

VOL. XXXII—PART VIII

NO. 1479—HIGH COURT OF JUSTICE—31ST OCTOBER AND
1ST NOVEMBER, 1949

COURT OF APPEAL—15TH, 16TH AND 17TH MARCH AND 5TH APRIL, 1950

HOUSE OF LORDS—22ND AND 23RD OCTOBER AND 29TH NOVEMBER, 1951

Purchase (H.M. Inspector of Taxes) v. Stainer's Executors (1)

Income Tax, Schedule D—Film actor and producer—Remuneration including right of participation in profits of, or receipts from, particular films—Sums in respect of such participations paid to executors—Income Tax Act, 1918 (8 & 9 Geo. V, c. 40), Schedule D, Cases III and VI.

S, who died in 1943, entered during his lifetime into a number of contracts as film actor and producer. His receipts from some of these contracts depended on the receipts from the distribution or the profits of the films and so could not be ascertained and paid until some time after the making of the film concerned. During his life the amounts payable to S in respect of "participations" in the receipts from films were entered as credits in his professional accounts when they had been ascertained and had become due, and this treatment was accepted in the computation of the assessments to Income Tax under Case II of Schedule D upon him as film actor and producer.

After his death his executors were entitled to amounts in respect of his services in three films, as follows:—

- (i) a proportion, to be paid monthly, of the receipts from the distribution of the first film;*
- (ii) a proportion of the net profit from the distribution of the second film; and*
- (iii) under a variation, agreed by the executors, of the contract entered into by S in respect of a third film, a sum of £11,000, payable by instalments, in respect of that film, together with*
- (iv) a proportion of the sums in excess of £11,000 received from time to time by the film company from the exploitation of that film.*

On appeal against assessments to Income Tax under Schedule D made on the executors in respect of sums received by them under these heads, the Special Commissioners held that the sums in question were not liable to tax under either Case III or Case VI of Schedule D, and they discharged the assessments.

Held, that the Commissioners' decision was correct.

(1) Reported 66 T.L.R. 18; [1951] 2 T.L.R. 1112; [1951] 2 All E.R. 1071.

CASE

Stated under the Income Tax Act, 1918, Section 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 2nd March, 1948, Florence Gospel and Harold Woosnam Morgan, the executors of Leslie Howard Stainer deceased (hereinafter called "the Executors"), appealed against assessments to Income Tax made upon them under Schedule D of the Income Tax Act, 1918, for the years 1944-45, 1945-46 and 1946-47, the amounts of such assessments being £8,724, £20,331 and £946 respectively. The question for our determination was whether certain payments made to the Executors after the death of Leslie Howard Stainer under agreements entered into by him in the circumstances hereinafter set out were assessable under Cases III or VI of the said Schedule.

2. The following facts were admitted or proved:—

(a) Leslie Howard Stainer was well known during his lifetime as a film actor and producer under his film name of "Leslie Howard", and he is hereinafter referred to by such film name. He was killed as a result of enemy action on or about 1st June, 1943.

(b) During his lifetime Leslie Howard entered into a number of contracts to act in and/or produce films. In respect of the receipts during his lifetime from all his film contracts he was assessed under Case II of Schedule D of the Income Tax Act, 1918, which (as amended) imposes "tax in respect of any profession . . . or vocation not contained in any "other Schedule", and in computing the profits of his profession for the purpose of taxation he was entitled to set against and deduct from the amount of such receipts the proper expenses of carrying on such a profession. Certain of the amounts payable to him under such contracts were dependent upon the success or otherwise of the films with which he was concerned, and consequently could not be ascertained and paid until a considerable time after the making of the film. Until such amounts had been ascertained and had become due they were not entered as credits in the accounts which formed the basis of his Income Tax assessments since they were not due and payable when Leslie Howard had finished his work as actor or producer, but a considerable time afterwards. It is with payments of this nature that the appeal was concerned, the three films in question and the agreements relating thereto being detailed in the next succeeding sub-paragraphs.

(c) Under an agreement dated 31st October, 1940, Leslie Howard agreed with British National Films, Ltd. (clause 3 (b)) to act as producer and associate director and to play the leading part in the picture to be produced called *Mr. Pimpernel Smith*. Leslie Howard was the owner of the story and "shooting script", both of which he was to assign to the company. The whole cost of production was to be borne by the company (clause 3 (a)), and the picture when completed and all rights therein were to be the sole property of the company (clause 3 (i)). For his services in producing, directing or acting in this picture Leslie Howard was to receive (clause 5 (a)) in the first place £5,000 during the making of the film. In the second place he was to receive (clause 5 (b)):—"a proportion of the "gross receipts as follows:—of the gross receipts from the distribution of "the said picture in the United Kingdom, British Empire and Europe 40% "and of the gross receipts from the distribution of the said picture in the

"United States, Central and South America, 50%, in each case after deduction of the agreed distribution charges, cost of copies, cost of advertising, cost of trade showing and all other agreed costs."

Leslie Howard's share of such gross receipts was to be paid to him monthly as they came in (clause 7 (b) and (c)). A full copy of such contract is hereto annexed marked "A" ⁽¹⁾.

The film was made in 1940, and Leslie Howard duly received the £5,000 due to him under clause 5 (a) of the agreement. Such sum was included in his accounts for that year and no question arises upon it. During the years ended 5th April 1945, 1946 and 1947 (*i.e.* after his death) considerable sums were received by the company from the distribution of the film and Leslie Howard's proportion under clause 5 (b) was duly paid to the Executors without any deduction for Income Tax.

(d) Under an agreement dated 13th December, 1940, Leslie Howard agreed with Ortus Films, Ltd. to perform in a film to be called *49th Parallel*. The expenses were to be borne by the company (clause 3), and the copyright was to belong to the company (clause 18). He was to receive (clause 7 (a)) firstly £2,000 during the making of the film (as to which sum no question arises) and secondly (clause 7 (b)) "A sum equal to Fourteen-forty-ninths of the Company's share in the ultimate net profits of the distribution of the . . . film." A full copy of the agreement is hereto annexed marked "B" ⁽²⁾. The film was duly made and during the years ended 5th April, 1945 and 1946 the Executors received from the company under clause 7 (b) of the agreement substantial sums without deduction of Income Tax.

(e) Under an agreement dated 18th September, 1941, Leslie Howard agreed with Misbourne Pictures, Ltd. to act as producer-director of and to perform in a film called *The First of the Few* (clause 1). In this case also the company was to bear all the expenses of production (clause 3), and the copyright was to belong to the company (clause 18). Leslie Howard was to get as remuneration for his services (clause 11) (a) £5,000 during the making of the film, (b) £10,000 to be paid within two years and six months after the trade show or *premiere* of the film, and (c) "a sum equal to two-thirds of the actual sums from time to time received by the Company in respect of the exploitation of the said film (not including in such sums any sums advanced to the Company in respect of the cost of production of the film) such two-thirds share to be paid within one year from the receipt by the Company from time to time of such sums." A full copy of such contract is hereto annexed marked "C" ⁽³⁾. The film was made in 1941 and 1942, the trade show being in August, 1942. Leslie Howard duly received the £5,000 provided for by clause 11 (a) of the contract during his lifetime, and no question arises upon it. A variation of the payments to be made under clause 11 (b) and (c) was agreed to by Leslie Howard during his lifetime, a sum of £11,000 being substituted for the sum of £10,000 payable as under:—

not later than 31st December, 1943	—	£2,000
" " " " " 1944	—	£2,000
" " " " " 1945	—	£2,000
" " " " " 1946	—	£2,000
" " " " " 1947	—	£3,000
		£11,000

(1) Reproduced in part at p. 372.

(2) Reproduced in part at p. 373.

In addition, in lieu of the two-thirds of the sums received by the company in respect of the exploitation of the film, Leslie Howard was to receive a sum equal to two-thirds of the actual sums received or to be received in respect of the exploitation of the film in excess of £11,000. A formal agreement to this effect between the company and Leslie Howard (a copy of which is hereto annexed marked "D" ⁽¹⁾) was drawn up during his lifetime (in 1943) but never executed. After his death his Executors entered into an agreement, dated 6th July, 1945, a copy of which is hereto annexed marked "E" ⁽²⁾, recording and confirming such variation. (Clause 2 of this agreement provided that the Executors were to assist in the exploitation of the film, but no reliance was placed on the Crown's behalf upon this clause it being admitted that the Executors were not in a position to do so.) During the years ended 5th April, 1945 and 1946, considerable sums were received by the Executors from the company under the above agreement without any deduction for Income Tax, some of such payments being made in advance of the date provided for by the agreement.

3. It was contended on behalf of the Executors that the various sums received by them after Leslie Howard's death (as above detailed) were remuneration professionally earned by Leslie Howard during his lifetime and were not assessable upon them either as annual payments under Case III of Schedule D, or under Case VI of Schedule D.

4. It was contended on behalf of the Inspector of Taxes;

(i) that the sums in question (other than the £11,000 received in respect of *The First of the Few* referred to in paragraph 2 (e) hereof) were annual payments assessable under Case III of Schedule D or in the alternative that these sums were assessable under Case VI of Schedule D;

(ii) that the said sum of £11,000 was assessable under Case VI of Schedule D.

5. The case of *Asher v. London Film Productions, Ltd.*, [1944] I, K.B. 133; 170 L.T. 17; [1944] 1 All E.R. 77, was referred to.

6. We, the Commissioners who heard the appeal, gave our decision in the following terms:—

During his lifetime the late Mr. Leslie Howard (to use his stage and screen name) contracted with certain companies to perform in three films. In the case of two of them he was also to direct and produce the film, and in the case of the third it was contemplated that he might act as co-director. For these services he was to receive certain lump sums, together with a share of the gross receipts arising from the distribution of the film when made, or in one case a share of the profits arising from the film. His share of receipts or profits would naturally not be ascertained until some time after his work in assisting to make the film had been completed. While he was alive and working he was assessed under Case II of Schedule D in respect of the "balance of the profits, gains and emoluments" of a "profession or vocation", the computation of such profits being made on what is termed an "earnings basis". It would appear from the case of *Davies v. Braithwaite*, 18 T.C. 198, that he was correctly so assessed, and the contrary was not suggested by either party before us. It is clear that so long as he was carrying on his profession all the remuneration set out above would fall to be included as a receipt in the account of the profits and gains upon which he would be

(1) Not included in the present print. (2) Reproduced in part at p. 373.

so assessed and that the proper expenses would be deducted therefrom. It follows that none of the payments made to him could at that time be charged upon him as "annual payments" under Rule I of Case III of Schedule D, since they were not in his hands "pure income profit": see *Earl Howe v. Commissioners of Inland Revenue*, 7 T.C. 289, and *Asher v. London Film Productions, Ltd.*, [1944] 1 K.B. 133, at page 140, where Lord Greene, M.R., uses that phrase to distinguish annual payments from payments forming an element in the computation of profits and gains. It is said, however, on behalf of the Crown that the share of receipts or profits (if not the lump sums) accruing to the Executors after Mr. Howard's death are annual payments and taxable as such, the taxable quality of the payments having presumably changed when Mr. Howard's profession ceased at his death. We cannot accept this view. In our opinion remuneration continues to be remuneration although the person who has earned it has died, and can only be charged under its proper Schedule and Case, in this instance Case II of Schedule D. The Crown cannot opt to charge it under Case III as an annual payment because during Mr. Howard's lifetime it was not an annual payment for the reasons stated, and its nature does not change because the profession ceases. This principle appears to us to be clearly stated by Rowlatt, J., in *Bennett v. Ogston*, 15 T.C. 374 at page 378, third paragraph, although its application to the facts of that case led to a different result. We come, therefore, to the conclusion that the share of profits or receipts from films cannot be taxed as annual payments under Case III. They remain the emoluments of a profession taxable under Case II; but as Mr. Howard died in 1943 assessments under that Case are not competent for the years before us, namely 1944-45, 1945-46 and 1946-47, nor did the Crown seek to support them under that Case. In the alternative the Crown relied on Case VI, but as we take the view that all the emoluments properly fall under Case II they cannot be charged under Case VI.

We leave the figures of the assessments to be agreed by the parties on the basis of our decision.

7. In accordance with our decision we discharged the assessments under appeal.

The Appellant immediately after such determination declared to us his dissatisfaction therewith as being erroneous in point of law and in due course required us to state a case for the opinion of the High Court pursuant to the Income Tax Act, 1918, Section 149, which Case we have stated and do sign accordingly. The question for the determination of the Court is whether our decision was right in law.

B. TODD-JONES
R. COKE,

} Commissioners for the Special Purposes
of the Income Tax Acts.

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

2nd February, 1949.

EXHIBIT "A" (1)

Memorandum of Agreement made the 31st day of October 1940 between British National Films Ltd. whose registered office is at Rock Studios Elstree in the County of Hertford (hereinafter called "the Company") of the one part and Leslie Howard of c/o Myron Selznick (London) Limited 7-9 St. James's Street in the County of London (hereinafter called "the Producer") of the other part.

Whereas the Producer is the owner of the story and shooting script (hereinafter called "the said Story") written by Wolfgang Wilhelm and A. G. McDonnell and entitled "Mr. Pimpernel Smith"

And whereas the Company has agreed to make and produce in association with the Producer a talking motion picture based on the said story upon the terms and conditions and in the manner hereinafter set out

Now it is hereby agreed as follows:—

. . . 5. For all his services to be rendered under this agreement, whether in respect of producing, directing or acting in the said picture, the Producer shall be entitled by way of remuneration:

(a) To receive from the Company the sum of £5,000 (five thousand pounds) cash payable during production in six weeks instalments on the last day of each week commencing with the commencement of shooting of the picture.

(b) To a proportion of the gross receipts as follows:—

Of the gross receipts from the distribution of the said picture in the United Kingdom, British Empire and Europe 40% and of the gross receipts from the distribution of the said picture in the United States, Central and South America, 50% in each case after deduction of the agreed distribution charges, cost of copies, cost of advertising, cost of trade showing and all other agreed costs.

In addition to such remuneration the Company shall repay to the Producer all reasonable first class travelling and living expenses incurred on location work during the production, and if the Producer shall be required personally to present the said picture in the United States of America, the whole or a reasonable proportion of his travelling expenses to and from the United States of America and of his reasonable first class living expenses while there for the aforementioned purpose.

7. (a) The Company shall keep all proper records and accounts of all payments made and other figures and accounts in connection with the production, distribution and exploitation of the picture, and the Producer by himself, or his agent or accountant, shall have full access to such records and accounts from time to time in the possession of the Company, with liberty to take copies thereof at his own expense.

(b) All moneys received by the Company from the distribution and exploitation of the said picture, otherwise than in respect of the United States of America, Canada and Central and South America, shall be paid into a separate account in the name of the Company in the Mercantile Bank of India Limited in London, and such part of the money standing to the credit of such account on the first day of each month as is found to be due to the Producer shall be paid to him by cheque drawn on such account . . .

(1) Reproduced in part.

EXHIBIT "B" (1)

An agreement made the Thirteenth day of December One thousand nine hundred and forty- [blank] between Ortus Films Limited whose registered office is situate at 115 Chancery Lane in the County of London (hereinafter called "the Company") of the one part and Leslie Howard of "Stow Maris" Westcott Dorking in the County of Surrey (hereinafter called "Mr. Howard") of the other part

Whereby it is agreed as follows:

. . . If Mr. Howard shall duly observe and perform the agreements on his part herein contained the Company shall pay to him in respect of the said film the following remuneration namely:

(a) The sum of Two thousand pounds by [blank] weekly instalments the first instalment to be payable on the Friday of the week during which Mr. Howard's engagement shall commence and subsequent instalments to be payable on the Friday of each subsequent week.

(b) A sum equal to Fourteen-forty-ninths of the Company's share in the ultimate net profits of the distribution of the said film . . .

EXHIBIT "C" (1)

An agreement made the Eighteenth day of September One thousand nine hundred and forty-one between Misbourne Pictures Limited whose registered office is situate at 115, Chancery Lane in the City of London (hereinafter called "the Company") of the one part and Leslie Howard of "Stow Maris" Westcott Dorking in the County of Surrey (hereinafter called "Mr. Howard") of the other part

Whereby it is agreed as follows:—

. . . 11. If Mr. Howard shall duly observe and perform the agreements on his part herein contained the Company shall pay to him in respect of the said film the following remuneration:—

(a) the sum of Five thousand pounds by ten weekly instalments the first instalment to be payable on the Friday of the week during which the shooting of the film shall commence and subsequent instalments to be payable on the Friday of each subsequent week.

(b) the sum of Ten thousand pounds to be paid within two years and six months after the Trade Show or the première of the said film whichever shall be the earlier.

(c) a sum equal to two-thirds of the actual sums from time to time received by the Company in respect of the exploitation of the said film (not including in such sums any sums advanced to the Company in respect of the cost of production of the film) such two-thirds share to be paid within one year from the receipt by the Company from time to time of such sums . . .

EXHIBIT "E" (1)

An agreement made the sixth day of July One thousand nine hundred and forty five between Misbourne Pictures Limited whose registered office is situated at 115 Chancery Lane in the City of London (hereinafter called "the Company") of the one part and Florence Gospel of Stow Maris Westcott Dorking in the County of Surrey Spinster and Harold Woosnam Morgan of 14 Castlebar Park Ealing in the County of London Chartered Surveyor (hereinafter called "the Executors") of the other part Whereas the Executors are the Executors of the Will dated the Twenty second day

(1) Reproduced in part.

of February One thousand nine hundred and forty one of Leslie Howard deceased late of Stow Maris Westcott near Dorking in the County of Surrey (hereinafter called "Mr. Howard") who died on or since the First day of June One thousand nine hundred and forty three and whose Will with a Codicil they proved on the Twenty fifth day of April One thousand nine hundred and forty four in the Principal Probate Registry at Llandudno And Whereas this agreement is Supplemental (1) to an Agreement (hereinafter called "the principal Agreement") dated the Eighteenth day of September One thousand nine hundred and forty one made between the same parties to this Agreement (2) to an Agreement (hereinafter called "the Distribution Contract") dated the Eighteenth day of September One thousand nine hundred and forty one and made between Misbourne Pictures Limited of the first part Mr. Howard of the second part British Aviation Pictures Limited of the third part and General Film Distributors Limited of the fourth part (3) to an Agreement (hereinafter called "the Variation Agreement") dated the Thirteenth day of January One thousand nine hundred and forty four and made between the same parties (except "Mr. Howard") as are parties to the Distribution Agreement And Whereas the Company entered into the Variation Agreement subsequent to the death of Mr. Howard but in pursuance of arrangements made in his lifetime under which it was agreed that he should enter into an agreement with the Company to the effect hereinafter set forth And Whereas the Company and the Executors being desirous of entering into this Agreement in order to carry out such arrangements the Company entered into the Variation Agreement on the terms that this Agreement should be entered into Now it is hereby agreed in pursuance of the last recited Agreement and in consideration of the Company entering into the Variation Agreement at the request of the Executors pursuant to such arrangements as follows:—

1. The Principal Agreement shall be varied so as to provide that:—

(a) the sum of ten thousand pounds referred to in Clause 11 (b) of the Principal Agreement shall not be payable to the Executors but in lieu thereof the Company will pay to the Executors a minimum sum of Eleven thousand pounds by four instalments of Two thousand pounds payable not later than Thirty first day of December in the years One thousand nine hundred and forty three One thousand nine hundred and forty four One thousand nine hundred and forty five and One thousand nine hundred and forty six respectively and a final instalment of Three thousand pounds payable not later than the Thirty first day of December One thousand nine hundred and forty seven:

(b) the sum referred to in Clause 11 (c) of the Principal Agreement equal to two thirds of the sums actually received by the Company in respect of the exploitation of the film referred to as therein mentioned shall not be payable but in lieu thereof the Company shall pay to the Executors a sum equal to two thirds of the actual sums already or hereafter from time to time received in respect of the exploitation of the said film in excess of the sum of Eleven thousand pounds (not including in such sums any sums advanced to the Company in respect of the cost of production of the said film) the said sum of Eleven thousand pounds being retained by the Company to meet the sum of Eleven thousand pounds payable under Clause 1 (a) hereof

Provided always that no payment shall be made to the Executors under this sub-clause (b) before the year One thousand nine hundred and forty five and that the total payment under this sub-clause (b) in any one calendar year before the year One thousand nine hundred and forty seven shall not exceed the sum of Two thousand five hundred pounds.

And provided also that in the year One thousand nine hundred and forty seven the Company shall pay to the Executors any balance due under this sub-clause (b) up to and including that year . . .

The case came before Croom-Johnson, J., in the King's Bench Division on 31st October and 1st November, 1949, and on the latter date judgment was given against the Crown, with costs.

The Solicitor-General (Sir Frank Soskice, K.C.) and Mr. Reginald P. Hills appeared on behalf of the Crown and Mr. L. C. Graham-Dixon for the Respondents.

Croom-Johnson, J.—The facts in this case have been very fully stated in the Case, and I do not think there is any advantage to be gained in recapitulating them. The late Mr. Leslie Howard Stainer, who has been called by his professional stage name, Mr. Howard, all through this case, carried on both the vocation of an actor and a film producer, using the term "producer" in the way in which it is sometimes used when one speaks of the producer of a stage play, meaning the man who drills the actors, arranges the business and all the rest of it. That was his vocation. He also happened to own the rights and the acting script of a particular story — I think shooting script is the right term — called *Mr. Pimpernel Smith*. He entered in the course of his vocation into the three contracts which are referred to in the Case, one of them being dated 31st October, 1940, that is contract "A"; another being dated 13th December, 1940, contract "B", and a third being dated 18th September, 1941, contract "C". Those three contracts are annexed to and form part of the Case which is submitted by the Special Commissioners for the opinion of the Court; as they are part of the Case I am entitled to look at them and to consider them.

Contract A is a little different from the other two. That is the *Pimpernel Smith* contract, and it recites that the producer Mr. Howard is the owner of the story and the shooting script. Amongst other things the agreement provides that the producer agrees to procure and assign to the company with whom the bargain was made, upon the execution of the agreement, all rights of every kind in the said story necessary for the production by the company of a talking motion picture, which is what contract A envisages. The general terms of the contract do not matter but the two parts of it that do matter are, first of all, what was Mr. Howard to do, and secondly, what was he to get for doing it. In other words, what were his duties under the contract and what was to be his remuneration? There is possibly a third: Over what period of time were his duties to run? All that is expressed in the contract. Apart from assigning the story and the shooting script in the manner that I have already indicated the producer undertook to act as producer and in addition to direct the said picture in association with another director to be approved by the company and the producer, and to play the leading part in the said picture. All that is to be found in paragraph 3 (b) of the contract. The period of time during which Mr. Howard was to perform his duties is to be found in paragraphs 3 (g) and 3 (h). The production of the picture was to commence as soon as was reasonably possible after completion and approval of the final shooting script, and this was intended to be on or about 21st November, 1940. The shooting of the

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picture was to take about six weeks and after the shooting had been completed the picture was to be edited—not an obligation apparently which fell upon Mr. Howard—and made ready for presentation with all possible despatch. Paragraphs 3 (*i*) said that the picture, when completed, and all rights therein were to be the sole property of the company. As far as I can see, except for a paragraph which is to be found hidden away in paragraph 5, there was no other obligation on Mr. Howard, who was to earn his money in somewhere about six weeks from 21st November, 1940.

There are special provisions in paragraph 4 (*a*) in which there are provided arrangements for the distribution of the picture, first of all in the United Kingdom, the British Empire and Europe and providing for how much that was to cost. I need not go into the detail of that. In paragraph 4 (*b*) there is a similar provision at a lesser cost in the United States of America, Canada and Central and South America in slightly different terms.

Then comes paragraph 5, "For all his services to be rendered under this Agreement, whether in respect of producing, directing or acting in the said picture, the Producer shall be entitled" — mark these words — "by way of remuneration: (*a*) To receive from the Company the sum of £5,000 (five thousand pounds) cash payable during production in six weeks instalments"—I think that really means "six weekly instalments"—"on the last day of each week commencing with the commencement of shooting of the picture." He had his £5,000; he had it, as far as I know, within the terms of paragraph 5 (*a*); he paid tax on it in his lifetime, and no question arises here, he being assessed under Schedule D, Case II. Paragraph 5 (*b*) says, "To a proportion of the gross receipts as follows", and then there is a provision that he should get 40 per cent. of the gross receipts from the distribution in the United Kingdom, the British Empire and Europe and 50 per cent. from the distribution in the United States of America and other places, after deducting all sorts of things. There is an apparent discord there because I do not understand "a share of the gross receipts" if before you get any money you have to take something off the gross by way of deduction. But there it is. People have a habit nowadays of using words they do not understand or about which they do not think.

Then comes the passage in paragraph 5 to which I referred earlier in discussing Mr. Howard's duties, "In addition to such remuneration the Company shall repay to the Producer all reasonable first class travelling and living expenses incurred on location work during the production, and if the Producer shall be required personally to present the said picture in the United States of America, the whole or a reasonable proportion of his travelling expenses to and from the United States of America and of his reasonable first class living expenses while there for the aforementioned purpose." From that it is obvious that although there is no express obligation on Mr. Howard to go to America, on the proper construction of this agreement when they require him so to do, he had to go; and he was to get no more remuneration for going, only expenses.

I do not think there is any more in that agreement which is relevant except this: in paragraph 7 there is an obligation on the company to keep proper accounts, to pay into a separate banking account in their own name in a named bank in London all moneys received from the distribution and exploitation of the picture otherwise than in respect of the United States of America, Canada and Central and South America, and a similar pro-

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vision that with regard to the excepted countries the moneys should be paid into any such bank as Mr. Howard should designate. The method of payment of the share of the so-called gross receipts was this: all they had to do so far as the English banking account was concerned was to look at the account on the first day of each month, see how much was standing there to the credit of the account, and Mr. Howard was entitled to have paid to him 40 per cent. of that by a cheque drawn on that account each month. That is to say he was to be paid by monthly instalments on a named banking account, there being no provision at all with the regard to the banking account which was to be elsewhere for the United States of America *etc.* and in the absence of any provision apparently the money would remain there until the film had ceased to attract the public and there ceased to be any more profits on the books. That is contract A.

It is perfectly obvious that the agreement on its proper construction provides for two things: first of all, by way of remuneration for the services which this gentleman had to render, £5,000 in cash, which he received, and secondly, a payment which was to be a proportion of the so-called gross profits paid in the way that I have indicated in this rather rough summary of mine of the terms of the agreement.

Some attempt has been made by the two learned Counsel who have addressed me on behalf of the Crown to suggest that these payments of gross profits are contingent payments—not in the sense in which I use the word “contingent”. They were in a sense subject to a condition subsequent, namely that there should be profits to divide. There is no contingency about it. There is an absolute right in Mr. Howard to have an account from the company who have undertaken to keep proper accounts. If there were no profits there would be nothing for which to account and whatever the profits were he was to receive 40 per cent. in the one case and 50 per cent. in the other. Subject to that, this “deferred remuneration” is made payable on ascertainment under the contract which is concerned partly with the assignment of rights in the story for film purposes and partly personal services to be rendered by him as a producer, director or actor. In those circumstances, if some share of profits had been paid to Mr. Howard during his lifetime and while he was still continuing to carry on his vocation as a producer and director of films and an actor, those sums would indubitably have to be returned by him as part of his income under Case II of Schedule D. The film was duly made and completed within the meaning of this contract. The question which arises for determination with regard to liability to tax is: Does it make any difference that Mr. Howard was unfortunately killed by enemy action on 1st June, 1943, after he had done, with the possible exception of the journey to America which of course he could no longer do, all that he had to do under the contract, and after, in a business sense and as I think in a legal sense, he had earned whatever he was entitled to receive under this contract A? I shall have to look and see the subsequent history after 1st June, 1943.

The second contract, B, has no complication of the shooting script or rights in the story because apparently Mr. Howard did not own them. It is a perfectly simple contract of employment. “The Company hereby engages Mr. Howard and Mr. Howard hereby accepts employment from the Company to perform in a film which the Company proposes to

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“produce which is provisionally entitled ‘49th Parallel’”—a most remarkable film, incidentally. “Mr. Howard shall if he so desires act as co-director (with the director appointed by the Company) of the part of the “said film in which he is concerned a credit to him being given accordingly.” That is all. It is a pure agreement by a gentleman, whose vocation it was to do these things, to do them in the course of his regular vocation. There is a provision in paragraph 2 that the engagement was to commence on 25th January, 1941, and to continue for a period of a maximum of 18 days, “and subject as hereinafter mentioned for such period as the Company “shall require for the purpose of completing Mr. Howard’s part of the “said film”. That is all. There is a provision, to which I need not refer, in case Mr. Howard had to go away to America in connection with some proceedings over there. That does not arise.

Paragraph 7 is the one which fixes what he was to get for these 18 days, or a little more if the company wanted him to do a little more. “If “Mr. Howard shall duly observe and perform the agreements on his part “herein contained the Company shall pay to him in respect of the said “film the following remuneration”—it is an ordinary contract of employment for money—“(a) The sum of Two thousand pounds by [*blank*] weekly “instalments the first instalment to be payable on the Friday of the week “during which Mr. Howard’s engagement shall commence and subsequent “instalments to be payable on the Friday of each subsequent week.” When one bears in mind that it was an eighteen-day engagement—I suppose the blank is capable of being worked out—all one can say about it in passing is that one may be perhaps permitted the reflection that £2,000 plus a good deal more for 18 days’ work might make some people feel just a little wistful. The second thing that he was to get was “a sum equal to Fourteen-“forty-ninths of the Company’s share in the ultimate net profits of “the distribution of the said film.” There is nothing in this agreement which fixes any time and so far as I remember there is nothing in this agreement which entitles him to have any money in the way of instalments or on account. That being so, as a matter of legal right Mr. Howard was not entitled to receive any of the 14/49ths of the ultimate net profits until the ultimate net profits had been ascertained. The language is “a “sum equal to Fourteen-forty-ninths of the Company’s share in the ultimate “net profits.” Of course as a matter of good common sense, cultivating good relations between the parties and all the rest of it, I have no doubt that the parties did not insist, and would not have insisted if Mr. Howard had lived, on strict rights. That is the position. Here again Mr. Howard received his £2,000 more or less down by the instalments provided and the deferred remuneration of the 14/49ths of the ultimate net profits, giving Mr. Howard the right to have an account of what the profits were. An action would lie in debt to recover the profits when ascertained, by the familiar method of an action in the Chancery Division for an account and payment of the amount found due which sounds in debt.

There is no other agreement which affects contract A or B at all. Those two agreements are the only documents which can be relied upon in order to solve the problems which arise on those contracts. Does the death of Mr. Howard on 1st June, 1943, make any difference to the liability to Income Tax? He became liable to pay tax and as I understand it he did pay tax on the £2,000. The film was duly completed within the meaning of contract B. If Mr. Howard had lived and was still carrying on his vocation when he received any part of the 14/49ths he would have

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been assessable to Income Tax on it subject of course to this: under the particular Case of the statute he would be entitled to deduct those expenses and disbursements which were necessary for him to make in order to earn the income. In other words, he had to be assessed on profits and gains. That is contract B.

Contract C is similar to contract B. It is a simple contract of employment. "The Company hereby engages Mr. Howard and Mr. Howard hereby accepts employment from and agrees to render his exclusive services to the Company as Producer-director of and to perform in a film which the Company proposes to produce which is provisionally entitled 'The First of the Few'." The only distinction that I can find is that, as I have read, Mr. Howard agreed to render his exclusive services. That means of course during such time as the services fell to be rendered under this contract. Paragraph 7 emphasises that. It says: "It is hereby expressly agreed that the engagement of Mr. Howard hereunder is an exclusive engagement by the Company of the entire services of Mr. Howard for the said period and accordingly Mr. Howard agrees with the Company that until the expiration or sooner determination of the said period he shall not do any work for or perform or render any services whatsoever for or to any person firm or company other than the Company." What is the period? That is to be found in paragraph 2. "The engagement of Mr. Howard"—my copy says "commenced", but grammatically I should have thought it should be "commences"—"commenced on the Twentieth day of October One thousand nine hundred and forty one and shall continue until the date on which the production of the said film is finally completed which date is estimated to be the Fourteenth day of April One thousand nine hundred and forty two. The period of Mr. Howard's engagement hereunder is hereinafter referred to as 'the said period.'" This is an employment agreement from 20th October, 1941, to somewhere about 14th April, 1942. I suppose it might be a little more and it would be proper to apply a reasonable construction to it.

Mr. Howard worked under that contract. The film was produced. Everything was done. Mr. Howard got the remuneration which was payable to him, in so far as it was payable at once. What was that remuneration? Paragraph 11 says: "If Mr. Howard shall duly observe and perform the agreements on his part herein contained the Company shall pay to him in respect of the said film the following remuneration (a) the sum of Five thousand pounds by ten weekly instalments". Those were all paid, and were all assessed to tax under Case II of Schedule D again. "(b) the sum of Ten thousand pounds to be paid within two years and six months after the Trade Show". That is deferred remuneration. It is a right which he had, and a right which he could assign, to receive it. The only thing that was postponed was the date of payment, and although the date of payment was uncertain it was a date which could be made certain by applying the usual maxims. "(c) a sum equal to two-thirds of the actual sums from time to time received by the Company in respect of the exploitation of the said film . . ."—I leave out the words in parenthesis which do not matter—" . . . such two-thirds share to be paid within one year from the receipt by the Company from time to time of such sums." There is, so far as I remember, no express provision for a payment on account of that sum of money. That I think concludes this bargain.

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What is this contract C? It is a contract for exclusive employment for a more or less fixed period for the purpose indicated in the contract, with £5,000 down, £10,000 two years and six months after the trade show, and two-thirds of the actual sums received—nothing about profits—to be paid within a year from the receipt by the company from time to time of such sums. I suppose that each time they got a sum of money for the exploitation, within one year Mr. Howard was entitled to his two-thirds. In other words again deferred remuneration under a right vested in Mr. Howard under the terms of this contract. It may produce nothing; it may produce large sums; but it is only capable of ascertainment in the future. It is subject to that condition subsequent. That is all it is. A vested right again, except in the sense that there may be no profits. There is no other contingency about it. The film was produced and in due course sums of money were paid to Mr. Howard's executors under the contract in respect of what I have called the deferred remuneration.

All three contracts speak of this as remuneration or remuneration for the services under the contract, but it is said that during Mr. Howard's lifetime—I suppose in view of the circumstances which existed in the amusement trades during the war—he made an agreement in variation of contract C in respect of the deferred remuneration. It was reduced into writing but never executed and I think I can put it on one side because the executors themselves on 6th July, 1945, in document E entered into an agreement with the company which recognised apparently that Mr. Howard had promised to enter into a variation agreement. The word "promised" is my own word; I do not think it is to be found in the document. Document E provides that instead of the sum of £10,000 to be paid within two and a half years of the trade show under contract C the company were to pay the executors a minimum sum of £11,000 and instead of paying it within two and a half years of the trade show they were to pay it on fixed dates and by fixed instalments—£2,000 not later than 31st December in each of the years 1943, 1944, 1945 and 1946, and a final instalment of £3,000 not later than 31st December, 1947. That is an agreement therefore to give time to the company for the discharge of its obligation of £10,000, to accept payments by instalments and to get an extra £1,000 in addition. In addition to that the parties agreed that the unascertained item of two-thirds of the sum actually received in respect of the exploitation should not be payable and that instead the company were to pay to the executors a sum equal to two-thirds of the actual sum received by them in respect of the exploitation in excess of the sum of £11,000. So they were letting the company off paying two-thirds of the first £11,000 of the sums received from exploitation. They were to retain the £11,000 in order to meet the £11,000 payable by instalments under the variation agreement.

The agreement also contained an obligation on the part of the executors. "The Executors will give all such assistance as the Company may reasonably require in regard to the exploitation of the said film and of any reissues thereof both with regard to advice and publicity and will use their best endeavours to procure the exploitation of the film outside the British Isles whenever conditions shall permit". The two executors were, one, a spinster lady residing in Surrey and, two, a chartered surveyor residing at Ealing, and I gather from something that happened before the Special Commissioners that they were not people with an intimate knowledge of the film industry. The Inspector before the Special Commissioners is said to have told them that, on behalf of the Crown, he placed

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no reliance on this clause, "it being admitted that the Executors were not "in a position to do so". Grammatically that seems to lack something, but I have no doubt the thing is all right. What am I to do with the clause when I find it in the contract? Am I to treat it as having been given up or given the go-by to this contract, or what am I to do with it? Mr. Hills I thought was rather shocked at the notion that in view of that statement I could regard that clause as having been given the go-by. I can find no trace anywhere that anybody before the Special Commissioners had suggested that the effect of this contract was to bring into existence a new obligation which itself would raise a new liability to tax. It is one of the things which I have had to consider in the course of hearing this case. Whatever the Inspector said there is a clause in the contract under which these people have undertaken, amongst other things, "to use their best "endeavours"—maybe a poor thing—"to procure the exploitation of the "film outside the British Isles whenever conditions shall permit". That is the position.

I now have to look at contract C to see what the position was. What happened was this. After the death of Mr. Howard, according to the Case, during the years ended 5th April, 1945 and 1946, considerable sums were received by the executors under the agreement, which is document E, without any deduction for Income Tax, some of such payments being made in advance of the date provided for by the agreement. That looks rather as if those sums were sums on account of the £11,000. With regard to contract A, during the years ended 5th April, 1945, 1946 and 1947 after his death considerable sums were received by the company from the distribution of the film and Mr. Howard's proportion under paragraph 5 (b) was duly paid to the executors without any deduction for Income Tax: similarly, under contract B during the years ended 5th April, 1945 and 1946. The result of that was that assessments were raised upon the executors under Schedule D for the three tax years which covered those three sets of payments—1944-45, 1945-46 and 1946-47. The amounts of such assessments were set out in the Case—£8,724, £20,331 and £946.

The Crown's contention about them was that those payments made to the executors after the death of Mr. Howard were assessable under Case III or Case VI of Schedule D. The explanation of why they would not be Case II was simple. Mr. Howard was dead. He had ceased to carry on his profession. The work which had to be done in order to enable him to be entitled to claim the remuneration under these three agreements apart from the sums down had all been done and completed during his lifetime. That brings me to the problem which has now, I think, been quite fully argued.

I think there is only one other statement I need make from the Case, and it is this: it was contended on behalf of the executors that this was remuneration earned by Mr. Howard during his lifetime and that inasmuch as he was dead no assessments under Case II were competent for the three years before the Special Commissioners. I have mentioned the three years 1944-45, 1945-46 and 1946-47. The Case says, "Nor did the Crown seek "to support them under that Case". That being so it would seem that the application of the observations of Rowlatt, J., in *Bennett v. Ogston*, 15 T.C. 374, at page 378, had been assumed by both parties to apply. "When a "trader or a follower of a profession or vocation dies or goes out of business . . . and there remain to be collected sums owing for goods supplied "during the existence of the business or for services rendered by the

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“professional man during the course of his life or his business, there is no question of assessing those receipts to Income Tax; they are the receipts of the business while it lasted, they are arrears of that business”—there the use of the word “business” covers vocation—“they represent money which was earned during the life of the business and are taken to be covered by the assessment made during the life of the business, whether that assessment was made on the basis of bookings or on the basis of receipts”. The Crown contended that they were entitled after his death, not to change their ground because there never was any ground in respect of those sums, but to change the heading under which the assessments could be made. They took the view that the shares of the receipts or profits accruing to the executors after Mr. Howard’s death were annual payments and taxable as such, and apparently, although this may be an inference of the Special Commissioners, alleging that the taxable quality of the payments changed when Mr. Howard’s profession ceased at his death.

I am going to leave on one side for a moment the question of the payments which fell to be made under document E. What were these other payments? It is true they were unascertained and only capable of ascertainment subsequently to their being earned when the exploitation of the films began to produce box office receipts and/or profits. But they are none the less debts. They were debts of the vocation, of the business of the deceased gentleman. They were sums of money which he had earned during his lifetime as the result of carrying out the obligations contained in these contracts. I must look to see whether it is right to say that they can have any other character than what to me is the perfectly obvious character which they have. You do not change them by fixing a label on them and saying that they are contingent rights or anything of the sort.

The first case which was cited to me about this was the case of *Bennett v. Ogston*⁽¹⁾ to which I have already referred. It was a moneylender’s business. The moneylender died, and his estate had to be administered by an administrator. He came into possession of a number of promissory notes in the form which at one time was very common in the moneylending business, providing for the payment of a number of instalments which would liquidate the principal and the interest of the money advanced by the moneylender to the maker of the note. It was decided by Rowlatt, J., that the moneys in so far as they represented the moneys of the business were, as I understand it, things which remained to be collected and accordingly were not susceptible of Income Tax. But there was interest which accrued due after the date of the death in respect of money which was left outstanding. It was sought to say in respect of that interest that it was not the profits of the dead man because he was not there and that that interest was assessable to Income Tax in the hands of the administrator. Rowlatt, J., decided that was right and he negated the argument on the part of the executor that the tax which the moneylender had paid during his lifetime on his trading must be deemed to include the profits which he would have made out of this interest after the date of his death. Then the learned Judge went on ⁽²⁾: “I think when you are dealing with what is interest and “nothing but interest you cannot say it is in the nature of business, because “it is payment by time for the use of money.” I think it is quite clear from reading this judgment that the learned Judge is holding that it is impossible to say that interest which is to be paid next year and to accrue

(1) 15 T.C. 374.

(2) *Ibid.*, at p. 378.

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next year can be treated as a profit of the preceding year—"this year" as the learned Judge calls it. That is a perfectly understandable position. It is not necessary for me to examine it to see whether it is right or wrong as in any case the decision binds me sitting here, but it is miles away from the present case.

If the shares of profits, which were deferred payments of remuneration as I have held, were to carry interest during such time as they were not accounted for or paid over and such interest ran after the death of Mr. Howard, then according to *Bennett v. Ogston* ⁽¹⁾ as I understand it the Revenue would be entitled to charge Income Tax on that income—and possibly, although I express no concluded view, it would be tax which would be properly deducted at the source by the different companies with whom these different contracts were made.

It is suggested that that case is authority for the general proposition that where you get deferred remuneration on profits which arise later on, that may make those profits or the share of the profits liable to Income Tax. I cannot follow that. I go further. Even if some of the profits from exploitation of the films still were received by the companies after the death of Mr. Howard those profits would still be caught by the agreements made by Mr. Howard in his lifetime in respect of the services which he had rendered, and for no other purpose. That was the consideration for the payment, that and that alone.

The Special Commissioners express their decision in reasoned language, all of which is set out in paragraph 6 of the Case. They apply, and I think rightly apply, the first passage which I read from the judgment of Rowlatt, J., in *Bennett v. Ogston*. They came to the conclusion that the share of the profits could not be taxed as annual payments under Case III. They came to the conclusion that the ultimate payments under contracts A and B were not susceptible of assessment under Case III.

Perhaps I ought to have said that in the contentions advanced on behalf of the Inspector of Taxes it was argued that the moneys received under contracts A and B were assessable under Case III or in the alternative under Case VI of Schedule D. Case VI, as is conceded, only applies if there is no other Case into which the particular items can be fitted. I can see no reason for applying Case VI to these two contracts. These payments may of course escape paying tax in the hands of the executors, firstly by reason of the fact that there is no business or vocation subsisting to which they can be attached, and for the reason which I will come to in a moment or two when I examine what Case III really says when I deal with it in connection with the claim under contract C. I cannot see on what principle the Crown are entitled to treat them as annual payments, especially under contract B which provides for one lump sum and a share of profits when the matter has been finally determined, so as to make these items assessable under Case III. I do not want to read all over again what the Special Commissioners have said with regard to it. In so far as it covers contracts A and B I think their reasoning is correct and I cannot see that they have come to any wrong conclusion in law. In my judgment they came to a right conclusion and there is no ground for interfering with their decision.

I have had a number of other cases cited to me but they give me no real assistance. It is no assistance to look and see what items in other

(1) 15 T.C. 374.

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circumstances have been held to be within the statute or not. I have no doubt about contracts A and B. They seem to me to be tolerably clear, clean cut and precise.

When I come to contract C the position is different. First of all the obligation to pay under contract C has really gone. The executors in the course of administering the estate and winding it up made a new bargain. They have made an agreement in the course of collecting what otherwise I should have held was a debt of an unascertained amount due to the estate on the death of Mr. Howard. The £10,000 was an accruing debt, but it was none the less a debt because the date of payment had not arrived, and in effect they released it. There was a new bargain altogether. In so far as both the £10,000 under contract C is concerned and the two-thirds of the sums received I should have thought both of those were not susceptible of tax for the same reasons that I have given with regard to contracts A and B; but I have not to look at it from that point of view. I have to look at it from the point of view of the new bargain that has been made. The old contract has gone. It is all very well to talk about a variation. Everything had been performed by Mr. Howard under that contract at the date of Mr. Howard's death; all that was left was an obligation on the part of the company to pay the remuneration which Mr. Howard had earned in his lifetime, although the date of payment had not arrived. When the executors in effect release £10,000, substitute another sum payable by instalments on different dates, change the incidence of the two-thirds for a sum over and above £11,000 and the £11,000 is to be retained in the coffers of the company to enable them to pay the £11,000 which is the substituted amount, it seems to me that the matter falls to be looked at from an entirely different angle and through a different pair of spectacles. The Crown do not attempt to put this on the basis of Case III. They put it simply and solely on Case VI; see paragraph 4 of the Case Stated. On second thoughts I do not think I am doing them quite justice there. It is that the £11,000 is assessable under Case VI and therefore I must in this branch of the case look to see what Case III says and I must look at the authority which has been cited as to what the effect of Case III is. As to the £11,000 it seems to me that this is merely an arrangement for the giving of time for a debt which was accruing and was outstanding at the date of the death of Mr. Howard.

With regard to the rest of contract C, the particular compartment of Case III into which this is alleged to fit is this. Perhaps I ought to go back to the general division of the subjects of charge under Schedule D. It is on page 164 of the Brown Book. "Tax under this Schedule shall be charged "in respect of—(a) The annual profits or gains arising or accruing"—the particular one is (ii)—"to any person residing in the United Kingdom from "any trade, profession, employment, or vocation, whether the same be respectively carried on in the United Kingdom or elsewhere". Then paragraph 2: "Tax under this Schedule shall be charged under the following "cases respectively; . . . Case III.—Tax in respect of profits of an uncertain "value and of other income described in the rules applicable to this Case". "Profits of an uncertain value" means, I suppose, incapable of ascertainment. But again, if a time will come when these profits can be ascertained then tax will be assessed on an assessment raised on those profits. "Other income described in the rules applicable to this Case"—I look and see the Rules of Case III, and the first one is Rule 1 (a)—"Any interest of "money, whether yearly or otherwise, or any annuity, or other annual pay-

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"ment". Then one has to look to see how that is defined: "whether such payment is payable within or out of the United Kingdom, either as a charge on any property of the person paying the same by virtue of any deed or will or otherwise, or as a reservation thereout, or as a personal debt or obligation by virtue of any contract, or whether the same is received and payable half-yearly or at any shorter or more distant periods".

Unaffected and untrammelled by authority I should have thought the dominant words in that Rule are the words "any interest of money". It is a method of bringing into tax other income described in the Rules applicable to the Case. It is "any interest of money". Then follows "whether yearly or otherwise, or any annuity, or other annual payment, whether such payment is payable within or out of the United Kingdom", and then I repeat, "whether . . . payable . . . either as a charge on any property . . . or as a reservation thereout, or as a personal debt or obligation by virtue of any contract". It is not merely that there is a personal debt or obligation. I have to look to see whether there is "any interest of money, or any annuity, or other annual payment". Those are the words which I think matter.

Again untouched by authority I should have had the greatest difficulty in appreciating how it is suggested that this share of profits can be "any interest of money, or an annuity, or other annual payment", and I include in these observations not merely the deferred money which is payable under contracts A and B but also the money payable under contract C and the share of receipts payable under contract E. But I am not left without authority about it. It is one of the things which has caused me more difficulty and anxiety than any other part of this case, because there was cited to the Special Commissioners and has been cited to me the case of *Asher v. London Film Productions, Ltd.*, [1944] 1 K.B. 133. That was a case which appropriately enough had to do with the production of motion pictures. The plaintiff, who, be it observed, was not dead but was alive, was engaged under a contract by which, in addition to certain fixed payments, he was to receive certain percentages on takings and other benefits as remuneration for his services in the production of motion pictures. The plaintiff agreed to cancel that service agreement and he thereby expressly released all claims to remuneration and other benefits under it. In consideration of the termination of the service agreement it was agreed that the plaintiff was to receive, amongst other things, 60 per cent. of the takings, if any, in excess of £110,000 from two named motion pictures. Certain payments became due under the agreement and the defendants in making those payments deducted tax at the source at the appropriate rate then in force. The plaintiff denied their right to make the deduction and the two parties to that contract sat down and staged a friendly action to decide whether the deduction at the source was correctly made or not. As was pointed out by the learned Judge—whether it was said by the Master of the Rolls or not I do not know—the Crown was not a party to the action at all and there was no method apparently by which they could be made a party. Nevertheless it is a decision which binds me. Atkinson, J., apparently decided that the deduction was correctly made. The point was argued, I am told, before him that this sum of 60 per cent. of the takings was a capital payment, consideration money for the cancellation of the service agreement, but as I gather from the facts it was only one of many items about which the parties agreed when they were severing their business

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relation. It is not capable of being stated so simply. Atkinson, J.'s, perhaps not unnatural decision was that it was not a capital payment and I understand that in the Court of Appeal, where the case went, the point was not further raised or discussed. I am not sure that it is possible to say under which Schedule he held that the tax was rightly deducted but it was held that the defendants were entitled to deduct tax under Rule 21 of the All Schedules Rules. The plaintiff, not being satisfied with that, appealed and the Court of Appeal held a number of things. They held that the plaintiff was not carrying on a vocation within Case II of Schedule D because he had ceased since the term of the agreement was that he was to stop serving under the agreement and apparently there was nothing else said about what his business was. Nor were the payments to him under the cancellation agreement either remuneration for services or a pension taxable under Schedule E. The Court of Appeal held that Case III, Rule 1 (which I have read and examined) of Schedule D, would cover the payments by the words "any annual payment . . . payable . . . as a personal debt or "obligation by virtue of any contract". They held that those payments being "pure income profit" tax was properly deductible under Rule 21 of the All Schedules Rules and that Case VI of Schedule D was automatically excluded by the application of Case III.

The trouble I have in this case is that Schedule D, so far as the £11,000 is concerned, apparently was only raised under Case VI and not under Case III at all; but the decision binds me and I have to look and see exactly what it was that was decided on the terms of the particular agreement. It is unlike the present case because the person whose money it was was alive and had entered into this arrangement. The money went to him and not to anybody else. It was therefore not a case of a debt which had accrued due or a right to receive money by way of remuneration which had accrued due. It was a new bargain under which the liability to pay the money, to account for the receipts, was not in existence. They had cancelled all of it in the *Asher* case⁽¹⁾, and it was a new obligation arising from the new contract. I have to seek to apply the reasoning of that to this present case where the man who had earned the money was dead and where executors, who were engaged in collecting the assets of his estate, had entered into this obligation. In so far as they were merely giving time by the terms of the agreement for payment of a sum which was a debt, the payment of £10,000, it seems impossible to hold that that £11,000 was a sum which attracted tax. It is merely giving time and accepting payment of a debt by instalments, a sum which in the hands of the executors is capital money upon which they would have to pay Estate Duty. I have no doubt about that although I do not think that topic has been mentioned at the Bar. Accordingly I am quite unable to see that this £11,000 falls to be taxed under Case III, subject to what I am going to read from the judgment of Lord Greene, M.R., to see whether, notwithstanding that view which I am expressing, I am obliged and constrained by this authority to decide the other way. So much for the £11,000. Does that open the door to say, "Well, here is a sum of money; it has not paid any tax under any Schedule; it is not liable to pay any tax under any Schedule; therefore it comes within Case VI"? Having regard to what I have stated I do not think that it comes within the general words of the introductory Rule under Schedule D—annual profits or gains arising under subheads (i), (ii) and (iii),

(1) [1944] 1 K.B. 133.

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and (b) "All interest of money, annuities, and other annual profits or gains not charged under Schedule A, B, C or E, and not specially exempted from tax". I do not think it fits into any of those headings and accordingly I come to the conclusion that the Special Commissioners were right as regards the £11,000, again subject to what I am going to read in a moment or two to see whether there is any distinction to be drawn between that and the facts of this case.

That leaves over the decision which has to be made about the two-thirds over £11,000 of the receipts of the company from the exploitation of the film under contract E. That is alleged to come under Case III. I think that is right.

The Solicitor-General.—Case III or VI.

Croom-Johnson, J.—I must look and see whether again I am constrained to hold that it is. I cannot see how, without straining language, it can be. It is not "interest of money" obviously. If it is to come in at all it must come in as "any annuity, or other annual payment . . . payable . . . as a personal debt or obligation by virtue of any contract". It is a lump sum payment to be ascertained no doubt by payments by instalments within a year after each lot of money—I am not using a term of art—comes into the coffers of the company under the contract, subject of course to the overriding right to retain the first £11,000 of the two-thirds. Again I have the greatest difficulty in seeing how anybody can say that such a sum of money, arising initially out of a contract of employment but now recoverable, and only recoverable, by the executors in an action if they pleaded their own agreement, contract E, can be held to come within the terms of Case III. That is my view of this particular contract and the circumstances of this particular case.

I now go to see precisely what was the language used by the members of the Court of Appeal, to see whether notwithstanding that view I must decide to the contrary. The argument in the Court of Appeal in the *Asher* case⁽¹⁾ was that this undertaking to which the plaintiff in the action himself was a party, under which he was to retire and *inter alia* to receive 60 per cent. of the takings, if any, in excess of £110,000 from two motion pictures, was "an annual payment by virtue of any contract". Mr. Scrimgeour's argument for the defendants was: "Here is a man who has agreed to surrender a profitable contract of employment, in consideration of payments, uncertain in amount, measured by a percentage of the other party's profits on certain transactions." Therefore there was a profit element in the case. The case which is for decision now is a case in which there is no element of profit; the two-thirds over the £11,000 is to be two-thirds of their receipts whether they make a profit or loss. No authority was cited by Mr. Scrimgeour for that proposition, and that was the quite simple argument. Lord Greene, M.R. at page 140, after dealing with the right to deduct (which does not arise in the present case at all) comes back to see what his decision ought to be with regard to the 60 per cent. "Turning back to schedule D the case for the defendants is that these payments fall under Case III. It seems to me that, once Case II is excluded . . ." (it is excluded for the very simple reason that the gentleman had given up his vocation, just as Mr. Howard has in the present case) ". . . and once sch. E. is excluded, the language of r.1 (a) of Case III covers the present case. These payments are payable as a 'debt or obligation' by virtue of

(1) [1944] 1 K.B. 133.

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“this contract which, as Mr. Scrimgeour rightly points out, is the sole source of income. Therefore, it seems to me that the language falls precisely within the language of r.1 (a).” It will be observed so far that the learned Master of the Rolls has not called attention to the fact that in order to qualify, to come within the class, it either has to be a payment of interest or it has to be an annuity or other annual payment; but he goes on to deal with that in the last two lines on that page⁽¹⁾. “The payments are annual payments in the sense that they have that recurrent quality which is the distinguishing mark differentiating an income payment from a capital payment for these purposes.” I do not see that because a thing has a distinguishing mark differentiating it from a capital payment and therefore it is an income payment, that turns it into an annual payment. He goes on: “You can have an annual payment under this rule, even though it happens by some accident or other to fall due in one year only”. I can see many cases where even an annuity granted as an annuity may by some accident happen to be paid and only fall due in one year. The Master of the Rolls continues: “The question is, has it the necessary periodical or recurrent quality?”. I confess I find that a very difficult decision to understand, but I must give full weight to it, and I do. It binds me to decide this case, if it comes within that language, in the same way. Does it? I can find nothing here of a recurrent quality. There is nothing suggested in this case, under contract E, as being recurring. Let me look again and see. I have already drawn the distinction that this is not a sum payable out of anybody’s profits at all; it is a sum which is payable out of the receipts by the company. The only thing recurring about it, if that is the right expression which I doubt in the circumstances of this case, is that the sum is to be two-thirds of the actual sum already or hereafter received in respect of the exploitation of the said film in excess of the sum of £11,000. It does not seem to me that of necessity there is anything recurring in that. You may get more than one payment, but it is a payment on account of the totality of the share of the receipts to which the executors have become entitled by virtue of this bargain in substitution for the original bargain. I think therefore, on the facts and circumstances of this present case, it is quite different from the case with which the learned Master of the Rolls was dealing and it is quite distinguishable from the particular things he was considering. He was considering the terms of a special contract which existed in that case just as I am considering what I think is a special and different contract in the present case, producing as I think, different results.

Perhaps as Mr. Hills devoted some attention to it I ought to deal with one observation of Mr. Graham-Dixon. He apparently sought to support the decision of the Special Commissioners by saying that this bargain under contract E had “its roots” in the arrangement between Mr. Howard and the company, which is contract C. It will not say I have a distaste for but I am shy and suspicious of similes in the Law Courts. They very often lead to an obscuring of legal principles and of the true effects of documents which have to be considered. If by having its roots in the original bargain Mr. Graham-Dixon means no more than this: if there never had been a contract C there never would have been a contract E, then I agree with him, but that does not seem to me to give any assistance at all in coming to a conclusion about the incidence of tax. Mr. Hills will not mind my

⁽¹⁾ [1944] 1 K.B. at p. 140.

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saying that I think his criticism of that observation of Mr. Graham-Dixon was not without point. I will say no more about it than that. I do not regard that as a factor, either decisive or indecisive, in the case at all, but it is just one of those things which happen—but for contract C there would never have been contract E. How that assists me in deciding what the net result of contract E is from the point of view of tax I do not know. I have dealt with this, I hope, thoroughly and sufficiently, although it looks to me to depend very much upon the question as to what the Inspector of Taxes statement made to the Special Commissioners was. I come to the conclusion that an interlocutory observation of mine in the course of Mr. Hills' argument that the Inspector of Taxes had given the go-by to contract E is not correct. I do not think he gave up anything, except that for some reason or other, good, bad or indifferent, he thought it right to say that he did not rely on the countervailing contract or obligation of the executors. I think one must take that into account. I do not think you can give the go-by, if that is the right word, to that obligation. It is part of the arrangement which was made in order to collect effectively, through the machinery of contract E, the debt which was otherwise accruing due under contract C. In those circumstances, although possibly for not quite the same reasons as given by the Special Commissioners, I have come to the conclusion that the Special Commissioners were right on this branch of the case as well.

Accordingly this appeal must be dismissed, with costs.

An appeal having been entered against the above decision the case came before the Court of Appeal (Sir Raymond Evershed, M.R.; Somervell and Jenkins, L.JJ.) on 15th, 16th and 17th March, 1950, when judgment was reserved. On 5th April, 1950, judgment was given, allowing in part the Crown's appeal (Jenkins, L.J. dissenting).

The Solicitor-General (Sir Frank Soskice, K.C.) and Mr. Reginald P. Hills appeared as Counsel for the Crown, and Mr. L. C. Graham-Dixon for the Respondents.

Sir Raymond Evershed, M.R.—The relevant facts relating to the present appeal have already been set out in the Case and in the judgment of Croom-Johnson, J. They are further summarised in the judgments of my brethren which I have had the advantage of seeing. My brethren have also referred in their judgments to the material parts of the relevant film contracts and to the language, so far as necessary, of Schedule D of the Income Tax Act, 1918. It is therefore unnecessary for me to relate these matters once again.

The Crown claims in the appeal to levy tax upon the executors of the late Mr. Leslie Howard Stainer in respect of four distinct subject-matters for some or all of the tax years 1944-45, 1945-46 and 1946-47, namely: (i) a proportion of the gross receipts (as defined in the contract known as Exhibit "A") of the film *Mr. Pimpernel Smith*, (ii) the sums paid as representing or in respect of 14/49ths of "the ultimate net profits" (as provided by the contract known as Exhibit "B") of the distribution of the film *49th Parallel*, (iii) sums paid in instalments of the single sum of £11,000 payable by virtue of the two contracts known as Exhibit "C" and Exhibit "E" in respect of the film *The First of the Few*, and (iv) further amounts representing the deceased's two-thirds share of the sums

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actually received by the film company in respect of the exploitation of the film *The First of the Few* as also provided by the contracts Exhibits "C" and "E". The Crown has claimed to be entitled to tax the subject-matters (i), (ii) and (iv) under Case III of Schedule D or, alternatively, under Case VI of that Schedule. The Crown's claim in regard to subject-matter (iii) is based only on Case VI.

Both my brethren agree with the view of Croom-Johnson, J., and the Special Commissioners in rejecting the claims of the Crown in respect of (ii) and (iii). I am of the same opinion, and for the reasons which are found in my brethren's judgments which (as I have said) I have seen. The Solicitor-General and Mr. Hills will not, I hope, regard me as unappreciative of their arguments if I refrain from what would be merely repetitive. I also agree with my brethren—and this matter is relevant to the last item (iv)—that the nature and quality of the sums received in respect of the film *The First of the Few* have not been affected by the circumstance that the terms of Exhibit "C" were varied by Exhibit "E", to which contract the executors were themselves parties. But as regards items (i) and (iv) (which do not differ in principle) my brethren have reached different conclusions. I think the matter a difficult one; and it appears to me strange that upon such a matter there is such paucity of authority. But, having given to it my best consideration, I have on the whole arrived at the conclusion which has commended itself to my brother Somervell, namely, that in respect of these items the Crown is entitled to succeed under Case III. Having regard to the different view taken by the Judge and the Commissioners as well as by my brother Jenkins, I will state in my own words the grounds on which I think that conclusion is justified.

In the first place I think that the fact that the sums in question were payable as part of the consideration for the professional services of Mr. Howard, and would, if received during Mr. Howard's lifetime, have been brought into account as professional receipts for the purposes of his assessment under Case II of Schedule D, cannot of itself be conclusive. Such a result would in my judgment be contrary to principle and common-sense and also, I think, to the authority of this Court in *Asher v. London Film Productions, Ltd.*, [1944] 1 K.B. 133, and to Rowlatt, J.'s conclusion in *Bennett v. Ogston*, 15 T.C. 374, as regards that part of the repayment instalments in that case which represented interest. I do not, so far, understand that I differ from Jenkins, L.J.

Second—and if I am thus far right—the question in each case must be whether the sums in question, once they have ceased to be capable of taxation under Case II by reason of the fact that the professional man who acquired the right to receive them has died or ceased to exercise his profession, nevertheless have such characteristics as fairly bring them within the compass of the relevant words of Case III, and more particularly the words of Rule 1 (a) of the Rules applicable to Case III: "Any . . . annual payment . . . payable . . . as a charge on any property of the person paying the same . . . or as a personal debt or obligation by virtue of any contract . . .". Thus, if a film company under such a contract as is here in suit contracted as part of the consideration for the services of an actor-producer to pay each year, for say 15 years, a particular sum charged on the company's interest in the film or all its films, or a specified portion of its distributable profits, I should have thought that, *prima facie*, payments made after the actor producer's death or retirement would have

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the necessary income quality for taxation under Case III, though during his professional life they would have been brought into account for the purposes of his taxation under Case II. On the other hand, if the reward or consideration for the actor-producer's services were a single sum presently fixed or ascertainable in the future but payable without interest by instalments, then instalments received by the actor-producer after retirement from his profession or by his estate after his death would not qualify for assessment under Schedule D; for example, the items (ii) and (iii) in the present appeal.

The distinction will often be fine, and I think it is so in the present case. In many instances the proper determination of the question may be a matter of fact. In the present case the Commissioners were (as I read their findings) of the view that payments which, if received in Mr. Howard's lifetime, would have been brought into account under Case II cannot therefore after his death be taxed at all. "In our opinion", said the Commissioners in paragraph 6 of the Case, "remuneration continues to be remuneration although the person who has earned it has died, and can only be charged under its proper Schedule and Case, in this instance Case II of Schedule D . . . during Mr. Howard's lifetime it was not an annual payment for the reasons stated and its nature does not change because the profession ceases . . .". They accordingly expressed no finding in regard to the character of the sums in question. It is therefore necessary to determine that character from an examination of the relevant terms of the respective contracts.

As regards *Mr. Pimpnel Smith* the relevant proportion of "gross receipts from the distribution" of the film is by clause 5 (b) of Exhibit "A" expressed to be "after deduction of the agreed distribution charges, cost of copies, cost of advertising, cost of trade showing and all other . . . costs"; and clause 7 (b) provides (as regards the share derived from exploitation elsewhere than in the American continent) that the amount found due on the first of each month is to be paid as therein specified. In my judgment the payments which by these provisions were liable to run from month to month over an unspecified period have the necessary quality of annual income payments within the language of Case III. In my view a like quality attaches to the two-thirds of the sums from time to time received by the film company in respect of the exploitation of the film *The First of the Few* which two-thirds (by the terms of clause 11 (c) of Exhibit "C") were to be paid "within one year from the receipt by the Company from time to time of such sums."

The point is a short one and may perhaps be in some measure one of first impression. For the reasons which I have attempted briefly to state and which do not, I conceive, lend themselves to elaboration, as well as those given by Somervell, L.J., I think that, as regards items (i) and (iv), the Crown is entitled to succeed and that the appropriate Order is that about to be proposed by my brother Somervell.

Somervell, L.J.—This appeal relates to three assessments made on the executors of Mr. Leslie Howard Stainer, better known as Mr. Leslie Howard, a film actor and producer, who lost his life as a result of enemy action in June, 1943. The assessments are for three Income Tax years, 1944-45, 1945-46 and 1946-47. The sums sought to be assessed were paid under contracts made by Mr. Howard. The first contract in order of date is Exhibit "A". It was made between Mr. Howard and British National Films, Ltd. It recited that Mr. Howard was the owner of the story and

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shooting script called *Mr. Pimpernel Smith*, and that the company had agreed in association with the producer to make and produce a talking picture based on the story. The company were to bear the costs. The producer was to act as producer and play the leading part. The picture when completed and all rights therein were to be the sole property of the company.

The provisions with which we are concerned deal with remuneration and are contained in clause 5 and clause 7 (b) and (c) which I will read: "5. For all his services to be rendered under this Agreement, whether in respect of producing, directing or acting in the said picture, the Producer shall be entitled by way of remuneration: (a) To receive from the Company the sum of £5,000 (five thousand pounds) cash payable during production in six weeks instalments on the last day of each week commencing with the commencement of shooting of the picture. (b) To a proportion of the gross receipts as follows:—Of the gross receipts from the distribution of the said picture in the United Kingdom, British Empire and Europe 40 per cent. and of the gross receipts from the distribution of the said picture in the United States, Central and South America, 50 per cent. in each case after deduction of the agreed distribution charges, cost of copies, cost of advertising, cost of trade showing and all other agreed costs.

"... 7 (b): All monies received by the Company from the distribution and exploitation of the said picture, otherwise than in respect of the United States of America, Canada and Central and South America, shall be paid into a separate account in the name of the Company in the Mercantile Bank of India Limited in London, and such part of the money standing to the credit of such account on the first day of each month as is found to be due to the Producer shall be paid to him by cheque drawn on such account. (c) The Producer's share of all moneys received by the Company from the distribution and exploitation of the said picture in respect of the United States of America, Canada and Central and South America, if received in the currencies of those countries or any of them shall be deposited by the Company in its name or in such name or names as the Producer shall require in such Bank or Banks in the United States of America, Canada, Central or South America as the Producer shall designate."

The second contract, Exhibit "B", was dated 13th December, 1940, and was with Ortus Films, Ltd. Mr. Howard was to act in and otherwise assist in the production of a film entitled *49th Parallel*. The provisions with which we are concerned are contained in clause 7 which I will read: "If Mr. Howard shall duly observe and perform the agreements on his part herein contained the Company shall pay to him in respect of the said film the following remuneration namely: (a) the sum of Two thousand pounds by [blank] weekly instalments the first instalment to be payable on the Friday of the week during which Mr. Howard's engagement shall commence and subsequent instalments to be payable on the Friday of each subsequent week. (b) A sum equal to Fourteen-forty-ninths of the Company's share in the ultimate net profits of the distribution of the said film." Mr. Howard gave the company any and all consents required under the Dramatic and Musical Performers Protection Act, 1925 (clause 13), and the full copyright was vested in the company (clause 18).

The third agreement, Exhibit "C", was dated 18th September, 1941, and was with Misbourne Pictures, Ltd. Mr. Howard was to act as producer-

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director and to perform in a film known as *The First of the Few*. The clause dealing with remuneration is clause 11, which I will read: "If Mr. Howard shall duly observe and perform the agreements on his part herein contained the Company shall pay to him in respect of the said film the following remuneration:—(a) the sum of Five thousand pounds by ten weekly instalments the first instalment to be payable on the Friday of the week during which the shooting of the film shall commence and subsequent instalments to be payable on the Friday of each subsequent week. (b) the sum of Ten thousand pounds to be paid within two years and six months after the Trade Show or the premiere of the said film whichever shall be the earlier. (c) a sum equal to two-thirds of the actual sums from time to time received by the Company in respect of the exploitation of the said film (not including in such sums any sums advanced to the Company in respect of the cost of production of the film) such two-thirds share to be paid within one year from the receipt by the Company from time to time of such sums." There were similar clauses as to performing rights and copyright as were contained in Exhibit "B". A further point arises under an agreement made by the executors with Misbourne Pictures which I will deal with later.

The film under Exhibit "A" was made in 1940. The sum of £5,000 was paid and included in Mr. Howard's Income Tax account under Case II of Schedule D which imposes "Tax in respect of any profession . . . or vocation not contained in any other Schedule". No question arises as to this. In each of the years with which we are concerned, sums were received by the company from the distributors of the film and the proportion of gross receipts under clause 5 (b) was paid to the executors without any deduction of tax.

The film under Exhibit "B" was also produced, the £2,000 was paid, and no question arises as to that sum. During the year ending 5th April, 1945 and 1946, substantial sums were also received by the executors under clause 7 (b) in respect of the 14/49ths of the company's share in the ultimate net profits without any deduction of tax.

The film under Exhibit "C" was made in 1941 and 1942. The trade show was in August, 1942, so that the sum of £10,000 would have been due early in 1945. A rearrangement was made with Mr. Howard during his lifetime, though no agreement was executed. This rearrangement was however affirmed by the executors and is set out in Exhibit "E". In place of the sum of £10,000 the company was to pay a minimum sum of £11,000 by four instalments of £2,000 and a last of £3,000 annually on 31st December from 1943 to 1947. With regard to the two-thirds of the sums actually received, this was to operate only after providing for the £11,000. In no case was any sum to be paid under this provision before 1945 and there was a maximum limit of £2,500 in any one year up to 1947.

During Mr. Howard's lifetime he was assessed under Case II of Schedule D in respect of all his receipts from all his film contracts, and he was entitled in computing the profits of his profession to set against such receipts his expenses, as allowed, of carrying on his profession. The sums which became due in financial years after the films had been made, whether as lump sums or as shares of profits, were not entered and valued as profits of the year when the services were performed, but brought in when paid.

It was common ground that there could in respect of the present claims be no assessment under Case II as Mr. Howard had died before the years

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with which we are concerned. The profession was not being carried on at any relevant time. The Crown contended that the sums in question other than the £11,000 were assessable under Case III as annual payments, or in the alternative, under Case VI, and that the £11,000 was assessable under Case VI.

The relevant statutory provisions are as follows: Case II, I have already read. The relevant Rule 1 (a) of Case III has already been read by the Master of the Rolls, and I need not read it again. Case VI says: "Tax in respect of any annual profits or gains not falling under any of the foregoing Cases, and not charged by virtue of any other Schedule".

I will consider first the sums payable as a share of gross profits under clause 5 (b) of Exhibit "A". The same principle would, in my opinion, apply to the two-thirds of the sums actually received under Exhibit "C" as modified by Exhibit "E", though it is not clear from the Case whether anything more has in fact been received than the amounts of the instalments of £11,000. Accepting in favour of the executors the Commissioners' view that these sums, if paid, could not, while Mr. Howard was exercising his profession, have been assessed otherwise than under Case II because they were not in his hands "pure income profit" (see *Asher v. London Film Productions, Ltd.*, [1944] 1 K.B. 133), it does not, in my opinion, follow that their nature may not change if the profession has ceased before they become payable and are paid. The most helpful of the authorities in my opinion is *Bennett v. Ogston*, 15 T.C. 374. Mr. Bennett was a moneylender. He made loans and took promissory notes covering periodical instalments of principal and interest. While he was alive the full amounts of the instalments were credited as receipts in his Case I assessment when due and paid. No account was taken of the outstanding instalments. Mr. Bennett died and instalments falling due after that date were collected by the administrator. It was not suggested that the administrator was at any time carrying on any trade. The Crown did not contend that Income Tax was payable on the full amount of the instalment, although that full amount was a receipt of the business when it existed. So much of the instalment as represented repayment of principal was not taxable. The rest of the instalments represented interest of money on principal sums outstanding and unpaid at the death. Case III taxes "interest of money", and Rowlatt, J., held that that part of the instalment was taxable. The case illustrates two points. First, a sum which would be a business receipt while the business continued may not be taxable if it becomes due and payable after the business has ceased. Second, sums which fall within the words of Case III may be trade receipts while a business is being carried on, but taxable under Case III if payable after the business has ceased.

Coming back to the shares of gross profits payable under clause 5 (b) of Exhibit "A", are they annual payments? To be so there must, *prima facie* (at any rate as I read the authorities) be some element of actual or potential recurrence. I will read a passage from Lord Macmillan's speech in *Moss' Empires, Ltd. v. Commissioners of Inland Revenue*, 21 T.C. 264, at page 298. He said this: "At your Lordships' Bar it was argued for the Appellants that the payments were not annual payments inasmuch as they were casual, independent, not necessarily recurrent and throughout subject to a contingency. This argument commended itself to Lord Moncrieff, but I am unable to accept it. There was a continuing obligation extending over each and all of the five years to make a payment to the Trustees for

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“the shareholders in the event of the Company earning no profits or insufficient profits. The fact that the payments were contingent and variable in amount does not affect the character of the payments as annual payments.” The next sentence makes clear that Lord Macmillan meant annual payments within the meaning of Rule 1 of Case III. In that case if the company had made sufficient profits, just as here if the film had made no profits, no sum would have been payable in any year. The obligation was there limited to five years, whereas here it will continue as long as the film makes profits. Assisted by this passage and giving the words their natural meaning, I have myself no doubt that these were annual payments. This film was made in 1940. It was still making profits and the share stipulated for was being paid in 1947. I do not of course suggest that the application of the principle depends on the life of the film, but by way of illustration take the case of a film which has a very long life. The principal actor has had an agreement similar to this. He dies leaving his rights under it to X, who for 10 or 20 years receives annually a cheque or cheques representing the share of the profit for which the deceased had stipulated. Unless there is some principle that sums which would be the receipts of a profession, if it had continued, can never be taxed under Case III when the profession ceases I fail to appreciate how it can be said that these are not annual payments. The suggested principle was negatived by Rowlatt, J., in the case cited of *Bennett v. Ogston*⁽¹⁾, and it seems to me contrary to the Act as well as to what at any rate seems to me common sense.

Mr. Graham-Dixon suggested at one time that the proper course was to tax the actor in the year in which the film was made on the estimated value of all his future rights. I think this would be both impossible and unjust. In the case of many films which looked like being successful and might be very successful, it would be quite impossible to estimate a figure. Nor can I see how sums not due could properly be brought in as professional earnings of the year in question. I do not think the argument is helped in any way by the woolcombers' case⁽²⁾. Mr. Graham-Dixon told us that there were documents not exhibited which showed that the Executors were put to expenses on which an argument could be based that these sums were not “pure profit income”. We ruled that these could not be admitted at this stage. On the documents in the Case there is nothing on which such an argument could be based.

But when one goes to Exhibit “B”, clause 7 (b), the sum there provided cannot in my opinion be regarded as an annual payment. The Solicitor-General felt this difficulty and invited us to construe it as meaning a share in the net profits payable from time to time. The parties may possibly have intended this, and the Case states that “sums” have been paid under this clause over a period of two years. We however must construe the clause as it stands. In my opinion it provides for a single sum to be ascertained when the film has had its day and, as a potential profit earner, ceased to be. On that construction it is of course possible that the company might make *ex gratia* payments on account, keeping enough in hand to provide for possible losses. This would not affect its nature for tax purposes. It provides, I think, for a single payment, contingent of course on there being profits, on the happening of a certain event and is not an annual payment. The £10,000 provided for in Exhibit “C” would have clearly fallen in the same category if it had been paid as a single sum. The Crown

(1) 15 T.C. 374.

(2) *Isaac Holden & Sons, Ltd. v. Commissioners of Inland Revenue*, 12 T.C. 768.

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had not contended below that the instalments under Exhibit "E" were annual payments, but as it will be necessary to consider their nature when one comes to Case VI, I agree with the learned Judge that Exhibit "E" was an arrangement for the giving of time for a debt with, of course, certain adjustments as to the payment of the share of profits.

What, therefore, has now to be considered is whether the ultimate net share of the profits under Exhibit "B" and the instalments of the £11,000 under Exhibit "E" are assessable under Case VI. There is an interesting consideration of Case VI in Rowlatt, J.'s judgment in *Ryall v. Hoare*, 8 T.C. 521. The relevant words are: "Tax in respect of any annual profits or 'gains' not falling under any other Case or Schedule. Rowlatt, J., held that 'annual' here meant 'in any one year', so there is no difficulty in applying Case VI to a single transaction. The case concerned commission for guaranteeing an overdraft. This was not 'in the line of business' of either of the individuals sought to be assessed. It was however in the nature of an emolument 'by virtue of some service rendered', and was therefore held by the learned Judge to be a profit or gain within Case VI. The learned Judge applied the same principle in *Sherwin v. Barnes*, 16 T.C. 278, and *Grey v. Tiley*, 16 T.C. 414.

The problem can be approached in two ways, both leading, as it seems to me, to the same conclusion. First, these sums are, I think, in the same position *qua* the Income Tax Act as the amounts of the instalments other than interest in the moneylender's case⁽¹⁾; sums which would have gone in to the account under Case I or Case II if they had become due and paid while the trade or profession was being carried on, but which are not taxable if paid after that date. It may be said that in *Bennett v. Ogston* Case VI was not considered. I therefore turn to the second approach. These sums were remuneration payable *in futuro* for Mr. Howard's professional services. If he had lived they would, when paid, have been a credit item in his Case II account. Their income character depended on their coming into Mr. Howard's professional account and I cannot see how they can be said to have that character in the hands of the executors. It is not suggested the executors are carrying on Mr. Howard's profession. These sums are not a reward for any service rendered by them and do not seem to be within the words of Case VI.

The learned Judge felt considerable difficulty about the issue on which I think the Crown succeeds. For the reasons I have given I have come to a different conclusion on that point and the appeal succeeds to the extent indicated. The Case will have to be remitted so that the assessments appealed against can be reduced by deducting any sums received under clause 7 (b) of Exhibit "B" and any sums received in respect of instalments of the £11,000 under Exhibit "E". Sums received under clause 5 (b) of Exhibit "A" and sums, if any, received under clause 11 (c) of Exhibit "C" are assessable.

Jenkins, L.J.—The question in this case is whether the executors of Mr. Leslie Howard Stainer, the distinguished film actor and producer, better known under his professional name of Leslie Howard, who died by enemy action on or about 1st June, 1943, are liable to Income Tax on any, and if so which, of the following sums received since his death: (i) tax under Case III, or alternatively, Case VI of Schedule D on sums received by the executors during the years ended 5th April, 1945, 1946 and 1947, in respect

(1) *Bennett v. Ogston*, 15 T.C. 374.

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of Mr. Howard's share of the gross receipts from the distribution of a film called *Mr. Pimpernel Smith* under an agreement dated 31st October, 1940, and made between British National Films, Ltd., of the one part, and Mr. Howard of the other part (being Exhibit "A" to the Case Stated and hereinafter called "contract A"): (ii) the like on sums received by the executors during the years ended 5th April, 1945, and 5th April, 1946, on account of Mr. Howard's share of the ultimate net profits of the distribution of a film called *49th Parallel* under an agreement dated 13th December, 1940, and made between Ortus Films, Ltd., of the one part, and Mr. Howard of the other part (being Exhibit "B" to the Case Stated and hereinafter called "contract B"): (iii) the like on sums received by the executors in the years ended 5th April, 1945 and 1946, in respect of the share payable to them of the actual sums from time to time received in respect of the exploitation of a film called *The First of the Few* under an agreement dated 18th September, 1941, and made between Misbourne Pictures, Ltd., of the one part, and Mr. Howard of the other part, as varied by an agreement dated 6th July, 1945, and made between the same company of the one part, and the executors of the other part (being Exhibits "C" and "E" to the Case Stated, and hereinafter called "contract C" and "contract E" respectively): (iv) tax under Case VI of Schedule D on a sum of £11,000 received by the executors during the years ended 5th April, 1945 and 1946, under contract C as varied by contract E. Assessments made on the executors for the years 1944-45, 1945-46 and 1946-47 were discharged on appeal by the executors to the Special Commissioners, whose determination was affirmed by Croom-Johnson, J., and the Inspector now appeals to this Court.

I need not read the contracts at length. Contract A, after reciting (*inter alia*) that Mr. Howard was the owner of the story and shooting script entitled *Mr. Pimpernel Smith*, provided (*inter alia*): (clause 1), that the company concerned should make and produce and Mr. Howard should co-operate with the company in making and producing a talking motion picture based upon the said story; (clause 2), that Mr. Howard should procure and assign to the company upon the execution of the agreement all rights of every kind in the said story necessary for the production by the company of the said picture; (clause 3 (b)), that Mr. Howard should act as producer and in addition should direct the said picture in association with another director to be approved by the company and Mr. Howard and should further play the leading part in the said picture; (clause 3 (g)), that the production of the said picture should commence as soon as was reasonably possible after completion and approval of the final shooting script and that it was intended that this should be on or about 21st November, 1940; (clause 3 (h)), that the shooting of the picture should take about six weeks; (clause 3 (i)), that the said picture when completed and all rights therein should be the sole property of the company.

The matter of Mr. Howard's remuneration was dealt with in clause 5 in the following terms: "For all his services to be rendered under this Agreement, whether in respect of producing, directing or acting in the said picture, the Producer shall be entitled by way of remuneration: (a) To receive from the Company the sum of £5,000 (five thousand pounds) cash payable during production in six weeks instalments on the last day of each week commencing with the commencement of shooting of the picture. (b) To a proportion of the gross receipts as follows:—Of the gross receipts from the distribution of the said picture in the United Kingdom, British

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“ Empire and Europe 40 per cent. and of the gross receipts from the distribution of the said picture in the United States, Central and South America, 50 per cent. in each case after deduction of the agreed distribution charges, cost of copies, cost of advertising, cost of trade showing and all other agreed costs. In addition to such remuneration the Company shall repay to the Producer all reasonable first class travelling and living expenses incurred on location work during the production, and if the Producer shall be required personally to present the said picture in the United States of America, the whole or a reasonable proportion of his travelling expenses to and from the United States of America and of his reasonable first class living expenses while there for the aforementioned purpose.” By clause 6 (a) and (b) provision was made for the monthly payment to Mr. Howard of any amounts due to him on account of his share of receipts otherwise than in respect of distribution in the U.S.A., Canada and Central and South America, and for the deposit in designated banks in those countries of his share of the receipts from distribution there.

Contract B provided (*inter alia*) as follows: (clause 1), that the Company concerned thereby engaged Mr. Howard and Mr. Howard thereby accepted employment from the company to perform in a film which the company proposed to produce which was provisionally called *49th Parallel*; (clause 2), that Mr. Howard's engagement should commence on 25th January, 1941, and continue for a period of a maximum of eighteen days, with provisions for the extension of that period in certain circumstances.

Clause 7 provided for Mr. Howard's remuneration as follows: “ If Mr. Howard shall duly observe and perform the agreements on his part herein contained the Company shall pay to him in respect of the said film the following remuneration namely: (a) The sum of Two thousand pounds by [blank] weekly instalments the first instalment to be payable on the Friday of the week during which Mr. Howard's engagement shall commence and subsequent instalments to be payable on the Friday of each subsequent week. (b) A sum equal to Fourteen-forty-ninths of the Company's share in the ultimate net profits of the distribution of the said film.” Clause 18 provided that the full copyright in any recording, photograph or other work done by Mr. Howard thereunder should vest in and be the sole and exclusive property of the company. No provision was made for any periodical payments to Mr. Howard in respect of his share in the ultimate net profits.

Contract C provided (*inter alia*) as follows: (clause 1), that the company concerned thereby engaged Mr. Howard and Mr. Howard thereby accepted employment from and agreed to render his exclusive services to the company as producer-director and to perform in a film which the company proposed to produce which was provisionally entitled *The First of the Few*; (clause 2), that the engagement of Mr. Howard commenced on 20th October, 1941, and should continue until the date on which the production of the said film was finally completed, which date was estimated to be 14th April, 1942. Clause 11 provided for Mr. Howard's remuneration as follows: “ If Mr. Howard shall duly observe and perform the agreements on his part herein contained the Company shall pay to him in respect of the said film the following remuneration:—(a) the sum of Five thousand pounds by ten weekly instalments the first instalment to be payable on the Friday of the week during which the shooting of the film shall commence and subsequent instalments to be payable on the Friday of each subse-

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"quent week. (b) the sum of Ten thousand pounds to be paid within two years and six months after the Trade Show or the première of the said film whichever shall be the earlier." (The trade show in fact took place in August, 1942). "(c) a sum equal to two-thirds of the actual sums from time to time received by the Company in respect of the exploitation of the said film (not including in such sums any sums advanced to the Company in respect of the cost of production of the film) such two-thirds share to be paid within one year from the receipt by the Company from time to time of such sums." Clause 18 provided that the full copyright in any recording, photograph or other work done by Mr. Howard thereunder should vest in and be the sole and exclusive property of the company.

By contract E, which was entered into by the executors on 6th July, 1945, pursuant to an arrangement agreed to in Mr. Howard's lifetime, and embodied in an unexecuted document (which is Exhibit "D" to the Case Stated) the remuneration provisions of contract C (therein called "the principal Agreement") were (by clause 1) varied so as to provide that: "(a) the sum of ten thousand pounds referred to in Clause 11 (b) of the Principal Agreement shall not be payable to the Executors but in lieu thereof the Company will pay to the Executors a minimum sum of Eleven thousand pounds by four instalments of Two thousand pounds payable not later than Thirty-first day of December in the years One thousand nine hundred and forty-three One thousand nine hundred and forty-four One thousand nine hundred and forty-five and One thousand nine hundred and forty-six respectively and a final instalment of Three thousand pounds payable not later than the Thirty-first day of December One thousand nine hundred and forty-seven (b) The sum referred to in clause 11 (c) of the Principal Agreement equal to two-thirds of the sums actually received by the Company in respect of the exploitation of the film referred to as therein mentioned shall not be payable but in lieu thereof the Company shall pay to the Executors a sum equal to two-thirds of the actual sums already or hereafter from time to time received in respect of the exploitation of the said film in excess of the sum of Eleven thousand pounds (not including in such sums any sums advanced to the Company in respect of the cost of production of the said film) the said sum of Eleven thousand pounds payable being retained by the Company to meet the sum of Eleven thousand pounds payable under Clause 1 (a) hereof. Provided always that no payment shall be made to the Executors under this sub-clause (b) before the year One thousand nine hundred and forty-five and that the total payment under this sub-clause (b) in any one calendar year before the year One thousand nine hundred and forty-seven shall not exceed the sum of Two thousand five hundred pounds. And provided also that in the year One thousand nine hundred and forty-seven the Company shall pay to the Executors any balance due under this sub-clause (b) up to and including that year".

Clause 2 of contract E provided that the executors would give all such assistance as the company might reasonably require in regard to the exploitation of the film in question and any re-issues thereof both with regard to advice and publicity and would use their best endeavours to procure the exploitation of the film outside the British Isles whenever conditions should permit.

It is clear that contracts A, B and C were in the nature of professional engagements entered into by Mr. Howard in the ordinary course of his

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profession or vocation as a film actor and film producer. His position in regard to Income Tax down to the date on which his profession or vocation was discontinued by reason of his death is thus described in the decision of the Special Commissioners: "While he was alive and working he was 'assessed under Case II of Schedule D in respect of the 'balance of the 'profits, gains and emoluments' of a 'profession or . . . vocation', the 'computation of such profits being made on what is termed an 'earnings 'basis'. It would appear from the case of *Davies v. Braithwaite*, 18 T.C. 198, that he was correctly so assessed, and the contrary was not suggested 'by either party before us. It is clear that so long as he was carrying on 'his profession all the remuneration set out above would fall to be included 'as a receipt in the account of the profits and gains upon which he would 'be so assessed and that the proper expenses would be deducted therefrom. 'It follows that none of the payments made to him could at that time be 'charged upon him as 'annual payments' under Rule 1 of Case III of 'Schedule D, since they were not in his hands 'pure income profit': see '*Earl Howe v. Commissioners of Inland Revenue*, 7 T.C. 289, and *Asher v. London Film Productions, Ltd.*, [1944] 1 K.B. 133, at page 140, where 'Lord Greene, M.R., uses that phrase to distinguish annual payments from 'payments forming an element in the computation of profits and gains."

On this basis the lump sums of £5,000, £2,000 and £5,000 payable under contracts A, B and C respectively which were duly received by Mr. Howard in his lifetime were brought into account for the purposes of his assessment to Income Tax under Case II of Schedule D, and no question arises in regard to them.

There remained the proportion of the gross receipts from the distribution of *Mr. Pimpernel Smith* payable to Mr. Howard under contract A, the proportion of the ultimate net profits of the distribution of *49th Parallel* payable to him under contract B and the £10,000 and two-thirds of the actual sums received in respect of the exploitation of *The First of the Few* payable to him under contract C, or the amounts substituted for the two last-mentioned items by the arrangement made in his lifetime to which formal effect was given by contract E.

In the assessments made on Mr. Howard under Case II of Schedule D no account was taken of the shares of receipts or profits prospectively payable to him under the various contracts, and as the amounts which might be received and the dates at which they might accrue were entirely unknown, it would obviously have been impossible to bring them into account. No valuation better than a mere guess could have been made of these prospective payments, and even if it had been practicable to deal with them in that way, the result would have been grossly unfair to Mr. Howard in view of the incidence of Surtax. Similarly, no account was taken of the £10,000 prospectively payable to Mr. Howard under contract C or of the £11,000 substituted for it by the arrangement to which I have just referred.

It was no doubt contemplated that all these amounts as and when received would be brought into account year by year in assessing Mr. Howard under Case II of Schedule D. But Mr. Howard unfortunately died and his profession was thereby discontinued. This brought to an end the liability of the profits of his profession to tax under Case II of Schedule D, subject to the appropriate assessment down to the date of discontinuance and other adjustments provided for under Section 31 of the Finance Act,

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1926, and subject also to the liability of his executors under Rule 18 of the General Rules as regards any profits or gains which arose or accrued to him before his death but were not returned by him for assessment in his lifetime, to be assessed to tax in respect thereof at any time within, or within three years after the expiration of, the year of assessment. Recourse was not had to Rule 18 within the prescribed period of three years, and it is not in dispute that the liability to tax of Mr. Howard's professional earnings as such is now exhausted. The executors have, however, in fact received since the death of Mr. Howard substantial sums in respect of the shares of receipts or profits payable to him under the several contracts and also in respect of the £11,000 payable in lieu of the £10,000 under contract C as varied by contract E.

It is contended on behalf of the Crown that although these sums were professionally earned by Mr. Howard in his lifetime, and although they can now no longer be assessed under Case II of Schedule D as profits of his profession, this does not conclude the matter, because the particular sums here in question, or at all events, the sums received by the executors in respect of the shares of receipts or profits accruing under the several contracts, possess in themselves the character of income, irrespective of the continuance or discontinuance of the profession in the course of which they were earned. It is pointed out that as these shares of receipts or profits were not and could not have been prospectively brought into account in Mr. Howard's lifetime for the purposes of his assessment to tax under Case II of Schedule D, they have never in fact borne tax, and unless now taxable in the hands of the executors will escape tax altogether. It is claimed that in these circumstances these shares of receipts or profits can properly be assessed to tax under Case III, or alternatively, Case VI of Schedule D.

Case III is: "Tax in respect of profits of an uncertain value and of "other income described in the Rules applicable to this Case". Rule 1 (a) of the Rules applicable to that Case is: "The tax shall extend to—
“(a) any interest of money, whether yearly or otherwise, or any annuity, “or other annual payment, whether such payment is payable within or out “of the United Kingdom, either as a charge on any property of the person “paying the same by virtue of any deed or will or otherwise . . . or as a “personal debt or obligation by virtue of any contract, or whether the “same is received and payable half-yearly or at any shorter or more distant “periods”. Case VI is in these terms: "Tax in respect of any annual “profits or gains not falling under any of the foregoing Cases, and not “charged by virtue of any other Schedule”.

It is I think reasonably plain that periodical payments in respect of a contractual right to a share in the receipts or profits of the distribution of a film acquired otherwise than in the course of a trade, profession or vocation falling within Cases I or II of Schedule D would be taxable under Case III, Rule 1 (a), as falling within the words "Any . . . annual payment . . . payable either as a charge on any property of the person paying "the same . . . or as a personal debt or obligation by virtue of any contract . . ."—see *Asher v. London Film Productions, Ltd.* (1).

This does not however take the case for the Crown the whole of the way. It may well be that if Mr. Howard had not been carrying on the profession of a film actor and producer or any other relevant profession,

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but had (for example) acquired by gift or purchase the copyright in certain films and had sold those films to a distributor for a lump sum plus a share in the profits to arise from their distribution, the share in the profits as and when it accrued to him or, after his death, to his executors would have been taxable under Case III of Schedule D. I apprehend that in these hypothetical circumstances the share of profits as and when it accrued would have been what Lord Greene, M.R., described as "pure income profit" in *Asher v. London Film Productions, Ltd.* (*supra*)⁽¹⁾, while the lump sum would have been capital. But the actual state of the case here is that under contracts A, B and C Mr. Howard in the course of his profession rendered professional services for remuneration consisting of the prescribed lump sums and shares of receipts or profits. This meant that for Income Tax purposes there was no distinction between the lump sums and the shares of receipts or profits. The former were not pure capital, the latter were not pure income; they were all in one and the same category as professional remuneration liable to be brought into account for the purpose of ascertaining the taxable profit of the profession. This would, I think, be accepted on the part of the Crown as a sufficiently accurate statement of the position as it stood so long as the profession was carried on. But it is claimed that on discontinuance of the profession a new liability arose with respect to the shares of receipts or profits remaining to be paid, which thereupon assumed the character of annual payments in the nature of pure income profit taxable in the hands of the executors under Case III of Schedule D. The Solicitor-General put it that the Crown had an option to tax either under Case II or under Case III, and it is no doubt true that in general, where income of a given description is such as to fall within the terms of two heads of charge, the Crown has an option to tax under whichever of the relevant heads it may select. But, as it seems to me, that is not this case. So long as the profession was carried on these shares of receipts or profits could not be taxed under Case III of Schedule D because they were earnings of a profession and not pure income profit. There was thus no option. It was Case II of the Schedule or nothing. After the discontinuance of the profession they could not be taxed under Case II of Schedule D as profits of any subsequent period for the very reason that they were earnings of a profession, which had been discontinued, received after such discontinuance. There was thus again no option. It was Case III or Case VI of Schedule D or nothing. It appears to me that the argument for the Crown involves not merely the exercise of an option but the assertion of a new and distinct liability to tax arising upon the discontinuance of the profession with respect to payments on account of the shares of receipts or profits received after such discontinuance. Perhaps the best way of putting the point is to describe the shares of receipts or profits as possessing the dual character of (a) professional earnings and (b) annual payments, the argument being in effect that so long as the profession was carried on their character as earnings precluded their assessment as annual payments under Case III of Schedule D, but that on the discontinuance of the profession this obstacle was removed and the sums in question became thenceforth simply annual payments to which the previously potential but suspended liability to tax under Case III of Schedule D thereupon attached.

The question thus is in effect whether in a case in which a person carrying on a profession performs professional services for remuneration,

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such as a share in the profits of a firm, to be received from time to time over a period, and dies or otherwise discontinues his profession before the whole of such remuneration has been received, the liability to tax in respect of such remuneration (whensoever received) is exhausted by his assessment to tax on the profits of his profession down to the date of such discontinuance under Case II of Schedule D; or the Crown can treat periodical payments in respect of such remuneration received after such discontinuance (and not in fact previously brought into account for tax purposes) simply as annual payments representing pure income profit taxable under Case III of Schedule D, disregarding its original character as remuneration earned in the course of the discontinued profession.

The point is one on which there is a remarkable dearth of authority, although one would think it must have arisen over and over again in practice, as remuneration for professional services in the form of a share or percentage of receipts or profits is by no means uncommon. A valuable statement of principle is however to be found in the judgment of Rowlatt, J., in the case of *Bennett v. Ogston*, 15 T.C. 374, which for my part I accept as a correct exposition of the law. The case concerned the business of a moneylender which had been discontinued by his death, and the question was whether the interest element in instalments on promissory notes falling due after his death and collected by his executors was taxable in their hands as "interest of money" under Case III of Schedule D, or was simply a deferred receipt of the discontinued business and as such not taxable under that Case. Rowlatt, J., decided that the interest element in the instalments in question was taxable as claimed by the Crown, and in the course of his judgment (at page 378 of the report) he said this: "When a trader or a follower of a profession or vocation dies or goes out of business—because Mr. Needham is quite right in saying the same observations apply here—and there remain to be collected sums owing for goods supplied during the existence of the business or for services rendered by the professional man during the course of his life or his business, there is no question of assessing those receipts to Income Tax; they are the receipts of the business while it lasted, they are arrears of that business, they represent money which was earned during the life of the business and are taken to be covered by the assessment made during the life of the business, whether that assessment was made on the basis of bookings or on the basis of receipts. But this is not that case; because here the interest in question is not the accrued earnings of the capital during the life of the deceased or the time the business was carried on; it is the earnings of the capital, or so much as is left of it since the death, and this interest has been earned over the time which has elapsed since the death." Then on the next page, after quoting a description of Mr. Needham's argument, he says: "That is how he puts it; but I do not think that is right. I think when you are dealing with what is interest and nothing but interest you cannot say it is in the nature of business, because it is payment by time for the use of money." This passage was relied on by both sides in the present case.

The Solicitor-General equated the sums received by Mr. Howard's executors in respect of the shares of receipts or profits to the interest element in the instalments received by the moneylender's executors, and said in effect that they were income earned by the exploitation of the films after Mr. Howard's death just as the interest was income earned after the moneylender's death by the use of the money lent in his lifetime.

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Mr. Graham-Dixon, on the other hand, relied on the principle stated in the earlier part of the passage just quoted as showing that if the receipts in question are to be regarded as remuneration earned by Mr. Howard while he carried on his profession "there is no question of assessing those receipts to Income Tax; they are the receipts of the business while it lasted, they are arrears of that business, they represent money which was earned during the life of the business and are taken to be covered by the assessment made during the life of the business, whether that assessment was made on the basis of bookings or on the basis of receipts." Mr. Graham-Dixon contends that he is entitled to succeed on this principle and that the shares of receipts or profits here in question cannot be regarded as the fruit or produce of some source of income separate and distinct from the mere carrying on of the profession in the course of which they were earned.

I think it is clear that if, in the course of a profession, an income-bearing asset is received as remuneration, the income produced by that asset after the discontinuance of the profession may be taxed as such, just as the interest accruing after the death of the moneylender was taxed in *Bennett v. Ogston*⁽¹⁾. But accepting as I do the principles stated in that case, I think it is equally clear that the assessment to tax of the profits of a profession under Case II of Schedule D down to the date of discontinuance is to be taken as covering all remuneration earned in the course of such profession whether received prior to or after such discontinuance and that, the liability to tax being thus exhausted so far as remuneration is concerned, nothing which is in truth remuneration so earned can afterwards be charged to tax merely because the mode of ascertaining and paying it is such that it might have been charged to tax under some other Case if it had not been remuneration so earned.

Applying these principles to the present case, I ask myself whether under each of the contracts A, B and C Mr. Howard is to be regarded as having rendered his professional services for remuneration consisting of a lump sum or lump sums, plus the notional capital equivalent of a new source of income in the shape of the right to receive the shares of receipts or profits, or simply as having rendered those services for remuneration consisting of a lump sum or lump sums plus a further sum consisting of the share of receipts or profits, whatever it might amount to.

This seems to me to be the short question upon the answer to which the result of the present appeal must depend, and for my part I think it should be answered in the latter sense. Each of the three contracts A, B and C seems to me to have contemplated the remuneration of Mr. Howard in two ways, that is to say, first by means of a sum or sums of fixed amount to be paid within a specified time, and secondly by means of a further sum ascertained by reference to the receipts or profits derived from the distribution of the film and from its nature uncertain in amount and time of payment. As regards this latter form of remuneration, contract A provided for the monthly payment to Mr. Howard of any amount due to him on account of his share of receipts (otherwise than in respect of Canada and the Americas) and contract C provided for the payment of Mr. Howard's share of the receipts within one year from their receipt by the company concerned, while contract B contained no provision for any periodical payment on account of his share in the ultimate net profits. I

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cannot however regard these differences with respect to mode and time of payment as having any material bearing on the character of the sums in question. I think that in all three cases (including contract C as varied by contract E) they constituted remuneration deferred in point of ascertainment and payment until (in the event which happened) periods subsequent to the death of Mr. Howard, but nevertheless professionally earned in his lifetime just as much as the lump sums were so earned. I appreciate that the point is one which may well appeal differently to different minds, but for my part I think it would be placing a strained and artificial construction on these contracts if, instead of being treated as giving Mr. Howard as part of his remuneration in each case a sum consisting of or representing a specified share or proportion of the receipts or profits derived from the distribution or exploitation of the particular film (which is what they purport to do), they were treated as giving him as part of such remuneration an income-bearing asset consisting of the right to receive a specified share or proportion of such receipts or profits, the sums paid to his executors on account of such share or proportion being consequently considered for Income Tax purposes, not simply as remuneration professionally earned by him in his lifetime, but as income subsequently produced by remuneration so earned.

It follows that in the view I take the shares of receipts or profits paid to the executors after the death of Mr. Howard should be regarded simply as remuneration professionally earned by him in his lifetime, and as such, on the principles stated in *Bennett v. Ogston* (1), not liable to tax in their hands. This conclusion of course disposes of the alternative claim under Case VI as well as the primary claim under Case III of Schedule D.

If I am wrong in my view as regards the shares of receipts or profits paid under contract A and contract C as varied by contract E, I think it is at all events clear that sums paid to the executors on account of the share of profits under contract B, which, be it remembered, is expressed as "a sum equal to fourteen forty-ninths of the Company's share in the "ultimate net profits of the distribution of the said film" cannot be taxed in the hands of the executors under Case III or Case VI. The words used point to the ascertainment of an ultimate balance of profit and the payment in one sum of a share of the balance so ascertained. I see no justification for attributing to a single sum of this description the character of income in the hands of the executors, whatever may be said of the shares of receipts or profits payable periodically under the terms of the other two contracts. Periodical payments made on account of the share in the ultimate net profits under contract B must I think be regarded as of the same quality as the share on account of which they are paid, resembling in this respect instalments on account of a single lump sum payment.

There remains the sum of £11,000 payable by instalments under contract C as varied by contract E. *A fortiori* I think the Respondents are entitled to succeed in repelling the claim to tax under Case VI of Schedule D in respect of these instalments whether the views I have expressed above with regard to the shares of receipts or profits under the several contracts are right or not.

I should add that I do not think the fact that the method of remuneration prescribed by contract C was varied by contract E after the death of Mr. Howard has any material bearing on the result. It was merely a

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matter of substituting one mode of remuneration for another, and the substituted payments provided for by contract E were just as much remuneration professionally earned by Mr. Howard in his lifetime as those originally provided for by contract C as originally framed, the sole consideration for them being the professional services Mr. Howard had rendered.

I have not overlooked clause 2 of the contract E, but I cannot regard that clause, under which admittedly no services were, and none of any value could have been, rendered by the executors, neither of whom had anything to do with the film or cinema trade, as having the effect of converting the sums payable (so far as capable of being regarded as income for any purpose) from remuneration earned by Mr. Howard into a new source of income acquired by the executors by means of a fresh consideration moving from them. Nor have I overlooked the fact that there was something in the nature of an element of sale under contract A in the sense that Mr. Howard was the owner of the story and agreed to make over all rights in it to the company concerned. I do not however think this affects the result as it is clear that the payments to be made under clause 5 were to be made simply and solely as remuneration for his services.

For these reasons I am of opinion that the Special Commissioners and the learned Judge came to a right conclusion, and would dismiss the appeal accordingly.

Sir Raymond Evershed, M.R.—Mr. Hills and Mr. Graham-Dixon, did you follow my brother Somervell's suggested form of Order?

Mr. Hills.—I do not think there will be any difficulty in drawing up the Order. It will be that the appeal is allowed and the case is remitted to the Special Commissioners to reconsider the assessments in accordance with your Lordship's judgment.

Mr. Graham-Dixon.—Yes.

Mr. Hills.—I do not think there will be any difficulty in drawing it up.

Sir Raymond Evershed, M.R.—The Order will be in that form.

Mr. Hills.—As to costs the position is this—

Somervell, L.J.—You have succeeded substantially.

Sir Raymond Evershed, M.R.—You have succeeded except on one point.

Somervell, L.J.—I do not know that the argument was substantially increased by that point.

(The Court conferred.)

Somervell, L.J.—I should have thought, subject to what may be said, that you had succeeded broadly. This Court is not too minute about saying that the Appellant did not succeed on every point and there should not be any variation about the costs. That point has not substantially extended the length of the argument.

Mr. Hills.—I was going to suggest as regards the Court below that each party should pay their own costs.

Sir Raymond Evershed, M.R.—Yes, I think that would be both generous and fair—each party to pay their own costs below, and the Crown to get their costs of the appeal.

Mr. Graham-Dixon.—With respect, I do not quite appreciate why it is said that my friend has entirely succeeded here. I have succeeded on contract B, and I have succeeded as to £11,000 on contract E. I do not know how much in terms of money that represents as compared with the periodic payments under contract A and under contract C.

Mr. Hills.—This is a substantial amount. I should have no objection to the same Order being made here—that there should be no Order as to costs here.

Sir Raymond Evershed, M.R.—No Order as to costs here or below.

Mr. Hills.—No. Your Lordships will have to reverse the Order against us below.

Sir Raymond Evershed, M.R.—There will be no Order as to costs either in this Court or before the learned Judge. I do not think you can object to that, Mr. Graham-Dixon—I should think you would take it with both hands.

Somervell, L.J.—If you object to that, you are very hard to please.

Mr. Graham-Dixon.—It is the suggestion I was going to make, and I am gratified that my friend should put it forward instead of myself.

Mr. Hills.—I gather from the figures that my friend has gained a considerable success. May I make the ordinary application that, after considering your Lordships' judgment, my clients may have leave to appeal to the House of Lords if they think fit?

Sir Raymond Evershed, M.R.—On those parts on which you have failed.

Mr. Hills.—On the parts on which we have failed.

Somervell, L.J.—I would like to ask Mr. Graham-Dixon if they want, on the part they have failed, to cross-appeal.

Mr. Graham-Dixon.—With respect, I was going to make that application in any event.

Sir Raymond Evershed, M.R.—You want leave to appeal also.

Mr. Graham-Dixon.—Yes, my Lord.

Somervell, L.J.—Then that eases the matter. Obviously, if Mr. Graham-Dixon wants to go further, he would have the right to lodge a cross-appeal.

Mr. Hills.—I hoped your Lordships would take that view.

Sir Raymond Evershed, M.R.—Leave to either party will be given to appeal to the House of Lords.

Mr. Graham-Dixon.—If your Lordship pleases.

Appeals having been entered against the above decision, the case came before the House of Lords (Lord Simonds, L.C., Lords Normand, Morton of Henryton, Tucker and Asquith of Bishopstone) on 22nd and 23rd October, 1951, when judgment was reserved. On 29th November, 1951, judgment was given unanimously against the Crown, with costs.

Mr. Frederick Grant, K.C., and Mr. Reginald P. Hills appeared as Counsel for the Crown, and Mr. L. C. Graham-Dixon, K.C., and Mr. Geoffrey Tribe for the executors.

Lord Simonds, L.C.—My Lords, the question in this appeal is whether the Appellants, who are the executors of the late Leslie Howard Stainer, are assessable to Income Tax on certain sums which had been earned by him in the course of his profession as a film actor and producer but in the events that happened fell due for payment after his death. A cross-appeal was presented on behalf of the Crown in respect of certain other sums which in the Courts below were held not to be assessable to tax, but it was withdrawn at the Bar of your Lordships' House.

Leslie Howard Stainer, who was professionally known as Leslie Howard, was killed by enemy action on or about 1st June, 1943. He had in the exercise of his profession entered into certain contracts, current at his death, under which the sums in question were paid, and about them I must say a few words. I need not state them at length as they are set out sufficiently in the judgment of Jenkins, L.J., in the Court of Appeal.

The relevant contracts were:—

(A) An agreement of 31st October, 1940, made between British National Films, Ltd. and Mr. Howard under which he was to act as producer and associate director and take the leading part in a film called *Mr. Pimpernel Smith*. He was also to assign to the company the story and the "shooting script" of which he was the owner. It was expressly provided that the picture when completed and all rights therein were to be the sole property of the company and that nothing in the agreement was to constitute a partnership between the parties. For his services in producing, directing and acting in the picture Mr. Howard was to be paid by way of remuneration a sum of £5,000 payable during production and a certain proportion of the gross receipts from the distribution after certain agreed deductions. This proportion was to be paid to him monthly by the company as the gross receipts came in. Mr. Howard fully performed the services required of him, the film was made in 1940, and he duly received the sum of £5,000. No question arises in regard to this sum. But during the years ended 5th April, 1945, 1946 and 1947, sums were received by the company from the distribution of the picture and sums representing the proportions due to Mr. Howard were paid to the Appellants as his executors without any deduction for Income Tax. These sums were included in the assessments now in dispute.

(B) An agreement of 13th December, 1940, made between Ortus Films, Ltd. and Mr. Howard under which he was to perform in a film called *49th Parallel*, the full copyright in which was to belong to the company. As remuneration Mr. Howard was to receive, and duly received, the sum of £2,000 (as to which no question arises) and he was also to receive a sum equal to 14/49ths of the company's share in the ultimate net profits of the distribution of the film. Under this agreement also sums were paid to the Appellants in the years ended 5th April, 1945 and 1946, and were included in the disputed assessments.

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(C) An agreement of 18th September, 1940, made between Misbourne Pictures, Ltd. and Mr. Howard under which he was to act as producer-director of, and perform in, a film to be called *The First of the Few*, the full copyright of the work being vested in the company. Under this agreement Mr. Howard's remuneration was to be (1) a sum of £5,000 during the making of the film, (2) a sum of £10,000 to be paid within two years and six months after the trade show of the film, and (3) a sum equal to two-thirds of the actual sums from time to time received by the company in respect of the exploitation of the film, such two-thirds share to be paid within one year from the receipt by the company from time to time of such sums. This film was made in 1941 and 1942, and the trade show was in August, 1942. No question arises with regard to the sum of £5,000 which was duly paid to Mr. Howard in his lifetime. Mr. Howard appears to have agreed with the company in his lifetime that there should be a variation of the remuneration secondly and thirdly provided for, but died before any agreement had been signed. The Appellants, however, agreed with the company that for the £10,000 there should be substituted the sum of £11,000 payable by four instalments of £2,000 each not later than 31st December, 1943, 1944, 1945 and 1946, and a final instalment of £3,000 payable not later than 31st December, 1947, and further that in lieu of the two-thirds of the sums received in respect of the exploitation of the film the company was to pay a sum equal to two-thirds of the sum so received in excess of £11,000. During the years ended 5th April, 1945 and 1946, sums were paid to the Appellants by the company without deduction of tax and these sums were included in the disputed assessments.

It will be seen, therefore, that the assessments included (a) certain instalments of a lump sum and (b) periodical payments of certain gross receipts. The Appellants appealed against the assessments to the Special Commissioners, who discharged them, but at the request of the Respondent stated a Case for the opinion of the High Court. On 1st November, 1949, Croom-Johnson, J., before whom the matter came, dismissed the appeal and confirmed the determination of the Special Commissioners. The Respondent accordingly appealed to the Court of Appeal, which allowed the appeal except so far as related to the instalments of the sum of £11,000 and the 14/49ths under contract (A): The Court, consisting of Sir Raymond Evershed, M.R., and Somervell and Jenkins, L.JJ., were unanimous in holding that the instalments of the sum of £11,000 and the said 14/49ths were not assessable to tax, but by a majority, Jenkins, L.J., dissenting, held that the other payments were so assessable. The cross-appeal of the Crown having been withdrawn, it is only with these payments that your Lordships are concerned.

My Lords, having given to this case all the consideration that I can, I am conscious that I can add little or nothing to the dissenting judgment of Jenkins, L.J., with every word of which I agree. I respectfully adopt it and only make these observations in deference to the opinion of the majority of the Court of Appeal and the argument of learned Counsel for the Respondent.

It will be convenient, my Lords, if I state the material provisions of the Income Tax Act. The disputed assessments are made under Case III, or alternatively Case VI, of Schedule D. Tax under Schedule D is chargeable "in respect of—(a) the annual profits or gains arising or accruing . . . "in the United Kingdom from any trade, profession, employment, or vocation, whether . . . carried on in the United Kingdom or elsewhere . . . and (b) all interest of money, annuities, and other annual profits or gains not

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“charged under Schedule A, B, C, or E, and not specifically exempted from tax”. It is chargeable under a number of Cases, of which I must mention II, III and VI. Case II is “Tax in respect of any profession, employment, or vocation not contained in any other Schedule”; Case III is “Tax in respect of profits of an uncertain value and of other income, described in the rules applicable to” that Case; and Case VI is “in respect of any annual profits or gains not falling under any other Case and not charged by virtue of any other Schedule”. The tax is chargeable “subject to and in accordance with the rules applicable to” the several Cases, and of these Rules I need mention two only. First, a Rule applicable to Case II provides that the tax shall extend to every employment as therein mentioned “and shall be computed on the full amount of the balance of the profits, gains and emoluments of the professions, employments or vocations”. Secondly, a Rule applicable to Case III provides that the tax shall extend to “any interest of money, whether yearly or otherwise, or any annuity, or other annual payment” as therein mentioned, “either as a charge on any property of the person paying the same by virtue of any deed or will or otherwise, or as a reservation thereout, or as a personal debt or obligation by virtue of any contract, or whether the same is received and payable half yearly or at any shorter or more distant periods”.

It is common ground between the parties that the position would be precisely the same if Mr. Howard had not died but had retired from his profession in the year 1943. His liability to tax would be the same as that of his executors. It is further agreed that had Mr. Howard been still carrying on his profession at the time when the sums in dispute were received they would have been properly included in the account of the profits, gains and emoluments of his profession under Case II and would not have fallen under any other Case. It was not suggested that the sums received in respect of any particular contract could be isolated: all of them would be aggregated with any other profits of his professional activity and the balance after deducting the expenses properly deductible would be chargeable under Case II: see *Davies v. Braithwaite*, 18 T.C. 198. But, it was said, and this is the short point of the case, Mr. Howard died before the sums were received, and in the hands of his executors, as they would have been in his hands if received by him after his retirement, they are no longer to be regarded as the profits and gains of his profession but assume a different character and fall under Case III or Case VI.

My Lords, if this contention had not found favour with the learned Master of the Rolls and Somervell, L.J., I should not have thought it arguable. The principle which is applicable here was stated with his usual clarity by Rowlatt, J., in *Bennett v. Ogston*, 15 T.C. 374, and I will cite his words⁽¹⁾: “When a trader or a follower of a profession or vocation dies or goes out of business . . . and there remain to be collected sums owing for goods supplied during the existence of the business or for services rendered by the professional man during the course of his life or his business, there is no question of assessing those receipts to Income Tax; they are the receipts of the business while it lasted, they are arrears of that business, they represent money which was earned during the life of the business and are taken to be covered by the assessment made during the life of the business, whether that assessment was made on the basis of bookings or on the basis of receipts.” I am satisfied that this is

⁽¹⁾ 15 T.C., at p. 378.

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a correct statement of the relevant principle of Income Tax law, though I have some doubt—it is not necessary to decide it—whether the learned Judge correctly applied the principle in the case before him. If so there seems to me to be an end of the case. How else could these sums come to the hands of Mr. Howard or his executors than as the remuneration for his professional activities, the reward for services rendered by him during his life and unpaid for at his death? It appears to me wholly irrelevant that they were not payable until after his death and equally so that they were not and could not be quantified until after that event. They retained the essential quality of being the fruit of his professional activity. If in all the circumstances it was not possible to bring the sums into account in the years in which they were earned, as I will assume to be the case, the result is not to change the character of the payment but to exhibit that some professional earnings may escape the Income Tax net. The withdrawal of the cross-appeal shows that lump sum payments made in the circumstances of the present case do so escape.

My Lords, it appears to me that the issue is confused by raising in general terms the question whether professional remuneration may in certain circumstances assume a different character for tax purposes when the taxpayer is dead or has retired. At least the case of *Asher v. London Film Productions, Ltd.*, [1944] 1 K.B. 133, is no authority for such a proposition. In that case there was no question of the same sum assuming a different quality in changing conditions. I am content to assume that there may be such a case, though I find it difficult to imagine. But here I cannot see how or where the change takes place. The source of these payments was the professional activity of Mr. Howard: it was never anything else. It is true that his remuneration took the form of annual payments which, if other conditions were satisfied, might fall within Case III. But other conditions were not satisfied, for *ex hypothesi* the source of the remuneration was the exercise of a profession falling within Case II.

Then your Lordships were pressed, particularly by junior Counsel for the Crown, with the argument that the remuneration of Mr. Howard took the form of an "income bearing asset" which became assessable after his death in the hands of his executors. I am not sure that I correctly apprehend the argument, though I can well understand that if a professional man receives as remuneration for his services the sum of £1,000 2½ per cent. Consols. and retains them he will suffer deduction of tax from the interest. But I do not understand in what sense the sums of money receivable by Mr. Howard can be described as an income bearing asset. At one time it appeared to be urged that the several contracts, which at once imposed obligations upon Mr. Howard and created rights in him, were income bearing assets, the income being the remuneration paid under them. Jenkins, L.J., described this argument as "placing a strained and "artificial construction upon these contracts" (1) and I am content to dismiss, without using more vigorous language, a contention that wholly disregards both the forms and substance of the transaction.

If I am right in thinking that the sums in question were not assessable under Case III because they were nothing else than remuneration professionally earned by Mr. Howard in his lifetime, this disposes also of the alternative claim under Case VI.

In the result I am of opinion that the appeal should be allowed and the cross-appeal dismissed, with costs, and I move your Lordships accordingly.

(1) Page 405 *ante*.

Lord Normand.—My Lords, I concur.

Lord Morton of Henryton.—My Lords, I also concur.

Lord Tucker.—My Lords, I also concur.

Lord Asquith of Bishopstone.—My Lords, I entirely agree with the opinions expressed by my noble and learned friends, and would only wish to add a few sentences.

It seems quite clear that the payments whose liability to tax is in issue were exclusively the fruit or aftermath of the professional activities of Mr. Leslie Howard during his lifetime. This was as a matter of historical fact their source and their only source. The fact that he died before some of this fruit had been garnered or its amount could be ascertained cannot alter that historical fact. He and he alone had done everything necessary to provide the harvest.

Secondly, I adhere to the statement of principle—never apparently challenged in any reported case—of Rowlatt, J., in *Bennett v. Ogston*, 15 T.C. at page 378, where, in a passage already cited by the Lord Chancellor, he says: “When a trader or a follower of a profession or vocation dies “or goes out of business . . . and there remain to be collected sums owing “for goods supplied during the existence of the business or for services “rendered by the professional man during the course of his life or his “business, there is no question of assessing those receipts to Income Tax; “they are the receipts of the business while it lasted, they are arrears “of that business, they represent money which was earned during the life “of the business and are taken to be covered by the assessment made “during the life of the business, whether that assessment was made on the “basis of bookings or on the basis of receipts.”

Applying this principle to the facts of the present case *prima facie* the resulting conclusion can only be that the payments in issue escape tax. It is however contended by the Crown that in *Bennett v. Ogston* the reason why the principle involving exemption did not apply was that when the moneylender died there was outstanding an income bearing asset (namely that part of the principal which was then unrepaid) which continued to earn income, as it were, in its own right. It was argued for the Crown that the same was the case here, the income bearing asset consisting of the contracts made by Leslie Howard whereunder the payments in question were posthumously made.

There seems to me however to be a very clear distinction between “income bearing assets” for the purpose of this type of case and the contracts in question. If Mr. Leslie Howard had stipulated for payment in blocks of shares or bonds, or any other instruments which by their independent vitality generate income, the dividends or interest might well have been taxable in the hands of his executors. The contracts in the present case enjoy, in my view, no such independent vitality. The consideration for what Mr. Howard was to do—to act or manage—was not the grant of a contract or contracts but the payment of money under the terms of those contracts. Mr. Howard acted for money: he did not act for contracts. The contracts were mere incidental machinery regulating the measure of the services to be rendered by him on the one hand, and on the other, that of the payments to be made by his employers: they were not the source but the instrument of payment, and his death, in my view, did nothing to divest them of that character. I agree unreservedly with the judgment of Jenkins, L.J., and respectfully concur with the motion of the Lord Chancellor that this appeal should be allowed.

Questions Put:

That the Order appealed from be reversed.

The Contents have it.

That the judgment of Croom-Johnson, J., be restored, and that the Respondent in the original appeal do pay to the Appellants in the original appeal their costs here and in the Court of Appeal.

The Contents have it.

That the cross-appeal be dismissed with costs.

The Contents have it.

[Solicitors:—Solicitor of Inland Revenue; Walter, Burgis & Co.]

