HIGH COURT OF JUSTICE (CHANCERY DIVISION)—
4TH, 5TH AND 6TH JULY, 1961

COURT OF APPEAL—
27TH AND 28TH FEBRUARY, AND 1ST MARCH, 1962

HOUSE OF LORDS—
14TH AND 15TH NOVEMBER, AND 20TH DECEMBER, 1962

British Commonwealth International Newsfilm Agency, Ltd.

v.

Mahany (H.M. Inspector of Taxes) (1)

Income Tax, Schedule D—Annual payment made to a trading company—Whether trading receipt—Whether recipient entitled to repayment of tax—Income Tax Act, 1952 (15 & 16 *Geo.* VI & 1 *Eliz.* II, *c.* 10), *Section* 123, *Schedule D, Case* III.

The Appellant Company was set up in March, 1957, *by R Ltd. and the B.B.C. for the purpose of providing a newsfilm service. On* 28*th March*, 1958, *they entered into a deed of covenant under which each was to pay the Company each year until* 1964–65 *one-half the amount of its trading deficit for the year. R Ltd.'s share of the deficit for the period ending* 31*st March*, 1958, *was* £62,590 5*s.* 2*d. and it paid the Company that amount after deducting* £26,600 17*s.* 2*d. in respect of tax. The Company claimed repayment of tax under Section* 341, *Income Tax Act*, 1952, *and Section* 15 (3), *Finance Act*, 1953.

The Special Commissioners disallowed the Company's claim, finding that the sum paid to the Company was a trading receipt and was not an annual payment of pure income profit within the provisions of Case III *of Schedule D.*

Held, *that there was evidence on which the Special Commissioners could arrive at their decision.*

CASE

Stated under the Income Tax Act, 1952, Section 64, and the Finance Act, 1953, Section 15(4), 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 13th May, 1959, and thence adjourned to 14th May, 1959, British Commonwealth International Newsfilm Agency, Ltd. (hereinafter called "the Appellant"), applied for an adjustment of its liability to Income Tax for the year 1957–58, under the provisions of Section 341, Income Tax Act, 1952, and Section 15(3), Finance Act, 1953, in respect of a loss sustained by it in a trade carried on by it and charged to tax under Schedule D, and for a certificate authorizing repayment of so much of the sum paid for tax as would represent the tax upon income equal to the amount of the loss.

(1) Reported (C.A.) [1962] 1 W.L.R. 560; 106 S.J. 194; [1962] 2 All E.R. 139; 233 L.T. Jo. 247; (H.L.) [1963] 1 W.L.R. 69; 107 S.J. 14; [1963] 1 All E.R. 88; 234 L.T. Jo. 38.

2. Evidence was given at the hearing of the claim by John Davis (hereinafter referred to as "Mr. Davis"), deputy chairman and managing director of Rank Organisation, Ltd. (hereinafter referred to as "Rank"); Kenneth Winckles (hereinafter referred to as "Mr. Winckles"), assistant managing director of Rank; William Norman Henderson Dickson (hereinafter referred to as "Mr. Dickson"), commercial manager of the Appellant; William Swaby Greenhalgh (hereinafter referred to as "Mr. Greenhalgh"), group co-ordinating accountant of Rank; and Derek Oswald Bailey, a member of the Institute of Chartered Accountants of England and Wales employed by Price, Waterhouse & Co., chartered accountants; and the following documents were produced and admitted or proved:

(i) a deed of covenant dated 28th March, 1958 (hereinafter referred to as "the deed of covenant"), made between the British Broadcasting Corporation (hereinafter referred to as "the B.B.C."), Rank and the Appellant;

(ii) a letter dated 31st March, 1958, from Mr. Greenhalgh to the secretary of the Appellant;

(iii) a certificate of deduction of Income Tax dated 3rd July, 1958, signed by the secretary of Rank;

(iv) the memorandum and articles of association of Film Development & Research, Ltd.;

(v) the memorandum and articles of association of Rank;

(vi) the annual report for 1957 of Rank;

(vii) a bundle of extracts from reports from Mr. Davis to the board of Rank, in the form of letters addressed to the Rt. Hon. Lord Rank (hereinafter called "Lord Rank") as chairman of the board;

(viii) the annual report for 1958 of Rank;

(ix) an agreement dated 31st October, 1957 (hereinafter referred to as "the agreement"), made between the B.B.C., Rank, the Canadian Broadcasting Corporation and the Australian Broadcasting Commission;

(x) a deed of trust dated 31st October, 1957 (hereinafter referred to as "the deed of trust"), made between the B.B.C., Rank and others;

(xi) the memorandum and articles of association of the Appellant;

(xii) the trading and profit and loss account of the Appellant for the period 8th March, 1957, to 31st March, 1958, and balance sheet at that date;

(xiii) a schedule of purchases by the Appellant from subsidiaries of Rank;

(xiv) a schedule of sales by the Appellant to subsidiaries of Rank.

The above documents are not attached to, and do not form part of, this Case, but are available for the use of the High Court of Justice if required.

3. We found the following facts admitted or proved on the evidence adduced at the hearing of the claim:

(1) The Appellant was incorporated on 8th March, 1957, with a share capital of £176,000 divided into 176,000 shares of £1 each. The memorandum of association contained, *inter alia*, the following objects for which the Appellant was established:

"(A) To establish, carry on and supply a service of world news recorded on film or by any other means and to issue, publish and circulate and otherwise turn to account the same and in particular to supply the same to subscribers throughout the world who are operators of television services, providers of television programmes or producers of cinematograph newsreels and to such other persons as may be thought fit. It is declared

that in the carrying out of its objects under this sub-head the Company shall at all times ensure that the services rendered by it are politically independent and free from bias."

The articles of association of the Appellant contained, *inter alia*, the following:

"*Dividends*

100. Subject to any preferential or other special rights for the time being attached to any class of shares, the profits of the Company which it shall from time to time be determined to distribute by way of dividend shall be applied in payment of dividends upon the shares of the Company in proportion to the amounts paid up thereon respectively otherwise than in advance of calls. All dividends shall be apportioned and paid *pro rata* according to the amounts for the time being paid up on the shares during the period in respect of which the dividend is paid except that if any share is issued on terms providing that it shall rank for dividend as if paid up (in whole or in part) as from a particular date such share shall rank for dividend accordingly.

101. The Company in General Meeting may from time to time declare dividends, but no dividend shall be payable otherwise than out of the profits of the Company. No higher dividend shall be paid than is recommended by the Directors.

102. The Directors may if they think fit from time to time pay to the members such interim dividends as appear to the Directors to be justified by the profits of the Company. If at any time the share capital of the Company is divided into different classes the Directors may pay such interim dividends in respect of those shares in the capital of the Company which confer on the holders thereof deferred or non-preferred rights as well as in respect of those shares which confer on the holders thereof preferential rights with regard to dividend and provided that the Directors act *bona fide* they shall not incur any responsibility to the holders of shares conferring a preference for any damage that they may suffer by reason of the payment of an interim dividend on any shares having deferred or non-preferred rights. The Directors may also pay half-yearly or at other suitable intervals to be settled by them any dividend which may be payable at a fixed rate if they are of opinion that the profits justify the payment.

103. The Directors may deduct from any dividend or other moneys payable on or in respect of any shares held by a member all sums of money (if any) presently payable by him to the Company on account of calls or otherwise in relation to the shares of the Company.

104. All unclaimed dividends may be invested or otherwise made use of by the Directors for the benefit of the Company until claimed. No dividends shall bear interest as against the Company.

105. Any dividend or other moneys payable on or in respect of a share may be paid by cheque or warrant sent through the post to the registered address of the member or person entitled thereto, and in the case of joint holders to any one of such joint holders, or to such person and such address as the holder or joint holders may direct. Every such cheque or warrant shall be made payable to the order of the person to whom it is sent or to such person as the holder or joint holders may direct, and payment of the cheque or warrant, if purporting to be duly endorsed, shall be a good discharge to the Company. Every such cheque or warrant shall be sent at the risk of the person entitled to the money represented thereby.

106. If several persons are registered as joint holders of any share, any one of them may give effectual receipts for any dividend or other moneys payable on or in respect of the share.

Reserves

107. The Directors may before recommending any dividend, whether preferential or otherwise, carry to reserve out of the profits of the Company (including any premiums received upon the issue of debentures or other securities of the Company) such sums as they think proper as a reserve or reserves which shall, at the discretion of the Directors, be applicable for any purpose to which the profits of the Company may be properly applied, and pending such application may, at the like discretion, either be employed in the business of the Company or be invested in such investments (other than shares of the Company) as the Directors may from time to time think fit. The Directors may also without placing the same to reserve carry forward any profits which they may think it prudent not to divide.

Accounts

108. The Directors shall cause proper accounts to be kept in accordance with the provisions of the Statutes."

(2) The incorporation of the Appellant followed closely upon the recommendations of Mr. Davis contained in reports to the board of Rank, which took

the form of letters to Lord Rank, the chairman, and contained, *inter alia*, the following.

From the report dated 26th September, 1956.

"14. *The Supply of Visual News Material*

I refer to the conversation which you and I had more than a year ago as to the supply of visual news material on a world-wide basis. Perhaps it would be desirable for me to remind your colleagues as to one of the fundamental reasons why the Rank Organisation was created: to combat the American influence in films, a visual medium, and to ensure that there was a British film production industry which would project across the world British entertainment and in the process portray the British way of living.

Television is a new medium, and the supply of visual news material on a gigantic scale has been a new development.

A situation has developed whereby the supply of such material on a world-wide basis is coming under the complete domination of American interests.

On the formation of commercial television in this country I endeavoured to persuade the commercial stations to set up a visual news service to supply material to the commercial stations, the B.B.C. and the film industry. My efforts were unsuccessful, largely because certain people in the commercial end of television wished to build empires. We have seen the effect of this empire building and the losses which have been created.

I was still hopeful that it would be possible to work out something from a national point of view, and mentioned to you some months ago what I had in mind. You stressed to me at that time that I should pursue my negotiations. They have now reached the point of finality.

The proposal is that the B.B.C. and ourselves will set up a "Reuters" to supply visual news on a world-wide basis. Sir Ian Jacob leaves next week for Australia, where an International Conference, primarily of the Empire countries, is to be held to discuss all facets of television. He is going to tell the Conference of this arrangement and hopes to secure the interest of a number of Empire countries, particularly Australia and Canada. There are, of course, considerable possibilities for development of this idea in Europe and South America. I would stress that the approach to this problem is not strictly a commercial one to start with, but is something which I believe is in the national interest; and, as we are the largest British Organisation operating in the visual medium in this country, it is our responsibility to take the lead in this connection.

The proposed arrangements are as follows:—

1. The B.B.C. and the Rank Organisation are to:—

(*a*) Forthwith incorporate a private limited Company with the suggested name "British International Newsfilm Agency Limited", and

(*b*) Within three months to appoint Trustees and to enter into a Trust Deed somewhat on the lines of the Reuters Trust. At the outset the Trustees to be limited to appointees of the B.B.C. and the Rank Organisation. It is agreed that a person cannot be both a Director of the Company and a Trustee under the Trust Deed. (In this connection, I would suggest that the Rank Trustees be yourself, Mr. R. G. Leach and myself.)

(*c*) It has been agreed that organisations which represent the following interests should not be eligible to become shareholders in the Company or to appoint Trustees:

(i) National Television Services of any country which is not a Dominion;

(ii) Commercial Television Services in any part of the world;

(iii) Independent Television News Limited;

(iv) Cinema newsreel organisations.

2. The nominal capital of the Company to be not less than £240,000 divided into shares of three different classes. The initial capital to be subscribed in equal proportions by the B.B.C. and the Rank Organisation.

3. The Canadian Broadcasting Corporation, the Australian Broadcasting Commission and the National Television Service in any other Dominion as and when established to be invited to subscribe for shares.

4. The B.B.C. and the Rank Organisation to have the right to appoint three Directors to the Board. (In this connection I recommend that our nominees be Mr. Hargreaves, Mr. Winckles and Mr. Norris.)

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5. Any of the National Television Services in Dominion countries who subscribe for shares in the Company to the value of not less than one-third of the number of shares in the Company subscribed by either the B.B.C. or the Rank Organisation shall be entitled to appoint one Director to the Board of the Company.

6. At meetings of the Directors, the Chair to be taken by each Director in rotation, but, in the event of equality of voting, the Chairman not to have a casting vote.

7. In the event of an equal number of votes being cast at a meeting of the Directors, the matter be referred to the Trustees for determination and consideration.

8. The scale of the operations has been designed to place the Company immediately in a position to compete with the United Press or Movietone. Photographic coverage will be either 35 mm or 16 mm or both, as occasion demands.

I will not worry you with details of the proposed world set-up.

9. *General Manager*. The recommendation is that Mr. Kenneth Dick be appointed Managing Editor, being seconded from the B.B.C. After a reasonable period of time, if he measures up to the job, his appointment be confirmed and a service agreement entered into. Mr. Kenneth Hargreaves has met with Mr. Dick and supports this recommendation.

10. Estimates of cost and potential revenue have been compiled and show that the venture should at least be breaking even at the end of the third year.

11. It is proposed that the B.B.C. and the Rank Organisation at the outset each subscribe for shares in the Company to the nominal value of £50,000. The sum of £100,000 will enable the Company to purchase such capital equipment as is necessary and to have approximately £38,000 as working capital.

12. The operating deficits during the initial period shall be financed by temporary loans to be made by the shareholders as required in proportion to their existing shareholdings in the Company, these loans to be repaid once the Company is on a profit-earning basis.

13. To give effect to this scheme, it is proposed an agreement be entered into between the B.B.C. and the Rank Organisation which will cover the points to which I have referred above, with the additional proviso that during a period of five years neither party shall—

(*a*) Mortgage or charge any of the shares in the Company registered in its name or the beneficial interest therein;

(*b*) Transfer any of the shares in the Company registered in its name to any other person;

(*c*) Vote in favour of any resolution or present any petition for putting the Company into liquidation.

The Trust Deed shall not be determined during the five-year period.

14. It is hoped that it will be possible to add in due course as parties to this agreement, upon the basis which I have set out above, the Canadian Broadcasting Corporation, the Australian Broadcasting Commission, and, at some later date, some other National Television Services.

15. It is estimated that, to finance the capital expenditure to which I have already referred and initial losses, approximately £375,000 will be involved. It will be seen from this that, assuming no one else joins with the B.B.C. and ourselves, our maximum commitment is not likely to exceed, over three years, £187,500.

I strongly recommend this proposal."

From the report dated 31st January, 1957.

"11. *Visual News Service*.

It is anticipated that the Press Statement announcing the setting up of the Deed of Trust and the British International News Film Agency will be made any day now.

Since I last reported on this matter the Canadian Broadcasting Corporation have agreed to come into it and we have heard unofficially that the Australian Broadcasting Commission will participate, but this has not been officially confirmed.

I am delighted to tell you that Sir Ian Jacob and I have been successful in persuading Lord Radcliffe to become the first Chairman of the Trustees. We explained to him what the scheme was and he was enthusiastic in supporting it because of the principles involved. He only made one condition, namely, that he would work in an honorary capacity."

(3) On 31st October, 1957, the agreement was made, which provided, *inter alia*, as follows:

"1. (*a*) The Parties shall forthwith incorporate a private company under the Companies Act, 1948 to be named "British Commonwealth International Newsfilm Agency Limited" (hereinafter called "the Company").

(*b*) The nominal share capital of the Company shall be £176,000 divided into 176,000 shares of £1 each of which 48,000 shall be designated "A" shares 48,000 shall be designated "B" shares and 80,000 shall be designated "C" shares.

(*c*) Forthwith upon the incorporation of the Company B.B.C. shall subscribe in cash at par for the 48,000 "A" shares Rank shall subscribe in cash at par for the 48,000 "B" shares and C.B.C. and A.B.C. shall each subscribe in cash at par for 16,000 "C" shares.

(*d*) Each of them B.B.C. and Rank shall be entitled to appoint three Directors and each of them C.B.C. and A.B.C. shall be entitled to appoint one Director of the Company.

2. The main purpose of the Company will be the provision of a service (hereinafter called "the Service") of world news recorded on film or by any other means for subscribers throughout the world who are operators of television services providers of television programmes or producers of cinematograph newsreels and for such other persons as may wish to subscribe in order to obtain the benefit of such service.

3. The parties shall enter into a Deed constituting a Trust (hereinafter called "the Trust Deed") in the form of the draft Deed of Trust the provisions whereof are set forth in the Schedule hereto together with eight Trustees as therein provided and B.B.C. and Rank shall so soon as is possible thereafter jointly appoint a ninth Trustee to act as Chairman of the Trustees as provided by Clause 5 of the Trust Deed. The parties shall execute the Deed of Trust and shall procure the execution thereof by the Trustees within three months of the date hereof.

4. Subject to there being a sufficient number of "C" shares available for allotment the parties shall from time to time forthwith upon being recommended so to do by the Trustees for the time being of the Trust Deed invite any corporation or company of the nature described in Clause 7 (*b*) of the Trust Deed to subscribe for "C" shares in the Company upon such terms in any such case as are described in Clause 5 hereof.

5. The parties agree that such corporation or company as is invited pursuant to the provisions of Clause 4 hereof to subscribe for shares in the Company (hereinafter in this Clause called "the Invited Company") shall be so invited upon the following terms namely:—

(*a*) The Invited Company shall be invited to subscribe in cash at par for 16,000 "C" shares.

(*b*) If the Invited Company shall agree so to subscribe for 16,000 "C" shares the same shall be allotted to it subject to the provisions of paragraph (*c*) of this Clause and upon such allotment the Invited Company shall be entitled to appoint one Director of the Company and (subject to the provisions of the Trust Deed) one Trustee of the Trust who shall be classed as a "C" Trustee for the purposes of the Trust Deed and such Director and Trustee shall be additional to the number of Directors and Trustees already appointed at the time of such allotment.

(*c*) Shares in the Company shall be allotted to the Invited Company only upon its executing an agreement binding it to comply with the provisions of the Trust Deed and of this Agreement (in so far as the same shall at the time of allotment be applicable) as if the Invited Company had been a party thereto.

6. If at any time any member of the Company (other than B.B.C. and Rank) which has appointed a Director of the Company shall cease to hold 16,000 "C" shares that member shall cease to be entitled to appoint a Director of the Company and that member shall ensure the immediate resignation or removal of the Director appointed by it.

7. No member of the Company shall:—

(*a*) Mortgage charge sell dispose of or otherwise deal with any of the shares in the Company registered in its name or the beneficial interest therein.

(*b*) Transfer any of the shares in the Company registered in its name to any other person.

(*c*) Vote in favour of any resolution or present any petition for putting the Company into liquidation.

8. If in any year the moneys paid or payable to the Company by way of subscription by the subscribers to the Service are insufficient to cover the cost of operating the Service B.B.C. and Rank agree each to pay to the Company an additional subscription which shall be equal to one-half of the amount of such deficit.

9. (*a*) The parties record that their aims in establishing the Service are not those of commercial gain and that it is their intention that any profits earned from time to time by the Company from the operation of the Service shall be applied firstly in improving the quality and expanding the range of the Service and subject thereto and to the provisions of paragraph (*b*) of this Clause in reducing the amount payable by subscribers for the benefit of the Service.

(*b*) B.B.C. has agreed to supply the Company with a daily supply of world news information and with such newsfilm as is produced by B.B.C.'s own cameramen and correspondents who are active both in the United Kingdom and elsewhere and has agreed to supply the same throughout the period during which the Company will be establishing the Service at a price of £30,000 per annum (hereinafter in this paragraph called "the basic price"). It is agreed that the basic price is lower than the price which B.B.C. would charge were it supplying such information and newsfilm on a commercial basis and therefore the parties agree that if the Company apart from this provision would on the footing of paying the basic price (and no more) show net trading profits for any financial year or other financial period B.B.C. shall be entitled to be paid an increase in the price of such information and newsfilm for such year or period but so that the total payment for such year shall not be in excess of a fair price calculated on a commercial basis and by reference to the amount of the net trading profits of the Company after deducting therefrom such sums as the Company shall deem advisable to place to reserve such increase failing agreement between B.B.C. and the Company to be determined by the auditors of the Company Provided always that no such increase shall fall to be paid unless the Company and B.B.C. are in agreement that the Service is at the end of such year or period sufficiently comprehensive to satisfy the requirements of the subscribers to the Service in accordance with the objects of the Trust.

. . . .

12. The parties agree that this Agreement and the Trust shall continue in force until the expiration of the fifth financial year or other financial period of the Company or until the expiration of five years from the date hereof (whichever is the later) and unless determined at such time by not less than twelve months' previous notice in writing given by any party to the Company shall continue in force thereafter until determined by not less than twelve months' previous notice in writing given by any party to the Company. Provided however that notwithstanding any such notice if the parties to whom the same is given so desire this Agreement and the Trust shall continue in force for such further period and on such terms as such parties may mutually agree and the retiring party shall dispose of its shares in the Company to such person or persons and upon such terms as the continuing parties shall direct."

(4) On 31st October, 1957, the deed of trust was made, which recited:

"(1) British Commonwealth International Newsfilm Agency Limited (hereinafter called "the Company") is a private company incorporated under the Companies Act, 1948 for the main purpose of providing a service (hereinafter called "the Service") of world news recorded on film or by any other means for subscribers throughout the world who are operators of television services providers of television programmes or producers of cinematograph newsreels and for such other persons as may wish to subscribe in order to obtain the benefit of such service and the issued share capital of the Company is owned beneficially as to 48,000 "A" Shares of £1 each by B.B.C. as to 48,000 "B" Shares of £1 each by Rank as to 16,000 "C" Shares of £1 each by C.B.C. and as to 16,000 "C" Shares of £1 each by A.B.C.

(2) B.B.C. Rank C.B.C. and A.B.C. wish to ensure that the Company shall remain under British control that it shall not pass into the control of any one group or interest and that the news offered to subscribers by the Company shall be collected and supplied in an impartial manner

(3) B.B.C. Rank C.B.C. and A.B.C. have therefore invited the "A" Trustees the "B" Trustees and the "C" Trustees to act as trustees for ensuring the achievement of the aforesaid objects in manner hereinafter appearing and the said Trustees have agreed so to act"

and provided, *inter alia*, as follows:

"1. The British Commonwealth International Newsfilm Agency Trust (hereinafter called "the Trust") is hereby constituted

2. The objects of the Trust are:—

(*a*) To develop expand and maintain the Service with a view to providing a leading service of filmed news of events throughout the world

(*b*) To ensure that such news is collected and supplied in an impartial manner and that the Service is politically independent and free from bias of any kind

(*c*) To ensure that the control of the Company does not pass into the hands of any one interest or group.

(*d*) To ensure that the control of the Company remains within the British Commonwealth of Nations

And B.B.C. Rank C.B.C. and A.B.C. hereby record that their aims in establishing the Service are not those of commercial gain and hereby undertake to use their best endeavours to ensure the achievement and maintenance of the said objects and to use the rights vested in them by virtue of their respective holdings of shares in the Company to that end

3. (*a*) In order further to ensure the attainment and maintenance of the objects of the Trust the powers hereinafter set out shall be vested in Trustees who shall originally be nine in number of whom B.B.C. and Rank shall each be entitled to appoint three to be known as "A" and "B" Trustees respectively and of whom C.B.C. and A.B.C. shall each be entitled to appoint one to be known as "C" Trustees and of whom B.B.C. and Rank shall in manner provided in Clause 5 hereof jointly appoint one who shall be the Chairman of the Trustees

(*b*) When at any time any corporation or company (following an invitation by the Directors of the Company given pursuant to a recommendation of the Trustees made under Clause 7 (*b*) hereof to subscribe for shares in the Company) shall be allotted 16,000 "C" shares in the Company that corporation or company shall be entitled to appoint one additional Trustee of the Trust who shall be classed as a "C" Trustee for the purposes of this Deed and the number of Trustees of the Trust shall be increased accordingly

(*c*) If at any time any corporation or company other than B.B.C. and Rank which has appointed a Trustee shall cease to hold 16,000 "C" shares in the Company that corporation or company shall cease to be entitled to appoint a Trustee of the Trust and the Trustee appointed by that corporation or company shall *ipso facto* vacate office as a Trustee of the Trust

(*d*) When from time to time any vacancy shall occur in the number of the "A" Trustees or of the "B" Trustees, B.B.C. or Rank as the case may be shall be entitled forthwith to fill the same and when from time to time any "C" Trustee shall cease to be a Trustee then C.B.C. or A.B.C. or other the corporation or company by which that "C" Trustee was appointed shall if then entitled to appoint be entitled forthwith to appoint a new "C" Trustee to take his place

(*e*) Each Trustee shall on his appointment execute a deed in which he shall undertake to exercise the powers from time to time vested in him as Trustee so as to further the objects of the Trust

. . . . . .

5. B.B.C. and Rank shall as soon as is possible after the execution of this Deed jointly appoint a further Trustee in addition to those appointed under Clause 4 hereof to act as Chairman of the Trustees (hereinafter called "the Chairman") and in the event of the Chairman at any time ceasing to be a Trustee B.B.C. and Rank shall forthwith jointly appoint a successor to take his place Provided that the Chairman shall at all times be a Commonwealth Citizen (as defined in the British Nationality Act, 1948) and a person particularly fitted so to act by virtue both of his independence of interest and of his reputation.

6. Each Trustee of the Trust shall serve for five years from the date of his appointment and shall be eligible for reappointment Provided that no person who is a director of the Company may be appointed a Trustee and Provided also that any Trustee shall cease to be a Trustee forthwith upon the happening of any one of the following events namely:—

(*a*) The event described in Clause 3 (*c*) hereof

(*b*) His becoming of unsound mind

(*c*) A receiving order being made against him or his making any arrangement or composition with his creditors generally

(*d*) His being absent from all the meetings of the Trustees held within a period of any twenty-four consecutive months

(*e*) His resigning office by notice in writing to the member of the Company by which he was appointed

(*f*) His being removed from office by notice in writing given to him by the member of the Company by which he was appointed Provided that the Chairman shall not be capable of being so removed from office

(*g*) His being appointed a director of the Company

(*h*) The termination of the Trust

Provided nevertheless that notwithstanding anything hereinbefore contained no "A" Trustee or "B" Trustee shall cease to be a Trustee solely because he shall at the same time be a director of the Company unless there shall at that time be another Trustee of his class who is also a director of the Company.

7. The powers of the Trustees shall include:—

(*a*) The submission to the Company of proposals and recommendations regarding the policy to be adopted by the Company in order to achieve the objects of the Trust set out in Clause 2 hereof and the methods of carrying such policy into effect

(*b*) The consideration from time to time of what other British or Commonwealth controlled corporations or companies operating television services providing television programmes or producing cinematograph newsreels might be invited to subscribe for shares in the capital of the Company and the making to the directors for the time being of the Company of recommendations to issue to any such corporations or companies as the Trustees may think suitable of invitations so to subscribe

(*c*) The receiving and consideration of reports put before them by the Company or requested by them from the Company and the giving of advice and the making of recommendations to the Company on such reports

(*d*) The consideration of any question referred to them by the directors of the Company in accordance with the provisions of the Articles of Association of the Company in the case of an equality of votes at a meeting of the directors on such question and the making of a recommendation to the directors as to how such question should be resolved

(*e*) The attendance at meetings of the directors of the Company if and when the Trustees so desire

8. B.B.C. Rank C.B.C. and A.B.C. Hereby Covenant with the Trustees that in their capacity as shareholders of the Company they will use their best endeavours to ensure the implementation of recommendations made by the Trustees pursuant to the powers vested in the Trustees under the preceding clause.

. . . .

14. All or any of the provisions of this Deed may be varied by deed executed by B.B.C. Rank C.B.C. and A.B.C. and any other member of the Company holding not less than 16,000 "C" Shares in the Company Provided that no such variation shall be effected unless it has received the prior approval of the Chairman.

15. The Trust shall continue in force until the expiration of the fifth financial year or other financial period of the Company or until the expiration of five years from the date hereof (whichever is the later) and unless determined at such time by not less than twelve months' previous notice in writing given by any member of the Company holding not less than 16,000 shares to each other member of the Company holding not less than 16,000 shares and to the Trust Secretary shall continue in force thereafter until determined by not less than twelve months' previous notice in writing given by any such member to each such other member and to the Trust Secretary Provided However that notwithstanding any such notice if the members to whom the same is given so desire the Trust shall continue in force for such further period and on such terms as such members may mutually agree".

(5) Rank never at any time had any business dealings with the Appellant, though certain subsidiary companies of Rank did so. These were: Gaumont-British Picture Corporation, Ltd.; Gaumont-British Distributors, Ltd.; Rank Film Distributors (Holland), N.V.; Rank Organisation Film Productions, Ltd.; The Rank Laboratories (Denham), Ltd.; G.B.-Kalee, Ltd.; Rank Precision Industries, Ltd.; Rank Film Distributors, Ltd.; Bush Radio, Ltd. None of these subsidiary companies of Rank itself had shares in the Appellant.

(6) Gaumont-British Distributors, Ltd.—a company which produced newsreels in black and white, and later ceased production of such newsreels and

instead produced a colour magazine—bought material from the Appellant, that is to say, exposed film collected on a world-wide service. No directive had been given for other than normal trading, and the market price was paid for material bought from the Appellant. The Appellant only dealt with black and white film, which was no longer of use to Gaumont-British Distributors, Ltd., when it abandoned newsreel production. The cost of the material acquired from the Appellant by Gaumont-British Distributors, Ltd., represented 0.7 per cent. of that company's costs for newsreel material in the period comparable to the Appellant's first accounting period.

(7) The Appellant sold exposed newsfilms to Rank Film Distributors (Holland), N.V., also at a normal trade price, which was slightly higher than that charged to the Appellant's other Dutch customer. The cost of the material acquired from the Appellant by Rank Film Distributors (Holland), N.V., represented 1.2 per cent. of that company's costs for newsreel material in the period comparable to the Appellant's first accounting period.

(8) The Appellant sold library material to Rank Organisation Film Productions, Ltd.—that is to say, exposed film used in one connection and then retained for later sale if required by film or newsreel makers to embody in a current film if it had some relation to the story they wanted to tell—at normal trade price. The cost of the material acquired from the Appellant by Rank Organisation Film Productions, Ltd., represented a quite minute proportion of that company's total cost of film materials.

(9) The Rank Laboratories (Denham), Ltd., performed laboratory services for the Appellant, and all work carried out was at the normal market price in respect of 35 mm. work, and at a preferential rate favourable to the Appellant in respect of 16 mm. work, which constituted the larger proportion of the Appellant's requirements. The charges made by The Rank Laboratories (Denham), Ltd., to the Appellant represented 0.6 per cent. of that company's total turnover for film processing in a period comparable to the Appellant's first accounting period. The Rank Laboratories (Denham), Ltd., also rented premises to the Appellant at Acton, for which they charged less than the commercial rent with the intention of assisting the Appellant when it was first set up.

(10) Bush Radio, Ltd., supplied television receivers to the Appellant at normal trade prices. The sales of Bush Radio, Ltd., to the Appellant represented an aggregate of £307 in relation to total sales in excess of £7,000,000 in the period comparable to the Appellant's first accounting period.

(11) Rank Precision Industries, Ltd., and its subsidiary, G.B.-Kalee, Ltd., sold equipment to the Appellant in the normal course of business and at normal prices, these two companies being manufacturers of cameras and other equipment used in taking and processing film. The sales of these companies to the Appellant represented 0.9 per cent. of their total sales in the period comparable to the Appellant's first accounting period.

(12) Rank Film Distributors, Ltd., supplied library material and cameramen to the Appellant at normal trade prices. The charge for newsreel material represented 0.1 per cent. of that company's total turnover in respect of newsreels in the period comparable to the Appellant's first accounting period.

(13) Rank Film Distributors, Ltd., made available office space and secretarial and interpreter services free of charge to Mr. Dickson during his travelling throughout the world.

(14) Any reduction in its charges for materials supplied to such of the foregoing companies as were its customers by the Appellant would ultimately accrue to the benefit of Rank; during the period relevant to the claim the actual amount

of business done between the Appellant and the above-mentioned subsidiary companies of Rank was very small indeed compared to the total business done by the aforesaid subsidiaries themselves. All transactions between the Appellant and any of Rank's subsidiaries were effected at full normal trade prices or terms, or at prices or terms favourable to the Appellant, throughout this time.

(15) The trade relations between Rank's subsidiaries and the Appellant were not affected by the fact that Rank was a shareholder in the Appellant.

(16) On 28th March, 1958, Mr. Davis again reported to the board of Rank, in the form of a letter addressed to Lord Rank which contained, *inter alia*, the following.

"10. *The Supply of Visual News Material (British Commonwealth International Newsfilm Agency Limited)*

I refer to my report dated 26th September, 1956, and the proposal contained therein, which was approved at a Board Meeting held on 2nd October, 1956.

We knew at the time we went into the arrangement with the B.B.C. that losses would be made during the development period, and consequently the B.B.C. and The Rank Organisation entered into an agreement to make additional subscriptions to B.C.I.N.A. to enable it to break even.

The latest figures available indicate a loss of £123,000 for the year ending 31st March, 1958, and the B.B.C. and ourselves will have to make good this deficit.

Our taxation advisers expressed some doubt as to whether these additional subscriptions would be allowable deductions for taxation purposes, and after consulting Counsel it was recommended that the B.B.C. and ourselves should enter into a Deed of Covenant agreeing to make good the annual deficit of B.C.I.N.A.

The B.B.C. have agreed this approach, and I would like confirmation that the Board do also. The proposal has been approved by Mr. Leach."

(17) The deed of covenant, also dated 28th March, 1958, was entered into between the B.B.C., Rank and the Appellant in the following form:

"Deed of Covenant

Date: Twenty-eighth March, 1958

Parties: The British Broadcasting Corporation,
Broadcasting House,
Portland Place,
London, W.1. ("the B.B.C.") (1)

The Rank Organisation Limited,
11, Belgrave Road,
London, S.W.1. ("Rank") (2)

British Commonwealth International Newsfilm Agency Limited,
School Road,
London, N.W.10. ("the Company") (3)

Definitions:

Covenant years—The United Kingdom tax years from 1957–58 to 1964–65 inclusive

Company's year—A period in respect of which a profit and loss account of the Company laid before it in general meeting is made up, whether that period is a year or not

Deficit—In relation to each Covenant year, the amount (if any) by which the cost of operating the Company's service of providing visual news items to television stations, newsreel makers and other subscribers exceeds the moneys paid or payable to the Company by way of subscriptions by the subscribers to the service, the deficit in respect of each Covenant year being ascertained by reference to the amounts of the cost and the subscriptions shown by the Company's accounts for the Company's year which ends within that Covenant year

Preliminary Agreement—An Agreement dated the 31st October, 1957 between the B.B.C., Rank and others for (*inter alia*) the formation of the British Commonwealth International Newsfilm Agency Trust.

Recital: The B.B.C. and Rank have agreed under Clause 8 of the Preliminary Agreement that each will make annual payments representing half the annual deficits of the Company and in order to implement that provision now enter into this Deed.

Covenants:

1. (*a*) The B.B.C. hereby covenants with the Company to pay to the Company in each Covenant year a sum equal to one half of the deficit

(*b*) Rank hereby covenants with the Company to pay to the Company in each Covenant year a sum equal to one half of the deficit

(*c*) The first annual payments under the two foregoing covenants shall be made on or after the date of this Deed and before the 5th April 1958

(*d*) For the avoidance of any doubt it is declared that the two foregoing covenants are several and not joint

2. The B.B.C. and Rank agree between themselves:—

(*a*) That neither will give any notice determining the Preliminary Agreement which would take effect before the Company's year-end which will fall within the last Covenant year, and

(*b*) That if any other person entitled to determine the arrangements constituted by the Preliminary Agreement gives a notice to determine them at a date earlier than the beginning of the last Covenant year, the B.B.C. and Rank will nevertheless under the powers contained in the Preliminary Agreement keep those arrangements in force at least until the Company's year-end which will fall within the last Covenant year

In Witness whereof the B.B.C. has caused its Corporate Seal to be hereunto affixed and Rank has caused its Common Seal to be hereunto affixed the day and year first above written".

(18) On 31st March, 1958, Mr. Greenhalgh wrote to the secretary of the Appellant in the following terms:

"Dear Mr. Bull,

I enclose herewith our cheque for £37,375, which represents the half share of the estimated additional subscription, less Income Tax, payable by the Rank Organisation Limited for the year ended 31st March, 1958. Insofar as this amount exceeds the finally ascertained additional subscription less Income Tax, any excess must be regarded as an advance by the Rank Organisation on Current Account.

Yours sincerely,

(sgd) W. S. Greenhalgh."

(19) The trading and profit and loss account of the Appellant for the period 8th March, 1957, to 31st March, 1958, showed a net loss for the period of £125,180, and receipts under the deed of covenant were as follows: B.B.C., £62,590 (gross); Rank, £62,590 (gross). The balance sheet of the Appellant at 31st March, 1958, to which the auditors' report dated 4th July, 1958, was attached, contained the following note:

"The operations of the company for the period from 8th March, 1957 (date of incorporation) to 31st March, 1958 have been concerned solely in carrying out its principal object of providing a service of world news recorded on film for subscribers.

Under the terms of an agreement between the members dated 31st October, 1957 the amount by which the cost of operating the service in the period covered by the accounts exceeded the subscriptions receivable has been reimbursed by means of additional subscriptions. The company has, therefore, neither earned any profit nor incurred any loss during the period."

Without the sums received under the deed of covenant the Appellant could not have met its obligations and continued trading.

(20) The Appellant received a certificate of deduction of Income Tax in the following form (R 185):

"I Certify that on paying to British Commonwealth International Newsfilm Agency Limited of School Road, London, N.W.10 the sum mentioned in the third Column of the Statement overleaf, I deducted the amount of Income Tax shown in the fourth Column of the Statement, and I further certify that this Tax has been or will be paid by me either personally to the proper Officer for the receipt of Taxes or by way of deduction from rent or other income when received by me. For and on behalf of the Rank Organisation Ltd.

3rd July, 1958. (Signed) S. E. A. Pitman

38, South Street, London, W.1." Secretary.

The back of the certificate contained a statement as follows:

Nature of the Annual Payment, e.g., Ground Rent, Mortgage or Loan Interest, Annuity, etc. 1	Description of the Property or Profits, out of which the Annual Payment is made 2	Gross Amount of the Payment from which I have deducted the Tax 3			Amount of Income Tax deducted by me 4			Period (i.e., year, half-year, etc.) for which the payment was due, and Date on which due 5
		£	s.	d.	£	s.	d.	
Payment under Deed of Covenant and Clause 8 of Preliminary Agreement.	General Income	62,590	5	2	26,600	17	2	For 1957–58 due between 28/3/58 and 1/4/58 inclusive

The amount therein shown as deducted for Income Tax, namely, £26,600 17*s.* 2*d.*, forms the subject-matter of the present claim.

4. It was contended on behalf of the Appellant:

(i) that a loss having been sustained by the Appellant in a trade carried on by it charged to tax under Schedule D, an adjustment of its liability to Income Tax for the year 1957–58 fell to be made under the provisions of Section 341, Income Tax Act, 1952, and Section 15(3), Finance Act, 1953;

(ii) that the aforementioned payment to the Appellant by Rank amounting to £62,590 5*s.* 2*d.* gross, being income payable to the Appellant by Rank under the deed of covenant hereinbefore referred to, repayment of tax deducted therefrom and amounting to £26,600 17*s.* 2*d.* fell to be made under the provisions of the said Sections 341, Income Tax Act, 1952, and 15(3), Finance Act, 1953;

(iii) that the claim should be allowed and a certificate authorizing repayment of tax in the sum claimed issued to the Appellant.

5. It was contended on behalf of the Crown:

(i) that the aforementioned payment to the Appellant by Rank amounting to £62,590 5*s.* 2*d.* gross was a trade receipt in the hands of the Appellant which ought properly to be taken into account in computing for Income Tax purposes the profits or gains of the Appellant, and was not an annual payment of pure income profit within the provisions of Case III of Schedule D, Income Tax Act, 1952;

(ii) that no repayment of Income Tax in respect of the amount deducted therefrom by the payer, namely, £26,600 17*s.* 2*d.*, fell to be made under the provisions of Sections 341, Income Tax Act, 1952, and 15(3), Finance Act, 1953;

(iii) that the claim should be refused.

6. We, the Commissioners who heard the claim, upon consideration of the evidence adduced and the arguments addressed to us on behalf of the parties, decided:

(i) that the sum of £62,590 5*s.* 2*d.* gross paid to the Appellant by Rank as aforesaid was a trade receipt in the hands of the Appellant and was not an annual payment of pure income profit within the provisions of Case III of Schedule D, Income Tax Act, 1952;

(ii) that no repayment of Income Tax in respect of the amount deducted therefrom by Rank—namely, £26,600 17*s.* 2*d.*—fell to be made under the provisions of Section 341, Income Tax Act, 1952, and Section 15(3), Finance Act, 1953;

(iii) that the claim failed.

7. Immediately after the determination of the claim dissatisfaction therewith as being erroneous in point of law was expressed to us on behalf of the Appellant, and in due course we were required to state a Case for the opinion of the High Court of Justice pursuant to the Income Tax Act, 1952, Section 64, and the Finance Act, 1953, Section 15(4), which Case we have stated and do sign accordingly.

8. The question of law for the opinion of the High Court of Justice is whether, on the facts found by us as hereinbefore set forth, there was evidence upon which we could properly arrive at our decision; and whether, on the facts so found, our determination of the claim was correct in law.

N. F. Rowe
N. S. Spendlow
} Commissioners for the Special Purposes of the Income Tax Acts.

Turnstile House,
94–99, High Holborn,
London, W.C.1.
21st April, 1960.

The case came before Plowman, J., in the Chancery Division on 4th, 5th and 6th July, 1961, when judgment was given in favour of the Crown, with costs.

Mr. F. N. Bucher, Q.C., and Mr. Philip Shelbourne appeared as Counsel for the Company, and Mr. Roy Borneman, Q.C., and Mr. Alan Orr for the Crown.

Plowman, J.—The question in this case is whether the British Commonwealth International Newsfilm Agency, Ltd. (which from its initials is commonly known as B.C.I.N.A.), is entitled to claim repayment of the Income Tax deducted by Rank Organisation, Ltd. (which I will call "Rank"), from a payment to B.C.I.N.A. in the year 1957–58 under a certain deed of covenant. B.C.I.N.A. claims repayment on the basis that it sustained a loss in its trade charged to tax under Schedule D, and is therefore entitled to an adjustment of its liability to Income Tax under the provisions of Section 341 of the Income Tax Act, 1952, and Section 15 (3) of the Finance Act, 1953. The question whether it is entitled to repayment turns on another question, namely, whether the payment was an annual payment of pure income profit falling within Case III of Schedule D. If it was not, there was no loss. The Special Commissioners have decided that it was a trade receipt not falling within Case III and that B.C.I.N.A. was not therefore entitled to repayment of tax, and from this decision it appeals. The amount of the relevant payment was £62,590 5*s.* 2*d.* gross, and the tax deducted from it by Rank was £26,600 17*s.* 2*d.*

The facts giving rise to these questions are as follows. In 1956 it appeared to Rank that a situation had developed where the supply of visual news material was coming under the complete domination of American interests.

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This was contrary to the Rank policy of using the British film industry for projecting the British way of life and, as a large organisation in the British film industry, Rank felt that it had a responsibility to combat this state of affairs. It therefore got together with the B.B.C. with a view to incorporating a British company with the object of supplying visual news on a worldwide basis, and of ensuring that the company should remain under British control. The company so incorporated was B.C.I.N.A., and it was incorporated on 8th March, 1957. Its principal object was stated in its memorandum of association as follows:

> "To establish, carry on and supply a service of world news recorded on film or by any other means and to issue, publish and circulate and otherwise turn to account the same and in particular to supply the same to subscribers throughout the world who are operators of television services, providers of television programmes or producers of cinematograph newsreels and to such other persons as may be thought fit. It is declared that in the carrying out of its objects under this sub-head the Company shall at all times ensure that the services rendered by it are politically independent and free from bias."

The shareholding was so arranged that Rank and the B.B.C. each held an equal number of shares, and each of them appointed an equal number of directors. The Canadian Broadcasting Corporation and the Australian Broadcasting Commission were invited to, and did, join in; and they too subscribed for shares and each of them was given power to appoint a director.

It was visualised that, at any rate in its early years, B.C.I.N.A. would not be a commercial proposition, and the proposal was that the operating deficits during the initial period should be financed by Rank and the B.B.C. The scheme was embodied in an agreement dated 31st October, 1957, to which Rank and the B.B.C., the Canadian Broadcasting Corporation and the Australian Broadcasting Commission were parties. The agreement provided for the execution by the parties of a trust deed to which I will refer in a moment, and it contained, among other clauses, these:

> "8. If in any year the moneys paid or payable to the Company by way of subscription by the subscribers to the Service are insufficient to cover the cost of operating the Service B.B.C. and Rank agree each to pay to the Company an additional subscription which shall be equal to one-half of the amount of such deficit."

Then comes clause 9 (*a*), which is in these terms:

> "The parties record that their aims in establishing the Service are not those of commercial gain and that it is their intention that any profits earned from time to time by the Company from the operation of the Service shall be applied firstly in improving the quality and expanding the range of the Service and subject thereto and to the provisions of paragraph (*b*) of this Clause in reducing the amount payable by subscribers for the benefit of the Service."

The agreement was made for an initial period of five years and thereafter until determined by not less than twelve months' previous notice in writing.

On the same day a deed of trust was executed which recited, among other things, that

> "B.B.C. Rank C.B.C. and A.B.C."

—that is to say, the Canadian Broadcasting Corporation and the Australian Broadcasting Commission—

> "wish to ensure that the Company shall remain under British control that it shall not pass into the control of any one group or interest and that the news offered to subscribers by the Company shall be collected and supplied in an impartial manner".

Then clause 1 provided that:

> "The British Commonwealth International Newsfilm Agency Trust (hereinafter called 'the Trust') is hereby constituted".

Clause 2 sets out the objects of the trust in the following terms:

> "(*a*) To develop expand and maintain the Service with a view to providing a leading service of filmed news of events throughout the world (*b*) To ensure that such news is collected and supplied in an impartial manner and that the Service is politically independent and free from bias of any kind (*c*) To ensure that the control of the Company does not pass into the hands of any one interest or group (*d*) To ensure that the control of the Company remains within the British Commonwealth of Nations And B.B.C. Rank C.B.C. and A.B.C. hereby record that their aims in establishing the Service are not those of commercial gain and hereby undertake to use their best endeavours to ensure the achievement and maintenance of the said objects and to use the rights vested in them by virtue of their respective holdings of shares in the Company to that end."

In clause 8:

> "B.B.C. Rank C.B.C. and A.B.C. hereby covenant with the Trustees that in their capacity as shareholders of the Company they will use their best endeavours to ensure the implementation of recommendations made by the Trustees pursuant to the powers vested in the Trustees under the preceding clause"

—under which it had been stated that the powers of the trustees should include

> "The submission to the Company of proposals and recommendations regarding the policy to be adopted by the Company in order to achieve [its objects] and the methods of carrying such policy into effect."

By March, 1958, it was clear that B.C.I.N.A. was going to make a loss for the initial period ending on 31st March, 1958, and that Rank and the B.B.C. would be called on to implement clause 8 of the agreement, which I have read. But Rank was advised that it was at any rate doubtful whether the payment which would fall to be made by it would be an admissible deduction in computing its profits for the reason that it never, as the Special Commissioners found, at any time had any business dealings with B.C.I.N.A. Certain subsidiary companies of Rank had dealings with B.C.I.N.A., and the finding of the Special Commissioners in regard to those dealings is this:

> "3. (14) . . . during the period relevant to the claim the actual amount of business done between the Appellant and the above-mentioned subsidiary companies of Rank was very small indeed compared to the total business done by the aforesaid subsidiaries themselves. All transactions between the Appellant and any of Rank's subsidiaries were effected at full normal trade prices or terms, or at prices or terms favourable to the Appellant, throughout this time. (15) The trade relations between Rank's subsidiaries and the Appellant were not affected by the fact that Rank was a shareholder in the Appellant."

In the hope of improving the tax position, Rank and the B.B.C. entered into a deed of covenant with B.C.I.N.A. on 28th March, 1958, and that deed first of all contained certain definitions. The "Covenant years" were defined as meaning:

> "The United Kingdom tax years from 1957–58 to 1964–65 inclusive"

—that is to say, a seven-year period. The expression "Deficit" was defined in this way:

> "In relation to each Covenant year, the amount (if any) by which the cost of operating the Company's service of providing visual news items to television stations, newsreel makers and other subscribers exceeds the moneys paid or payable to the Company by way of subscriptions by the subscribers to the service, the deficit in respect of each Covenant year being ascertained by reference to the amounts of the cost and the subscriptions shown by the Company's accounts for the Company's year which ends within that Covenant year."

Then the expression "Preliminary Agreement" was defined as being the agreement at 31st October, 1957, to which I have already referred. Then the deed

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contains this recital:

> "The B.B.C. and Rank have agreed under Clause 8 of the Preliminary Agreement that each will make annual payments representing half the annual deficits of the Company and in order to implement that provision now enter into this Deed."

The covenant with which I am concerned is that contained in clause 1 (*b*), which is in these terms:

> "Rank hereby covenants with the Company to pay to the Company in each Covenant year a sum equal to one half of the deficit".

The deficit for the period from the incorporation of the Company on 8th March, 1957, to 31st March, 1958, was £125,180, of which Rank's share was £62,590 odd; and in due course Rank sent to B.C.I.N.A. a cheque for that sum, less tax. Rank also gave to B.C.I.N.A. a certificate of deduction of tax showing that the tax so deducted was the sum of £26,600 17*s.* 2*d.*, and that is the sum which forms the subject-matter of the present claim.

Mr. Bucher, for B.C.I.N.A., submits that, since the Special Commissioners found as a fact that there was no trading relationship between Rank and B.C.I.N.A., they must have found that the payment under the deed of covenant was a trade receipt on the ground that it was a sum received by a trader, for, says Mr. Bucher, there was no other ground on which they could have so found; and this tacit finding, says Mr. Bucher, is illogical. He submits that the true proposition is that an annual payment is not a trade receipt unless the recipient has to give consideration or some *quid pro quo* for it; and here, says Mr. Bucher, B.C.I.N.A. gave none. Therefore, the argument concludes, the decision of the Special Commissioners was irrational. If, on the other hand, Mr. Bucher argues, the Special Commissioners tacitly found that there was a *quid pro quo* for payment, that is a finding or inference which is inconsistent with all the primary facts, and particularly with clause 9 (*a*) of the agreement which I have read, and the finding about the trading between B.C.I.N.A. and Rank's subsidiaries which I have also read.

Mr. Borneman, for the Crown, parts company with Mr. Bucher *in limine*. He does not accept that Mr. Bucher's test of *quid pro quo* as the criterion of a trade receipt is valid, and he submits that the proper test is to pose the question, "Was the sum in question a receipt by a trader and, if so, was it received by him in the way of his trade?" In other words, he accepts Mr. Bucher's argument only to the extent of conceding that the mere fact that a trader receives a sum of money does not make it a trading receipt.

There is, I think, one other area of common ground, and it is this: that not every annual payment is within Case III of Schedule D. It is common ground that payments which are trading receipts in the hands of the recipient are excluded from Case III, as Lord Reid said in *Commissioners of Inland Revenue* v. *Corporation of London* (*as Conservators of Epping Forest*), 34 T.C. 293, at page 326:

> "It is, I think, clear that the sums payable by the City have all the necessary characteristics of annual payments, taking 'annual' in the sense in which that word is generally used in the Income Tax Act; but it is equally clear that by no means all payments which have those characteristics fall within the scope of Case III. There is no qualification or limitation of the words 'annual payment' expressed in the Rules applicable to Case III, but a limitation must be implied so as to exclude certain kinds of annual payments. The Act must be read as a whole and construed so as to produce, as far as possible, a coherent scheme; and it is settled that Case III does not apply to payments which are in reality trading receipts in the hands of the recipients although such payments take the form of annual payments."

Mr. Bucher, however, submits that the payment with which I am concerned is not a trading receipt and is therefore not excluded from Case III, whereas Mr. Borneman submits that it is a trading receipt and therefore is excluded from Case III. So the crucial question is, "What is a trading receipt?"

Mr. Borneman in this connection cited two cases, the first of them being *Smart* v. *Lincolnshire Sugar Co., Ltd.*, 20 T.C. 643. The headnote for that case is this:

> "The British Sugar (Subsidy) Act, 1925, provided that a subsidy be paid for ten years on sugar manufactured in Great Britain from beet grown therein. The British Sugar Industry (Assistance) Act, 1931, provided for further assistance to be given to companies engaged in such manufacture (of which the Respondent Company was one) by way of weekly advances for one year commencing on 1st October, 1931. In the event of a rise in sugar prices, the advances were repayable, wholly or in part, by deductions from any subsidies payable under the Act of 1925 in respect of sugar manufactured during the period of two years beginning on 1st October, 1932, while in the event of the winding-up of the Company or the appointment of a receiver within the period of three years beginning on 1st October, 1931, the total advances, so far as not already repaid, were to become repayable. Apart from these provisions, the advances were not to be repayable. The Respondent Company received payments of the subsidy under the Act of 1925, and brought them into its profit and loss accounts as trading receipts, and they were so dealt with for Income Tax purposes. During the year 1931–32, the Company received advances under the Act of 1931 which were shown in its balance sheets as a liability. It was admitted that in the events which happened no part of the advances was in fact repayable by the Company. In the assessment under Schedule D made upon the Company for the year 1932–33, the advances received under the Act of 1931 were treated as trading receipts of the Company's year ending 31st March, 1932. On appeal the Special Commissioners held that the advances were in their nature loans and not trading receipts, and that, in any event, they were not trading receipts until the period during which possible repayment might be claimed had expired, and the Company could not be assessed to Income Tax in respect thereof in the year under appeal. *Held*, in view of the business nature of the sums in question, that they were trading receipts of the Company and proper to be taken into account for Income Tax purposes in the year in which they were received."

Lord Wright, M.R., said, at page 660:

> "I cannot myself see any ground for regarding these payments as other than payments made to the Respondent Company in the way of their trade. I think they are what are often called, not perhaps very satisfactorily, 'trading receipts'. They were made for the definite purpose of enabling the Company to surmount the difficulties in the carrying on of their trade to which they might otherwise have been exposed."

In the House of Lords Lord Macmillan said, at page 670:

> "But in my view the question ought not to be decided on merely verbal arguments. What to my mind is decisive is that these payments were made to the Company in order that the money might be used in their business."

A little later on he said:

> "It was with the very object of enabling them to meet their trading obligations that the 'advances' were made; they were intended artificially to supplement their trading receipts so as to enable them to maintain their trading solvency."

Again, at the bottom of page 671:

> "I prefer to rest it"

—that is, his judgment—

> "on my view of the business nature of the sums in question which the Company received in 1931–32. I think that they were supplementary trade receipts bestowed upon the Company by the Government and proper to be taken into computation in arriving at the balance of the Company's profits and gains for the year in which they were received."

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The second case to which Mr. Borneman referred was *Ostime* v. *Pontypridd and Rhondda Joint Water Board*, 28 T.C. 261. I do not think I need trouble about the facts of that case, but there are two passages in speeches in the House of Lords to which I venture to refer. The first is in the speech of Viscount Simon, at page 278, when he says:

"the real question in the appeal seems to me to be under which of these two propositions the present case falls."

He then states the propositions, the first of which is the relevant one and is this:

"subject to the exception hereafter mentioned, payments in the nature of a subsidy from public funds made to an undertaker to assist in carrying on the undertaker's trade or business are trading receipts, that is, are to be brought into account in arriving at the balance of profits or gains under Case I of Schedule D. It is sufficient to cite the decision of this House in the sugar beet case"

—that is the *Lincolnshire Sugar* case [1], to which I have already referred—

"as an illustration".

Lord Thankerton said, at page 284:

"The other case cited was *Lincolnshire Sugar Co., Ltd.* v. *Smart* . . . in which advances made under the British Sugar Industry (Assistance) Act, 1931, to a company carrying on business as manufacturers of sugar beet were held to be trading receipts of the company and liable to Income Tax under Case I of Schedule D. The language of my noble and learned friend Lord Macmillan, in describing the nature of these advances, seems to be equally applicable to the sums in question in this appeal. Lord Macmillan, in whose opinion the other four noble and learned Lords concurred, said, at page 704 [of the report] [2]: 'It was with the very object of enabling them to meet their trading obligations that the "advances" were made; they were intended artificially to supplement their trading receipts so as to enable them to maintain their trading solvency.'"

Then Lord Thankerton continues:

"In my opinion these two cases afford sufficient reason for the rejection of Mr. Tucker's contention that, on general grounds, the sums here in question are not trading receipts."

In reply to those two cases Mr. Bucher cites *Seaham Harbour Dock Co.* v. *Crook*, 16 T.C. 333, showing that a grant made by a Government Department to enable a dock company to carry out its undertaking was not a trade receipt, and he submits that that case contradicts the universality of Mr. Borneman's proposition that you cannot have a subsidy to a trader which is not a trade receipt. But I think it was really for the purpose of submitting his test of what a trade receipt is that Mr. Borneman cited those cases, and after referring to the passages which I have read he submits that the test is not consideration but whether the payments were of a business nature: were they made to the recipient in the way of his trade? Those cases were distinguished in the *Epping Forest* case [3] which I have already mentioned in passing, and to the headnote of which I shall now refer. The headnote is this:

"Under the Epping Forest Act, 1878, Epping Forest is regulated and managed by the Corporation of London as the Conservators of Epping Forest; and the Corporation is required to contribute, in such amounts as shall be necessary, to the income of a fund applied to the expenses of the Conservators. The Corporation makes a contribution each year to make good the deficiency on the income account of the Conservators. On paying that contribution in the Income Tax year 1948–49 the Corporation made a deduction therefrom based on the prevailing rate of Income Tax, which it justified by the contention that the contribution was an

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(1) 20 T.C. 643. (2) [1937] A.C. (20 T.C., at p. 670).
(3) Commissioners of Inland Revenue *v.* Corporation of London (as Conservators of Epping Forest), 34 T.C. 293.

'annual payment' for Income Tax. In its capacity of Conservators the Corporation was regarded as a separate entity, the purposes of which were exclusively charitable. It was therefore claimed that the deduction made should be repaid by the Inland Revenue under the provisions relieving charities from Income Tax. The Special Commissioners admitted the claim. *Held*, that the Special Commissioners' decision was correct."

It is on the authority of this case that Mr. Bucher primarily relies for his test of a *quid pro quo* as the criterion of a trading receipt. It is important, I think, to notice the ground on which the House of Lords distinguished the two cases to which I last referred; and I think that the ground of distinction is best to be seen in the following passage from Lord Reid's speech, at page 328, where he said this:

"While it is true that no one contended in these cases that the payments there in question were annual payments within the scope of Case III and no reference was made to Case III"

—I pause to say that these cases to which he is referring there are the *Pontypridd* case (1) and the *Lincolnshire Sugar* case (2)—

"it might now be difficult to argue, in face of clear statements that those payments were trade receipts, that similar payments can now be treated as annual payments. But it is another matter to treat these cases as laying down a general rule that no payment can come within the scope of Case III if words used in this House in these cases can be applied to it. These cases dealt with payments in the nature of a subsidy. Lord Macmillan rested his judgment in the *Lincolnshire* case on"

—and then he quotes—

"'the business nature of the sums in question' (3) and Viscount Simon in the *Pontypridd* case referred to payments"

—and he quotes again—

"'to assist in carrying on the undertaker's trade or business'(4)."

Then Lord Reid continues:

"In my opinion, the payments in the present case were not of a business nature —they were of a benevolent nature—and they were not primarily made to assist in carrying on any trade or business—they were made primarily to achieve a public benefit of a charitable nature."

In other words, as I see it, the ground of distinction was this, that in the *Epping Forest* case (5) the receipts were not of a business nature and the business test could not therefore be applied. The House did not, however, regard the fact that the receipts were not of a business nature as of itself concluding the case in favour of the taxpayer. It went on to adopt another test, namely, whether the payment in question was made without conditions and counter-stipulations; in other words, without consideration or any *quid pro quo*. Lord Normand said, at page 324:

"My Lords, I am satisfied with the way in which the Special Commissioners have dealt with the question and with their reasons. I am also in agreement with much that is said in the judgment of the Court of Appeal, though I have differed from it on the actual ground of the decision. The sum, in my opinion, is in no different position from a sum (having the requisite quality of recurrence) paid without conditions or counter stipulations out of taxed income under a covenant by a private individual to any charitable body. The Crown would neither admit nor deny that such a payment would be an annual payment to the charity within

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(1) Ostime v. Pontypridd and Rhondda Joint Water Board, 28 T.C. 261. (2) Smart v. Lincolnshire Sugar Co., Ltd., 20 T.C. 643. (3) *Ibid.*, at p. 671. (4) 28 T.C., at p. 278. (5) 34 T.C. 293.

(Plowman, J.)

> the meaning of Case III, or that the party paying it would be entitled to retain the tax, or that the charity would be entitled to recover it. We were implored to be guarded in our opinions on covenants in favour of charities. I can only say that I am compelled to follow where the argument leads. If the payment under covenant were made by an individual to a body not a charity it could still be an annual payment, but the question whether it was in return for some consideration would probably be much more prominent and acute."

The House of Lords did not, however, in my judgment, decide that the test of consideration is a test to be applied to the exclusion of the business nature test; nor, in my judgment, did the House of Lords decide that, in the case of a payment of a business nature, the question of consideration was necessarily the primary test to apply. As I have said, in the *Epping Conservators'* case[1] the House applied that test only when the business nature test broke down.

Once the test of consideration or *quid pro quo* as an exclusive test is rejected, it follows, in my judgment, that there was ample evidence on which the Special Commissioners could reach the conclusion which they did reach. B.C.I.N.A. is a trading Company, the payment was made to it to be used in its trade and was used in its trade. No payment would fall to be made to it under the deed of covenant unless it was trading, and there is the finding of fact of the Special Commissioners, in paragraph 3 (19) of the Case, namely this:

> "Without the sums received under the deed of covenant the Appellant could not have met its obligations and continued trading."

In those circumstances, I am of opinion that there was evidence on which the Special Commissioners could arrive at their decision and that, so far from their decision being an irrational one, it was a reasonable one; but in any case I consider that I am not entitled to interfere with it. I must therefore dismiss the appeal.

Mr. Roy Borneman.—I would ask your Lordship to dismiss the appeal with costs.

Plowman, J.—You have no answer to that?

Mr. F. N. Bucher.—No, my Lord.

The Company having appealed against the above decision, the case came before the Court of Appeal (Lord Evershed, M.R., and Upjohn and Diplock, L.JJ.) on 27th and 28th February, and 1st March, 1962, when judgment was given unanimously in favour of the Crown, with costs.

Mr. F. N. Bucher, Q.C., and Mr. Philip Shelbourne appeared as Counsel for the Company, and Mr. Roy Borneman, Q.C., and Mr. Alan Orr for the Crown.

Lord Evershed, M.R.—This appeal has raised a question of considerable interest and some novelty, though it has an affinity to certain recently decided cases, upon the speeches in one of which (the latest, known as the *Epping Forest* case) Mr. Bucher has particularly relied. The case has arisen out of a claim

(1) 34 T.C. 293.

under Section 341 of the Income Tax Act, 1952, by the Company which is the Appellant here, British Commonwealth International Newsfilm Agency, Ltd., for recovery of a sum in respect of Income Tax which, according to the Appellant's case, must be treated as having been paid on its behalf, although during the year in question—namely, the tax year 1957–58—the Company in fact made no profits.

It is necessary to pay regard to the history of the Appellant Company. It was incorporated on 8th March, 1957. It appears that, until that date, the preparation of items of news for transmission to those who watch television and for showing to those who may go to the cinema had been largely, if not exclusively, in the hands of American photographers and others, so that the items of news as presented to British viewers or cinema-goers were not, it was said, sufficiently British in character to be of real interest to those viewers. So there came about the formation of this Company; and those most responsible for its formation were, first, the British Broadcasting Corporation, and, second, a company known as Rank Organisation, Ltd., which we understand is in truth a holding company, holding controlling interests in a number of other companies which are proprietors of, or are otherwise concerned in, what I will call the cinema business. These two bodies, with which were associated also the Canadian Broadcasting Corporation and the Australian Broadcasting Commission, therefore caused the formation of the Appellant Company, the main purpose of which was the obtaining of news items of the kind I have described, but of a nature that would be particularly appropriate and of interest to the British viewer. From the accounts which were before the Special Commissioners, it is made plain that the total authorised capital of the Company was £176,000, divided into shares of different classes. That division does not matter for present purposes. It is sufficient to note that, of the issued share capital—128,000 shares of £1 each—the British Broadcasting Corporation and the Rank Organisation, Ltd., each held 48,000, the remaining 32,000 being held, among others at any rate, by the Canadian and Australian corporations I have mentioned. By the terms of the memorandum and articles, the two corporations—the British Broadcasting Corporation and Rank Organisation, Ltd.—were between them entitled to appoint six directors, and by that means to control the management of the Company. As I have said, its purpose was the obtaining of news items of the kind mentioned.

It was apparently anticipated that, at any rate for a period, the Company would be unlikely to trade otherwise than at a loss. However that may be, in the month of October, 1957, an agreement was made, to which the parties were the four corporations already mentioned—that is, the British Broadcasting Corporation, the Rank Organisation, Ltd., and the Canadian and Australian corporations—and which provided, first of all, according to the recitals in the Case Stated, for the formation of the Appellant Company, although in truth the Company had then been in existence for some six months. But for present purposes the important clauses of the agreement are numbers 8 and 9. Clause 8 reads:

> "If in any year the moneys paid or payable to the Company"

—that is, the Appellant Company—

> "by way of subscription by the subscribers to the Service are insufficient to cover the cost of operating the Service B.B.C. and Rank agree each to pay to the Company an additional subscription which shall be equal to one-half of the amount of such deficit."

By way of exposition of that language, I should state that the subscribers

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mentioned were the persons (that is to say, those operating television services or cinemas) who would get from the Appellant Company the news items they had photographed and recorded, and the subscriptions mentioned were in truth fees paid by the subscribers for the services of the kind I have indicated. It will follow from the language of the paragraph that the two corporations, B.B.C. and Rank, together undertook to make up entirely the deficit on the trading operations for the year in question.

Clause 9 (*a*) states:

> "The parties"

—and I recall that they are the four corporations already mentioned—

> "record that their aims in establishing the Service are not those of commercial gain and that it is their intention that any profits earned from time to time by the Company"

—that is, the Appellant Company—

> "from the operation of the Service shall be applied firstly in improving the quality and expanding the range of the Service and subject thereto and to the provisions of paragraph (*b*) of this Clause in reducing the amount payable by subscribers for the benefit of the Service."

Although, therefore, it was stated not to be the intention to make a commercial gain, it none the less cannot be for a moment doubted, I think, that the enterprise which this newly-formed Company was to undertake was a commercial enterprise as that phrase is ordinarily understood; and the qualification about gain meant this, that they would, so to say, feed back into the Company any profits so as to expand the services, and that, subject thereto, the subscribers would then get the benefit of having to pay less for those services. I mention (although I do not wish to over-emphasise this) that the subscribers would include a number of the Rank Organisation, Ltd.'s subsidiaries; and, although it is perfectly true that this part of their operations is shown to be a very small part, it nevertheless was a part of their ordinary commercial work, and Rank Organisation, Ltd., as the holding company, was therefore naturally commercially interested in the result if things worked out as was hoped. There is one other thing only that I state about the agreement of 31st October, 1957, and that is that—not unnaturally, since its first object was apparently expressed to be the formation of the Appellant Company, although it had been formed—the Appellant Company was not a party to it. The consideration which bound the contracting parties was, of course, the fact that the other contracting parties were similarly bound.

That having been the document recording the purposes and so on of the newly-formed Appellant Company, it then occurred to the Rank Organisation, Ltd., that it might be a good thing from its point of view—having regard particularly to the vexed but pressing modern problem of taxation—that it should, with the British Broadcasting Corporation, enter into a form of document which is of a kind familiar to many, particularly in relation to donations to charity, known as a seven-year covenant. So, on 28th March, 1958—in fact, three days before the end of the first financial year of the Appellant Company—a deed of covenant was entered into by the British Broadcasting Corporation and the Rank Organisation, Ltd., with the Appellant Company. The deed is fully recited in the Case Stated, and from the recital it appears—and this, I think, is not insignificant—that the word "deficit" was there defined. It was defined in this language:

> "In relation to each Covenant year, the amount (if any) by which the cost of operating the Company's service of providing visual news items to television

stations, newsreel makers and other subscribers exceeds the moneys paid or payable to the Company by way of subscriptions by the subscribers to the service, the deficit in respect of each Covenant year being ascertained by reference to the amounts of the cost and the subscriptions shown by the Company's accounts for the Company's year which ends within that Covenant year".

Then there was a recital of the agreement of October, 1957, and particularly of clause 8 thereof, which I have read; and the operative form of the covenant was thus, so far as the Rank company was concerned:

"1. . . . (*b*) Rank hereby covenants with the Company"

—the Appellant Company—

"to pay to the Company in each Covenant year a sum equal to one half of the deficit (*c*) The first annual payments under the two foregoing covenants shall be made on or after the date of this Deed and before the 5th April 1958".

I then turn to the accounts again, and those accounts show that in the year ended 31st March, 1958, the subscriptions obtained by the Appellant Company fell short of the costs and expenses—which covered such matters, of course, as film editing, a large item described as "cost of coverage", cameras, and all the rest of it—by a total figure of no less than £125,180. According to the definition, therefore, in the deed of covenant, that figure represents the deficit for the year in question, and one-half of that sum (I am leaving out shillings and pence) is £62,590. What the Rank Organisation, Ltd., then did was this. Having paid Income Tax in the ordinary way upon its trade profits, it paid to the Appellant Company, not the gross sum of £62,590 but the net figure of some £35,990, certifying as it made the payment that from the gross amount of the covenanted sum it had deducted £26,600 for Income Tax which it said it had paid. Now it is not in doubt that if this was a case to which the provisions of Section 169 of the Income Tax Act, 1952, were properly applicable, it would follow that the Rank Organisation, Ltd., by paying £35,990 and certifying that it had paid Income Tax of £26,600, was entitled to be discharged from its obligations, and the sum of tax paid would be treated as having been paid for and on account of the payee Company. So it is contended by the Appellant Company: here is a trading concern which is shown to have made no profit whatever—in fact, to have lost £125,000 odd —and it should be entitled to recover this tax so paid because, if a true account is taken of its operations, it will be shown it had no income, profits or gains which rendered it liable to pay that tax. Those, I hope, are sufficient of the facts of the case to found what follows.

In substance, the question is indeed capable of very brief statement. The question is whether this particular item is one which falls properly within Case I or Case III of the Schedule which is appropriate, Schedule D. If the language of the Act is looked at, there is no definition or exposition of what exactly is meant by "income", or similar phrases as used in Case III; but the decisions to which I have briefly alluded have made it clear that some limitation must be put upon the broad sense of the words. In the end of all, the problem, I think, undoubtedly comes down to this, and again it is one which may be simply stated: in the light of all the relevant circumstances, is the sum which the Rank Organisation, Ltd., covenanted to pay to the Appellant Company an item of income (what is sometimes in the cases called "pure profit income") taxable, if at all, as a separate item; or is it more properly to be regarded as a trading receipt of the recipient Company, and so to be brought into the Company's general accounts in ascertaining, in the end, whether they have made a trading profit for the year? That, I think, is the problem. It was put in reply

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by Mr. Bucher in this form, and I am content to accept it: is what has been received by the Appellant Company income (and that he uses as synonymous with this somewhat expanded formula, "pure profit income"), or is it an ingredient in the receipts of the Appellant Company's trade? Mr. Bucher rightly observed that not every receipt which a company may receive can be properly called, and should be treated as, a trading receipt; and he gave by way of an example—a relevant example in this case—interest which a company might receive upon deposited cash.

This problem—is it a trading receipt, or is it income as a distinct Case III item?—has, as I said a little earlier, been debated somewhat at length in a number of cases. I do not think it is necessary to refer to those cases, though I shall presently make two references, at any rate, to the speeches in the last case, to which I have already alluded—the so-called *Epping Forest* case, 34 T.C. 293. The problem in that case related to the sums which the Corporation of London were under obligation to pay to the Conservators of Epping Forest (in a sense, it was themselves in another capacity, but that is irrelevant); and the question there was of the same character, essentially, as that with which we are concerned: were the sums which the Corporation paid income or trading receipts? Certain language used in the judgment of this Court, delivered by myself, I think invited some criticism from Lord Normand in the House of Lords, who, as I understand it, thought that we had exclusively founded ourselves on the view—which was the fact—that the enterprise of conserving Epping Forest was charitable, and that that of itself was an end of the case. Lord Normand said, in the course of his speech—and I refer to the passage, at page 324 of the report, which was also cited by Plowman, J.[1], in this case—

> "My Lords, I am satisfied with the way in which the Special Commissioners have dealt with the question and with their reasons. I am also in agreement with much that is said in the judgment of the Court of Appeal, though I have differed from it on the actual ground of the decision. The sum, in my opinion, is in no different position from a sum (having the requisite quality of recurrence) paid without conditions or counter stipulations out of taxed income under a covenant by a private individual to any charitable body."

I will not read the rest of the citation which Plowman, J., made, but it is those words "without conditions or counter stipulations" upon which Mr. Bucher has very largely founded himself; for he says that true, no doubt, it may be that the Rank Organisation, Ltd., was commercially interested in the success of this Company—in which, incidentally, it had invested £48,000, and of the services of which its subsidiaries had taken advantage—but, none the less, in making these convenanted payments there was flowing to it from the Appellant Company no counter stipulation, no kind of consideration, which, as he said, really brought it within the scope of the ratio of Lord Normand's decision.

I do not myself take the view that Lord Normand was there laying down as a proposition of law this test: that the answer to a problem of this kind rests upon whether or not you find that there are, in favour of the payer, conditions or counter stipulations on the part of the payee. I think that was, as he thought, an essential characteristic of the case which he decided, leading to the conclusion that the payment by the Corporation of London which the Conservators of Epping Forest had received could not be described as a trading receipt. But, as I venture to think, that test is not the sole, or exclusive, test. The question for the Court, in my opinion, is: after regarding the whole of the relevant facts, whether in truth, in reality, the sum in question

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(1) *See* page 569 *ante*.

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is a business payment—part of the trading receipts, in this case—of an admittedly trading Company. Support for that view I do obtain from certain language which Lord Reid used in his speech in the same *Epping Forest* case(1). He referred to other cases, including two to which our attention has been drawn—namely, *Lincolnshire Sugar Co., Ltd.* v. *Smart*(2), [1937] A.C. 697, and *Ostime* v. *Pontypridd and Rhondda Joint Water Board*(3), [1946] A.C. 477. In those cases, the decision of the House went the other way from the decision in the *Epping Forest* case, and much of the argument before the House in the latter case was in an attempt to show that the principles which had governed the *Lincolnshire Sugar* case and the *Pontypridd and Rhondda* case should equally govern the *Epping Forest* case. In the course of his speech(4), Lord Reid made a citation from the language used by Lord Macmillan in the *Lincolnshire Sugar* case, 20 T.C., at page 671:

> "But I do not find it necessary to rest my judgment on wisdom after the event. I prefer to rest it on my view of the business nature of the sums in question which the Company received in 1931-32. I think that they were supplementary trade receipts bestowed upon the Company by the Government and proper to be taken into computation in arriving at the balance of the Company's profits and gains for the year in which they were received."

Then, a little later, Lord Reid thus expressed his own opinion(5):

> "In my opinion, the payments in the present case were not of a business nature—they were of a benevolent nature—and they were not primarily made to assist in carrying on any trade or business—they were made primarily to achieve a public benefit of a charitable nature."

Mr. Bucher also referred—and it is in deference to his argument that I make this allusion—to Section 20 of the Finance Act, 1953, which had the effect of relieving from what might otherwise be a double taxation what were called subvention payments made by or between associated companies. He referred to the language of Sub-section (2) of that Section, and particularly to these words in it:

> "a payment . . . [which] is not a payment which (apart from this section) would be taken into account in computing profits or gains or losses of either company or on which (apart from this section and from any relief from tax) the payee company would be liable to bear tax by deduction or otherwise".

It was Mr. Bucher's contention that that showed that, in 1953, Parliament did contemplate that one company might be making a payment to another company *ejusdem generis* with the payment to the Appellant Company, and it was that kind of payment which the draftsman had in mind in using the language I have read.

I think it may well be that the draftsman was being cautious, because in the course of the argument in the *Epping Forest* case—and it is perhaps relevant to note, as my brother Upjohn pointed out in the course of the argument, that the matter came before this Court in the month of May, 1952—the point was raised of that kind of so-called benevolent payment being made by a company or an individual for the purposes of keeping alive some operative trading concern. I am reported as having said (34 T.C., at page 311):

> "Supposing a man were to make a covenant to pay £x *per annum* out of his taxed income to a trader or professsional man so long as he continued to carry on his trade or profession and for the purposes of augmenting the income he received from his trade or profession; would such a case fall within Case III of Schedule D? According to [learned Counsel for the Crown], no such case

(1) 34 T.C. 293. (2) 20 T.C. 643. (3) 28 T.C. 261. (4) 34 T.C., at p. 328. (5) 34 T.C., at p. 329.

(Lord Evershed, M.R.)

> has ever been before the Courts and it is therefore unnecessary for us to express any view upon it".

As Mr. Bucher has said, this is just such a case; and I repeat that the foundation of his submission is that if you properly balance, properly judge, the nature of this payment, its origin and its purpose, it is not the kind of payment which Lord Normand had in mind when he spoke of "conditions and counter stipulations(1)". It is, says Mr. Bucher, really benevolence, though it may be associated with a long-sighted business interest; but it is not something paid in repect of the Rank Organisation's own business, nor does there come to the Rank Organisation from the Appellant Company any countervailing consideration or advantage for the payment.

The type of case which is formulated in the passage I have read may arise hereafter, but in my judgment this present case is not within the formulation as I have read it. Taking into account all the circumstances as I have related them—the purpose of this Company; the particular interest in its trading operations which, with the British Broadcasting Corporation, the Rank Organisation had; the agreement which indicated that there might likely be a period when there would be trading losses; and, finally, that in such an event it would be the obligation of these promoters to make payments which would be treated as additions to subscriptions (that is, as essential trading receipts)—I for my part think that the Commissioners were justified, and that Plowman, J., was justified, in concluding that in truth this payment should be regarded (and I am content to use Mr. Bucher's words) as an ingredient in the trading receipts of the Appellant Company. That being so, it seems to me that it cannot be regarded as a Case III payment, and the necessary consequences inevitably follow.

I think I should not improve upon what I have said by attempted elaboration. It is to some extent, no doubt, a matter of first impression; but, as I have said, and for the reasons I have given, the true character of this payment, in my judgment, is that it was by way of supplement to subscriptions of the same kind as subscriptions, and therefore a trading receipt of the Appellant Company: or, to use Lord Reid's words which I have earlier quoted(2), "of a business nature . . . primarily made to assist in carrying on [the] trade or business" of the Appellant Company. I therefore would dismiss the appeal.

Upjohn, L.J.—I agree with the judgment which has just been delivered, and it is only out of deference to the arguments that we have heard from Mr. Bucher that I desire to add a very few words. The principal plank in Mr. Bucher's argument was, of course, the *Epping Forest* case(3), but I venture to think that his reliance thereon was misplaced. It is clear from the speeches of both Lord Normand and Lord Reid (and the relevant passages from them have been quoted by my Lord, so I will not take up further time by repetition) that the payments in that case, though made by the Corporation of London pursuant to Statute, were payments—made without condition or counter stipulation on the part of the payer—not by way of business but by way of benevolence to support a charity. Both noble Lords, in the course of their speeches, pointed out that the payments in that case were just like any other covenanted payment by a donor to support a charity without himself receiving any benefit or *quid pro quo*. Those circumstances completely distinguish the *Epping Forest* case from this case; for in that case there was no business element, in this case there is no charitable element.

(1) 34 T.C., at p. 324. (2) *Ibid.*, at p. 329. (3) 34 T.C. 293.

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It is, then, as my Lord has pointed out, a question of determining whether, on all the facts and circumstances, the payments in this case (made by Rank) are received by the Appellant Company as a trading receipt to be brought in on the credit side when computing the profits or gains of its trade under Case I of Schedule D, or whether it is income to be brought in under Case III. That really is a question of fact in each case, and I certainly do not propose to re-state the facts. I do desire, however, to make one further reference to the speech of Lord Macmillan in the *Lincolnshire Sugar* case (20 T.C. 643), because what he said fits so exactly the circumstances of this case.

In the present case, the Commissioners found as a fact that, without the sums received under the deed of covenant, the Appellant Company could not have met its obligations and continued trading. Lord Macmillan said this of the advances or payments in the *Lincolnshire Sugar* case (20 T.C., at the foot of page 670):

> "It was with the very object of enabling them to meet their trading obligations that the 'advances' were made; they were intended artificially to supplement their trading receipts so as to enable them to maintain their trading solvency"

—and he held accordingly that the advances in that case were items of receipt for the purposes of Case I. So, too, here, it seems to me quite clear that these payments were made to supplement the Company's trading receipts; that they were clearly payments made and received as trading receipts, to be brought into computation when assessing the Appellant Company under Case I. Accordingly, the basis of Mr. Bucher's argument that this is income under Case III breaks down.

I agree that this appeal should be dismissed.

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

Mr. Roy Borneman.—My Lord, I ask your Lordships to dismiss the appeal with costs.

Mr. F. N. Bucher.—I cannot object to that, my Lord. My Lord, convincing though the judgments may strike now, I think this is the time when, if ever, I should ask your Lordships for leave to appeal to the House of Lords.

Lord Evershed, M.R.—You may say, I suppose, that the *Lincolnshire Sugar* case, the *Pontypridd and Rhondda* case[1] and the *Epping Forest* case[2] having all gone to the House of Lords, this one has a particular affinity. It is pointed out to me, Mr. Bucher, that, after all, the Commissioners, the learned Judge and ourselves have all taken the same view.

Mr. Bucher.—It is a case where there is a considerable sum involved, and it is a case—I think your Lordship used the expression "of some novelty" —of considerable general importance in industry, and of importance to clients who are important in industry. I would have thought that, however impressed one might be with the decisions up to this date, it would still be fair to give my client the opportunity of obtaining the opinion of the House of Lords in a case of this magnitude.

Lord Evershed, M.R.—Mr. Borneman, I suppose the Crown say nothing on such an application?

Mr. Borneman.—It is the custom of the Crown in these cases not to offer any observations on such an application, my Lord, and I adhere to that custom.

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(1) 28 T.C. 261. (2) 34 T.C. 293.

Lord Evershed, M.R.—I think my brethren are rather doubtful, but, on the whole, I think, yes, Mr. Bucher: we will give you leave.

Mr. Bucher.—I am much obliged, my Lord.

The Company having appealed against the above decision, the case came before the House of Lords (Lord Dilhorne, L.C., and Lords MacDermott, Cohen, Jenkins and Guest) on 14th and 15th November, 1962, when judgment was reserved. On 20th December, 1962, judgment was given unanimously in favour of the Crown, with costs.

Mr. F. N. Bucher, Q.C., and Mr. J. Holroyd Pearce appeared as Counsel for the Company, and Mr. Roy Borneman, Q.C., and Mr. Alan Orr for the Crown.

Lord Jenkins.—My Lords, my noble and learned friend **Lord Dilhorne, L.C.**, who is unable to be present today, has asked me to say that he concurs with the opinion about to be delivered by my noble and learned friend Lord Cohen.

Lord MacDermott (read by Lord Hodson).—My Lords, in my opinion this appeal fails. Although the payment in question may have had the recurrent quality of a payment within Case III of Schedule D, it is clear that, both in substance and in form, it was a payment made to a trading company (the Appellant) as a supplement to its trading revenue and in order to preserve its trading stability. This being the position, it seems to me that the Special Commissioners were entirely justified in holding that this payment was a trade receipt in the hands of the Appellant. There is ample evidence to support that determination in so far as it is a question of fact, and there is nothing that I can discover in the authorities to compel a different conclusion in point of law. Indeed, I have some difficulty in seeing how, on the material before them, the Commissioners could have arrived at any other finding. And if they were right in thus holding, I do not think it can be doubted, in the circumstances of this case, that they were also right in holding that the payment was not an annual payment of pure income profit within Case III.

While that suffices to dispose of the matter, I hope I may not be thought lacking in respect for the arguments on behalf of the Appellant if I do not enter into detail on the facts or proceed to an examination of the cases. Since coming to the conclusions stated, I have had the advantage of reading the opinion prepared by my noble and learned friend Lord Cohen, and I agree so fully with his reasoning that it would serve no useful purpose to say more.

Lord Cohen (read by Lord Jenkins).—My Lords, the Appellant claims repayment of tax under the provisions of Section 341 of the Income Tax Act, 1952, and Section 15 (3) of the Finance Act, 1953, in respect of a loss sustained in the trade carried on by the Appellant for the year of assessment 1957–58. The claim is made in respect of tax deducted at source from a payment made to the Appellant under a deed of covenant in the circumstances hereinafter described. The substantial issue in the case is whether this payment (from which tax was in fact deducted at source by the covenantor) was taxable in the hands of the Appellant as an item of income under Case III of Schedule D or whether it was a trading receipt of the Appellant's trade which should have been included as an ingredient in the computation of the profit or loss of the Appellant's trade under Case I of Schedule D.

(Lord Cohen)

The Appellant contends that the payment received under the deed of covenant was taxable under Case III of Schedule D with the result, which is common ground, that the deduction of tax was properly made by the covenantor and that the Appellant, having made a loss in its Case I trade, was entitled to make a claim of the tax deducted. The Crown contend that the payment under the covenant was a receipt of the Appellant's Case I trade with the result, which is common ground, that the deduction of tax by the covenantor was not properly made and that there was no loss in the trade carried on by the Appellant.

To appreciate the dispute between the parties it is necessary to go into the history of the matter. The Appellant was incorporated on 8th March, 1957, and its memorandum and articles were in a usual form for a commercial company. They contained common form articles as to dividends and reserves. But it is clear from the Case Stated that Rank Organisation, Ltd. (to whom I shall refer hereinafter as "Rank") and the B.B.C., who were primarily responsible for the foundation of the Appellant, were not actuated entirely, or indeed mainly, by commercial motives, but believed that it was in the national interest to supply visual news on a world-wide basis in a form sufficiently British in character to interest British viewers and cinema-goers. They contemplated that in the first few years the Appellant might make substantial losses, which were to be financed by temporary loans from the promoters. They interested in the proposal the Canadian Broadcasting Corporation and the Australian Broadcasting Commission (to whom I shall refer hereinafter as C.B.C. and A.B.C. respectively).

On 31st October, 1957, an agreement was entered into by the B.B.C., Rank, C.B.C., and A.B.C. In form this agreement purported to provide for the incorporation of the Appellant, but it had in fact been incorporated in March of that year. This, however, is immaterial. The agreement provided for the execution of a trust deed designed to secure that the news supplied by the Appellant should be impartial and that the control of the Appellant should remain within the British Commonwealth of Nations. It contained a provision that the trust should continue in force until the expiration of the fifth financial year or other financial period of the Company, or until the expiration of five years from its date (which was 31st October, 1957), and thereafter unless determined by not less than twelve months' notice in writing given as therein mentioned. It further provided that notwithstanding any such notice, if the members to whom the same was given should so desire, the trust should continue in force for such further period and on such terms as such members might mutually agree. It is plain, therefore, that it was competent to the parties, on the expiration of five years, to change the character of the trust and alter the way in which the Appellant dealt with its profits, if any.

I return to the agreement; the important clauses are clauses 8 and 9 (*a*) which are in the following terms.

> "8. If in any year the moneys paid or payable to the Company by way of subscription by the subscribers to the Service are insufficient to cover the cost of operating the Service B.B.C. and Rank agree to pay to the Company an additional subscription which shall be equal to one-half of the amount of such deficit. 9. (*a*) The parties record that their aims in establishing the Service are not those of commercial gain and that it is their intention that any profits earned from time to time by the Company from the operation of the Service shall be applied firstly in improving the quality and expanding the range of the Service and subject thereto and to the provisions of paragraph (*b*) of this Clause in reducing the amount payable by subscribers for the benefit of the Service."

(Lord Cohen)

Rank itself never had any business dealings with the Appellant. Some of its subsidiaries did have such dealings, but all the transactions between the Appellant and any of Rank's subsidiaries were effected at full normal trade prices or terms, or at prices or terms favourable to the Appellant, throughout the period relevant to the Appellant's claim in these proceedings.

As I have said, it was expected that the Appellant would make a loss for the year ending 31st March, 1958, and Rank was warned on 28th March, 1958, by Mr. Davis, its deputy chairman and managing director, that there would be a substantial deficit which Rank and the B.B.C. would have to make good. Rank was also told that its legal advisers felt a doubt whether the additional subscriptions which it had bound itself to pay by clause 8 of the agreement would be liable to deduction for taxation purposes, and on legal advice the B.B.C. and Rank entered into the deed of covenant with the Appellant of 28th March, 1958. This deed of covenant contained a recital to the effect that under clause 8 of the agreement the B.B.C. and Rank would each make annual payments representing half the annual deficits, and that they were entering into the covenant in order to implement that provision. The B.B.C. and Rank each covenanted to pay to the Appellant in each of the covenant years as therein defined the sum equal to one-half of the deficit calculated as indicated in the agreement. Pursuant to this covenant, Rank, on 31st March, 1958, paid the sum of £37,375, which was described in the letter enclosing the cheque as representing

> "the half share of the estimated additional subscription less Income Tax payable by Rank for the year ended 31st March, 1958."

The Commissioners found as a fact that without the sums received from Rank and the B.B.C. under the deed of covenant the Appellant could not have met its obligations and continued trading.

On these facts, the Commissioners found that the sum of £62,590 5*s.* 2*d.* gross paid to the Appellant by Rank was a trade receipt in the hands of the Appellant and was not an annual payment of pure income profit within the provisions of Case III of Schedule D, and that accordingly no repayment of Income Tax in respect of the amount paid by Rank fell to be made under the provision of the Act to which I have referred. In due course the Commissioners stated a Case for the opinion of the High Court. This came before Plowman, J., who upheld the Commissioners' finding, and his decision was confirmed by the Court of Appeal.

Stated shortly, the issue is whether the sums received by the Appellant from Rank and the B.B.C. were trade receipts or were what has been called "pure income profit" (taxable under Case III of Schedule D). The Appellant says that the question thus raised is a question of law. It seems to me to be a mixed question of law and fact, and I will proceed on the basis that a question of law is involved. It is clear that this is a case of a payment made by one trader to another, but it does not follow that such a payment is necessarily a trade receipt. Indeed it was not disputed that there can be payments between trading companies which are not necessarily ingredients in calculating the trading profits of the payee company.

The Appellant disputed that the sums payable under the covenant were trade receipts and relied on the provisions of clause 9 (*a*) of the preliminary agreement, and submitted that the payments in question were analogous to those which were made by the Corporation of London which were considered by this House in *Commissioners of Inland Revenue* v. *Corporation of London* (the *Epping Forest* case), 34 T.C. 293. Under the Epping Forest Act, 1878,

Epping Forest is regulated and managed by the Corporation of London as the Conservators of Epping Forest; and the Corporation is required to contribute, in such amounts as shall be necessary, to the income of a fund applied to the expenses of the Conservators. The Corporation makes a contribution each year to make good the deficiency on the income account of the Conservators. On paying that contribution in the Income Tax year 1948–49 the Corporation made a deduction therefrom based on the prevailing rate of Income Tax, which it justified by the contention that the contribution was an "annual payment" for Income Tax purposes. In its capacity of Conservators the Corporation was regarded as a separate entity, the purposes of which were exclusively charitable. It was therefore claimed that the deduction made should be repaid by the Inland Revenue under the provisions relieving charities from Income Tax. The Special Commissioners admitted the claim for repayment. Their decision was reversed by Donovan, J., but was restored by the Court of Appeal, who apparently based their judgment on the fact that the Corporation in its capacity of Conservators of Epping Forest was a charity. This ground for decision was disapproved by the House of Lords, but the decision was confirmed on other grounds, reasoned opinions being delivered by Lord Normand and Lord Reid.

The Appellant relied on the observations of Lord Normand, and in particular on that portion of his speech at page 324, where he approved the way in which the Special Commissioners dealt with the questions and with the reasons they gave for their decision. He continued:

> "The sum, in my opinion, is in no different position from a sum (having the requisite quality of recurrence) paid without conditions or counter stipulations out of taxed income under a covenant by a private individual to any charitable body. The Crown would neither admit nor deny that such a payment would be an annual payment to the charity within the meaning of Case III, or that the party paying it would be entitled to retain the tax, or that the charity would be entitled to recover it. We were implored to be guarded in our opinions on covenants in favour of charities. I can only say that I am compelled to follow where the argument leads. If the payment under covenant were made by an individual to a body not a charity it could still be an annual payment, but the question whether it was in return for some consideration would probably be much more prominent and acute. If it were an annual payment the payer would be entitled to deduct tax under Rule 19 but the payee would not be entitled to recover the tax."

The Appellant stressed the reference to conditions or counter stipulations and to consideration, and submitted that it was clear from clause 9 (*a*) of the preliminary agreement that in this case also the sums paid under the covenant were paid without conditions or stipulations and were not made in return for any consideration. Before I consider this argument further I must refer to the judgment of Lord Reid. I will content myself with one citation, from page 329[1]:

> "In my opinion, the payments in the present case were not of a business nature—they were of a benevolent nature—and they were not primarily made to assist in carrying on any trade or business—they were made primarily to achieve a public benefit of a charitable nature. If the Appellants are right the result would be far-reaching and, in my opinion, anomalous. Many, if not all, subscriptions to a charity which achieves its charitable object by trading could properly be described as intended to supplement its trading receipts or to assist it in carrying on its trade. But if that were the sole criterion, the result would be an unreal distinction between charities which do not trade and those which do: in the one case subscriptions would be part of their income and within Case III and in the other case not. If one reason, and perhaps the main reason, for excluding from Case III payments which apparently fall within its scope

(1) 34 T.C.

(Lord Cohen)

> is to produce a coherent scheme of taxation, I cannot see anything coherent or reasonable in so distinguishing between charities which do trade and charities which do not. But on the other hand to treat all business payments alike whether or not the payer gets any direct return for them seems to me to be eminently reasonable. I would reserve my opinion about a payment which is primarily benevolent but which brings some incidental benefit to the donor."

It is plain from the judgment of Lord Reid that he does not regard the question of consideration or conditions or counter-stipulations as conclusive of the matter. Nor, I think, did Lord Normand intend to express a contrary view. Their absence, like the fact that the payer was a charity, was merely one of the elements which the Commissioners should take into account in reaching a conclusion as to whether the payments in question were or were not of a business nature. Both their Lordships were, I think, agreeing with the finding of the Special Commissioners that

> "the proper view of Sections 39 and 41 of the Epping Forest Act, 1878, is, not that the Corporation discharges debts of the Conservators, nor that it pays a mere 'balancing' sum in the nature of a trade receipt against which must be set expenses, but that it makes contributions to the income of the Conservators, and that, out of their independent income and these contributions, the Conservators discharge their own debts."

In my opinion, the facts in the *Epping Forest* case [1] are very different from the facts with which we have to deal in the present case. I cannot shut my eyes to the fact that the purpose of the covenant was expressed to be to implement clause 8 of the preliminary agreement. The obligation of that clause, as I read it, was to pay an additional subscription; and though in fact it was the only subscription which Rank itself paid, I think the wording of the clause clearly implied that any sum which was paid thereunder would bear the character of a trade receipt. In reaching this conclusion I derive assistance from what were called in the argument the "subsidies cases", two of which came before your Lordships' House. The first case was *Smart* v. *Lincolnshire Sugar Co., Ltd.*, 20 T.C. 643; [1937] A.C. 697. In that case advances had been made to the company under the British Sugar Industry (Assistance) Act, 1931, and the question was whether they were trading receipts of the company liable to Income Tax under Case I of Schedule D. This House decided that they were so liable. Lord Macmillan in the course of his judgment said [2]:

> "In my view the question ought not to be decided on merely verbal arguments. What to my mind is decisive is that these payments were made to the Company in order that the money might be used in their business".

Later on he said [3]:

> "It was with the very object of enabling them to meet their trading obligations that the 'advances' were made; they were intended artificially to supplement their trading receipts so as to enable them to maintain their trading solvency."

I need not trouble your Lordships in detail with the other subsidies case cited—that of *Pontypridd and Rhondda Joint Water Board* v. *Ostime*[4], [1946] A.C. 477. It is sufficient to say that there too the payments were in the nature of a subsidy from public funds to an undertaker to assist in carrying on the undertaker's trade, and it was held that they were properly treated as trade receipts. It is true that in neither of the cases cited had this House to consider whether the payments could be charged under Case III of Schedule D, whereas in the present case that alternative is open; but in my opinion there are a number of features in this case which seem to me to support the finding of the Commissioners that the payments in question were trade receipts. Thus:

(1) 34 T.C., 293. (2) 20 T.C., at p. 670. (3) *Ibid.*, at pp. 670-1. (4) 28 T.C. 261.

(1) both payer and payee are traders; (2) the payments are described as subscriptions in clause 8 of the preliminary agreement; (3) without them the Appellant could not have carried on business; (4) the memorandum and articles of association clearly establish that the Appellant was not tied to carrying on a charitable venture; (5) although the aim of the promoters was not commercial gain when they formed the Appellant Company, the trust deed would not necessarily remain in force beyond five years and there was nothing to prevent the parties thereto and to the preliminary agreement modifying either that deed or the preliminary agreement by a supplementary agreement.

In the result, for the reasons I have given, which do not differ from those given in the Courts below, I would dismiss the appeal.

Lord Jenkins.—My Lords, I express my concurrence with the opinion of my noble and learned friend Lord Cohen, which I have just read.

My noble and learned friend **Lord Guest,** who is unable to be present today, has asked me to say that he agrees with the opinion which has just been read.

Questions put:

That the Order appealed from be reversed.

The Not Contents have it.

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

The Contents have it.

[Solicitors:—Richards, Butler & Co.; Solicitor of Inland Revenue.]