HIGH COURT OF JUSTICE—11TH, 12TH, 13TH AND 21ST DECEMBER, 1951

COURT OF APPEAL—14TH, 15TH, 16TH AND 29TH MAY, 1952

HOUSE OF LORDS—16TH, 17TH, 18TH, 19TH AND 23RD FEBRUARY AND 20TH APRIL, 1953

Commissioners of Inland Revenue

v.

Corporation of London (as Conservators of Epping Forest)[1]

Income Tax—Annual payment—Income Tax Act, 1918 (8 & 9 *Geo.* V, *c.* 40), *Schedule D, Case* III, *Rule* 1 (*a*), *and General Rules, Rule* 19.

Under the Epping Forest Act, 1878, *Epping Forest is regulated and managed by the Corporation of London as the Conservators of Epping Forest; and the Corporation is required to contribute, in such amounts as shall be necessary, to the income of a fund applied to the expenses of the Conservators.*

The Corporation makes a contribution each year to make good the deficiency on the income account of the Conservators. On paying that contribution in the Income Tax year 1948-49 *the Corporation made a deduction therefrom based on the prevailing rate of Income Tax, which it justified by the contention that the contribution was an "annual payment" for Income Tax. In its capacity of Conservators the Corporation was regarded as a separate entity, the purposes of which were exclusively charitable. It was therefore claimed that the deduction made should be repaid by the Inland Revenue under the provisions relieving charities from Income Tax.*

The Special Commissioners admitted the claim.

Held, *that the Special Commissioners' decision was correct.*

CASE

Stated under Section 19 (3) of the Finance Act, 1925, and Section 149 of the Income Tax Act, 1918, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the High Court of Justice.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 4th April, 1950, the said Commissioners heard, under Section 19 (3) of the Finance Act, 1925, a claim for exemption from Income Tax for the year 1948–49 under Section 37 (1) (*b*) of the Income Tax Act, 1918, by the Corporation of the City of London in its capacity of the Conservators of Epping Forest (hereinafter called "the Respondents"). The said claim had been duly made to the Commissioners of Inland Revenue (hereinafter called "the Appellants") who had disallowed the same.

2. The way in which the said claim arises is as follows.

[1] Reported (H.L.) [1953] 1 All E.R. 1075; 97 S.J. 315; [1953] 1 W.L.R. 652.

By virtue of the Epping Forest Act, 1878, Epping Forest is regulated and managed by the Corporation as Conservators of the Forest.

The Corporation is required by the said Act (*inter alia*) to contribute to the income of a fund called the Epping Forest Fund, and has for many years so contributed, the amount contributed in the year ended 31st March, 1949 (the relevant year) being £16,006 3*s.* 4*d.*, from which the Corporation deducted £7,202 15*s.* 6*d.* for Income Tax, leaving a net payment of £8,803 7*s.* 10*d.*

3. It was common ground between the parties that in its capacity of Conservators the Corporation fell to be regarded as a separate entity capable of receiving payments from itself in its capacity of the Corporation of the City of London, that the said contributions made by the Corporation to the said fund fell to be regarded as payments (made in account) to the Conservators, and that the purposes of the Conservators were exclusively charitable.

The claim of the Respondents was that; (1) the above contributions were "annual payments" within Rule 1 (*a*) of Case III of Schedule D and Rule 19 (1) of the General Rules of the Income Tax Act, 1918; (2) in making the contribution for the said year ended 31st March, 1949, the gross amount of the contribution was £16,006 3*s.* 4*d.*, from which the Corporation had deducted tax amounting to £7,202 15*s.* 6*d.*; and (3) the Respondents (being admittedly a charity, and so exempt from tax) were entitled to repayment of the said sum of £7,202 15*s.* 6*d.* from the Appellants.

4. There were put in evidence before us the following documents, marked respectively, as under, which accompany this Case in a separate bundle and form part of the Case, namely[1]:

A. Statement headed "Epping Forest" being a detailed statement of the relevant history of the Forest, deposed to as hereinafter mentioned.

B. Balance of revenue account made up from City's Cash since 1920–21.

C. Bundle containing copy claim for repayment of Income Tax for the year 1948–49 submitted to the Appellants by the Respondents, with copy certificate of deduction of Income Tax for the year ended 31st March, 1949, submitted by the Respondents to the Appellants, and copy correspondence in relation thereto.

D. Bundle containing copies of (*a*) warrant for £200 of 11th June, 1945, drawn on behalf of the Epping Forest Committee on the Chamberlain of London, (*b*) list of payments ordered by that committee to be made by warrant on 11th June, 1945, (*c*) warrant for £8 10*s.* 0*d.* of 9th July, 1945, drawn on behalf of that committee on the said Chamberlain and (*d*) list of payments ordered by that committee to be made by warrant on 9th July, 1945. Although these documents relate to years earlier than the year of claim, they were taken as representative examples in order to avoid using similar documents for the year of claim, which might be required for the current records of the Corporation.

E. Printed accounts of the Corporation for the year ended 31st March, 1949.

The following statutes were also referred to, namely, the Metage on Grain (Port of London) Act, 1872, the Epping Forest Act, 1878, and the Epping Forest Act, 1880.

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[1] Not included in the present print.

5. The principal statute, for present purposes, is the Epping Forest Act, 1878.

Section 3 of this Act provides that Epping Forest shall be regulated and managed under and in accordance with that Act by the Corporation of the City of London, acting by the Mayor, Aldermen and Commons of the said city in Common Council assembled, as the Conservators of Epping Forest (in the Act referred to as the Conservators).

Section 30 (1) provides that there shall be four verderers of Epping Forest. Sub-section (2) sets out the names of the first verderers. Sub-section (3) provides that they shall hold office until 25th March, 1880, and Sub-section (4) provides that succeeding verderers shall be elected by the persons for the time being on the register of commoners provided for in the Fourth Schedule to the Act, and in manner prescribed in that Schedule. Sub-section (5) provides that a person shall not be qualified to be elected a verderer unless he is resident within one of the Forest parishes, or if he is a member of the Court of Common Council of the City of London. By Sub-section (6) the elected verderers shall hold office for seven years, but shall be re-eligible.

Section 31 provides:

"(1) There shall be a committee for the purposes of this Act styled the Epping Forest Committee (in this Act referred to as the committee), which committee shall, subject to the provisions of this Act, have authority to exercise the powers and discretion and do the acts which the Conservators are by this Act empowered to exercise and do.

(2) The Court of Common Council of the City of London shall from time to time select members thereof, not exceeding twelve in number, to be members of the committee.

(3) The verderers shall be members of the Committee, and shall have the same powers, authorities, rights and privileges as the members thereof selected from the Court of Common Council, and no other or different powers, authorities, rights, or privileges.

(4) The acts and proceedings of the committee shall be done and conducted subject and according to the like directions, rules, and practice as if the committee were a committee of the Court of Common Council."

Section 33 sets out the general powers and duties of the Conservators under 26 heads, which include the management of the timber, the making of inclosures, the maintenance and making of roads, footpaths and ways, the acquisition or erection of buildings for recreation or for the use of offices of the Conservators, the provision and maintenance of pounds for the impounding of cattle, provision for games, bathing and other amusements, and numerous other matters.

Section 39 provides as follows:

"(1) The Corporation of London shall from time to time contribute to the capital and income of a fund, to be called the Epping Forest Fund, such moneys as shall be necessary out of the City of London grain duty or from other sources.

(2) The Fund shall consist of—

As regards capital: . . .

As regards income: . . .

(iv) The annual income arising from the investments of any money, part of the capital of the fund:

(v) The half-yearly or other periodical payments in respect of rentcharges:

(vi) All fines, penalties, proceeds of timber-cuttings and loppings, and other moneys received by the Conservators, other than capital as aforesaid:

(vii) The fees and income received for marking the cattle of the commoners, and in respect of cattle and animals impounded.

(viii) All moneys contributed by the Corporation of London, or by any person, to the income of the fund."

Section 41 (2) provides:

"The Conservators shall apply the income of the Fund in payment of rents, salaries, taxes, insurances, and other current expenses attending the execution of their powers and duties, and the making of the register of commoners and the elections of verderers, and in payment of or provision for any annual sums of money, allowances for compensation, annuities, pensions, or retiring allowances, and such other charges as they are not empowered to discharge out of capital."

6. Evidence (which we accepted) was given by Mr. Irving Blanchard Gane, who is the Chamberlain of London. He testified to the history of Epping Forest, the rights of parties in the Forest, the acquisition of Forest land by the Corporation, the events leading up to the Epping Forest Act, 1878, and subsequent thereto, payments by the Corporation for Forest land, the management of the Forest, and the Epping Forest Fund, as set out in Exhibit "A", and also gave further evidence as under.

7. Regarding the "grain duty" or "other sources", out of which the Corporation was required to pay the contribution in question (Section 39 (1)), the City of London is quite unlike any other municipality in England, in that, in addition to the moneys which it collects as a municipality, it has large private properties and funds of its own, and private income derived from investments, lands and markets. These private funds are known as "City's Cash". It also has many liabilities in its private capacity, some, like the present one, imposed by statute, and others undertaken voluntarily.

Prior to 1871, the Corporation possessed a right to compulsory metage on grain of every kind and all other merchandise, wares and things brought into the Port of London. In the year 1871, the Corporation voluntarily offered to abandon this right, and this offer resulted in the passing of the Metage on Grain (Port of London) Act, 1872. This Act abolished compulsory metage on grain imported into the Port of London, commuted the metage dues into a fixed due, and created a fund to be applied towards the preservation of open spaces near London and to other purposes connected therewith. By Section 4 the Corporation was empowered to demand and receive in lieu of the compulsory metage and metage dues, for a period of 30 years from 31st October, 1872, a duty at the rate of $\frac{3}{16}d.$ per cwt. in respect of grain brought into the Port of London, to be called the City of London grain duty, which was to be held by the Corporation for the preservation of open spaces in the neighbourhood of London not within the Metropolis.

This is the "City of London grain duty" referred to in Section 39 (1) of the Epping Forest Act, 1878, aforesaid. This duty, having been granted for 30 years only, came to an end in 1902, since when the Corporation's contributions to the Epping Forest Fund have been provided out of City's Cash, the income of which consists of the profits from the Corporation's estates and markets and also the income from certain of its investments, all of which income is brought into computation for Income Tax purposes.

The Epping Forest Fund has income of its own consisting of income from landed property and other investments, rentcharges and certain fees and other sums. In every year the expenses of the Conservators have exceeded the total of these forms of income, and the Corporation each year transferred to the fund a sum equal to the deficiency, the amount so transferred in the year 1948–49 being as set out in paragraph 9 below.

8. As the Chamberlain of London, Mr. Gane is the Corporation's banker. All moneys of the Corporation are in his possession, and he, in turn, has his own banking account at the Bank of England, just as any other banker may have. He is also treasurer of the Epping Forest Fund, and, as such, keeps the accounts of that fund. In his capacity as a banker he keeps a separate banking account for that fund.

The procedure for meeting the expenditure of the Conservators and making the Corporation's contributions to their income is as follows: The Forest is managed by the Epping Forest Committee aforesaid. Bills are presented, through that committee, by one of the staff of Epping Forest; they are examined by the Accountant Auditor; and finally a cheque or warrant is drawn on the Chamberlain in payment of the same. As regards the wages of the Forest staff, an account is kept by the superintendent of the Forest, which the Epping Forest Committee keeps in funds by means of warrants drawn from time to time on the Chamberlain. (See the bundle of documents Exhibit "D".)

The accounts of income and expenditure are gone through monthly, and at the end of the year the amount of the Corporation's contribution from City's Cash necessary to make up the deficiency between the income and expenditure of the year is finally determined; and payment is made, in account, by the Chamberlain, as banker, who makes the necessary transfer in his books from the City's Cash account to the Epping Forest Fund account in the same way as any banker might, on appropriate instructions from a customer, transfer moneys from the account of that customer to the credit of the account of another of his customers.

9. For the particular year concerned (1948-49) we refer to the Revenue Account of the Epping Forest Income Fund for the year ended 31st March, 1949, at page 109 of Exhibit "E".

The expenses for the year total £22,660 19*s.* 2*d.*, whereas the income (other than the Corporation's contribution) is only £6,654 15*s.* 10*d.*, leaving a deficiency of £16,006 3*s.* 4*d.* The Corporation's contribution was accordingly £16,006 3*s.* 4*d.* From this sum of £16,006 3*s.* 4*d.* the Corporation deducted Income Tax amounting to £7,202 15*s.* 6*d.* thus making to the Respondents (in account) a net payment of £8,803 7*s.* 10*d.* On the footing that this tax of £7,202 15*s.* 6*d.*, so deducted, was recoverable by the Respondents from the Appellants this item of £7,202 15*s.* 6*d.* was brought back into the account as Income Tax "reclaimed", thus balancing the account; but, pending the determination of the present appeal and actual repayment by the Appellants of the said sum of £7,202 15*s.* 6*d.* the Respondents borrowed the same amount from the Corporation.

10. It was contended on behalf of the Respondents that;

(*a*) the said contributions paid by the Corporation to the Epping Forest Fund were "annual payments" within Rule 1 (*a*) of Case III of Schedule D and Rule 19 of the General Rules of the Income Tax Act, 1918;

(*b*) the Corporation had properly deducted Income Tax amounting to £7,202 15*s.* 6*d.* from its said (gross) contribution of £16,006 3*s.* 4*d.* for the year 1948-49;

(*c*) the Respondents, being admittedly a body of persons established for charitable purposes only, were exempt from Income Tax and were therefore entitled to repayment from the Appellants of the said tax of £7,202 15*s.* 6*d.* so deducted;

(*d*) the claim should accordingly be allowed.

11. It was contended on behalf of the Appellants that ;

(*a*) the said contributions were not annual payments within Rule 1 (*a*) of Case III and Rule 19 of the General Rules ;

(*b*) the said sum of £7,202 15*s*. 6*d*. purported to have been deducted from the said contribution of £16,006 3*s*. 4*d*. for the said year 1948-49 was not in law deductible therefrom as Income Tax ;

(*c*) the Respondents were not entitled to repayment of the said sum of £7,202 15*s*. 6*d*. from the Appellants and the claim should accordingly be dismissed.

12. We, the Commissioners who heard the said claim, gave our decision in the following terms.

(*a*) Section 3 of the Epping Forest Act, 1878, provides that the Forest shall be regulated and managed by the Corporation of London, acting by the Mayor, Aldermen and Commons of the said City in Common Council assembled, as the Conservators of Epping Forest (in this Act referred to as the Conservators). Section 31 provides that there shall be a committee, styled the Epping Forest Committee, which is to exercise the powers of the Conservators under the Act, the acts and proceedings of the committee to be done and conducted subject and according to the like directions, rules and practice as if the committee were a committee of the Court of Common Council. Section 39 (1) requires the Corporation to contribute to the capital and income of a fund, to be called the Epping Forest Fund, such moneys as shall be necessary out of the City of London grain duty or from other sources. The Corporation's contributions to the income of that fund are the subject of the present appeal.

On behalf of the Respondents, the case is presented to us, in effect, on the basis that in its capacity of Conservators the Corporation falls to be regarded as a separate entity, capable of receiving payments from itself in its capacity of the Corporation of the City of London, that the contributions made by the Corporation to the said fund fall to be regarded, not as applications of income to a particular purpose of its own imposed upon it by statute, but as payments to a separate body, namely the Conservators (made through the medium of the Chamberlain of London as " banker " to both parties), for the purposes of the Conservators, which purposes are exclusively charitable.

The Crown does not dispute the correctness of this basis, and we deal with the case on this footing accordingly.

On this footing, the sole question in issue for our decision is whether the said contribution of £16,006 3*s*. 4*d*. due and payable by the Corporation to the Respondents for the year 1948-49 is an " annual payment " within Rule 1 (*a*) of Case III and Rule 19 of the General Rules, from which the Corporation was entitled to deduct Income Tax under the said Rule 19, so as to entitle the Respondents (as an admitted charity) to repayment from the Appellants of the said sum of £7,202 15*s*. 6*d*. which was in fact deducted as tax.

(*b*) It is contended on behalf of the Crown (*inter alia*) that the contributions are mere " balancing figures " coming into an account to fill up a deficiency, and, as such, cannot be " income " for the purpose of the Income Tax Acts. We appreciate that, in general, such a figure coming into an ordinary trading account would be,

at the most, a mere trade receipt and not in itself a "profit" or "income". But we think the matter is dependent upon the relevant provisions of the Epping Forest Act, 1878.

(*c*) In our opinion, once it is conceded that the Corporation's contributions to the Epping Forest Fund are properly regarded as payments (in account) to a separate body of persons (namely the Conservators), the proper view of Sections 39 and 41 of the Epping Forest Act, 1878, is, not that the Corporation discharges debts of the Conservators, nor that it pays a mere "balancing" sum in the nature of a trade receipt against which must be set expenses, but that it makes contributions to the income of the Conservators, and that, out of their independent income and these contributions, the Conservators discharge their own debts. In other words, we think a reasonable interpretation of these Sections is that the Corporation is required to supplement the income of the Conservators so as to ensure that such income, so supplemented, shall be sufficient to enable the Conservators to meet all expenditure on revenue account incurred in the performance of their statutory duties.

A sum payable (albeit out of capital) under a will to supplement the income of an individual is itself "income" (*Brodie's Trustees* v. *Commissioners of Inland Revenue*, 17 T.C. 432) and in this respect we see no difference in principle between this and a sum payable (out of revenue) under a statute to supplement the income of a body of persons.

(*d*) The question then arises whether this "income" has the characteristics of an "annual payment". The fact that the annual amount is not fixed but variable is immaterial. The sums in question are legally exigible, they have the quality of recurrence, and in our opinion are a "pure income profit", as distinct from sums in the nature of trade receipts against which have to be set the expenses of earning them. We therefore hold that the contributions are "annual payments" made by the Corporation to the Conservators.

(*e*) We find that the gross amount of the said contribution for the year 1948–49 was £16,006 3*s*. 4*d*. and that in paying the same (in account) the Corporation deducted therefrom Income Tax amounting to £7,202 15*s*. 6*d*., being the correct amount at the then rate of tax of 9*s*. in the £.

(*f*) We accordingly hold that the Corporation was entitled to deduct the said sum, as tax, and that the Respondents are consequently entitled to repayment from the Appellants of the said tax of £7,202 15*s*. 6*d*. so deducted.

We allow the claim accordingly.

13. The Appellants immediately after the determination of the claim declared to us their dissatisfaction therewith as being erroneous in point of law and in due course required us to state a Case for the opinion of the High Court pursuant to Section 19 (3) of the Finance Act, 1925, and Section 149 of the Income Tax Act, 1918, which Case we have stated and do sign accordingly.

14. The question of law for the opinion of the Court is whether or not our determination set out in paragraph 12 (*f*) above is erroneous in point of law.

F. N. D. Preston,
A. W. Baldwin,
} Commissioners for the Special Purposes of the Income Tax Acts.

Turnstile House,
94–99, High Holborn,
London, W.C.1.
6th September, 1950.

The case came before Donovan, J., in the High Court on 11th, 12th and 13th December, 1951, when judgment was reserved. On 21st December, 1951, judgment was given in favour of the Crown with costs.

Mr. Cyril King, K.C., and Mr. Reginald P. Hills appeared as Counsel for the Crown and Mr. J. Millard Tucker, K.C., and Mr. N. E. Mustoe for the Conservators.

Donovan, J.—In the year 1871, the Corporation of the City of London, being alarmed by the increasing illegal inclosures being perpetrated in Epping Forest, began its efforts to secure that the peace and beauty of the forest should be preserved for the public. By 1878 it had succeeded. The cost to the Corporation was some quarter of a million pounds, being the amount it paid out for the acquisition of the greater part of the forest. In addition, ever since 1878, the Corporation has contributed, on an average, some £9,000 a year to the management and preservation of the forest's amenities.

By these public-spirited and generous acts, the Corporation has ensured that Epping Forest shall be devoted for ever to the rest and recreation of the people.

The present case is concerned with the sum contributed annually by the Corporation as aforesaid. Its true nature is the subject of a difference between the Corporation and the Commissioners of Inland Revenue, which, it appears, has arisen for the first time now, although the issue might have been raised by the Corporation in any year back to 1878.

As part of its efforts, the Corporation was instrumental in getting Parliament to enact the Epping Forest Act, 1878. The long title of the Act proclaims its chief purpose to be:

> "The Disafforestation of Epping Forest and the preservation and management of the uninclosed parts thereof as an Open Space for the recreation and enjoyment of the public".

Section 3 provided that the forest should be managed by the Corporation through the Mayor, Aldermen and Commons of the City in Common Council assembled as the Conservators of Epping Forest.

The duty of the Conservators, stated in general terms, was to preserve and maintain the forest as an open space for the recreation and enjoyment of the public (see Section 7) and for this purpose power to do a variety of things was conferred upon them. These things are detailed in Section 33 of the Act; and all I need say about them for the purposes of this case is that doing them would and has involved the Conservators in expense. On the other hand, the exercise of some of the powers would or could provide

the Conservators with revenue; for example, selling timber cuttings and loppings, and the granting of licences to shoot and fish. The Conservators were given by Section 36 power to make bye-laws for regulating various specified matters, and paragraph 13 of the Section indicates that charges might become payable to the Conservators under such bye-laws. At the present time the Conservators' revenue comprises receipts from a variety of sources, all set out on page 109 of the printed accounts exhibited to the Case Stated. Among the chief items are rents, licence fees and tolls, sale of wood thinnings, and fees for the use of the Chingford golf course.

Section 39 (1) enacted as follows:

> "The Corporation of London shall from time to time contribute to the capital and income of a fund, to be called the Epping Forest Fund, such moneys as shall be necessary out of the City of London grain duty or from other sources."

The Section goes on to prescribe what other moneys shall be credited to the Fund. The City of London grain duty ceased early in the present century, and in implementing Section 39 (1) the Corporation has since found the money out of its cash resources.

Section 41, Sub-section (2), deals with the way in which the income of the Epping Forest Fund was to be applied and is in these terms:

> "The Conservators shall apply the income of the Fund in payment of rents, salaries, taxes, insurances, and other current expenses attending the execution of their powers and duties, and the making of the register of commoners and the elections of verderers, and in payment of or provision for any annual sums of money, allowances for compensation, annuities, pensions, or retiring allowances, and such other charges as they are not empowered to discharge out of capital."

Section 42 provided that the accounts of the Conservators were to be audited yearly, and that a copy was to be available, free of charge, to any person interested in Epping Forest.

The last section of the Act I need refer to by way of introduction is Section 31. That Section required a committee to be set up called the Epping Forest Committee. It was to consist in part of members of the Common Council and in part of the verderers of the Forest. This committee was to have authority to exercise all the powers of the Conservators.

The organisation thus created may be summarised as follows. The Corporation were appointed Conservators. The Epping Forest Committee would have authority to do all the work of the Conservators. That work would bring in some revenue and entail some expenses. The revenue would go into the Epping Forest Fund and the expenses would come out of it. The Corporation was to contribute, *inter alia*, to the income of the Epping Forest Fund from time to time "such moneys as shall be necessary".

Such a necessity of course would arise if the revenue of the fund fell short of the expenses. This indeed seems to have been consistently the position and each year the Corporation has put its hand in its pocket so that Epping Forest may continue to give health and pleasure to succeeding generations. If one turns again to page 109 of the exhibited accounts, one finds an item thus expressed on the credit side of the Forest Revenue Account for the year ending 31st March, 1949: "Annual payment from City's Cash in accordance with Section 39 (1), Epping Forest Act, 1878, less Income Tax . . . £8,803 7*s.* 10*d.*"; and another item reading thus: "Income

(Donovan, J.)

Tax on Annual Payment, reclaimed £7,202 15*s.* 6*d.*" The total of these two items is £16,006 3*s.* 4*d.* and the receipt of that sum enabled the Conservators to balance their revenue account for the year.

The facts behind the two entries in question are these. The Corporation contributed £16,006 3*s.* 4*d.* (say £16,000) to the revenue of the Epping Forest Fund for the year, pursuant to the terms of Section 39 (1) of the Epping Forest Act and on the footing that that was the sum which was necessary. It was necessary of course because the work of preserving and managing Epping Forest, which the Corporation had undertaken as Conservators, required £16,000 more than the amount of the year's revenue. This £16,000 was contributed by the Corporation making the payment less tax; that is, less £7,202.

The Conservators, being a charity, reclaimed that sum from the Inland Revenue, who rejected the claim. On appeal to the Special Commissioners, however, the claim was upheld, and the Crown now appeals to this Court.

Before coming to the arguments, I mention two matters in order to get them out of the way. The Corporation, which makes the payment under Section 39 (1), is also the body which receives it, namely the Conservators. But it is agreed between the parties that the Corporation is to be regarded as one *persona* and the Corporation as Conservators as another; so that payments can be made from one to the other. Second, the Corporation has a banker called the Chamberlain of the City. He is also treasurer of the Epping Forest Fund and as such keeps its accounts. The result of all this is that a payment by the Corporation to the Conservators can be made in account, and no doubt would be effected by the Chamberlain debiting one account and crediting another.

Mr. King, for the Crown, sought to extract out of this situation and from the accounts some evidence that no single payment of £16,000 had really been made. I cannot say I fully understood the reasoning; but in any event I am bound by what the Commissioners find as facts in this connection. They say this in paragraph 2 of the Case:

> "The Corporation is required by the said Act (*inter alia*) to contribute to the income of a fund called the Epping Forest Fund, and has for many years so contributed, the amount contributed in the year ended 31st March, 1949 (the relevant year) being £16,006 3*s.* 4*d.*, from which the Corporation deducted £7,202 15*s.* 6*d.* for Income Tax, leaving a net payment of £8,803 7*s.* 10*d.*"

The Commissioners also had the City Chamberlain before them giving evidence, who testified that the payment had been made in account (see paragraph 9 of the Case) and his evidence (apparently unchallenged) obviously justified the Commissioners' finding. I therefore proceed to consider the case on the like basis.

It is convenient to consider the Corporation's argument first, and it may be expressed thus: (1) The £16,000 in question is an annual payment of the kind taxable in full in the hands of the recipient under the provisions of Case III of Schedule D of the Income Tax Act, 1918. (2) Therefore the £16,000 is a payment from which the Corporation was entitled, under General Rule 19 of the same Act, to deduct Income Tax at source on payment; and it did so. (3) The Conservators are a charity and, being exempt from tax, are entitled to reclaim the tax so deducted. If the first two propositions are true the third admittedly follows.

The Crown's case is a denial of the truth of the first proposition; and unless that proposition can be established, the Corporation's claim fails, for Rule 19 would not then apply to the payment here in question so as

to entitle the Corporation to deduct tax and the Conservators to reclaim tax. This is because Rule 19 authorises a deduction of tax only from such annual payments as come within Case III of Schedule D. So much is common ground.

Accordingly, this case can be decided by determining whether the £16,000 is an annual payment within the meaning of Case III. That Case, so far as is here relevant, provides as follows: Rule 1:

> "The tax shall extend to any interest of money or other annual payment . . . whether the same is received and payable half-yearly or at any shorter or more distant periods".

Rule 2 (1) (*b*) says:

> "The tax shall . . . be computed . . . on the full amount of the profits or income arising within the year preceding the year of assessment".

Rule 2 (2) says:

> "Tax shall be paid on the actual amount computed as aforesaid without any deduction."

To facilitate the collection of the tax so charged, Rule 19 of the General Rules provides, in effect, that the person liable to pay the annual payment shall suffer tax in full on his own income without being given any deduction for such annual payment and that he can recoup himself by deducting tax when he comes to make the payment and can keep the tax so deducted. This is simply machinery for collecting the tax which Case III imposes.

The words of Case III which I have quoted make this much plain: that the Legislature is there taxing sums which are a profit in the true sense of the word in the hands of the recipient. The full amount is to suffer the tax and there is to be no deduction from the full amount. When I receive interest from my debtor or an annuity from whoever is obliged to pay me one, I receive a sum which comes to me in its entirety as a profit. I do not have to set some expenses against the interest or the annuity to find out what the profit content is. It is all profit—at least in contemplation of Case III. To distinguish such a receipt from a receipt against which expenses must be set in order to discover the profit, various expressions are used. Interest and annual payments caught by Case III are said to be income *eo nomine* or "pure income" or "profit income". It does not matter much what label one uses so long as one makes it plain what is being labelled. I will use the term "profit income" to denote that kind of annual payment which the Legislature has in mind under Case III, namely an annual payment which for tax purposes is all profit in the recipient's hands.

Then the question in the present case becomes this: Was the £16,000 profit income in the hands of the Conservators? Or put in another way, could the Revenue, if the Conservators were not a charity, have made them pay tax under Case III on the whole £16,000?

Mr. Tucker for the Corporation answers this question in the affirmative, as he must in order to succeed. The payment, he says, has all the required characteristics of annual payment. Under the express terms of Section 39 (1) of the Epping Forest Act, it is a contribution towards the "income" (which he contends means profit income) of the Epping Forest Fund, and it is capable of being paid year by year. Why then, he asks, is it not an annual payment within Case III?

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Mr. King for the Crown replies that the income of the Epping Forest Fund to which the £16,000 is a contribution is not itself a fund of profit income. It contains all sorts of miscellaneous gross receipts (see Section 39 (2) and Section 50 of the Act). Next, he says, the circumstance that a sum is paid or is capable of being paid year by year does not of itself involve that it is profit income in the hands of the recipient and therefore an annual payment within Case III.

This latter assertion is clearly right. One always goes for authority on the point to the classic judgment of Scrutton, L.J., in *Commissioners of Inland Revenue* v. *Earl Howe*, 7 T.C. 289, where he points out (1) that if I agree to pay my butcher an annual sum for meat, the whole sum is not profit income of the butcher and so an annual payment of the kind taxed under Case III. To find how much of the annual sum is profit the butcher must deduct the cost to him of the meat. In his hands what I pay him is a gross receipt.

Lord Greene, M.R., in In re *Hanbury*, 20 A.T.C. 333, formulated the same proposition in the following terms, at page 334:

> "There are two classes of annual payments which fall to be considered for income-tax purposes. There is, first of all, that class of annual payment which the Acts regard and treat as being pure income profit of the recipient, and treat as the pure income profit of the recipient undiminished by any deduction. Payments of interest, payments of annuities, to take the ordinary simple case, are payments which are regarded as part of the income of the recipient, and the payer is entitled in estimating his total income to treat those payments as payments which go out of his income altogether. The class of annual payment which falls within that category is quite a limited one. In the other class there stand a number of payments, none the less annual, the very quality and nature of which make it impossible to treat them as part of the pure profit income of the recipient, the proper way of treating them being to treat them as an element to be taken into account in discovering what the profits of the recipient are."

The Crown in the present case alleges that the £16,000 is an annual payment in the latter class. If this be right the payment is not an annual payment within Case III and the Corporation's claim will fail.

If the Conservators by preserving and maintaining Epping Forest were carrying on a trade the profits of which were taxable under Schedule D, and the Crown sought to segregate the £16,000 here in question and tax it in full, what would the Conservators say? Their obvious reply would be that this was simply part of their total receipts and certainly not profit income in itself: that the profits of the trade could be ascertained only after setting against their total receipts their total outgoings. In my judgment that would be right.

But the Conservators do not, as such, carry on a trade the profits of which are taxable under Case I of Schedule D. They are exempt from tax as a charity. Whether otherwise they would be liable as carrying on a trade is not for me to say, though I should doubt it. But whether the Conservators carry on a trade the profits of which are specially exempt from tax, or whether their activities fall short of trade, seems to me to be inconclusive. In order to determine the true nature of this £16,000 one should I think look at all the facts including what the Conservators do, and then ask, regardless of whether there is a trade or a taxable trade, if on the facts it is right to regard the £16,000 merely as an item of revenue

(1) 7 T.C. at p. 303.

against which expenses must be set to determine whether the Conservators have made a profit or if, on the other hand, it is right to regard the £16,000 as all profit income.

The Conservators preserve and manage Epping Forest with all the detailed work that that involves, which can be pictured from the nature of their statutory powers, and from the entries on both sides of their revenue account. I need not repeat these. At the end of the year which closed on 31st March, 1949, the Conservators found that this work had involved them in liabilities £16,000 greater than the revenue which came in. This sum was accordingly contributed by the Corporation under Section 39 (1). In all the circumstances, can this £16,000 be segregated and called a profit? The Conservators, in whose hands it is alleged to be a profit, get the sum only because they have performed duties which involve them in an outlay of equivalent amount. If the charitable exemption were abolished I think the Conservators would be astonished if the Inland Revenue descended upon them and said: "Never mind about your expenses, this £16,000 is all profit—pay tax on it."

Here is an undertaking the management of which is vested by statute in the Conservators. They are given powers which bring them in a revenue. They are allotted duties which involve them in expense. They are given a right to receive from the Corporation a sum year by year such as shall be necessary to enable their work to be carried on. Faced with the question: Is this contribution by the Corporation profit income in the Conservators' hands which would ordinarily be taxable in full, or is it just one item of revenue to be taken into account in ascertaining the result of each year's working, I say unhesitatingly that it is the latter. That means it is not an annual payment within Case III of Schedule D. Such a conclusion involves, in my view, no conflict at all with the words of Sections 39 and 41 of the Epping Forest Act. Here, though it is not responsible for my decision, I may refer to one recital in that Act. It reads:

> "And whereas the Corporation of London are desirous of being constituted Conservators of the Forest, and are willing and able to defray such expenses as are to be borne by the Conservators . . .".

I think this recital affords some clue at least to the nature of the £16,000 and tends to confirm my conclusion.

The Special Commissioners came to a different decision for reasons which they express as follows[1]:

> "But we think the matter is dependent upon the relevant provisions of the Epping Forest Act, 1878. In our opinion, once it is conceded that the Corporation's contributions to the Epping Forest Fund are properly regarded as payments (in account) to a separate body of persons (namely the Conservators), the proper view of Sections 39 and 41 of the Epping Forest Act, 1878, is, not that the Corporation discharges debts of the Conservators, nor that it pays a mere 'balancing' sum in the nature of a trade receipt against which must be set expenses, but that it makes contributions to the income of the Conservators, and that, out of their independent income and these contributions, the Conservators discharge their own debts. In other words, we think a reasonable interpretation of these Sections is that the Corporation is required to supplement the income of the Conservators so as to ensure that such income, so supplemented, shall be sufficient to enable the Conservators to meet all expenditure on revenue account incurred in the performance of their statutory duties. A sum payable (albeit out of capital) under a will to supplement the income of an individual is itself 'income' (*Brodie's Trustees* v. *Commissioners of Inland Revenue*, 17 T.C. 432) and in this respect we see no difference in principle between this and a sum payable (out of revenue) under a statute to supplement the income of a body of persons."

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[1] Page 299 *ante*.

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I accept as accurate the statement that the Corporation does not itself actually discharge the Conservators' debts; but I respectfully suggest that the fallacy in the Commissioners' reasoning is their apparent assumption that if a sum is paid by one person to supplement the income of another, the supplemental sum is profit income in the hands of the recipient. Such may be true in many cases, but the proposition is not universally true. A state subsidy to the National Trust to enable it to preserve the properties in its care would hardly be profit income in the hands of the trust. Grants by the Exchequer to supplement the income of a local authority and enable it to provide proper education or maintain an efficient police force would not be profit income of the local authority.

I recognise that these examples are not the precise counterpart of the present case and that other considerations may come into play; but that simply emphasises the truth that such a problem as here arises is not solved simply by asking: "Is it a sum paid in supplement of the payee's income?" Before the true nature of the payment can be determined, all the circumstances must be taken into account: how the payment comes to be made: in what character the recipient gets it: what must he do with it when he gets it, and so on. Only then can one say whether the payment is inside or outside Case III.

The Commissioners go on in their decision thus:

> "The sums in question are legally exigible, they have the quality of recurrence, and, in our opinion, are a 'pure income profit', as distinct from sums in the nature of trade receipts against which have to be set the expenses of earning them."

The Commissioners give no grounds for this opinion other than the one I have already dealt with. Whether the Conservators carry on a trade or not is, as I have said, inconclusive and I do not suppose the Commissioners thought otherwise. They merely use the example of a trade receipt to point a contrast.

I do not refer to any more of the decided cases. Once the criterion to be applied is settled, the problem becomes largely one of fact in each case: and the search for analogies from decisions on different facts may mislead as easily as it may guide. I doubt also whether it really assists to try and draw conclusions from the way in which other payments are dealt with for tax purposes: for example, payments under covenant to a hospital.

I think the Commissioners applied the wrong criterion here and, in so far as they thought that the language of Sections 39 and 41 of the Epping Forest Act justified their conclusion, I regret I must disagree. If the right criterion be applied, the result must in my view be adverse to the Corporation's claim. The appeal of the Crown is therefore allowed.

I hope I may be permitted to add, as one who has spent many happy days in the Forest, and who only now realises the extent of his debt to the Corporation, that I reach this conclusion with personal regret.

Mr. Cyril King.—Your Lordship will give the Crown the costs of the appeal?

Donovan, J.—Yes.

The Conservators having appealed against the above decision the case came before the Court of Appeal (Sir Raymond Evershed, M.R., and Birkett and Romer, L.JJ.) on 14th, 15th and 16th May, 1952, when judgment was reserved. On 29th May, 1952, judgment was given unanimously against the Crown, with costs.

Mr. Cyril King, Q.C., and Sir Reginald Hills appeared as Counsel for the Crown and Mr. J. Millard Tucker, Q.C., and Mr. N. E. Mustoe, Q.C., for the Conservators.

Sir Raymond Evershed, M.R.—The judgment I am about to read is the judgment of the Court.

The question in this appeal is whether the Mayor and Commonalty and Citizens of the City of London (to whom in that capacity we will hereafter refer as "the Corporation") were properly entitled in respect of the Income Tax year 1948-49 to deduct under the provisions of Rule 19 (1) of All Schedules Rules the sum of £7,202 15*s.* 6*d.* for Income Tax in respect of the contribution made for the year ended 31st March, 1949, of £16,006 3*s.* 4*d.* paid by the Corporation to the Conservators of Epping Forest. The facts, including the relevant history of Epping Forest, have been fully stated in the Case and were further referred to in the judgment under appeal. It will therefore suffice for the purposes of this judgment if we refer to certain Sections of the Epping Forest Act of 1878.

By Section 3 of that Act it was provided that Epping Forest should be

> "regulated and managed under and in accordance with this Act by the Corporation of London acting by the Mayor, Aldermen and Commons of the said City in Common Council assembled, as the Conservators of Epping Forest".

Section 7, Sub-section (1), provided that the Conservators should

> "at all times keep Epping Forest unenclosed and unbuilt on, as an open space for the recreation and enjoyment of the public."

For the purposes of the management of the Forest the Act specified (by Section 30) that there should be four verderers and (by Section 31) that there should be a committee called the Epping Forest Committee consisting of persons selected by the Court of Common Council of the City of London together with the verderers; and that such Committee should have authority to exercise the powers and discretions vested by the Act in the Conservators. For the purposes of the present appeal the most important Sections are Sections 39 and 41. The former, so far as relevant, is as follows:—

> "39.—(1) The Corporation of London shall from time to time contribute to the capital and income of a fund, to be called the Epping Forest Fund, such moneys as shall be necessary . . ."

Sub-section (2) provided that the fund should consist of, first, capital (the further details of which are not relevant for the present appeal) and, second:

> "As regards income: . . .
>
> (iv) The annual income arising from the investments of any money, part of the capital of the fund: (v) The half-yearly or other periodical payments in respect of rentcharges: (vi) All fines, penalties, proceeds of timber-cuttings and loppings, and other moneys received by the Conservators, other than capital as aforesaid: (vii) The fees and income received for marking the cattle of the commoners, and in respect of cattle and animals impounded: (viii) All moneys contributed by the Corporation of London, or by any person, to the income of the fund."

Section 41 (2) is in these terms:—

> "41. . . . (2) The Conservators shall apply the income of the Fund in payment of rents, salaries, taxes, insurances, and other current expenses attending the execution of their powers and duties, and the making of the register of commoners and the elections of verderers, and in payment of or provision for any annual sums of money, allowances for compensation, annuities, pensions, or retiring allowances, and such other charges as they are not empowered to discharge out of capital."

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Two matters of the first importance may now be stated. (1) Although, as appears from the Act, the Conservators of Epping Forest (who are the Appellants before us) acting through the Epping Forest Committee are in fact an emanation of the Corporation, it has been agreed on both sides in the Court below and in this Court—and we do not suggest that it was otherwise than properly agreed—that for the purpose of the question involved in this appeal the Conservators should be treated as though they were a body entirely separate and distinct from the Corporation. (2) The functions and duties of the Conservators constitute a charitable object, as that phrase is understood in our law. Pursuing, therefore, the analogy above indicated we must determine the present case as though we were dealing with a body of independent trustees managing a charitable foundation—whether the maintenance of a public park or of a hospital or of a religious or educational establishment—and bound accordingly to apply all their funds, and particularly the income of such funds, exclusively in furtherance of such charitable purposes.

As appears from the citation of Section 39 of the Act, certain revenues accrue to the Conservators in the due course of the management of the Forest—for example, certain rents which they obtain for the letting of sporting rights, and certain fees for the use of the Chingford golf course. For many years, however, the revenues from the various sources specified in the paragraphs we have cited from Section 39 (2), other than the last, have fallen far short of the sums required for the proper upkeep and management of the Forest. In accordance, therefore, with its obligations under the Act (for it is agreed that such is its effect) the Corporation has each year paid over to the Conservators (or into the Conservators' account) the sum required to bring up the revenues for that year to the total of the expenses. For many years these sums have in fact been paid out of the income which the Corporation receives from considerable properties belonging to the Corporation, both real property and investments, which properties constitute the private fortune of the Corporation corresponding in all respects to the private fortune of an individual ; and this income, out of which the contribution to the Conservators has been made, is income which has suffered tax by deduction at its source before receipt by the Corporation. As a matter of machinery, until the final figures for any years are ascertained, the Conservators draw upon the City Chamberlain the sums required from time to time to meet current obligations, the City Chamberlain being in fact the banker of the Conservators. Nothing turns on the very special position in relation to the affairs of the Corporation or of the Conservators occupied by the City Chamberlain ; but it follows that the sums eventually paid over in any year to the Conservators are the sums required and used in fact for either one or both of the following purposes, namely (1) to meet any outstanding obligations in respect of that year on the part of the Conservators and (2) to discharge the debit balance in account with the City Chamberlain of the Conservators which has arisen as a result of the excess of the Conservators' drawings during the year over the sums derived from other sources and paid into their account.

In the year in question the sum required to make good the deficit was, as we have stated, £16,006 3*s.* 4*d.*, and this sum, in accordance with previous practice for many years, was, as we have also stated, paid out of the taxed income of the private properties of the City which are known as "City's Cash". But whereas, in previous years, the Corporation has in fact paid over, out of this fund of taxed income, the full amount required to equate the Conservators' account, in the year in question for the first

time, the Corporation deducted from the sum of £16,006 3*s.* 4*d.* the appropriate sum (£7,202 15*s.* 6*d.*) in respect of Income Tax, paying over to the Conservators or into their account the net figure of £8,803 7*s.* 10*d.* This the Corporation has sought to justify on the ground that for tax purposes the Corporation's contribution to the income of the Conservators, in accordance with the statutory obligation imposed by the Act of 1878, falls within the scope of the language and intendment of Case III of Schedule D of the Income Tax Act, 1918, and also—and consequentially—within the scope of Rule 19 (1) of the All Schedules Rules. If this claim is well founded the consequences are not in doubt; since the management of Epping Forest is a charitable purpose the Conservators are exempt from Income Tax and can, accordingly, reclaim the amount of tax (£7,202 15*s.* 6*d.*) which has been deducted by the Corporation and which, on this view, must be treated as having been paid by the Corporation on the Conservators' behalf. If, on the other hand, as the Crown say, the payment is not within the proper interpretation of Case III or Rule 19 then it is equally clear that no claim to repayment of the amount of tax on the part of the Conservators can be sustained, and the Corporation will have to make up, out of their own funds, the equivalent of the sum which they have deducted in order to fulfil their obligations under the statute.

The facts of the case are plainly of a special character. In the course of the argument our attention was drawn, and properly drawn, to many decided cases, both as illustrations of the principles involved and by way of providing useful analogies. But, as so often happens in cases of this character, the question, as we think, turns in the end upon a short point which may be at least simply stated, *viz.*, what is the quality for tax purposes of the sum paid over, when examined both in the hands of the Corporation as payer immediately before payment and in the hands of the Conservators as recipients immediately after?

The material language of Rule 1 (*a*) of the Rules applicable to Case III is so well known that we hope we shall be excused for citing the relevant words—

> " any interest of money, whether yearly or otherwise, or any annuity, or other annual payment . . . as a charge on any property of the person paying the same by virtue of any deed or will or otherwise ".

And that language is clearly reflected in the opening words of Rule 19 (1) of the All Schedules Rules. It is not seriously contested that, if the sums of money here in question are otherwise within the ambit of Case III, they possess the requisite quality of recurrence to qualify as annuities or annual payments. It is also not in dispute that the word " charge " in the language we have quoted from Rule 1 (*a*) above is not to be interpreted as requiring the existence of a " charge " as commonly understood ; in other words, that the language of the Rule is satisfied if the annuity or annual payment is made or provided out of some " property " though the latter is not strictly " charged " therewith. The real question is whether (as the Crown contend) these sums in the hands of the Corporation constitute merely a spending or outlay, in the ordinary sense, of the Corporation's income, and in the hands of the Conservators constitute the equivalent of or are equivalent to, trading receipts *in pari materia* in all respects with other revenues of the Conservators, such as those we have already instanced ; or whether the operation of discharging its statutory obligation on the part of the Corporation constitutes in effect a transfer of a slice of the income of City's Cash to the income of the Conservators—a taking

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out of a section, as it were, of the former so as to make it a separate and identifiable part of the income of the Conservators, as though a part of the capital of City's Cash appropriate to produce the required gross sum of income had been, for the purposes of the performance of their statutory obligation, earmarked, so to speak, and attributed to the Conservators. If the latter view is correct, the income in question would in its quality appear to correspond to the interest and dividends received by the Conservators from the capital of the fund under paragraph (iv) of Section 39, Sub-section (2), of the Act, or to the item of rents, quitrents, etc. in respect of which latter item (according to the accounts exhibited to the Case) the Income Tax, presumably deducted at the source, was in fact, recovered by the Conservators.

Reference was made in the argument here and below to the judgment of Lord Greene, M.R., in the case of In re *Hanbury*, 20 A.T.C. 333, and to the phrase he there coined, and often since used, "pure profit income". Reference was also made inevitably, to the classic judgment of Scrutton, L.J., in *Earl Howe* v. *Commissioners of Inland Revenue*(1), [1919] 2 K.B. 336. The arguments have, we think, shown that in a case such as this, Lord Greene's formula may, without some exposition, be inclined to mislead and involve the danger (to which Lord Greene himself elsewhere adverted) of inducing the Court to the exercise of construing not the Act of Parliament but some judicial paraphrase of the Act. It is, however, agreed, as we have stated already, that the quality of the sum in question must be examined both in the hands of the payer and in the hands of the recipient, and must at least in the latter have the character of income chargeable itself as such to tax, as distinct from a sum which, so far as tax is concerned, is only relevant as an ingredient or item on one side or other of an account in respect of any credit balance upon which tax may be leviable under some other of the Cases and Schedules than Case III of Schedule D.

Though accurate formulation of the problem involved is not always easy, the decision in any given case must in some degree be, we venture to think, a matter of first impression; and we agree with Mr. Millard Tucker that the problem before us is, in the end of all, straightforward and not abstruse. In this case the vital element, as it seems to us, is that the enterprise which the Conservators manage and conduct is a charitable enterprise to be regarded in the same way as any other charitable enterprise conducted with charitable funds by charitable trustees. The Conservators are not carrying on a trade; and, in spite of references in the argument, naturally enough, to "subsidies" and "balancing figures", the enterprise which the Conservators conduct is, in our judgment, nothing like a trade. The question, therefore—What if a profit were made?—seems to us not really capable of being sensibly asked. For, by the statute, every penny piece of income must be applied for the purposes (being charitable purposes) for the Forest and no other purposes, and the Corporation's obligation is by the statute to pay what is required to provide for the year's expenses and no more. There is thus no real question or possibility of the Conservators so conducting the affairs of the Forest as to result in the production of "profits or gains" within the meaning of the Income Tax Acts.

It is this aspect of the matter which in our judgment distinguishes the present case fundamentally from cases such as *Humber Conservancy*

(1) 7 T.C. 289 at p. 301.

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Board v. *Bater*, 6 T.C. 555, *Commissioners of Inland Revenue* v. *Forth Conservancy Board*, 16 T.C. 103, *Ostime* v. *Pontypridd Water Board*, 28 T.C. 261, and equally from *Smart* v. *Lincolnshire Sugar Beet Co., Ltd.*, 20 T.C. 643. In all those cases the recipient of the sums there in question was carrying on a trade or something properly analogous to a trade, an enterprise capable of producing "profits or gains", one in which the idea of an annual profit and loss account in respect of the year's operations was applicable. *Prima facie*, therefore, all receipts would be *in pari materia* as items on the credit side in the year's accounts in the same way as would be the annual sum paid, according to Scrutton, L.J.'s example in *Earl Howe's case*(1), to the car proprietor for the hire of his car. The question would no doubt still remain. Supposing a man were to make a covenant to pay £*x per annum* out of his taxed income to a trader or professional man so long as he continued to carry on his trade or profession and for the purposes of augmenting the income he received from his trade or profession; would such a case fall within Case III of Schedule D? According to Mr. King, no such case has ever been before the Courts and it is therefore unnecessary for us to express any view upon it; for, as we have tried to show, we do not think such a case is parallel to that which we have to decide.

But reverting to the *Conservancy* and other cases above cited it seems to us that similarly from the point of view of the payer the sums there in question constituted "ordinary spending" of the payer's means. Certainly in the case of shipping tolls (to take the example of the *Forth Conservancy*(2)) such payments would be trade expenses in the ordinary course of the shipper.

The facts in the *Forth Conservancy* case were that the tolls paid by shippers in respect of the goods which they carried were substantially the sole income of the Conservancy: and the question was whether a surplus of such tolls over the expenditure of the Conservancy constituted (in spite of the fact that any such surplus had, by the terms of the relevant Private Acts, to be applied in a particular way) "profits or gains" for the purposes of the Income Tax Acts and particularly of Case VI of Schedule D. The House answered the question affirmatively—the operations resulted in fact in "profits or gains" according to the ordinary sense of those words as used in the Acts, and they constituted, if not a trade or something in the nature of a trade, an enterprise (according to Lord Russell of Killowen) "analogous to a trade". They served the interests of shippers from whom they derived their income in the form of tolls which were for shippers' ordinary trade outgoings. And, as to subsidies paid by the Government and sums contributed under precepts from constituent authorities (as in the *Pontypridd* case), it seems to us very difficult, if not impossible, sensibly to regard these payments as constituting a making over of a slice of income or even of a sum of money properly to be treated in the payee's hands as a separate fund of income, distinct in quality from other revenues of the trading or *quasi* trading operations on which the recipients were engaged; and for that reason, as we think, no suggestion to that effect was ever made in any of the cases.

On the other hand—and again, because it is of the essence of the matter that the Conservators are engaged upon a charitable purpose—we derive assistance from the example given in the course of the argument. Suppose (as might quite well have happened or happen) a private individual were to execute a deed of convenant to pay out of his taxed income

(1) 7 T.C. 289, 303. (2) 16 T.C. 103.

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so much *per annum* for the requisite period of time to the Conservators, to be of course employed by them in pursuance of their statutory obligation. Such a sum, when paid, would be caught by the express terms of paragraph (viii) of Section 39 (2) of the Act; and for our part we think it tolerably clear that the payer would properly pay the net figure in accordance with the strict terms of his covenant and that the Conservators would then be entitled to recover the amount of the tax from the tax authority. In other words, such an annual payment would exactly fall within the terms of Case III of Schedule D; and Mr. King was, as we understood him, disposed so to admit. Suppose then, further, that by some amending legislation the obligations of the Corporation were limited and stabilised at a figure say of £10,000 a year, the balance required to meet the annual expenditure of the Conservators in the discharge of their duties being made up out of the national revenues. So far as the Corporation would be concerned, the annual sum would, in our view, be within the terms of Case III of Schedule D no less than the annual payments of the individual covenantors. In our judgment, it would make no difference that the annual payments of the Corporation would be made by virtue or under compulsion of a statute instead of by virtue of a deed of covenant. As to the balance payable (according to the example) out of national revenues, no point would or could in practice arise. Since the balancing payment was paid out of national revenues no question could arise of its being provided out of taxed income; and (because, as always, the Conservators' undertaking is a charity and therefore exempt from tax) there would in any case be no point or sense in deducting tax under Rule 21 of the All Schedules Rules. But we think also, for reasons later given, that there is no distinction in principle between an obligation on the part of the Corporation to pay over to the Conservators the sum of £10,000 *per annum* and an obligation to pay over each year a sum calculated to meet the requirements of the Conservators for that year.

Mr. King also made the point that there was in this case some special consideration moving to the Corporation so as, on that ground, to take it in any event out of the ambit of Case III. Mr. King gave by way of example the case of a covenantor in favour of a hospital where the covenant was expressed to be subject to the promise on the part of the hospital to maintain a bed in the hospital in the covenantor's name. According to Mr. King, the presence of such a consideration might well be held (for such a case has not, we understand, ever come before the Courts) to exclude the case from the ordinary application of Case III and Rule 19. Whether there is any validity in such a distinction it is unnecessary for us to decide. We have, however, been unable to accept the suggestion that any such element of consideration is present or, if present, material in this case. No doubt the Corporation have in some sense a special interest in the Forest, which is close to London and with which the Corporation has been historically associated. And it is also, no doubt, the fact that the Act of 1878 was promoted by the Corporation. Still, the benefits provided by the Conservators are, by force of the Act itself, benefits for the public at large, and we cannot see that the Corporation is for tax purposes under some peculiar disability because of the matters to which we have alluded any more than would be a private covenantor for the benefit of a hospital serving the area in which he himself happened to live.

There is finally the point that was made, based on the circumstance that the contributions of the Corporation were (as they were called in argument) "mere balancing figures", sums required to enable the Con-

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servators to pay off outstanding obligations and to balance their bank account. Again, however, as already indicated, we are unable to see that those circumstances properly affect the conclusion. They are matters, in our view, affecting the extent or degree and not the quality of the payments. In that respect we think some assistance may be fairly derived from *Lady Miller* v. *Commissioners of Inland Revenue*, 15 T.C. 25, and other similar authorities referred to by Mr. Tucker. It is quite true, as Mr. King observed, that such cases turned upon the circumstance that the beneficiary in question was equitably entitled to the relevant amount of trust income, however it was in fact expended on the beneficiary's behalf. But the cases are still, we think, useful as showing that the quality of such payments is not affected, or necessarily affected, by circumstances affecting the calculation of amount, or by the mere fact that any sums so paid must wholly or partly be applied in some specified manner.

We have already referred to the point taken: Suppose a "profit" were shown upon a year's operations on the part of the Conservators, would they not be liable to be taxed as profits or gains under Case VI of Schedule D, and would not then the case be shown to be parallel to those of the *Humber*(1) and *Forth Conservancies*(2) and other similar cases? And we have also indicated our view that the point begs the real question in the case by assuming the one thing which cannot happen or be assumed. Further, it is in any case to be remembered that Case VI is a residuary provision and only applies in the event of no other of the Cases or Schedules being applicable, and particularly (in the present instance) if Case III of Schedule D is excluded, that is, if the quality of the payments here in question is such as not to bring them within Case III as (since the enterprise is a charitable purpose) we think they are. It is perhaps useful to enquire what the situation would be if the exemption from Income Tax at present allowed to charitable bodies were removed; but the effect would be, first, that Case III, if we are right in thinking it to be applicable now, would still remain applicable; and second, because there was no exemption from tax for the Conservators, the Corporation would (as it seems to us) have to pay over the net figure of £16,006 instead of the gross, for that would be the effect of their statutory obligation.

Our conclusion, therefore, is that the Special Commissioners were right in the conclusion which they reached and which they particularly expressed in sub-paragraphs (*c*) and (*d*) of paragragh 12 of the Case(3):—

> "(*c*) In our opinion, once it is conceded that the Corporation's contributions to the Epping Forest Fund are properly regarded as payments (in account) to a separate body of persons (namely the Conservators), the proper view of Sections 39 and 41 of the Epping Forest Act, 1878, is, not that the Corporation discharges debts of the Conservators, nor that it pays a mere balancing sum in the nature of a trade receipt against which must be set expenses, but that it makes contributions to the income of the Conservators, and that, out of their independent income and these contributions, the Conservators discharge their own debts. In other words, we think a reasonable interpretation of these sections is that the Corporation is required to supplement the income of the Conservators so as to ensure that such income, so supplemented, shall be sufficient to enable the Conservators to meet all expenditure on revenue account incurred in the performance of their statutory duties . . . (*d*) The question then arises whether this 'income' has the characteristics of an 'annual payment'. The fact that the annual amount is not fixed but variable is immaterial. The sums in question are legally exigible, they have the quality of recurrence, and, in our opinion are a 'pure income profit', as distinct from sums in the

(1) 6 T.C. 555. (2) 16 T.C. 103. (3) Page 299 *ante*.

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> nature of trade receipts against which have to be set the expenses of earning them. We therefore hold that the contributions are 'annual payments' made by the Corporation to the Conservators."

It follows also that we have felt unable to agree with the conclusion of Donovan, J., and particularly with that part of his judgment which seems to us to contain the gist of his reasoning. The passage to which we refer (1) is:

> "But the Conservators do not, as such, carry on a trade the profits of which are taxable under Case I of Schedule D. They are exempt from tax as a charity. Whether otherwise they would be liable as carrying on a trade is not for me to say, though I should doubt it. But whether the Conservators carry on a trade the profits of which are specially exempt from tax, or whether their activities fall short of trade, seems to me to be inconclusive. In order to determine the true nature of this £16,000 one should I think look at all the facts including what the Conservators do, and then ask, regardless of whether there is a trade or a taxable trade, if on the facts it is right to regard the £16,000 merely as an item of revenue against which expenses must be set to determine whether the Conservators have made a profit or if, on the other hand, it is right to regard the £16,000 as all profit income . . . In all the circumstances, can this £16,000 be segregated and called a profit? The Conservators, in whose hands it is alleged to be a profit, get the sum only because they have performed duties which involve them in an outlay of equivalent amount. If the charitable exemption were abolished I think the Conservators would be astonished if the Inland Revenue descended upon them and said: 'Never mind about your expenses, this £16,000 is all profit—pay tax on it.' . . . Faced with the question: Is this contribution by the Corporation profit income in the Conservators' hands which would ordinarily be taxable in full, or is it just one item of revenue to be taken into account in ascertaining the result of each year's working, I say unhesitatingly that it is the latter. That means it is not an annual payment within Case III of Schedule D."

From the passages which we have read it seems to us that the learned Judge treated the operations of the Conservators as being of a *quasi* trading character or of a character capable of producing "profits or gains", therefore characteristically similar to the operations of the Conservancies in the *Conservancy* (2) cases. For the reasons which we have given it is upon this matter that we have formed a different view. It does not seem to us irrelevant (as the Judge thought) whether the Conservators could be thought of as carrying on a trade or not. It is, in our judgment, of the essence of the matter that they do not do any such thing, and as we have more than once stated, we do not think there is here any question at all of their arriving at a "profit" as the result of their operations. We have also expressed the view that there is here no question of any consideration flowing to the Corporation being implicit in the transaction; and even though the contributions of the Corporation may form an item in ascertaining the financial result of the year's operations, it does not seem to us thereby to follow that the contributions can be treated as mere ingredients in account comparable for this purpose with the ingredients in the trading account of a trader, or with the ingredients in an account of a body (like the Conservancies) capable of producing "profits and gains". We venture, indeed, to think that there is force in the criticism made by Mr. Millard Tucker that the learned Judge, having cited Lord Greene, M.R.'s formula, "pure profit income", was thereafter misled into placing an undue emphasis upon the word "profit" in its business sense.

We have, however, said that though the question is a difficult one, it is essentially straightforward, a matter to some degree of first impression.

(1) Pages 304/5 *ante*. (2) 6 T.C. 555 and 16 T.C. 103.

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Giving the matter the best consideration of which we are capable, we conclude accordingly that the Conservators are right in their contention and that their appeal should succeed.

Mr. J. Millard Tucker.—The appeal will be allowed with costs here and below, and the decision of the Commissioners restored?

Sir Raymond Evershed, M.R.—Is that right, Mr. King?

Mr. Cyril King.—Yes, my Lord, that would be the right Order.

May I ask for leave to appeal, should the Commissioners of Inland Revenue be so advised on consideration of your Lordships' judgment? Your Lordships are differing from the judgment of Donovan, J., and, in our submission, there are several points of difficulty in the case. Would your Lordships give leave?

Sir Raymond Evershed, M.R.—Is there anything you have to say on that, Mr. Tucker?

Mr. Tucker.—It is always difficult to answer an application of that sort. The Crown, obviously, takes a view, in support of the judgment of the learned Judge, that there is something special about this matter, but I would have submitted there is not, particularly in the light of your Lordships' judgment. It is merely the application to certain facts, perhaps special facts, of the ordinary principles of Case III and Rule 19.

(*The Court conferred.*)

Sir Raymond Evershed, M.R.—We think it is a case in which we should give leave.

Mr. King.—Your Lordships say I may have leave?

Sir Raymond Evershed, M.R.—Yes.

Mr. Tucker.—Will the leave be unconditional?

Sir Raymond Evershed, M.R.—I should have thought there was no reason here for imposing any condition. As you have pointed out, it is very much a case of its own. It is not a test case.

Mr. Tucker.—No. I only point out that Epping Forest is a charity.

Sir Raymond Evershed, M.R.—I think perhaps, as you have pointed it out, that is a matter that the Crown may consider. On the other hand, the City Corporation is not a legally aided person.

Mr. Tucker.—No, my Lord, not yet.

The Crown having appealed against the above decision the case came before the House of Lords (Lords Normand, Oaksey, Morton of Henryton, Reid and Cohen) on 16th, 17th, 18th, 19th and 23rd February, 1953, when judgment was reserved. On 20th April, 1953, judgment was given unanimously against the Crown, with costs.

The Attorney-General (Sir Lionel Heald, Q.C.), Mr. Cyril King, Q.C., and Sir Reginald Hills appeared as Counsel for the Crown, and Mr. J. Millard Tucker, Q.C., Mr. N. E. Mustoe, Q.C., and Mr. R. R. D. Phillips for the Conservators.

Lord Normand.—My Lords, the appeal arises out of a claim by the Respondents for exemption from Income Tax for the year 1948–49 under Section 37 (1) (*b*) of the Income Tax Act, 1918, and for recovery from the Inland Revenue of the sum of £7,202 15*s.* 6*d.*, which had been deducted (professedly under Rule 19 (1) of the All Schedules Rules) by the Mayor and Commonalty and Citizens of the City of London in paying to the Respondents a contribution under Section 39 (1) of the Epping Forest Act, 1878, for the year ended 31st March, 1949, of £16,006 3*s.* 4*d.* The Court of Appeal decided in favour of the Respondents, reversing a judgment of Donovan, J., and reaffirming the determination of the Special Commissioners. Against the decision of the Court of Appeal, this appeal is taken by the Commissioners of Inland Revenue.

The substantial question is whether the contribution paid to the Respondents is an " annual payment " within the meaning of Case III of Schedule D. Under Rule 1 of the Rules applicable to Case III, Income Tax extends to

> " any interest of money . . . or any annuity, or other annual payment, whether such payment is payable . . . 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 ".

If the payment of the contribution falls within the words " annual payment ", it follows on the facts of the case that the Corporation are entitled under Rule 19 (1) of the General Rules, on making the payment, to deduct and retain a sum representing the amount of the tax thereon at the rate in force during the period when the payment was accruing due, and, further, that the Conservators of Epping Forest, the Respondents, can recover from the Inland Revenue the amount of the tax deducted. These consequences inevitably follow from these findings which are now common ground:

(1) that the Conservators, the recipients of the sum, are a separate legal *persona* from the City of London Corporation which pays them, though the members of the two bodies are the same ;

(2) that the contribution was paid wholly out of profits or gains on which the Corporation had paid Income Tax ; and

(3) that the Conservators are a body established for charitable purposes only, and therefore exempt from Income Tax on " annual payments " forming part of their income.

In June, 1871, the Court of Common Council of the Corporation of the City of London met the First Commissioner of Works and offered to abandon certain ancient rights of metage on grain and wares brought into the Port of London and to devote the revenue arising from a fixed duty, which it was proposed should be levied in lieu of metage, to the preservation of Epping Forest for the benefit of the public at large. This offer was voluntary, and it was accepted. In pursuance of this arrangement an Act was passed in 1872 abolishing compulsory metage and creating a fixed due called the " City of London grain duty ". This Act also created a fund to be applied to the preservation of open spaces near London. In the meantime an enquiry was proceeding in order to ascertain what illegal enclosures had been made in the previous 20 years. There were legal proceedings for the purpose of staying further illegal enclosures and for the purpose of obtaining

a declaration that all owners and occupiers of lands and tenements within the regard of the Forest were entitled to rights of common pasture and pannage over the whole waste land of the Forest. These legal proceedings, in which the City Corporation took a part, were successful. Thereafter the Corporation acquired by voluntary purchase the waste lands of certain manors in the Forest. The next step was the introduction by the Government of the day, by arrangement with the Corporation, of a Bill which became the Epping Forest Act, 1878. It should also be mentioned that the Corporation's interest in the preservation of open spaces for the benefit of the public was not confined to Epping Forest. That was, however, much the largest of the open spaces which the Corporation was anxious to preserve.

The Act of 1878 is entitled:

> "An Act for the Disafforestation of Epping Forest and the preservation and management of the uninclosed parts thereof as an Open Space for the recreation and enjoyment of the public; and for other purposes."

It recites with much detail the steps which had led to its enactment. From these recitals I quote the following:

> "Whereas the Corporation of London have made great exertions to preserve the Forest as an open space for the recreation and enjoyment of the public, and for that purpose they have purchased and hold a large proportion of the waste lands, and have expended large sums of money, . . . And whereas the Corporation of London are desirous of being constituted Conservators of the Forest, and are willing and able to defray such expenses as are to be borne by the Conservators".

Section 3 of the Act provides that Epping Forest shall be regulated and managed under and in accordance with the Act by the Corporation of the City of London, acting by the Mayor, Aldermen and Commons of the City in Common Council assembled, as the Conservators of Epping Forest. Section 7 requires the Conservators at all times to keep the Forest uninclosed and unbuilt on, as an open space for the recreation and enjoyment of the public, and, *inter alia,* to preserve as far as possible the natural aspect of the Forest, ancient remains within it, and its natural amenities. There are provisions (Section 30) providing for the appointment of verderers, and (Section 31) of a committee, of which the verderers are *ex officio* members, with authority to exercise the powers of Conservators. The powers and duties of the Conservators are set out (Section 33) and are designed to give the Conservators authority and power to manage the Forest in order, *inter alia,* to safeguard and improve the Forest as a place of public resort and enjoyment, and they include powers to set apart such parts as they think fit for the use of the inhabitants to play at cricket and other sports, and to lay out cricket grounds and grounds for other sports and to enter into agreements with and to confer special privileges on particular clubs or schools, and powers to set apart and maintain bathing places. The obligation of the Corporation of London to contribute is dealt with in Section 39. The material provisions of the Section are:

> "(1) The Corporation of London shall from time to time contribute to the capital and income of a fund, to be called the Epping Forest Fund, such moneys as shall be necessary out of the City of London grain duty or from other sources.
>
> (2) The Fund shall consist of—
>
> As regards capital: . . .
>
> As regards income: . . .
>
> (iv) The annual income arising from the investments of any money, part of the capital of the fund:

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(v) The half-yearly or other periodical payments in respect of rent-charges:

(vi) All fines, penalties, proceeds of timber-cuttings and loppings, and other moneys received by the Conservators, other than capital as aforesaid:

(vii) The fees and income received for marking the cattle of the commoners, and in respect of cattle and animals impounded:

(viii) All moneys contributed by the Corporation of London, or by any person, to the income of the fund."

It should be explained that the City of London grain duty referred to in Section 39 (1) came to an end in 1902 and that the contributions to the Epping Forest Fund have since then been provided out of the City's Cash, the income of which consists of the profits from the Corporation's estates and markets and certain investments, all of which, in the hands of the Corporation, are brought into computation for Income Tax purposes.

In every year since the Act of 1878 became law the other receipts of the Epping Forest Fund have been insufficient to defray the expenses of the Conservators and the Corporation has in each year transferred to the fund a sum equal to the deficiency. The burden had been increasing and this fact no doubt moved the Corporation for the first time to deduct Income Tax in the year in question when it made the payment. The Chamberlain of the City of London is the banker of the Corporation and he is also treasurer of the Epping Forest Fund. Bills are presented through the Epping Forest Committee and are examined by the accountant auditors, and a cheque or warrant is drawn on the Chamberlain in payment. As regards the wages of the Forest staff, an account is kept by the Superintendent of the Forest, which the Epping Forest Committee keeps in funds by means of warrants drawn from time to time on the Chamberlain. The accounts of income and expenditure are gone through monthly, and at the end of the year the amount of the Corporation's contribution from the City's Cash necessary to make up the deficiency between the income and expenditure of the year is finally determined. Payment is made, in account, by the Chamberlain as banker and he makes the necessary transfer in his books from the City's Cash account to the Epping Forest account. In the year 1948–49 the expenses were £22,660 19*s.* 2*d.*, the receipts (other than the Respondents' contribution) £6,654 15*s.* 10*d.* The deficiency was £16,006 3*s.* 4*d.*, which was met by a net payment (that is, a payment after deduction of Income Tax), in account, of £8,803 7*s.* 10*d.* This payment was made on the footing that the Respondents were entitled to recover the tax deducted, amounting to £7,202 15*s.* 6*d.*, from the Appellants.

The Special Commissioners give their reasons and conclusion in the following paragraphs[1]:—

"In our opinion, once it is conceded that the Corporation's contributions to the Epping Forest Fund are properly regarded as payments (in account) to a separate body of persons (namely the Conservators), the proper view of Sections 39 and 41 of the Epping Forest Act, 1878, is, not that the Corporation discharges debts of the Conservators, nor that it pays a mere 'balancing' sum in the nature of a trade receipt against which must be set expenses, but that it makes contributions to the income of the Conservators, and that, out of their independent income and these contributions, the Conservators discharge their own debts. In other words, we think a reasonable interpretation of these Sections is that the Corporation is required to supplement the income of the Conservators so as to ensure that such income, so supplemented, shall be sufficient to enable the Conservators to meet all expenditure on revenue account incurred in the performance of their statutory duties.

A sum payable (albeit out of capital) under a will to supplement the income of an individual is itself 'income' (*Brodie's Trustees* v. *Commissioners of*

(1) Page 299 *ante*.

Inland Revenue, 17 T.C. 432) and in this respect we see no difference in principle between this and a sum payable (out of revenue) under a statute to supplement the income of a body of persons.

The question then arises whether this 'income' has the characteristics of an 'annual payment'. The fact that the annual amount is not fixed but variable is immaterial. The sums in question are legally exigible, they have the quality of recurrence, and in our opinion are a 'pure income profit', as distinct from sums in the nature of trade receipts against which have to be set the expenses of earning them. We therefore hold that the contributions are 'annual payments' made by the Corporation to the Conservators."

Donovan, J., agreed with the Special Commissioners in the proposition that the Respondents do not discharge the Conservators' debts, but he found that the Special Commissioners' reasoning was fallacious because it assumed that, if a sum is paid by one person to supplement the income of another, the supplement is necessarily "profit income" in the hands of the recipient. He thought that the test was whether, on the facts as a whole, the contribution paid by the Respondents was an item of revenue against which expenses must be set to determine whether the Conservators had made a profit. He said :(1)

"The Conservators, in whose hands it is alleged to be a profit, get the sum only because they have performed duties which involve them in an outlay of equivalent amount. If the charitable exemption were abolished I think the Conservators would be astonished if the Inland Revenue descended upon them and said: 'Never mind about your expenses, this £16,000 is all profit—pay tax on it'."

Sir Raymond Evershed, M.R., who delivered the judgment of the Court of Appeal, rejected the test of Donovan, J. In his view(2)

". . . the vital element, as it seems to us, is that the enterprise which the Conservators manage and conduct is a charitable enterprise to be regarded in the same way as any other charitable enterprise conducted with charitable funds by charitable trustees. The Conservators are not carrying on a trade; and, in spite of references in the argument, naturally enough, to 'subsidies' and 'balancing figures' the enterprise which the Conservators conduct is, in our judgment, nothing like a trade. The question, therefore—What if a profit were made?—seems to us not really capable of being sensibly asked. For, by the statute, every penny piece of income must be applied for the purposes (being charitable purposes) of the Forest and no other purposes, and the Corporation's obligation is by the statute to pay what is required to provide for the year's expenses and no more. There is thus no real question or possibility of the Conservators so conducting the affairs of the Forest as to result in the production of 'profits or gains' within the meaning of the Income Tax Acts."

Again, the learned Master of the Rolls says :(3)

"it is of the essence of the matter that the Conservators are engaged upon a charitable purpose".

And yet again :(4)

"it seems to us that the learned Judge treated the operations of the Conservators as being of a *quasi* trading character or of a character capable of producing 'profits or gains' . . . For the reasons which we have given it is upon this matter that we have formed a different view. It does not seem to us irrelevant (as the Judge thought) whether the Conservators could be thought of as carrying on a trade or not. It is, in our judgment, of the essence of the matter that they do not do any such thing".

In my view these passages make it clear beyond any doubt that the Court of Appeal decided the question, annual payment or not, on the ground that the Conservators, being a body constituted for charitable purposes only and

(1) Page 305 *ante*. (2) Page 310 *ante*. (3) Page 311 *ante*. (4) Page 314 *ante*.

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bound to apply their whole income to those purposes, was incapable in law of earning profits within the meaning of the Income Tax Acts, with the corollary that their accounts were not such as that

> "the idea of an annual profit and loss account in respect of the year's operations was applicable."(1)

My Lords, both in the judgment of Donovan, J., and in the judgment of the Court of Appeal, reference was made to the well-known judgment of Scrutton, L.J., in *Earl Howe* v. *Commissioners of Inland Revenue*(2), [1919] 2 K.B. 336, and to the judgment of Lord Greene, M.R., in In re *Hanbury*, 20 A.T.C. 333. In the first of these authorities Scrutton, L.J., pointed out that if someone agrees to pay his butcher an annual sum for meat, the whole sum is not profit of the butcher. To find how much of the annual sum is profit, the butcher must deduct the cost of the meat. In his hands the sum paid is a gross receipt, not an annual payment under Case III. In *Hanbury* Lord Greene distinguished two classes of annual payments; one which the Income Tax Acts regard as "pure income profit" of the recipient, which is not diminished by any deduction, and which the payer is entitled to treat as a payment which goes out of his income altogether; and the other, a number of annual payments the very quality and nature of which makes it impossible to treat them as pure profit income of the recipient, the proper way of treating them being to treat them as an element to be taken into account in discovering what the profits of the recipient are.

The judgment of the Court of Appeal, after a timely reminder that the Court must construe the Act itself and not a judicial paraphrase of it, expresses the opinion that Donovan, J., was misled by the words in Lord Greene's formula, "pure income *profit*", into placing an undue emphasis upon the word "profit" in its business sense. I do not think that Donovan, J., fell into any verbal trap or that his reasoning is vitiated by giving a false emphasis to the word "profit". I respectfully think that he addressed himself to a real and not a verbal distinction, whether the sum received by the Respondents was an item of revenue or receipt in their hands against which their expenses have to be set, or whether it was income in their hands. It is not possible, and I think I would have the assent of everyone to this, to state the issue in a short and tidy formula, which shall have regard equally to the character of the payment from the payer's position and from the payee's position. But Lord Greene's formula, which would perhaps lose nothing by the omission of the words "pure profit", states the position, at any rate from the point of view of the payee, in terms which are not misleading, and I see no reason for thinking that the problem was not understood by Donovan, J.

The *ratio* of the decision of the Court of Appeal was, we were told, not among the reasons put forward by the Respondents in that Court, nor does it appear among the reasons in their case. It was not supported by Mr. Tucker, and I must, with understandable regret, admit that a *ratio*, which would afford a short and clear-cut solution of our problem, is scarcely in line with the *ratio* of previous decisions of this House. It is, indeed, much too late to say that a charitable body, every penny of whose income must be applied to its exclusively charitable purposes, is incapable of earning profits or gains. I do not know how to reconcile this with *Brighton College* v. *Marriott*(3), [1926] A.C. 192, where the surplus earned by a charit-

(1) Page 311 *ante*. (2) 7 T.C. 289. (3) 10 T.C. 213.

able body in carrying on its trade of education was held to be subject to tax though the surplus was dedicated to the charitable purpose of the college. It is true that, in my opinion, the Respondents were not carrying on a trade as defined in Section 237 of the Income Tax Act, 1918, that is, a trade, manufacture, adventure or concern in the nature of trade. But the activities they were carrying on are fairly within the category " analogous to trade ", and if they had resulted in a surplus, the surplus would be profits and gains under Schedule D, Case VI, though it could only be applied for purposes which exclude " personal profit " to use the words employed by Lord Dunedin in *Commissioners of Inland Revenue* v. *Forth Conservancy Board*(1), 1931 S.C. (H.L.) 95. That case was not concerned with a charity, and the Conservancy was not carrying on a trade or a concern in the nature of a trade and was not liable to tax under Case I of Schedule D. But it was carrying on an enterprise " analogous to trade ", and the dues it was entitled to levy exceeded its outgoings. The surplus was held to be subject to tax under Case VI. Lord Dunedin would have held, but for authority, that it was not liable to tax because

> " not a penny of the dues so levied can be employed for any other purposes except only for the necessary expenses of the trust. No one makes a personal profit out of any of the moneys received."(2)

But Lord Dunedin conceded that he was bound by the authority of *Mersey Docks and Harbour Board* v. *Lucas*(3), 8 App. Cas. 891, in which

> " it was most definitely laid down in this House that the purpose to which the money collected was applied could not be considered in settling whether it was a gain or profit or not."(4)

Now the Conservators in the present case might have had a surplus in some one year apart from any contribution by the Corporation of the City of London. That may have been improbable, but it was not impossible. They would not, then, of course, have been entitled to any contribution from the Corporation. The surplus would have been available in the next year or later for the charitable purpose of preserving the Forest as a public resort, but it would none the less have been a profit within the meaning of the Income Tax Act, Schedule D, Case VI. The question whether it would have been exempted from the liability is a different question ; that depends on the scope of the exempting provisions of the Income Tax Acts, which themselves necessarily presuppose a profit that without them would be taxable. The result is that if the decision of the Court of Appeal is to stand, it must be supported by reasons other than those given in the judgment. The other reasons must show that, though the Respondents may be regarded as carrying on an activity which might render a resulting surplus taxable under Case VI, they also received the sum in question as income within Case III ; a sum, therefore, that does not come into the reckoning of its Case VI profits but remains taxable separately under Case III without any deduction. That is a situation that the Income Tax Act contemplates and for which it has made provision.

The convenient course will be to turn to the other grounds which were put forward on the Respondents' behalf.

The case in outline is as follows. The payment in question is an annual payment hardly distinguishable from an annuity. The matter has to be looked at both from the payee's point of view and from the Respondents' point of view. Regarded as a payment it is a sum paid under a legal obligation and it makes no difference that the obligation is

(1) 16 T.C. 103. (2) 16 T.C., at p. 118. (3) 1 T.C. 385. (4) 16 T.C., at p. 119

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statutory and not under covenant. It has the characteristic of recurrency. It is true that unlike an ordinary annuity it fluctuates from year to year, but that is immaterial: *Moss' Empires, Ltd.* v. *Commissioners of Inland Revenue*(1), 1936 S.C. 531 ; [1937] A.C. 785. It is paid wholly out of taxed money and it is a transfer of part of the income from the payee with its tax burden *Perkins' Executor* v. *Commissioners of Inland Revenue,* 13 T.C. 851. It is calculated by reference to a rule prescribed in Section 39 (2) of the Epping Forest Act, 1878, but

> "there is no relation between the measure that is used for the purpose of calculating a particular result and the quality of the figure that is arrived at by means of the test."(2)

It cannot reasonably be regarded as payment for services rendered or for any consideration of any kind. Regarded as a receipt, the Respondents take it as a sum at their own disposition to expend just in the same way as interest on their investments or rents received by them ; and the fact that it was or even had to be expended in payment of debts incurred in the performance of their duties is irrelevant. Many of these propositions are not in dispute. The controversy indeed settled down on the question whether the sum is income in the hands of the Respondents. On this the Crown submitted that it was a balancing item in the Respondents' profit and loss account, or an account of the nature of a profit and loss account. This account was kept in accordance with the provisions of Section 39 (2) of the Epping Forest Act, 1878, which stamped the payment with the character of a trade receipt. Moreover, the payment only filled up a deficit and it could, therefore, unlike the sum paid to shareholders in *Moss' Empires,* never be a profit in the pocket of the recipient. Apart from that it was a payment in return for the performance of the duties laid on the recipients by the Epping Forest Act, 1878, and in effect a payment in discharge of debts thereby incurred and not income or pure profit in the hands of the Respondents.

My Lords, it is evident that the decision of the appeal, subject to the effect of the authorities, largely hinges on the proper construction of the Epping Forest Act and especially of Section 39. But, in view of the Crown's contention that the payment was made in return for services or some advantage received by or on behalf of the Corporation, it is necessary to recall the circumstances antecedent to the passing of the Act and those recitals of the Act which I have quoted. I will deal with this aspect of the Crown's case first. It may *in limine* be said that there is no finding that the Corporation received any consideration, or money's worth in any form, in return for the payment. But I go further and say that no such finding could have been made consistently with the evidence laid before the Commissioners and accepted by them. In the first place, it seems necessary to repeat that the whole actions of the Corporation which led up to the passing of the Act were disinterested and sprang from a desire to preserve this Forest, among other open spaces, for the benefit of the public. That was the motive which induced the Corporation to undertake the obligation and to agree to have it embodied in the statute. But satisfaction of a motive must not be confused with consideration. To come to the Act itself, the duties laid on the Respondents were duties which they owed to the public, not to the Corporation. In view of some of the argument addressed to us it may be well to add that the public, who are the beneficiaries of the Act, are the public at large, and that the sparse

(1) 21 T.C. 264.

(2) Glenboig Union Fireclay Co. Ltd. *v.* Commissioners of Inland Revenue, 12 T.C. 427, 464; 1922 S.C. (H.L.) 112, 115.

dwellers among the offices, warehouses and public buildings in the City of London are today but a microscopic part and even in 1878 must have been only a small proportion of those who enjoy the open spaces of Epping Forest. I dismiss as a fantasy the notion that the Corporation was in some way, direct or indirect, the beneficiary of the Respondents' performance of their duties, and that the sum has the quality of a payment for services or the like.

I turn next to examine the question whether Section 39 imparts to the sum the character of a trade receipt in a kind of profit and loss account. Now, in my opinion, the character of the payment cannot depend on the place which it takes in the account even though that account is statutory. The account does not bind the Inland Revenue when it comes to assess the taxable income of the Respondents. Nor are the Respondents bound by the account in their discussions with the Inland Revenue. The question between them is whether the sum ought to be dealt with as a trade receipt or an item of that nature in an account properly framed to arrive at the taxable profit of the Respondents, assuming them to have been carrying on a trade (Case I) or some enterprise analogous to a trade (Case VI), or whether it ought to be dealt with as a Case III profit or income. We cannot advance towards a decision merely by asking how the accounts of the Respondents have been framed or how they must be framed under their statute. But, secondly, this contention of the Crown is, in my opinion, based on a misconstruction of Section 39. The first Sub-section creates the obligation to contribute to the capital and income of the Epping Forest Fund " such moneys as shall be necessary ". The question immediately occurs, how measure what is necessary, and the answer is found appropriately in the immediately following Sub-section. It provides the measure of what must be paid to the income of this fund. I do not attach any importance to the description " income " in Section 39 for the reasons already explained, that the use of such a word in the statute or in the account cannot affect the issue. Nor do I attach the least importance to the fact that the sum is a balancing figure. It is that, of course, but the purpose of coming to a balance is merely to measure what is " necessary ". It is to be noted, moreover, that among the credit figures in the account are the income from investments and payments of rentcharges, which are not of the nature of trade receipts.

My Lords, a reading of the recitals and of the Act convinces me that the approach of the Crown's argument to the issue is faulty and involves a perverted view both of the duties of the Respondents and of the means at their disposal to achieve the purposes for which the Act was passed. From the first the Respondents had large duties thrust upon them, duties which might be discharged in a niggardly, penurious way, or in a generous and liberal way. They had a very small income apart from the Corporation's contribution. Without that contribution they would have been able to do little to achieve the purpose of the Act. They certainly could not fulfil that purpose unless they had at their command an income on a scale which would enable them to follow a policy for the management of the Forest involving a certain magnitude of expenditure. It was there that the Corporation were willing to help, not by defraying the annual debts, or part of them, incurred by the Conservators, but by giving the assurance, under sanction of statute, that the Conservators would have an income of the order required for their task. Since the members of the Corporation were also the Conservators there was a practical safeguard against the burden

(Lord Normand.)

thus assumed becoming unmanageable. That is my reading of the Act, and it is worth noticing that Section 39 (2) (viii) contemplates the possibility that persons other than the Corporation would contribute to the income of the fund. What can this mean except that other persons might desire, like the Corporation, to contribute recurrent gifts of money to the Conservators, and what would such gifts be but benevolent contributions of income to income? It is here that I must respectfully part company from Donovan, J. He says that the Conservators get the sum only because they have performed duties which involve them in outlay of equivalent amount. I think that the truth is that the Conservators performed their duties in a manner which involved them in a considerable outlay only because they had the assurance of this income contribution from the Corporation. In the next succeeding sentence Donovan, J., poses the question: What would happen if the charitable exemption were abolished? Here I think the Court of Appeal has given the correct answer. A larger sum would then be "necessary" within the meaning of Section 39, and it would be arrived at by "grossing up" the £16,000 and then deducting the Income Tax. But this, again, is not relevant to the issue. It is merely a matter of measuring the sum "necessary".

The last point with which I must deal before coming to the authorities is the Crown's contention that since the contribution only filled a gap between receipts and expenditure it never could be the income of anyone. The Crown used *Moss' Empires*(1) by way of contrast, and said that there the sums paid were in fact income in the shareholders' pockets, but whose pockets does the Corporation's contribution reach except the pockets of the Respondents' trade creditors as payment of the debts due to them? This argument was met by the Respondents' Counsel with a short but cogent answer. Though the Respondents paid away the whole sum of £16,006 3*s.* 4*d.* to their creditors, they were better off to the extent of £16,006 3*s.* 4*d.* by receiving it. That they paid it to creditors is in no way inconsistent with its being the Respondents' income. The argument is inconsistent with the principle that you cannot determine the nature of a payment by inquiring what becomes of it or even what must become of it after the payee has received it.

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

(1) 21 T.C. 264.

(Lord Normand.)

If my analysis of Section 39 of the Epping Forest Act, 1878, and my interpretation of that Act as a whole is correct, it will be apparent that *Humber Conservancy Board* v. *Bater* (6 T.C. 555), in which a lump sum paid to a conservancy board by a railway company which participated in the benefits of the board's operations was held to be of the nature of a trade receipt, has little to do with the matter. Nor, in my opinion, are the decisions in the so-called subsidy cases relevant. The facts were far removed from the facts in this case, if I am right in my presentation of them. In *Smart* v. *Lincolnshire Sugar Co., Ltd.*(1), [1937] A.C. 697, the company's trade consisted in the manufacture and sale of sugar made from beet grown in this country. The industry was new and there had been a sharp fall in the price of sugar. The effect of this would, from the national point of view, have been unfortunate, for the company might not be able to pay the farmers their contract prices for the beet, and the whole policy of growing beet for sugar and manufacturing it in this country might collapse in insolvency. To meet the difficulty a statute was passed under which "advances" were made to the company in respect of the sugar manufactured by them from home-grown beet during a period of one year up to a maximum fixed at 300,000 cwt. of manufactured sugar and at a rate not exceeding 1*s.* 3*d.* per cwt. It was provided that no advance was to be made unless the Minister was satisfied that the price paid to the grower was not less than the price specified in a schedule to the Act. There were certain conditional provisions for repayment which never came into operation. The question to be decided was whether the advances were loans, and therefore not subject to Income Tax, or trade receipts. There was no contention that they were annual payments, and no discussion of that question. This House took the view that the grants were not loans but were artificial supplements of the trading receipts, or, in other words, of the price which the company received for its sugar, and that the supplement partook of the nature of the price supplemented. The Attorney-General, however, fastened on the words employed by Lord Macmillan(2):

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

He said: "Strike out the word 'trading' and every word applies literally to the payments in this case." This is an extreme instance of construing not the Act of Parliament but judicial *dicta*. The argument is particularly subject to this objection because the words were used with reference to a wholly different issue from the issue whether there was an annual payment. But in substance the answer to the Attorney-General's argument is that in the present case there is nothing corresponding to the sugar, nothing corresponding to the price of the sugar and nothing corresponding to a supplement of the price of the sugar. I need not take up much time with *Ostime* v. *Pontypridd and Rhondda Joint Water Board*(3), [1946] A.C. 477. The facts are complicated but the essence of the matter is that the water board was selling water. It could not raise the price payable by its customers and there was a deficit in its accounts. The urban district councils, many of whose constituents were among those supplied, granted a subsidy to the board, levying on their ratepayers. The question at issue was not whether the subsidy was an annual payment or a trade receipt. The issue was whether the lump sum payments were receipts of trade or the equivalent of a rate levied by a local authority to meet

(1) 20 T.C. 643. (2) *Ibid.*, at p. 670. (3) 28 T.C. 261.

(Lord Normand.)

a deficit on its own undertaking. This House solved the question in the same way as it had solved the *Lincolnshire Sugar Company* case(1). It held that the payments were a supplement to the water board's trading receipts, that is, to the payments for the supply of water, and Lord Macmillan's words above cited were used by Lord Thankerton to define the purpose and character of the payments.

I find it unnecessary to deal with the cases on payments out of trust funds, one of which (*Lady Miller* v. *Commissioners of Inland Revenue,* 1930 S.C. (H.L.) 49)(2) is referred to by the Special Commissioners. They were cited and relied on by Counsel for the Respondents and it is not suggested that the Crown can gain any comfort from them. They are decisions upon trust law and I think they add little to the discussion of the principles involved in this case.

I would dismiss the appeal with costs.

Lord Morton of Henryton.—My Lords, I concur, and my noble and learned friend, **Lord Oaksey,** has asked me to say that he also concurs. We have both had an opportunity of reading the opinions of Lord Normand and Lord Reid.

Lord Reid.—My Lords, the real question in this case is whether the payments which the City of London make to the Conservators of Epping Forest under the Epping Forest Act, 1878, are or are not annual payments within the scope of the Income Tax Act, 1918, Schedule D, Case III, Rule 1. The Appellants contend that they are not, and the first argument adduced in support of this contention is that payments in return for services are not annual payments, and that these payments are made in return for services rendered by the Conservators, because the Epping Forest Act and the whole circumstances show that the City undertook to make these payments in order to have these services performed and to obtain benefit for the citizens of London. I agree with your Lordships that this argument is unsound. The Conservators are a charity and the beneficiaries are the public as a whole. The City were anxious to have Epping Forest preserved for public purposes, they were responsible for obtaining the Act which set up this charity, and they undertook heavy financial responsibilities in order to achieve this result. But I cannot see any relevant distinction between this case and a case where a private benefactor has taken a leading part in founding a charity and has undertaken to pay to the charity each year such sum as may be necessary to meet any deficit from its operations. It is not admitted that sums payable under such an obligation would come within the scope of Case III, at least where the charity carries on trading operations or operations of such a kind that, if a surplus were produced in any year, it would be taxable under Case VI of Schedule D. I shall assume in favour of the Appellants that the Conservators carry on such operations.

It is, I think, clear that the sums payable by the City have all the necessary characteristics of annual payments, taking " annual " in the sense in which that word is generally used in the Income Tax Act; but it is equally clear that by no means all payments which have those characteristics fall within the scope of Case III. There is no qualification or limitation of the words " annual payment " expressed in the Rules applicable to Case III, but a limitation must be implied so as to exclude certain kinds of annual payments. The Act must be read as a whole and construed so as to produce, so far as possible, a coherent scheme; and it is settled that Case III does

(1) 20 T.C. 643. (2) 15 T.C. 25.

not apply to payments which are in reality trading receipts in the hands of the recipients although such payments take the form of annual payments. One reason is that Income Tax is a tax on income and trading receipts are not income: a trader's income from his trade can only be determined after he has deducted his expenditure from his receipts, and it cannot be supposed that sums which are not income are to be taxable under Case III. But in my judgment the payments in this case are not trading receipts in the hands of the Conservators even if they are carrying on a trade or something in the nature of a trade. Trading receipts are generally received in return for something done or provided by the recipient for the payer, but, as I have said, that does not appear to me to be the case here.

So if the Appellants are to succeed it must be because the payments in this case fall within some other class of annual payments which, as well as annual payments received as trading receipts in return for something done or provided or to be done or provided, must for some reason be held to be excepted from the scope of Case III. But before considering this difficult question I think it well to consider certain annual payments, not related to any benefit to the payer, which in my opinion are clearly within the scope of Case III. That most relevant to the present case is an annual subscription under covenant to a charity by a donor who gets no advantage to himself in return for it. If the charity is not trading or carrying on anything in the nature of a trade I cannot see how such a payment can be excluded from the scope of Case III. What reason can there be for excluding it? Charities are not excluded from the scope of the Income Tax Acts; certain provisions entitle them to certain particular exemptions from tax, but that is all, and it was not suggested that any of those provisions affect this matter. Then on what ground can it be said that such a subscription is not income in the hands of the charity? What else could it be? It cannot be a trading receipt, because I am dealing for the moment only with a charity which is not carrying on anything in the nature of trading operations. But such a charity spends money and may need its subscriptions to meet its current expenditure. A donor might base the amount of his annual subscription on the needs of the society or might undertake to pay such sum in each year as might be necessary to balance the accounts. Would the money which he paid not be income in the hands of the society although other subscriptions in ordinary form were income? I see no escape from the conclusion that such payments to non-trading charities come within the scope of Case III. Can it then be held that the nature of the payment is essentially different if the charity happens to carry on some trading operation?

Two cases were cited by the Appellants as decisive in their favour—*Lincolnshire Sugar Co., Ltd.*(1), [1937] A.C. 697, and *Ostime* v. *Pontypridd and Rhondda Joint Water Board*(2), [1946] A.C. 477. Neither case dealt with payments to a charity and in neither case was the issue raised whether the payments there in question came within the scope of Case III: the importance of these cases lies in the fact that in both it was held that payments made without any direct return to the payer must be taken into account for Income Tax purposes and treated as trading receipts.

The *Lincolnshire Sugar Company's* case was concerned with payments by the Treasury to the company under the British Sugar (Subsidy) Act, 1925, and the British Sugar Industry (Assistance) Act, 1931. It was admitted that payments under the former Act were trade receipts, but it was contended

(1) 20 T.C. 643. (2) 28 T.C. 261.

(Lord Reid.)

that payments under the latter Act, which were called advances, were really loans and should not be taken into account at all for Income Tax purposes: the company had not needed to use these payments and had not carried them to its profit and loss account. I think that the grounds of the decision of the House are to be found in the following passages from the speech of Lord Macmillan, with which the other noble and learned Lords agreed(1):

> "What to my mind is decisive is that these payments were made to the Company in order that the money might be used in their business . . . . If the Company had not happened to be able to pay for its raw material otherwise it could properly have used the 'advances' for this purpose. It was with the very object of enabling them to meet their trading obligations that the 'advances' were made; they were intended artificially to supplement their trading receipts so as to enable them to maintain their trading solvency."

The payments in question were made during 1931-32, and it was not until 1934 that it was certain that they would not have to be set off against later payments of subsidy. After dealing with that matter Lord Macmillan said(2):

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

In the *Pontypridd*(3) case the rates received by the water board were not sufficient to meet its expenditure and the board was entitled to issue precepts to its "constituent authorities", two urban district councils, for amounts necessary to meet estimated deficits. It is settled that if a surplus results in any year from a public authority having collected more rates from its ratepayers than is necessary to meet current expenses that surplus is not taxable as income, and it was argued for the board that the sums received from its constituent authorities were analogous to rates collected from ratepayers. But this contention was rejected, and it was held that the sums in question must be brought into account as trading receipts. Viscount Simon said(4):

> ". . . payments in the nature of a subsidy from public funds made to an undertaker to assist in carrying on the undertaker's trade or business are trading receipts, i.e. are to be brought into account in arriving at the balance of profits or gains under Case I of Schedule D",

and he cited the *Lincolnshire Sugar Company* case as an illustration of this. Lord Thankerton, quoting words used by Lord Atkin in an earlier case, said that these sums were received

> "as a sum which went to make up the profits or gains of their trade"(5)

and he also relied on the *Lincolnshire* case.

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

> "the business nature of the sums in question"(2)

and Viscount Simon in the *Pontypridd* case referred to payments

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

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(1) 20 T.C., at p. 670. (2) *Ibid.*, at p. 671. (3) 28 T.C. 261.
(4) *Ibid.*, at p. 278. (5) *Ibid.*, at p. 284.

In my opinion, the payments in the present case were not of a business nature—they were of a benevolent nature—and they were not primarily made to assist in carrying on any trade or business—they were made primarily to achieve a public benefit of a charitable nature. If the Appellants are right the result would be far-reaching and, in my opinion, anomalous. Many, if not all, subscriptions to a charity which achieves its charitable object by trading could properly be described as intended to supplement its trading receipts or to assist it in carrying on its trade. But if that were the sole criterion, the result would be an unreal distinction between charities which do not trade and those which do: in the one case subscriptions would be part of their income and within Case III and in the other case not. If one reason, and perhaps the main reason, for excluding from Case III payments which apparently fall within its scope is to produce a coherent scheme of taxation, I cannot see anything coherent or reasonable in so distinguishing between charities which do trade and charities which do not. But on the other hand to treat all business payments alike whether or not the payer gets any direct return for them seems to me to be eminently reasonable. I would reserve my opinion about a payment which is primarily benevolent but which brings some incidental benefit to the donor.

The Appellants also submitted a rather different argument. This was, as I understand it, that a payment which is destined to go into the profit and loss account of the recipient cannot be within the scope of Case III. Case III only deals with payments which are profit income in the hands of the recipient and if a receipt has to go into a profit and loss account and be set against outgoings it cannot be all profit. The Appellants point out that no part of the sums paid by the City in this case can ever be profit in the hands of the Conservators because the amount of any sum payable is measured by the amount of the Conservators' deficit and, therefore, the whole of it must go to pay expenses and no part of it can ever be profit. This argument appears to me to be based on some misunderstanding of what the Act means by income or profit. Such cases as *Commissioners of Inland Revenue* v. *Forth Conservancy Board*(1), [1931] A.C. 540, and *Mersey Docks and Harbour Board* v. *Lucas*(2), 8 App. Cas. 891, make it clear that a receipt or surplus is none the less income although the recipient is bound to use it in a particular way and cannot enjoy it as a profit in the ordinary sense. Reference was made to a judgment of Lord Greene, M.R., in In re *Hanbury*, 20 A.T.C. 333. There Lord Greene contrasted annual payments

> "which the Acts regard and treat as being pure income profit of the recipient"

with those

> "the very quality and nature of which make it impossible to treat them as part of the pure profit income of the recipient, the proper way of treating them being to treat them as an element to be taken into account in discovering what the profits of the recipient are."

The phrase "pure income profit" is appropriate in the sense that the rules applicable to Case III permit no deductions and I think that the context shows that Lord Greene was referring to this: I cannot think that he meant that Case III only applies to payments which are pure profit in the sense that the recipient is free to use them as he pleases. He does not say that because a payment has to go into a profit and loss account, therefore it is

(1) 16 T.C. 103. (2) 1 T.C. 385.

(Lord Reid.)

not pure profit income. He puts it the other way round and says in effect that if you find payments

> "the very quality and nature of which make it impossible to treat them as part of the pure profit income of the recipient"

then you treat them as an element in the profit and loss account. So one must first enquire into the quality and nature of the payment and not as to its destination. Not every receipt by a trader in the course of his business is a trading receipt in the Income Tax sense. For instance, "interest of money" is specially mentioned in Case III as falling within the scope of that Case. It may be a business receipt which would appear in the trader's profit and loss account made up for ordinary business purposes. But, having been already taxed at source, it must be excluded from his profit and loss account for the purpose of Case I, or otherwise it would be taxed twice. So, in my opinion, neither the fact that the amount of the payments in this case is measured by the amount of the Conservators' deficit, nor the fact that the Conservators cannot use these payments as they please, but must carry them to the profit and loss account to extinguish that deficit, can determine whether or not these payments come to them as income. For the reasons which I have given I am of opinion that these payments are income in the hands of the Conservators and fall within the scope of Case III. I therefore agree that this appeal should be dismissed.

Lord Cohen.—My Lords, I concur.

Questions put:

That the Order appealed from be reversed.

The Not Contents have it.

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

The Contents have it.

[Solicitors: Solicitor of Inland Revenue; Comptroller and Solicitor of the City of London.]