additional to those annexed hereto were among those in evidence before us and may be referred to if desired:

(1) Copy of the first annual report and records of the Board for 1929.

(2) Copy of an agreement dated 2nd February, 1944, between the Board and Tote Investors, Ltd.

(3) Copies of letters dated 24th August, 1954, 14th September, 1954, and 22nd September, 1954, passing between Sir Frank Newsam (of the Home Office) and Sir Dingwall Bateson (of the Board).

10. It was contended on behalf of the Board that all the items of expenditure set out above were proper deductions in computing the profits of its trade.

11. It was contended on behalf of H.M. Inspector of Taxes that none of such items of expenditure was so deductible because none of them was wholly and exclusively expended for the purpose of the trade, and such of them as resulted in the creation of enduring assets, e.g., new buildings on racecourses, were of a capital nature.

12. We, the Commissioners, took time to consider our decision, and gave it in writing on 5th December, 1955, as follows:

(1) It is admitted on behalf of the Racecourse Betting Control Board (hereinafter called "the Board") that its activities constitute the carrying on of a trade within the meaning of that word in the Income Tax Acts.

(2) We are concerned with certain items of expenditure by the Board details of which are set out in exhibits 2, 2 (*a*) and 2 (*b*) (hereto annexed as exhibits B, B1 and B2[1]) which it claims are proper deductions in computing the profits of such trade for the purposes of Income Tax. For this claim to succeed it must be shown, firstly, that such expenditure was made wholly and exclusively for the purposes of the trade and, secondly, was not of a capital nature.

(3) We do not consider that the terms of the two Acts setting up the Board and regulating its activities, and in particular Section 3 (6) of the Act of 1928, are at all conclusive in determining the two questions at issue; nor do we think it proper to conclude that the balance of the totalisator fund after deduction of the items set out in brackets in that Sub-section corresponds with the profit of the trade which is to be taxed. The Act does not purport to be concerned with taxable profits, and one of the items in the bracket, namely, payment to charitable purposes, would only in exceptional circumstances form a proper deduction in computing the profits of a trade.

(4) We consider that in this as in other cases we have to determine whether the disputed payments were made wholly and exclusively for the purposes of the Board's trade upon the evidence of the witnesses called before us and an examination of the documents placed before us. Upon a full consideration of such evidence and documents we find that all the items set out in exhibits 2, 2 (*a*) and 2 (*b*) were paid wholly and exclusively for the purposes of such trade.

(5) We find, on the other hand, that certain of the payments in question were reimbursements of expenditure upon the provision of certain physical installations on racecourses (examples of which are given in exhibit 12, hereto annexed as exhibit E[1]). Such installations were of enduring advantage to the Board, and we therefore hold that such payments were of a capital nature and not proper deductions in arriving at the Board's profits; see *Coalville Urban District Council* v. *Boyce*, 18 T.C. 655.

(6) We leave figures to be agreed in accordance with our decision.

13. Figures having been agreed, we adjusted the assessments under appeal in accordance with such decision as follows:

1953–54 assessment reduced to £980,386
1954–55 assessment reduced to £977,462

(1) Not included in the present print.

The said agreement of figures was contained in a document sent to us headed " Agreed submission to Special Commissioners ", which was signed on behalf of both parties to the appeal. Such submission set out in paragraphs 1 (*a*), 2, 3 and 4 thereof the basis on which the amounts to be disallowed as capital expenditure, see paragraph (5) of our decision, had been agreed, and stated in paragraph (1) (*b*) thereof:

> " On the footing of these figures the assessments under appeal will require pursuant to the Commissioners' decision in principle, to be adjusted to the following amounts, viz.: . . ."

We did not consider that such submission constituted, or was intended to constitute, further evidence which should influence our decision. We did not hear any argument upon it, nor were we requested to do so, but simply determined the assessments in the agreed figures. The Inspector of Taxes has suggested that it should be exhibited to this Case but the Board objected to its inclusion. In the circumstances we do not consider it part of the evidence before us and accordingly we do not annex it.

14. Both the Board and H.M. Inspector of Taxes immediately after the determination of the appeal declared to us their dissatisfaction therewith as being erroneous in point of law and in due course required us to state a Case for the opinion of the High Court pursuant to the Income Tax Act, 1952, Section 64, which Case we have stated and do sign accordingly. The question for the determination of the Court is whether upon the facts found our decision was correct in law.

B. Todd Jones
R. A. Furtado
W. E. Bradley
} Commissioners for the Special Purposes of the Income Tax Acts.

Turnstile House,
94–99, High Holborn,
London, W.C.1.

25th March, 1957.

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(2) *Commissioners of Inland Revenue* v. *Racecourse Betting Control Board*

Racecourse Betting Control Board v. *Commissioners of Inland Revenue*

CASE

Stated under the Finance Act, 1937, Fifth Schedule, Part II, Paragraph 4, and the Income Tax Act, 1952, Section 64, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the High Court of Justice.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 28th, 29th and 30th November, and 1st December, 1955, the Racecourse Betting Control Board (hereinafter called " the Board ") appealed against assessments to Profits Tax for the chargeable accounting periods 1st January to 31st December, 1952, 1st January to 31st December, 1953 and 1st January to 31st December, 1954.

2. The points at issue in such appeal and the facts and arguments relating thereto were the same as those in an appeal by the Board against Income Tax assessments for the years 1953–54 and 1954–55 heard at the same time as the present appeal and they are set out together with our decision in a Case we have today stated relating to such assessments.

3. To save expense we do not here repeat such facts, arguments and decisions, but a copy of such case stated is available to the Court.

4. We finally determined the above assessments in accordance with our decision as follows:

Chargeable accounting period ended 31st December, 1952, assessment reduced to £24,673 5*s*. (tax).

Chargeable accounting period ended 31st December, 1953, assessment reduced to £24,340 10*s*. (tax).

Chargeable accounting period ended 31st December, 1954, assessment reduced to £23,211 2*s*. 6*d*. (tax).

5. Both the Board and the Commissioners of Inland Revenue immediately after the determination of the appeal declared to us their dissatisfaction therewith as being erroneous in point of law and in due course required us to state a Case for the opinion of the High Court pursuant to the Finance Act, 1937, Fifth Schedule, Part II, Paragraph 4 and the Income Tax Act, 1952, Section 64, which Case we have stated and do sign accordingly.

The question for the determination of the Court is whether upon the facts found our decision was correct in law.

B. Todd Jones
R. A. Furtado
W. E. Bradley
} Commissioners for the Special Purposes of the Income Tax Acts.

Turnstile House,
94–99, High Holborn,
London, W.C.1.

25th March, 1957.

The cases came before Upjohn, J., in the Chancery Division on 3rd, 5th and 6th December, 1957, when judgment was given in favour of the Crown, with costs.

Mr. F. N. Bucher, Q.C., Mr. Alan Orr and Mr. H. H. Monroe appeared as Counsel for the Crown, and Mr. F. Heyworth Talbot, Q.C., and Mr. Desmond Miller for the Board.

Upjohn, J.—I have before me four appeals, which fall into two groups. The first group contains two appeals, one by the Inspector of Taxes and the other by the Commissioners of Inland Revenue, against the Racecourse Betting Control Board relating to assessments made upon the Board for 1953–54 and 1954–55. Both these appeals raise precisely the same point, one appeal being directed to Income Tax and the other to Profits Tax. I shall therefore deal with them as one appeal. The second group of appeals

(Upjohn, J.)

is by the Racecourse Betting Control Board, in the one case against the Inspector and in the other against the Commissioners. Again there are two appeals, because one relates to Income Tax and the other to Profits Tax. The same point, however, arises in each, and it is whether a certain expenditure was of enduring capital benefit which ought to be treated as capital and not as a revenue expenditure. I shall deal first with the appeals by the Crown.

The Racecourse Betting Control Board, as is well known, carries on a trade of running totalisators at a large number (some 72 or 73) racecourses in England. It was set up in the year 1928 by the Racecourse Betting Act, 1928, and I had better turn straight to that Act, for much will depend upon it. Its title was this :

> "An Act to amend the Betting Act, 1853, to legalise the use of totalisators on certain racecourses, and to make further provision with regard to betting thereon."

Section 1 relaxed the provisions of the Betting Act, 1853, in relation to approved racecourses, and it provided that on such an approved racecourse the Racecourse Betting Control Board might set up a totalisator and operate it with regard to the public attending the horse race. I do not think I need read anything more in Section 1. The operation of a totalisator now being so well known, I need not, I think, describe it in any way. Section 2 set up and incorporated the Board and provided for its constitution and for its procedures. I need not, I think, read that either.

Now comes the important Section, which is Section 3, and I had better read the whole of it.

> "The Racecourse Betting Control Board—(1) may for the purposes of this Act issue (subject to such conditions as they may impose) and at any time revoke certificates of approval in respect of racecourses and ground adjacent thereto ; (2) shall make it a condition of the grant of a certificate of approval of any racecourse that the persons having the management of such racecourse shall provide a place, whether in a building or not, where bookmakers may carry on their business and to which the public may resort for the purpose of betting, and that the charge to a bookmaker and to any assistant accompanying him, for admission to an enclosure on the racecourse for the purpose of the bookmaker's business shall, in the case of a bookmaker, not exceed five times the amount, and in the case of an assistant not exceed the amount of the highest charge made to members of the public for admission to the enclosure ; (3) shall distribute or cause to be distributed the whole of the moneys staked by means of a totalisator on any race among the persons winning bets made by means of the totalisator on that race, after deducting or causing to be deducted such percentage of those moneys as the Board may from time to time determine either generally or with respect to any particular racecourse ; (4) shall establish a fund known as the totalisator fund, into which shall be paid the percentage deducted as aforesaid of moneys staked by means of the totalisator, and any other moneys received by the Board ; (5) may, for the purposes of this Act, borrow money upon the security of such fund or otherwise, and lend money for the purpose of setting up or operating totalisators in accordance with the provisions of this Act ; (6) shall (subject to the payment out of the totalisator fund of all taxes, rates, charges, and working expenses, and to the retention of such sums as they think fit to meet contingencies, and to the payment out of the said fund of such sums as they think fit to charitable purposes) apply the moneys from time to time comprised in the totalisator fund in accordance with a scheme prepared by the Board and approved by the Secretary of State for purposes conducive to the improvement of breeds of horses or the sport of horse racing ; (7) may do all such things as are incidental to the foregoing matters ; (8) shall submit annually to the Secretary of State a report of their proceedings, together with an account, in such form as may be prescribed by the Secretary of State, of the moneys received and expended by them during the year, and such report and account shall be laid by the Secretary of State before both Houses of Parliament."

I do not think I need read the next Section. An amendment was made to that Act in the year 1934 by Section 18 (5) of the Betting and Lotteries Act, 1934, to this extent, that the purposes for which a scheme might be prepared and approved by the Secretary of State might include purposes conducive to the advancement and encouragement of veterinary science and education.

The general scheme of Section 3 is clear enough. The Board might issue certificates of approval of racecourses and set up totalisators thereon, but it was to be a provision or a condition of any certificate of approval that there should be a place where bookmakers might carry on their business, though they might have to pay higher charges than were formerly permissible ; and then there are the provisions as to what is to happen to the fund created by the deduction of a percentage from the proceeds of the totalisator stake. From its inception to the year 1954 the general method of procedure was this. The totalisator fund was, each year, a very substantial fund, and in each year with which I am concerned the total amounts invested with the totalisator were, broadly speaking, about £25 million and the dividends paid out were £22 or £23 million. Then there were the expenses of management and so forth, and that left for application each year in accordance with schemes prepared by the Board and approved by the Secretary of State something over £500,000.

Those schemes have been set out very fully in the Case Stated, and I do not think I need do more than attempt a very brief recital of them. In each of the years ending 1952, 1953 and 1954, the surplus went in this sort of way. About £250,000 went to a fund set up by the Board called the racecourse fund, and that sum was divided amongst the racecourses, approximately speaking, in proportion to the cost of maintenance of each racecourse as a fraction of the total cost of maintaining all racecourses. That fund could only be expended by the racecourses in accordance with proposals which were approved by the Board, and that was normally for improvements to the racecourse itself : buying additional land, improving the grandstands and many other ways of improvement which are set out in the Case. In 1952 such, I suppose, were economic difficulties that it was difficult to get owners to run horses in races, and so the Board gave a general authority to racecourses to use up to 25 per cent. of the total amount appropriated to each racecourse for the purpose of augmenting prize money, to attract more entries and, no doubt, of a better quality. Then another class of expenditure in view of economic difficulties was that travelling allowances were made to owners and trainers to meet the cost of travelling racehorses to race meetings ; and in 1952 some £168,000 was so expended. The scheme was expanded in 1954 by a runner's allowance, and it was then decided to give every owner whose horse ran in a race £1 for doing so ; and in the 1954 accounts provision of £42,000 under the heading of " operating expenses " was made for this allowance. Then the next class of expenditure was towards the administrative expenses of the Jockey Club and the National Hunt Committee and of the race finish recording camera. In 1952 those apparently amounted to some £60,000, and the sums so applied were used to meet the salaries of racing officials, starters, judges, clerks of the course

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and others, expenses which, had they not been contributed to by the Board, would have had to be paid by the racecourse owners or the hunts which organised point-to-point meetings. Then about £25,000 was paid for the benefit of point-to-point meetings, and, finally, a small sum was devoted to the Pony Turf Club, but that seems to have come to an end, because they have ceased to have pony racing. It is fair to say that the Board have been great benefactors to the sport of racing.

There is no doubt that, at any rate, one of the reasons why those payments were made was that it was in the interests of the Board as a trader, for the very simple reason that the more people that you can persuade to attend a race meeting the more people are likely to come and bet on the tote. Some of them, of course, will bet with the rivals who have to be accommodated, the bookmakers. But some of them will bet on the tote, and so, to increase the turnover of the tote, you want to increase the attendance at race meetings; and one way of doing that is to improve the racecourse so that it is more attractive to members of the public. Another way of doing that, of course, is to try and increase the number of horses running and the quality of the horses running. You do that by making travelling allowances and by increasing the prize money; for this was established without a shadow of a doubt, that the more horses that you have in any given race the more money is placed on the tote in respect of that race. So these payments were in fact very much to the benefit of the Board itself, and, as was pointed out in the Case, in these respects the interests of the Board coincide with the interests of the bookmakers, who also benefit by increased attendances, improvements of amenities and proper supervision of racing.

Until 1954 those appropriations were made by way of schemes approved by the Secretary of State, and the totalisator fund was operated in this way. The fund, after paying, of course, the dividends to winners of races, was paid to an account, and out of that the operating expenses and headquarters expenses were deducted. Then the balance was ascertained. Upon that Income Tax was paid in the usual way. The surplus, amounting, as I have said, to something over £500,000 for each of the relevant years, was then dealt with by way of scheme in the manner I have described. In 1954, however, a different attitude was adopted, quite properly, by the Board. I think I can best deal with that by reading an extract from the report of the Board to the Secretary of State for the year 1954, and I can begin reading at paragraph 3 (ii):

> "Shortly after their establishment in 1928 the Board took up with the authorities, at the highest level, the question of their liability to tax and took advice on the matter. The outcome was that up to the present, the Board have been treated as carrying on a trade for taxation purposes and, on the basis of the advice tendered to them, have accepted this treatment. On this footing, the Board's taxable profits have been regarded, by the Inland Revenue, as being the balance in the totalisator fund after meeting rates and working expenses (interpreting the words 'working expenses' in their narrowest sense) with the result that *all* expenditure incorporated in schemes approved by the Secretary of State under the Act, has been treated as having been paid out of taxed profits. (iii) The Board have now been advised by Counsel that—if a trade is indeed carried on—this treatment is wrong in law and that disbursements genuinely made by the Board for the purposes of their trade or business are not rendered ineligible as deductions in arriving at the taxable profits on the ground, simply, that they are made, have been made or could equally be made, under a statutory scheme approved by the Secretary of State."

Then in sub-paragraph (v) they say this:

> "In view of the very definite advice received by them, the Board, in these circumstances, have decided that it is their duty to contest the taxation issues

> in the Courts. The Board have also, during the past year, incurred expense of a kind analogous to that heretofore made under statutory schemes."

Then they set out the runner's allowance at £1 per starter. They had done that perfectly fairly and openly with the view of seeing whether that is a proper way of dealing with the matter in the accounts.

The question I have to determine is whether that view which has been expressed by the Board is correct or whether the former procedure is indeed the proper procedure that should be followed from an Income Tax point of view. On behalf of the Board, Mr. Heyworth Talbot has put the case in this way. He submits that the Board is not really a trader at all. It is a statutory administrator which has statutory obligations to fulfil; but he concedes that for the purposes of Income Tax the activities of the Board are in the nature of trade and are taxable if a surplus be shown as such. But he submits that the expenses of making provisions for the improvement of stands and so forth which I have already enumerated are the expenses of carrying on that trade and ought to be allowed before a balance for the purposes of Income Tax is ascertained. He submits that you must look at the activities of the Board as a whole for the purpose of Income Tax. Every penny that it disburses, he points out, should be a disbursement out of the totalisator fund, and he says you must regard the Board, if it is to be regarded as a trader at all, as a trader throughout its activities. That does not necessarily mean, as he fairly concedes, that all expenses are necessarily deductible for the purposes of Income Tax. The only expenses that can be deducted are those which fall within Section 137 (*a*) of the Income Tax Act, 1952. The words are very well known, but perhaps I had better read them:

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

He concedes that he has to establish that these expenses are "wholly and exclusively laid out or expended for the purposes of the trade".

He submits that the matter must be looked at in this way. At the end of each accounting year the Board has a surplus to deal with, and they can consider how that surplus should be dealt with, just like any ordinary trading concern. A trading concern finds it has a surplus at the end of a year's trading. They may decide to apply it in a dividend. But they may not; they may, for instance, decide to apply it in paying a bonus wage or in undertaking some advertising activity. Then next year, when you find that profit has been applied in paying a bonus wage, that obviously is an expense allowable for Income Tax, and if some of it has been applied as an ordinary trade advertising expenditure, it too will be allowed for the purposes of tax. So, he says, here you find that the Board have a surplus. They then decide to apply it to matters which he submits are wholly and exclusively laid out for the purposes of the trade; that is to say, for the improvement of racecourses or the increase of prize money and all the other matters which I have discussed, because that is an expenditure which has to be incurred to

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earn more profits; and he relies on the well-known passage in *Commissioners of Inland Revenue* v. *Stonehaven Recreation Ground Trustees*, 15 T.C. 419, in the judgment of the Lord President (Lord Clyde), at page 426. He says this:

> "it is trite law that, as Lord President Kinross observed in *Harris* v. *Corporation of Irvine*(1), [1900] 2 F. 1080 at p. 1084, 'the term "profits" prima facie means all the net proceeds of a concern or adventure, after deducting the necessary outgoings without which these proceeds could not be earned, but when the proceeds have been so ascertained, Income Tax is leviable on the full balance of them, to whatever purpose—whether to the payment of debt or any other purpose,—they are applied after they have been earned—*Mersey Docks* v. *Lucas*(2) (1883), 8 App. Cas. 891.'"

That, he submits, is the case here. You must ask for what purpose, for example in the year 1954, were these payments or appropriations made. The answer, he submits, must be that if for the relevant purpose, that of collecting tax, the Board is to be regarded as a trader, those sums were expended wholly for the purpose of the trade with the object and for the purpose of increasing the trade and increasing the profits in future years; and in paragraph 7 of the Case the Commissioners accept that view. They say this:

> "We were satisfied on the evidence that all the payments set out in exhibits B, B1 and B2 were made by the Board with the object of increasing the receipts of its totalisators, although such payments might, and in all cases did (in the words of Section 3 (6) of the Act of 1928), improve the breed of horses or the sport of horse-racing, and although the increase in such receipts was not in all cases expected to be exactly proportionate to the expenditure",

and then they came to the conclusion which they set out in paragraph 12 (2):

> "We are concerned with certain items of expenditure by the Board details of which are set out in exhibits 2, 2 (*a*) and 2 (*b*) [hereto annexed as exhibits B, B1 and B2] which it claims are proper deductions in computing the profits of such trade for the purposes of Income Tax. For this claim to succeed it must be shown, firstly, that such expenditure was made wholly and exclusively for the purposes of the trade and, secondly, was not of a capital nature. (3) We do not consider that the terms of the two Acts setting up the Board and regulating its activities, and in particular Section 3 (6) of the Act of 1928, are at all conclusive in determining the two questions at issue; nor do we think it proper to conclude that the balance of the totalisator fund after deduction of the items set out in brackets in that Sub-section corresponds with the profit of the trade which is to be taxed. The Act does not purport to be concerned with taxable profits, and one of the items in the bracket, namely, payment to charitable purposes, would only in exceptional circumstances form a proper deduction in computing the profits of a trade. (4) We consider that in this as in other cases we have to determine whether the disputed payments were made wholly and exclusively for the purposes of the Board's trade upon the evidence of the witnesses called before us and an examination of the documents placed before us. Upon a full consideration of such evidence and documents we find that all the items set out in exhibits 2, 2 (*a*) and 2 (*b*) were paid wholly and exclusively for the purposes of such trade."

The question is whether that is a right conclusion, and before going back to the Act I think perhaps there are one or two passages which I can usefully refer to in the speech of Lord Reid in *Commissioners of Inland Revenue* v. *Dowdall O'Mahoney & Co., Ltd.*, 33 T.C. 259, at pages 281–2. There he quotes the passage in the speech of Lord Davey in *Strong* v. *Woodifield*(3):

> "he said of the words in the rule, 'for the purpose of the trade', that these words 'appear to me to mean for the purpose of enabling a person to carry on and earn profits in the trade, etc. I think the disbursements permitted

(1) 4 T.C. 221, at p. 232. (2) 2 T.C. 25. (3) 5 T.C. 215, at p. 220.

are such as are made for that purpose. It is not enough that the disbursement is made in the course of, or arises out of, or is connected with, the trade, or is made out of the profits of the trade. It must be made for the purpose of earning the profits'."

Lord Reid then continued:

"This explanation has always been regarded as authoritative and is difficult to reconcile with the Respondents' contention."

Then, after referring to *Smith's Potato Crisps (1929), Ltd.* v. *Commissioners of Inland Revenue* (30 T.C. 267), he says,

"But I cannot reconcile the Respondents' contention with the opinions expressed by the majority in *Smith's Potato Crisps*. Lord Porter said(1) with reference to the expense of an appeal for the purpose of discovering the true measure of profits for tax purposes: 'Such expenditure is incurred directly for tax purposes and for nothing else, though it may indirectly affect both the amount available for distribution to the proprietors of the business and that proper to be put to reserve.'"

A little later on Lord Porter had quoted from Lord Selborne, L.C., in *Mersey Docks and Harbour Board* v. *Lucas*(2):

"it is reasonably plain that the gains of a trade are that which is gained by the trading, for whatever purposes it is used",

and continued:

"and therefore what your Lordships have to determine is whether the expense is incurred in order to earn gain or is the application or distribution of that gain when earned";

and the matter is summed up by Lord Reid, 33 T.C., at page 282:

"My Lords, I trust that I have not misrepresented the speeches of noble Lords by giving these short extracts from them. I have read and re-read those speeches and they appear to me to establish conclusively (first) the distinction between money spent to earn profits and money spent out of profits which have been earned".

Now, I approach the matter by returning to Section 3 of the Racecourse Betting Act, 1928. It is quite plain that, although the word "trade" is not used, the activities which the Board, exercising its statutory duties, are going to carry out are activities in the nature of a trade, that is, by running totalisators at racecourse meetings where the public can come and bet upon the results of races; and the Board is to make a deduction as a percentage, and the Act lays down how that percentage is to be dealt with. It is to be paid into a fund known as the totalisator fund, and then there is an express direction as to how it is to be applied in Sub-section (6). I do not think I need read it again. The whole question is whether it is right to consider that the Racecourse Betting Control Board, in making payments in accordance with Section 3 (6), are making payments wholly and exclusively for the purpose of making gains. This Act, of course, constituted and set up this statutory body and created a legal entity, and its powers and duties must, therefore, be ascertained from the terms of the Act itself. Two main questions arise. First of all, is it proper to look upon the appropriation pursuant to a scheme prepared by the Board and approved by the Secretary

(1) 30 T.C., at p. 288. (2) 2 T.C. 25, at p. 29.

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of State as money laid out for the purposes of Section 137? Secondly, is it right to consider whether the same result could be achieved by a debit in the accounts of the Board before making an appropriation for the approval of the Secretary of State, and is it proper to debit, by way of example, the sum of £42,000 for runners' allowances?

With regard to the first point, it seems to me that the scheme of the Act is this. The Board engages in trade or something in the nature of trade. From that it makes a surplus. From that surplus certain deductions are to be made. They are set out in the brackets of Section 3 (6): the payment out of the fund of all taxes, rates, charges, and working expenses, and the retention of such sums as they think fit to meet contingencies, and the payment of sums to charitable purposes. It seems to me that after that has been done, the trading activities of the Board have come to an end. Their trading activities have resulted in the creation of a fund. That fund is to be held in accordance with the trusts pointed out in Sub-section (6). It is a fund from which the working expenses of carrying on the trade have been deducted. It is a fund from which tax has been deducted. If a claim to Income Tax cannot be resisted, that includes the deduction of Income Tax; rates, charges and other working expenses are all to come out of the fund before it is held upon the trusts of Sub-section (6), and accordingly, in my judgment, this fund at that stage is a fund which has finished with trading activities, and appropriations thereout no longer have any reference to trading activities of the Board. The appropriations are made, and are made only, for the reason that they have to be so made pursuant to Section 3 (6) of the Act. The Board is under a duty to prepare a scheme. The Secretary of State is the person to approve it. It is a statutory distribution of a fund in the hands of the Board, and, with all respect to the argument, in my judgment it has nothing whatever to do with the trading activities of the Board. True enough, the appropriations made coincide with the trading desires of the Board. Well, my comment upon that is how very fortunate it is for the Board. But it cannot turn what is, in essence, a statutory distribution in accordance with an Act of Parliament of a surplus of a fund into a trading activity. Accordingly, it seems to me that, when the Secretary of State approves an appropriation, that is something which has nothing to do with the trading activities of the Board.

Now, as to the second point, is it proper to regard the runners' allowances as being proper deductions for the purpose of Income Tax? The first thing is, is it proper to deduct that sum from the fund which is going to be dealt with by Section 3 (6)? It can only be deducted if it is a charge, or a working expense, or a deduction to meet contingencies. If any of those, it can only be a working expense. Is it proper to regard a runner's allowance as a working expense? That seems to me entirely a question of construction of this Act of Parliament. This Board is not a commercial concern. I have to construe the words "working expenses" as I find them in this Act. In my judgment, "working expenses" there means what one ordinarily thinks of as a working expense in connection with the operation of the totalisators. It has nothing whatever to do with paying money to attract more horses, which, you hope, will attract more of the public, who, you hope, some of them, will place more money with the totalisator. That does not seem to me to be a proper description of an outlay as a working expense. Accordingly, it seems to me that the deduction of this expense of £42,000 was in fact *ultra vires* the Board. They could not make it, except, of course, by way of a scheme approved by the Secretary of State. As, therefore, they could not

deduct it in their accounts, they cannot deduct it for the purposes of Income Tax. But the matter does not rest there, because, of course, even if it could be treated as a working expense, the question still arises whether it is a proper deduction for the purposes of Section 137 of the Income Tax Act, 1952. I do not think it is, because, with all respect to the Special Commissioners, I do not see how this sum of runners' allowances can be described as a sum wholly and exclusively laid out for the purposes of the trade. It is laid out to attract more horses and more public quite generally to racecourses. It is really an outlay which is as much, in the long run, for the benefit of the public, of racecourse executives and of bookmakers, or generally for the sport of racing, as it is for the benefit of the Board: and, in my judgment, it would not in any event be a proper deduction for the purposes of Income Tax, even if it were a working expense, which in my judgment it is not.

In my judgment, the Special Commissioners have failed entirely to give proper weight to the construction and meaning of the Act. It is in the Act that one finds the powers and duties and obligations of the Board set out, and I venture to think that they have wholly failed to give due weight to that fact. Accordingly, the Crown's appeals must be allowed, and the matter must be remitted to the Commissioners to adjust the figures in accordance with my judgment.

That brings me to the second group of appeals. That proceeded upon this basis, that on the footing that these appropriations were proper deductions for Income Tax, a subsidiary point arose which I find set out by the Commissioners in paragraph 12 (5) of the Stated Case:

> "We find, on the other hand, that certain of the payments in question were reimbursements of expenditure upon the provision of certain physical installations on racecourses".

They then refer to exhibit E.

> "Such installations were of enduring advantage to the Board, and we therefore hold that such payments were of a capital nature and not proper deductions in arriving at the Board's profits: see *Coalville Urban District Council* v. *Boyce*, 18 T.C. 655."

I need not look at exhibit E, but they are improvements on the racecourses of all sorts.

Of course, as I am reversing the Commissioners on the main appeals, that question does not now arise, but as the matter has been fully argued I think I had better deal with the point quite shortly. The principle upon which the expenditure was not allowed is because it was of enduring advantage to the Board. The principle was stated by Lord Cave, L.C., in *Atherton* v. *British Insulated and Helsby Cables, Ltd.*, 10 T.C. 155. I think the relevant passage is sufficiently set out in the later case of *Anglo-Persian Oil Co.* v. *Dale*, 16 T.C. 253, at the foot of page 273, where Romer, L.J., said this:

> "It was pointed out by Lord Cave in *Atherton's* case(1) that an expenditure, though made once and for all, may nevertheless be treated as a revenue expenditure, and he then added this(2): 'But when an expenditure is made,

(1) 10 T.C. 155. (2) *Ibid.*, at pp. 192–3.

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> not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital.' It should be remembered, in connection with this passage, that the expenditure is to be attributed to capital if it be made 'with a view' to bringing an asset or advantage into existence. It is not necessary that it should have that result. It is also to be observed that the asset or advantage is to be for the 'enduring' benefit of the trade. I agree with Mr. Justice Rowlatt that by 'enduring' is meant 'enduring in the way that fixed capital endures'. An expenditure on acquiring floating capital is not made with a view to acquiring an enduring asset. It is made with a view to acquiring an asset that may be turned over in the course of trade at a comparatively early date. Nor, of course, need the advantage be of a positive character. The advantage may consist in the getting rid of an item of fixed capital that is of an onerous character, as was pointed out by this Court in the case of *Mallett* v. *Staveley Coal and Iron Company*(1)."

Each case depends on its own facts; and of *Coalville Urban District Council* v. *Boyce*(2), referred to in the Case, I desire only to say this. That was a very special case which turned on its own particular facts and, although it is interesting as an example of the application of the principle, it does not seem to me that it can in any way govern the case before me. The case of *Bolam* v. *Regent Oil Co., Ltd.*(3), was relied upon. That is another example of the principle; in that case it was not applied. But there again, the facts of that case were so very different to this that it does not seem to me to afford any guidance in this case. The real question I have to consider is whether the putting out of this expenditure upon the property of other persons is something which really can be described to be of an enduring advantage to the Board. In one sense it is, of course, because the Board hopes to attract more persons to its totalisator windows. But not every advertising expenditure is proper to come within the principle and, speaking for myself, though it is not necessary to come to a final conclusion for the reason I have already given, I find much difficulty in thinking that this expenditure can be treated as being an expenditure of the type envisaged by Lord Cave in *Atherton's* case(4). However, in the event, of course, these two supplemental appeals must be dismissed, with costs.

You are entitled to your costs in the main appeals, Mr. Bucher.

Mr. F. N. Bucher.—If your Lordship pleases.

The Board having appealed against the above decision, the cases came before the Court of Appeal (Lord Evershed, M.R., and Morris and Ormerod, L.JJ.), on 21st, 22nd, 23rd and 24th April, 1958, when judgment was reserved. On 7th May, 1958, judgment was given unanimously in favour of the Crown, with costs.

Mr. F. Heyworth Talbot, Q.C., and Mr. Desmond Miller appeared as Counsel for the Board, and Mr. F. N. Bucher, Q.C., Mr. Alan Orr and Mr. H. H. Monroe for the Crown.

Lord Evershed, M.R.—Two appeals by the Racecourse Betting Control Board (which I shall hereafter refer to as "the Board") and corresponding cross-appeals on the part of the Crown have been heard together. One

(1) 13 T.C. 772. (2) 18 T.C. 655. (3) 37 T.C. 56. (4) 10 T.C. 155.

appeal and the corresponding cross-appeal is concerned with the Board's liability to Income Tax; the second appeal and cross-appeal relates to Profits Tax. It has been agreed before us that identical principles apply, so far as is relevant to these appeals, to both Income Tax and Profits Tax, so that the answer as regards the one necessarily involves the answer also as regards the other. In the circumstances I shall confine myself in this judgment to Income Tax.

The Board has been assessed to Income Tax under Schedule D of the Income Tax Act, 1952, for the Income Tax years 1953–54 and 1954–55, in reference to its trade as a totalisator operator. Although Mr. Heyworth Talbot was not prepared unreservedly so to admit, it is, in my judgment, clear that the Board is in fact carrying on such a trade. In respect of these tax years, the Board has claimed that certain payments made by it ought to be deducted from its taxable profits or gains as having been, within the terms of Section 137 (*a*) of the Act, "wholly and exclusively laid out or expended for the purposes of" its trade. The facts as regards these payments have been fully recited in the Case Stated. They were summarised also in the judgment appealed from of Upjohn, J(1). So far as necessary, I shall treat the Case Stated as incorporated in this judgment. It is a sufficient recapitulation for me to state that the sums in question have fallen under six heads, namely: (1) Runners' allowances, that is, sums paid to racehorse owners who run horses in any race at racecourses with which the Board is concerned, at the rate of £1 for every runner. (2) Sums paid to "racecourse executives", that is, sums paid to racecourse owners for use by them in improvements upon the structures and amenities, etc., on racecourses (being racecourses used for horse races, and approved as such by the Board). The details of these payments I need not state, but it is to be noted that the expenditure is in fact subject to a substantial measure of control or supervision by the Board in each case. (3) Sums paid to owners and trainers towards their expenses in bringing racehorses to the racecourses, and therefore an encouragement to them so to do. It was clearly proved that the business done by the Board varies in direct proportion to the number of runners in the races with which they are concerned, and that without assistance the owners and trainers in modern times have found the burden of these travelling expenses a serious financial strain. (4) Sums paid to assist in meeting the administrative expenses of the Jockey Club, the National Hunt Committee and the like, which need no further exposition. (5) Sums paid to assist those responsible in discharging the expenses of point-to-point meetings. (6) Sums paid to assist and encourage racing under the rules of the Pony Turf Club. The sums involved are large, amounting in each year to something over £500,000, but that figure is, in truth, only about 2½ per cent. of the total receipts of the Board.

Of the six heads which I have above mentioned, there is a distinction for the purposes of the appeal between the first of them and the other five.

(1) *See* page 437 *ante*.

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The first, the runners' allowances, was made by the Board as being a working expense, that is, part of the financial obligations to be discharged by the Board under the relevant Act regulating their activities, before arriving at what is called in the Act the surplus totalisator fund. The remaining five heads are applications of that surplus totalisator fund. There is evidence before us of correspondence between the Board and the Home Secretary as regards this first head of payment, but in my judgment the correspondence is not relevant to the problem before us, and I do not further refer to it.

I must now make some reference to the Racecourse Betting Act of 1928 under which the Board was constituted; but as the terms of the Act are conveniently and sufficiently summarised in the judgment from the case in 1935[1] which I shall hereafter mention, it will be sufficient for me now to make a somewhat fuller reference to Section 3 than is found in the summaries mentioned. Section 3 is the Section setting out the powers and duties of the Board. Sub-section (1), for example, provides for the giving of certificates of approval by the Board, and Sub-section (2) relates to conditions of the grant of certificates. Then it is provided that the Board

> "(3) shall distribute or cause to be distributed the whole of the moneys staked by means of a totalisator on any race among the persons winning bets made by means of the totalisator on that race, after deducting or causing to be deducted such percentage of those moneys as the Board may from time to time determine either generally or with respect to any particular racecourse; (4) shall establish a fund known as the totalisator fund, into which shall be paid the percentage deducted as aforesaid of moneys staked by means of the totalisator, and any other moneys received by the Board; (5) may, for the purposes of this Act, borrow money upon the security of such fund or otherwise, and lend money for the purpose of setting up or operating totalisators in accordance with the provisions of this Act; (6) shall (subject to the payment out of the totalisator fund of all taxes, rates, charges, and working expenses, and to the retention of such sums as they think fit to meet contingencies, and to the payment out of the said fund of such sums as they think fit to charitable purposes) apply the moneys from time to time comprised in the totalisator fund in accordance with a scheme prepared by the Board and approved by the Secretary of State"

—that means the Secretary of State for the Home Department—

> "for purposes conducive to the improvement of breeds of horses or the sport of horse racing".

Those purposes have been extended by Section 18 (5) of the Betting and Lotteries Act, 1934, to include purposes conducive to the advancement and encouragement of veterinary science and education.

> "(7) may do all such things as are incidental to the foregoing matters; (8) shall submit annually to the Secretary of State a report of their proceedings, together with an account, . . . and such report and account shall be laid by the Secretary of State before both Houses of Parliament."

The problem presented in the appeal is: were the payments in question wholly and exclusively laid out for the purposes of the business of the Board within the Section of the Act? The authorities relating to the meaning of that phrase were considered by Upjohn, J., [1958] 1 W.L.R. 122, at pages 135–6[2]. I need not, I think, add to what the learned Judge said, because there was before us no doubt that the phrase means what the words indeed imply, that the payments in question, to qualify as proper deductions, must in truth, as to all of them, have been laid out exclusively for the purposes of the Board's business. As I have indicated, there are

[1] Attorney-General *v.* Racecourse Betting Control Board], 1935] Ch. 34.
[2] *See* pages 439–441 *ante*.

two categories of payment, namely, first, the runners' allowances under the first head above stated, which the Board have said were part of their working expenses within Section 3 (6) of the Act; and, secondly, the remaining items, which were applications of the surplus of the totalisator fund pursuant to the same Sub-section, after the discharge of rates, taxes, working expenses, etc. The Board's case has been that all these six heads of payment were found in paragraph 7, and again in paragraph 12 (4), of the Case Stated to have been wholly and exclusively laid out for the purposes of the Board's business, and that that finding being a finding of fact is now conclusive.

Paragraph 7 of the Case Stated is in the following terms:

> "We were satisfied on the evidence that all the payments set out in exhibits B, B1 and B2 were made by the Board with the object of increasing the receipts of its totalisators, although such payments might, and in all cases did (in the words of Section 3 (6) of the Act of 1928), improve the breed of horses or the sport of horse-racing, and although the increase in such receipts was not in all cases expected to be exactly proportionate to the expenditure."

The other reference, in paragraph 12 (4), reads:

> "We consider that in this as in other cases we have to determine whether the disputed payments were made wholly and exclusively for the purposes of the Board's trade upon the evidence of the witnesses called before us and an examination of the documents placed before us. Upon a full consideration of such evidence and documents we find that all the items set out in exhibits 2, 2 (*a*) and 2 (*b*) were paid wholly and exclusively for the purposes of such trade."

It will be noticed that in the second paragraph the Commissioners adhere to the language of the Section, whereas in the first paragraph they do not. This is a point to which I shall later again allude.

The Board, however, has also said that if it were regarded as an ordinary trader then all these payments would necessarily have been or be so allowable in the light of the findings which I have mentioned. In my judgment, however, this submission really carries the matter no further; for the fact is that the Board's trade and the Board's powers are defined by or are to be derived from the terms of the Act, upon which, in the end, the answer to the question must depend. In any event, the Board's case, as will be seen, hangs upon the sanctity of the findings of the Special Commissioners. The case of the Crown, on the other hand, is that, as regards the items other than the runners' allowances, the finding is, upon the face of it, not sacrosanct. The question whether payments were wholly and exclusively laid out for the purposes of the business of the Board is not a mere question of fact. The Crown say that the purposes of the payments cannot be judged in disregard of the purposes imposed by Section 3 (6), which are real and independent objectives. In any case, say the Crown, the terms of paragraph 7 of the Case, which ought, in the light of the whole document, to be read as expository of paragraph 12 (4), do not come up to the standard of the phrase "wholly and exclusively laid out", etc. That matter was put in the form of a dilemma by Mr. Orr: either, looking at paragraph 7, the language used by the Commissioners means

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what it says, in which case it is not a finding of fact of sufficient precision ; or, if paragraph 7 has to be expounded and explained, it is necessarily open in some degree to review.

As regards the first head of payment, the runners' allowances, the Crown have supported Upjohn, J.'s view, and have said that the payment was *ultra vires :* but even if the payment were *intra vires,* say the Crown, still in essential quality the purposes of that payment are the same as the purposes of the other payments, particularly the payment of travelling allowances. So much, indeed, was admitted by the Board, and therefore if the finding of the Commissioners cannot stand as to the five heads relating to the surplus, it cannot stand either, say the Crown, as to the first head, the runners' allowances.

It will be seen, therefore, that the two questions for the Court may be formulated as follows: First, what is, in truth, the scope of the Board's business, and what are its powers? Put more precisely, what is the scope of the phrase " working expenses " in Sub-section (6), and what otherwise is the effect of that Sub-section? Secondly, and in the light of the answer to the first question, is the finding of the Special Commissioners conclusive, and, if it is not conclusive, is it right? As to the first question, that of the scope and powers of the Board, they are to be found in the first three Sections of the Act. They are conveniently summarised in the case that I have mentioned of *Attorney-General* v. *Racecourse Betting Control Board,* [1935] Ch. 34. In that case the question was whether certain payments were *intra vires* the Board, and I would therefore like to begin my citation (because it has a bearing upon the like question relating to runners' expenses) with a passage in the judgment of Romer, L.J., at page 54:

> " It is sufficient to say that the test to be applied is whether the acts in question of the Board, which are nowhere expressly prohibited, can fairly be regarded as incidental to or consequential upon the exercise of the powers that the Legislature has in express terms conferred upon the Board. In these circumstances the first thing to be ascertained is what those powers are. Here again there is no room for dispute. They are to be found expressed in unambiguous terms in the Racecourse Betting Act, 1928. By s. 1, sub-s. 2, the Board is given power (amongst other things) to set up and keep a totalisator on any approved racecourse (as defined in sub-s. 3), and there to operate the totalisator for the purpose of effecting betting transactions on horse races only on days when horse races, but no other races, take place on such racecourses. By s. 3, sub-s. 3, it is provided that the Board shall distribute or cause to be distributed the whole of the moneys staked by means of a totalisator on any race among the persons winning bets made by means of the totalisator on that race after deducting a percentage, as therein mentioned, which we are told is in fact 10 per cent. Such percentage, as well as any other moneys received by the Board, are to be paid into a totalisator fund. This fund is to be applied by the Board in payment of all taxes, rates ",

etc. Then Romer, L.J., summarised the other Sub-sections of Section 3, which I have thought it right to read more fully.

Upon the question of *vires,* I would also like to make this reference to the judgment of Maugham, L.J., in the same case at page 59, when he said:

> " It follows therefore from the decisions of the House of Lords in *Baroness Wenlock* v. *River Dee Co.*(1) and *Attorney-General* v. *Great Eastern Ry. Co.*(2), that, on the one hand, the powers of the corporation must either be expressly conferred by or be derived by reasonable implication from provisions of the Act of Parliament while, on the other hand, the doctrine ought to be reasonably understood and applied and that whatever may fairly be regarded as incidental to or consequential upon the things which the Legislature has authorized ought not in the absence of express prohibition to be held to be ultra vires."

(1) 10 App. Cas. 354. (2) 5 App. Cas. 473.

Maugham, L.J., then, at pages 60–61, himself summarised the effect of the provisions of the Act, and I need not read that passage also.

It will be observed that, whereas the trading purposes of the Board are, as stated in those judgments, the operation of the totalisator, the purposes as stated in Section 3 (6) comprise (*inter alia*) the improvement of breeds of horses; and it is, no doubt, true that the two things are closely linked. If it is indeed permissible to make a reference from a living historian, Professor Brogan, I cite this passage from "An Introduction to American Politics", at page 153:

> "For although it is well known that the object of horseracing is to improve the breeds of racehorses so that they may run faster in other horseraces, this activity has historically been associated with wagers upon the success of the endeavours."

But if the purposes are closely linked it does not follow that they are the same.

I note that the Court of Appeal in the case that I have cited(1) held that the payment of commissions to Tote Investors, Ltd., was reasonably incidental to the powers of the Board, as being directed to increasing the number of bets and therefore to promoting the business success of the Board. The members of this Court did not say that the commissions, which were held to be *intra vires*, must therefore be comprehended by the formula "working expenses" in Section 3 (6) of the Act. Still less did they indicate a view—and the point not being before them it was unnecessary that they should—whether the commissions were payments wholly and exclusively laid out for the purpose of the Board's business. In my view, however, it is inevitable that such commissions and any other expenditure properly incurred by the Board in the conduct of the business, as distinct from applications of the surplus of the totalisator fund, pursuant to the latter part of Section 3 (6), must be classed as "working expenses": for the directions contained in Sub-sections (3), (4), (5) and (6) of Section 3 appear to leave no scope for expenditure by the Board (other than by way of payment to winning backers and of application of the surplus of the fund) save under one or other of the heads in the parenthesis in Sub-section (6); and of these heads "working expenses" is the only one relevant. It was therefore said that the phrase "working expenses" must be narrowly construed. But I am not, for my part, quite clear what precisely is thereby meant. Having regard to the presence of Sub-section (7) of Section 3 and to the language which I have quoted from the judgments of Romer and Maugham, L.JJ., the term "working expenses" must at any rate cover expenditure reasonably and properly incurred in the conduct of the business committed to the Board by Parliament. I therefore prefer to attempt no further definition than to say that "working expenses" means what those two English words naturally signify, and that they cover the expenses incurred, reasonably and properly, in the "working" (that is, the setting up, keeping and operating) of totalisators upon approved racecourses; but that they are not limited to such expenditure only as is wholly and exclusively laid out for the purposes of the Board's business.

(1) [1935] Ch. 34.

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Subject to what I have said, I for my part accept the Crown's argument, which I have above indicated. The business of the Board is, as I have said, that of operating totalisators, and is not the promoting, as such, of the improvement of breeds of horses, and the like. More particularly, I accept the view of the Crown that the purposes to which the surplus can alone be applied are " independent objectives," and I, like Upjohn, J., reject the view that it is legitimate to disregard these purposes as regards any of the applications of the surplus, and that is nonetheless so, even though the procedure which was indicated in Sub-section (6) appears to have been somewhat departed from. By the express terms of Sub-section (6), the Board is bound to apply the surplus moneys " in accordance with a scheme prepared by the Board and approved by the Secretary of State for purposes conducive ", etc. The phrasing seems at first sight, at any rate to me, to contemplate that there will be drawn up at some stage, though no doubt subject to later variation, a " scheme ", in the sense in which that word is used familiarly, e.g., for administration of a charity. In truth, what appears to have happened is that no such formal scheme operative over a period has been drawn up. The Board, at the end of the year, put before the Secretary of State proposals for the application of the surplus, and those proposals are considered and approved, and then constitute the " scheme " for that year. Nevertheless, in truth it seems to me that the matter cannot be put higher than this : out of the purposes which Parliament designated as those for which alone the surplus can be applied, and which, in my view, are essentially distinct from the business purposes of the Board, the Board has selected those most calculated to promote the Board's own business interests. The result, therefore, in my judgment, is that Upjohn, J., was right in saying that the findings in this case were, upon their face, open to question, and ought not to be regarded as sacrosanct.

The Judge said this, [1958] 1 W.L.R. 122, at page 137(1):

> " The appropriations are made and are made only for the reason, that they have to be so made pursuant to section 3 (6) of the Act. They are made, not for the purposes of trade, but for public purposes conducive to the improvement of breeding of horses and the sport of horseracing and the advancement of veterinary science. . . . True enough, the appropriations made coincide with the trading desires of the board. My comment upon that is how very fortunate it is for the board. But it cannot turn what is, in essence, a statutory distribution in accordance with an Act of Parliament of a surplus of a fund into a trading activity."

The only qualification to what I have earlier said that I would venture to make is this: that it does not seem to me (though it is not strictly necessary for my judgment) that no application under Section 3 (6) could, in any case, be one wholly and exclusively laid out for the purposes of the Board's trade. But on the material before us it has not, in my judgment, been established that any such payments were of such a very special character that they should be rightly so described.

As regards the first head of expenses, the runners' allowances, I am not prepared, with all respect to him, to hold with Upjohn, J., that these payments were *ultra vires* the Board. In my judgement, it is not necessary to decide whether such payments were or were not *ultra vires*, because, assuming they were *intra vires* and must therefore be treated as working expenses, it does not follow, as I have earlier stated, that the payments were wholly and exclusively laid out for the purposes of the Board's business. And, in my judgment, the sums paid for runners' allowances were

(1) *See* page 442 *ante*.

not so wholly and exclusively laid out, notwithstanding the findings of the Special Commissioners. It is true that these sums, not having been applications of the surplus fund pursuant to the final part of the Sub-section, are not therefore of necessity impressed with the quality of being applied for one or other of the purposes for which alone such surplus is applicable. But it is, in my judgment, impossible to sever the Commissioners' findings. The Commissioners treated all the expenses with which we are concerned as having been incurred with like intent and for like purposes; and rightly so, for it has been conceded before us that the runners' allowances cannot in these respects be distinguished from, for example, the travelling allowances. In my judgment it follows that, if the Commissioners' findings are open to challenge as to all the other expenses, as I think they are, they must inevitably be open to challenge as regards the runners' allowances, to which they directed no separate attention or conclusion. And if the findings are so open to challenge, then in my judgment the runners' allowances fail equally with the other expenses to qualify as deductions for Income Tax purposes, since they, like certain of the other expenses and particularly the travelling allowances, were laid out for purposes not exclusive to the Board's business but, to some real extent at least, for the purpose of assisting and promoting the interests of racehorse owners. For these reasons I would therefore prefer to leave entirely open the question of the *vires* of the payment of runners' allowances, and all the more so since I have no wish to add to the difficulties of the Board in the discharge of their responsible statutory tasks, and since the point does not appear to have been taken before the Commissioners, so that the materials before us, like the form of the proceedings itself, are not properly or sufficiently directed to the determination of the question.

In the course of presenting the case, Mr. Heyworth Talbot propounded six propositions. They are: (1) whatever the scope of the expression "working expenses" in Section 3 (6), the expression does not, as a matter of law, constitute an exclusive definition of disbursements or expenses which are deductible in computing the profits of trade; (2) there is no reason in law why a disbursement made pursuant to a scheme prepared by the Board and approved by the Home Secretary should not be a disbursement wholly and exclusively laid out for the purposes of the Board's trade; (3) if the disbursement is of such a nature that it can, as a matter of law, have been made wholly or exclusively for the purposes of the trade, the question whether or not it was so made is one of fact; (4) where it is found that the disbursement has been made by the trader "wholly and exclusively", etc., the fact that the expense inures also for the benefit of a third party is *nihil ad rem* as a matter of law; (5) the payments of the runners' allowances were not *ultra vires*; and (6) if these propositions are well founded, there is no ground on which the decision of the Special Commissioners on the main part of the case can be disturbed. In the result, I am prepared to accept (1), (2) (with qualification), (4) and (5), but not (3). (6) does not arise. Accepting proposition (2), I do so as constituting a general negative, as above indicated, but not in fact as governing this case.

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In the circumstances the cross-appeal does not now arise, but in case there is an appeal in this matter to the House of Lords I am prepared to say that, as at present advised, I agree with Upjohn, J., that none of the payments can be distinguished as creating some enduring asset in the business of the Board within the meaning of the issue. In the circumstances, I would dismiss the appeal.

Morris, L.J.—I find myself in entire agreement with the reasoning and conclusion in the judgment that my Lord has delivered, and there is nothing that I desire to add.

Ormerod, L.J.—I agree also, and have nothing to add.

Mr. Alan Orr.—My Lord, I would ask that the appeals be dismissed with costs.

Mr. F. Heyworth Talbot.—That must necessarily follow, my Lords.

Lord Evershed, M.R.—Yes.

Mr. Heyworth Talbot.—May I venture, my Lord, to ask your Lordships to consider, and consider favourably, an application for leave to appeal to the House of Lords?

Lord Evershed, M.R.—I imagine the Crown take no objection?

Mr. Orr.—No.

Lord Evershed, M.R.—Yes ; then we give leave to appeal.

Mr. Heyworth Talbot.—If your Lordship pleases.

The Board having appealed against the above decision, the cases came before the House of Lords (Viscount Simonds and Lords Radcliffe, Reid, Tucker and Keith of Avonholm) on 13th and 14th July, 1959, when judgment was reserved. On 29th July, 1959, judgment was given unanimously in favour of the Crown, with costs.

The Hon. Charles Russell, Q.C., Mr. F. Heyworth Talbot, Q.C., and Mr. Desmond Miller appeared as Counsel for the Board, and Mr. F. N. Bucher, Q.C., Mr. Alan Orr and Mr. H. H. Monroe for the Crown.

Viscount Simonds.—My Lords, the main issue in these consolidated appeals, of which one relates to Income Tax and the other to Profits Tax, is whether the Racecourse Betting Control Board (which I will call " the Board ") was entitled in computing the profits of the trade of totalisator operator for the years 1953–54 and 1954–55 to deduct certain payments which I will describe in due course. This it could do only if the payments were of " money wholly and exclusively laid out or expended for the purposes of the trade " within Section 137 of the Income Tax Act, 1952. If your Lordships were of opinion that the payments were of this character, the further question would arise whether any of the payments were of a capital nature and for that reason not deductible in computing the amount of the profits and gains. But, as will presently appear, this question does not arise.

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It is first necessary to consider the constitution and functions of the Board. It was constituted a body corporate under the Racecourse Betting Act, 1928, which by Section 1 (2) enacted that, notwithstanding any rule of law or enactment to the contrary, it should be lawful on any approved racecourse, and whether in a building or not, for the Board or any person authorised by the Board to set up and keep a totalisator. The expression "totalisator" is defined to mean

> "the contrivance for betting known as the totalisator or pari-mutuel, or any other machine or instrument of betting of a like nature, whether mechanically operated or not".

Section 3 is all-important for the determination of this appeal. After providing for certificates of approval of racecourses and other matters not immediately relevant, it enacted by Sub-section (3) that the Board should distribute the whole of the moneys staked by means of a totalisator on any race among the persons winning bets made by means of the totalisator on that race, after deducting or causing to be deducted such percentage of those moneys as the Board might from time to time determine either generally or with respect to any particular racecourse; by Sub-section (4) that the Board should establish a fund known as the totalisator fund into which should be paid the percentage deducted as aforesaid of moneys staked by means of the totalisator and any other moneys received by the Board; and by Sub-section (6) that the Board should, subject to the payment out of the totalisator fund of all taxes, rates, charges and working expenses, and to the retention of such sums as they think fit to meet contingencies, and to the payment out of the said fund of such sums as they think fit to charitable purposes, apply the moneys from time to time comprised in the totalisator fund in accordance with a scheme prepared by the Board and approved by the Secretary of State for purposes conducive to the improvement of breeds of horses or the sport of horse racing. Sub-section (7) empowered the Board to do all such things as are incidental to the foregoing matters and Sub-section (8) required it to submit annually to the Secretary of State a report of its proceedings together with an account in such form as might be prescribed of the moneys received and expended by it during the year, such report and account to be laid by the Secretary of State before both Houses of Parliament. By Section 18 (5) of the Betting and Lotteries Act, 1934, the purposes for which the Board might under Section 3 (6) of the 1928 Act in accordance with a scheme approved by the Secretary of State apply moneys included in the totalisator fund were extended to include purposes conducive to the advancement and encouragement of veterinary science and education.

From the time that the Board was established it has operated totalisators on many racecourses and has by deducting a percentage of money staked created a totalisator fund. Out of this fund it has paid the working expenses of running the totalisator and such other administration expenses as were necessary. In addition it has made the payments with which this appeal is concerned. It claims that such payments were wholly and exclusively laid out or expended for the purpose of its trade, and its claim was upheld by

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the Commissioners for the Special Purposes of the Income Tax Acts. It was however rejected upon Case Stated by Upjohn, J., and by the Court of Appeal.

I will briefly describe the payments in question, all of which were voluntary payments. They fall under six heads and are not in any relevant way distinguishable from each other, except that the third head, runners' allowances, has a special feature which will require consideration. The first of these heads is described in the Board's accounts as "to racecourse executives from the racecourse fund". This is a fund created by contributions from the totalisator fund and from it payments are made to each of the 73 racecourses upon which the Board operated a totalisator. I need not state in any detail the purposes for which the money was used; it is sufficient to say generally that it was used for the rehabilitation of racecourses and buildings, the provision of various amenities and latterly for increasing the prize money for races. The second head is described as "to owners and trainers in reduction of the cost of travelling racehorses to race meetings". No further explanation of this title is necessary. The third head is "runners' allowance". This was first introduced in 1954. It was an allowance to owners of horses who ran their horses in any race, the amount being fixed at £1 per runner. The distinctive feature of this payment is that it was not part of the distribution made under a scheme which the Secretary of State sanctioned but was treated in account as part of the working expenses of the trade. The fourth head is described as "towards the administrative expenses of the Jockey Club and National Hunt Committee and the cost of the race finish recording camera". Payments in this category were used to meet the salaries of racing officials, starters, judges and clerks of the course who were provided by the Jockey Club or the National Hunt Committee and for similar purposes. The fifth and sixth heads were sums paid "for assistance . . . of point-to-point meetings" and "for the assistance of racing under the rules of the Pony Turf Club", respectively. All these payments, with the exception, as I have already said, of the runners' allowance, were included in schemes prepared by the Board in accordance with the provisions of the Act and submitted to and approved by the Secretary of State. The excepted item appears to have been treated as part of the Board's working expenses in order to test whether inclusion in a scheme was material for tax purposes.

I have very briefly summarised the facts as they appear in the Case Stated and will only add that the Special Commissioners had before them a quantity of evidence in regard to the relationship between the volume of totalisator betting and the number of horses running in a race and the number of people attending the race meeting, in regard to the influence of racecourse amenities upon attendances by the public and to the necessity of public confidence in the proper conduct of racing and the accuracy of the official supervision and decision, in regard to the need for augmenting prize money and the increase in the cost of maintaining racehorses and bringing them to meetings and the need for subventions to point-to-point and Pony Turf Club meetings. On this evidence the Special Commissioners came to this conclusion:

> "We were satisfied on the evidence that all the payments set out in exhibits B, B1 and B2"

—being the relevant statements of account—

> "were made by the Board with the object of increasing the receipts of its totalisators, although such payments might, and in all cases did (in the words of Section 3 (6) of the Act of 1928), improve the breeds of horses or the sport of horse racing, and although the increase in such receipts was not in all cases expected to be exactly proportionate to the expenditure."

They accordingly determined that all such payments were wholly and exclusively made for the purpose of the Board's trade of operating totalisators. This determination was, as I have said, reversed by Upjohn, J., who was upheld by the Court of Appeal.

My Lords, a considerable part of the debate in this House turned upon the meaning of the conclusion of the Special Commissioners which has been set out verbatim. It was urged that it was a finding of fact which must be accepted by the Court and, being accepted, could lead to no other result than that the payments fell within Section 137 of the Income Tax Act, 1952, and were deductible in a computation of profits and gains. It could only mean, it was said, that the only object of the Board in making the payments was to increase the receipts of the totalisators. If so, it followed that they were made wholly and exclusively for the purpose of their trade; the concluding part of the paragraph could be disregarded. My Lords, I cannot regard this as a correct interpretation of the conclusion. It is altogether too ingenuous to suppose that the Board, in making these payments, had not in mind the justification, if not the very purpose, of its creation and had not the object of improving the breed of horses and the sport of horse racing. It is true that the part of the sentence beginning with the word "although" suggests that the ensuing result was fortuitous and unintended; but, if this is what the Commissioners meant, I should not hesitate to regard the finding as irrational and even perverse.

The difficulty in the case no doubt arises out of the somewhat anomalous position of the Board, which is not that of an ordinary trading corporation. The same difficulty may well arise in the case of all nationalised industries. In such cases the distinction is likely to be obscured between expenditure made in order to earn profits of the trade and expenditure out of earned profits. It is often a fine distinction—see for instance *Mersey Docks and Harbour Board* v. *Lucas*[1], 8 App. Cas. 891, *Commissioners of Inland Revenue* v. *Stonehaven Recreation Ground Trustees*, 15 T.C. 419, and in particular the observations of my noble and learned friend Lord Reid in *Commissioners of Inland Revenue* v. *Dowdall O'Mahoney & Co., Ltd.*, 33 T.C. 259, at pages 281–2. But in the present case the line is clearly drawn by the Act itself, and the Commissioners have I think fallen into error because they have ignored its structure and assumed that the tax position was precisely what it would have been if the Board was an ordinary corporation whose object was under its memorandum of association to carry on the trade of operating totalisators on racecourses and other objects incidental thereto and nothing had been prescribed in regard to the distribution of its profits. I do not say—it is unnecessary for me to say—what the result would be if that had been the case and there had been a similar finding of fact. Here however the Act distinguishes between on the one hand the trading activities of the Board and its attendant expenditure, and on the other the

(1) 2 T.C. 25.

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payments which are to be made out of any balance that remains. The payments or appropriations so made must accord with the directions of the Act and must be approved by the Secretary of State, and it would, as it appears to me, be inconsistent with its scheme and purpose to treat those very payments as expenditure made wholly and exclusively for the purpose of its trade. The same result is reached if the matter is looked at from a slightly different angle. It may be asked what is the trade which the Board carries on. The answer is that it is the trade of operating totalisators on racecourses. It is the expenditure for the purpose of that trade which is deductible in computing the amount of its profits or gains. No doubt, as was held in the case of *Attorney-General* v. *Racecourse Betting Control Board*, [1935] Ch. 34, the legitimate activity of the Board extends to matters fairly incidental to its express powers, but the question in that case was solely one of *vires*, and it is not to be regarded as an authority for saying that every activity which might indirectly result in an increased patronage of the totalisator was a part of the trade of the Board. On the contrary, I would hold that, though the appropriations may benefit the Board, it is no part of its trade to assist racecourse executives or to encourage racing in other ways. That is the object to which, under the control of the Secretary of State, the profits of its trade may be devoted.

It remains to say something about the third item of expenditure. This was the so-called runners' allowance to owners of horses of £1 per runner in every race. The object was beyond doubt to induce owners to enter and run their horses in races and thus presumably to increase the amount of betting. The only difference that I have been able to detect between this and the other expenditure with which I have been dealing is that in its accounts the Board has treated this payment as part of its working expenses which did not require the approval of the Secretary of State. But this does not determine their character for taxation purposes and I am clearly of opinion that they are not properly described as working expenses of operating the totalisators but were payments which might be made out of the balance of the fund under an approved scheme. Without such approval they were *ultra vires* payments.

In the result, therefore, I am of opinion that Upjohn, J., and the Court of Appeal came to a correct conclusion and these appeals must be dismissed with costs.

My noble and learned friend **Lord Radcliffe,** who is unable to be here today, has asked me to say that he has read and concurs in the opinion which I have just expressed.

Lord Reid.—My Lords, I entirely agree with the speech which my noble and learned friend Lord Simonds has just delivered and I cannot usefully add anything.

My noble and learned friend **Lord Tucker** is unable to be present today and he has asked me to say, in his words: " I agree that these appeals should be dismissed, for the reasons stated by my noble and learned friend on the Woolsack ".

Lord Keith of Avonholm.—My Lords, the point on which the Board mainly, if not entirely, relies in this appeal is the finding in paragraph 7 of the Case stated by the Special Commissioners, which has already been

recited to your Lordships and which I do not repeat. I am unable to appreciate how the Commissioners could have reached this finding without some element of misdirection, and their conclusion that all the items referred to in that finding were paid wholly and exclusively for the purposes of the trade is equally vitiated. All the items, with the exception of the item paid in the year 1954 known as runners' allowance, were payments made pursuant to schemes approved by the Secretary of State in accordance with Section 3 (6) of the Racecourse Betting Act, 1928. Under that Sub-section the schemes had to be "for purposes conducive to the improvement of breeds of horses or the sport of horse racing". The Betting and Lotteries Act, 1934, extended the purposes to which the surplus of the totalisator fund might be applied. For the purposes of this case that extension is immaterial. The Commissioners in their finding in paragraph 7 expressly accept it that the payments "in all cases did (in the words of Section 3 (6) of the Act of 1928), improve the breeds of horses or the sport of horse racing". Looking to this part of the finding and to the fact that the Board put forward its scheme for approval of the Home Secretary in terms of the Act, I fail to see how the conclusion can be reached, as the Commissioners have done, that "all the items . . . were paid wholly and exclusively for the purposes of such trade", i.e., with the object of increasing the receipts of its totalisators. It is not possible in my opinion to say in the circumstances of this case that that was the whole purpose and that the other was merely an accidental or incidental consequence.

I would be prepared however to treat the matter on broader grounds. The Board has a statutory duty under statutory procedure to make a defined class of payments out of the totalisator fund. In my opinion these payments and payments that may be called working expenses are mutually exclusive. It is not permissible to diminish what would otherwise be the surplus of the totalisator fund by payments of the kind to which the totalisator fund falls to be applied. This I think is explicit in the Act. The deductions to be made before striking the balance to be applied to the statutory purposes are expressed to be all taxes, rates, charges and working expenses, such sums as the Board thinks fit to meet contingencies, and such sums as it thinks fit to pay to charitable purposes. It is only as working expenses that the Board can put forward its claim here, but I cannot hold that the very payments to which the totalisator fund falls to be applied can be working expenses within the meaning of the Statute. The Act has in my view drawn a clear distinction between these two things.

There remains the point about the runners' allowances. These were introduced in only one of the years in question for the express purpose of testing the claim in a situation unembarrassed by their having been approved as an authorised payment by the Secretary of State. But this payment is of the same type as the others and the same result must follow. It should in my opinion have been paid, if at all, under an approved scheme, and

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the fact that it was not cannot improve the position. The Commissioners themselves seem to have made no distinction with regard to the runners' allowances.

I would dismiss the appeals.

Questions put :

That the Orders appealed from be reversed.

The Not Contents have it.

That the Orders appealed from be affirmed and the appeals dismissed with costs.

The Contents have it.

[Solicitors:—Simmons and Simmons ; Solicitor of Inland Revenue.]

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