COURT OF SESSION (FIRST DIVISION)—28TH FEBRUARY AND 1ST, 2ND AND 10TH MARCH 1967

HOUSE OF LORDS—24TH AND 25TH APRIL AND 29TH MAY 1968

Commissioners of Inland Revenue v. Carron Company(1)

Income tax, Schedule D—Deduction—Expenses—Company incorporated by charter in 1773*—Cost of obtaining supplementary charter—Cost of settling action by dissenting shareholder.*

The Respondent Company, which carried on the business of ironfounders, was incorporated by charter in 1773. *The Company's constitution remained virtually unaltered until revised in* 1963, *as hereinafter mentioned. By the late* 1950s *many of its features had become archaic and unsuited to modern conditions, and the Company's commercial performance was suffering a progressive decline. The most significant disadvantages were the restriction of the Company's borrowing powers to* £25,000, *restrictions on the issue and transfer of shares and the restriction of voting rights to certain members holding at least ten* £250 *shares. The restrictions relating to shares and voting rights prevented the manager of the Company's day-to-day commercial business from being given the status of a managing director, and so made it difficult to obtain a suitable person for the post. It was accordingly decided to petition for a supplementary charter under which,* inter alia, (a) *responsibility for management could be vested in a board of directors, so that management could proceed on lines similar to that of a company incorporated under the Companies Acts,* (b) *the limitation of the Company's borrowing powers to* £25,000, *the restrictions on the issue and transfer of shares and the restriction of voting rights would all be removed, and* (c) *the members' liability would be limited. A number of the points covered by the proposed charter had little to do with the Company's trade.*

The Company petitioned for the supplementary charter in December 1959, *but proceedings were suspended pending the outcome of an action by a shareholder claiming that the procedure adopted in deciding to petition was invalid. After winning the action before the Lord Ordinary and in the First Division of the Court of Session, the Company was advised that its prospects of success in the House of Lords were dubious, and the shareholder threatened to raise a further action on new grounds which would once more indefinitely postpone consideration of the petition. Consequently the Company settled the action on the terms that it should pay the pursuer's costs in the action and buy out part of her holding and the whole holding of another shareholder, her nephew, who had for many years been at variance with the Company, and, on the other hand, that she and her nephew should desist from further obstruction and he should never again acquire shares in the Company.*

(1) Reported (C.S.) 1967 S.C.204; 1967 S.L.T. 186; (H.L.) 1968 S.C. (H.L.)47; 1968 S.L.T. 305.

A supplementary charter was granted in January 1963 *substantially in the form proposed; the Company's affairs were then reorganised and its commercial performance improved.*

On appeal against an assessment to income tax under Case I *of Schedule D for the year* 1964–65 *the Company claimed to deduct the costs of obtaining the charter* (£3,107) *and defending the action* (£2,641) *and the amounts paid to the two dissenting shareholders in respect of their shares* (£83,800) *and expenses in the action* (£1,666). *For the Crown it was contended that the sums in question were not incurred wholly and exclusively for the purposes of the trade; alternatively, that they were incurred on capital account. The Special Commissioners found that the significant objects of the new charter were the removal of the restrictions on borrowing and the issue and transfer of shares and qualification for voting, which were obstacles to the proper management and conduct of the business, and that the object of the other expenses was the removal of the obstruction to the charter; they held that the Company was entitled to the deductions claimed.*

In the Courts it was conceded by the Crown that, if the cost of obtaining the charter was deductible, so were the other sums in question.

Held, (1) *that, the objects of the new charter being to remove obstacles to profitable trading, anything in it beyond that could be disregarded;* (2) *that, since the engagement of a competent manager and the removal of restrictions on borrowing facilitated the day-to-day trading operations of the Company, the expenditure was on income account.*

Anglo-Persian Oil Co. Ltd. *v.* Dale 16 T.C. 253; [1932] 1 K.B. 124 *applied on the second point.*

CASE

Stated for the opinion of the Court of Session, as the Court of Exchequer in Scotland, under the Income Tax Act 1952, s. 64.

I. (1) At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held at Edinburgh on 29th and 30th September 1965 for the purpose of hearing appeals, Carron Company, a company incorporated by Royal Charter (hereinafter called "Carron"), appealed against an assessment to income tax, Schedule D, Case I, for the year 1964–65 in the sum of £400,000 (subject to capital allowances of an amount as to which there was no dispute). Before the hearing the said figure of £400,000 had been adjusted to £219,846, subject to the questions for our decision.

(2) Shortly stated, the questions for our decision were whether, in computing the profits of its trade for the purpose of the assessment under appeal, Carron was entitled to deduct the following expenses incurred by it: (1) legal expenses of £3,107 incurred in connection with obtaining the grant of a supplementary charter; (2) legal expenses of £2,641 incurred in connection with an action brought against Carron by Mrs. Dorothy Brown; (3) the following sums paid pursuant to an agreement for the settlement of the said action: to Mrs. Dorothy Brown, a sum of £41,900, and a further sum of £1,666 being her expenses in connection with the said action; to Mr. W.G. Stevenson, a sum of £41,900.

(3) The following witnesses gave evidence before us: Mr. William Leslie W.S., a partner in Messrs. Brodie, Cuthbertson & Watson, solicitors, who acted throughout for Carron; Mr. H. Wilson-Bennetts, managing director of Carron since 1963; Mr. C.S.R. Stroyan W.S., a director of Carron. A

(4) The following documents were proved or admitted before us:

1. Print of an agreed translation from the Latin of Carron's royal charter of 1773, together with original and additional articles of co-partnery, deed of renewal of 1859, and by-laws (exhibit A). B

2. Print of Carron's supplementary royal charter of 1963 (exhibit B).

3. Print of Carron's 1963 bye-laws (with amendments to date).

4. Copy of explanatory letter issued by the secretary of Carron on 5th February 1963 (exhibit C).

5. Extract registered minute of agreement between Carron, Mrs. Dorothy Brown and Mr. W. G. Stevenson, dated 5th and 6th March 1962, and registered in the Books of Council and Session on 18th April 1962 (exhibit D). C

6. Statement showing sums claimed as admissible deductions (exhibit E).

7. Statement showing numbers of shares in Carron held by voting partners and others in 1962 (exhibit F).

8. Comparative statement of Carron's trading profits and losses from 1954 to 1965 (exhibit G). D

9. Appendix *in causa* Mrs. Dorothy Brown *v.* Carron Company (exhibit H). Copies of such of the above as are not annexed hereto as exhibits(1) are available for inspection by the Court if required.

II. As a result of the evidence, both oral and documentary, adduced before us, we find the facts set out in this paragraph and in paras. III, IV, V and VI below: E

(1) Carron was incorporated by royal charter in 1773 to carry on the business of ironfounders which had previously been carried on by certain partners under articles of co-partnery entered into in 1759. It has carried on the said business continuously ever since.

(2) The facts relevant to Carron's appeal were complicated, and for convenience we have stated them under four main headings, i.e., para. III, comparison of Carron's constitution prior to and subsequent to 1963; para. IV, Mr. W. G. Stevenson's participation in the affairs of Carron; para. V, Mrs. Dorothy Brown's participation in the affairs of Carron; para. VI, effects of settlement with Mrs. Dorothy Brown. F

III. (1) Until 15th January 1963 Carron's constitution consisted of: (*a*) original articles of co-partnery entered into in 1759; (*b*) additional articles of co-partnery entered into in 1771; (*c*) royal charter of 1773; (*d*) bye-laws passed by Carron since 1773 in exercise of the powers in that regard conferred upon the Company by the royal charter of 1773. Exhibit A contains copies of the said documents. G

(1) Not included in the present print.

A (2) The significant features of the above constitution in so far as affecting the matters in issue were as follows.

(*a*) *Capital.* By the charter of 1773 the capital of Carron was restricted to £150,000, divided into 600 shares of £250 each, with no provision for subdivision, increase or reduction.

(*b*) *Purchase of shares.* By the additional articles of co-partnery power was B given to Carron to purchase or acquire by forfeiture its own shares, and as at the date of the grant of the supplementary charter in 1963 Carron since its incorporation had so acquired 153 of its shares.

(*c*) *Annual Courts.* The charter of 1773 made it obligatory to hold two half-yearly General Courts, and declared that a quorum for these meetings should be those proprietors present in person or by proxy holding £10,000 of the capital C stock of the Company.

(*d*) By the additional articles of 1771 the right to vote in the affairs of Carron was, with certain exceptions which are not relevant to the matters in issue, limited to those partners who were (*a*) possessed of ten or more shares of Carron's stock and (*b*) being so possessed had been admitted by ballot by the other partners entitled to vote. Those partners who possessed this voting D qualification were known as "voting partners", and the voting partners as a body made up the governing body, known as the General Court. There were also certain provisions whereby the widow of a deceased voting partner having the liferent of her husband's shares and the daughters the fee of such shares could grant a proxy to a voting partner to vote on her behalf in respect of the shares of which she had the liferent. The royal charter of 1773 explicitly reiterated the E provisions of the additional articles conferring the right to vote upon those partners possessed of ten or more shares, but made no specific reference to the additional ballot qualification imposed by the additional articles, nor to the provisions therein contained affecting the right of widows referred to above, although it did confer upon Carron as a body corporate, *inter alia*, all the rights and privileges hitherto held and exercised by the individual partners of the F previous partnership.

(*e*) *Management.* The charter of 1773 empowered Carron to appoint committees of voting partners with full powers of management. For many decades prior to 1963 Carron's affairs had been managed by such a committee, known as the "standing committee", which in practice usually consisted of all the voting partners. Since the latter half of the nineteenth century few if any of G the voting partners had possessed the necessary technical qualifications to supervise the day-to-day business of Carron on the technical side, and as none of the voting partners since the middle of the nineteenth century had been in the full-time service of Carron, it was the policy of the voting partners from about 1870 onwards to delegate the day-to-day management of its business to a salaried official, known as the manager, who was possessed of the appropriate H technical qualifications but not a partner in the Company, and who was responsible to the standing committee.

(*f*) *Borrowing.* The charter of 1773 restricted Carron's borrowing powers to £25,000.

(*g*) *Limited liability*. The charter of 1773 imposed upon the members of Carron unlimited liability for its debts. A

(*h*) *Transfer of shares*. The original and additional articles of co-partnery and the bye-laws contained stringent restrictions upon the transfer of Carron's shares, the effect of which may be summarised as being that for the most part shares could not be transferred without first being offered at a fixed price to Carron, and in the event of Carron not wishing to purchase, then to the voting B partners.

(*i*) *Bye-laws*. The charter of 1773 conferred upon Carron power to pass bye-laws for the regulation and management of its affairs, but only in so far as the same were not inconsistent with the tenor of the charter.

(3) The foregoing constitution, which had remained virtually unaltered (except for certain bye-laws of limited effect) since the eighteenth century, had C by the fourth and fifth decades of the twentieth century become archaic and unsuited for modern commercial practice, and as such imposed insurmountable obstacles to the profitable development of Carron's business in contemporary economic and commercial conditions. The most significant disadvantages, for the purpose of the matters in issue, were as follows. (*a*) The limitation of borrowing powers to £25,000 made it impossible for Carron legally to finance any D large-scale commercial project, except by selling its investments or other assets. (*b*) The restrictions on transfer of shares coupled with the stringent qualifications for voting had confined the voting strength to a small number of voting partners, none of whom possessed any qualifications for the management of Carron's business on the technical side, while the practice of delegating the technical side of management to a salaried official who did not enjoy a status equivalent to E that of a managing director—a practice which was in itself an inevitable product of these aspects of Carron's constitution—made it more difficult in changing social and economic conditions to obtain the services of persons of sufficient calibre successfully to carry out the onerous and responsible duties of manager, and contained in itself the seeds of conflict between the manager and the standing committee, to which he was responsible. These difficulties became F increasingly apparent during the tenure of the last manager, Mr. Leaver, who occupied that post from 1954 to 1962.

(4) Further disadvantages flowing from the old-fashioned, ambiguous and sometimes self-contradictory language of Carron's constituent documents were as follows. (*a*) They made Carron's administration unduly cumbersome and complicated. (*b*) They opened a wide field to any shareholder with sufficient G interest to exploit their ambiguities and contradictions. The results of this are noted below.

(5) Since Carron's ability to remedy these constitutional deficiencies at its own hand was limited, inasmuch as it could only pass bye-laws which could not be inconsistent with the provisions of the charter of 1773 (which was itself the source of most of the deficiencies), the standing committee decided in 1954 that H the situation could only be cured by a complete revisal of the constitution, which would require a petition to the Crown for the grant of a supplementary royal charter, substantially altering the provisions of the charter of 1773. Carron's law agents were instructed to take the necessary steps to enable such a procedure to be carried out. On 28th October 1959 the General Court approved the drafts

A of the necessary petition to the Queen in Council and of the supplementary royal charter, and, having been advised by Counsel that all members of Carron (whether voting partners or not) should have an opportunity to express their views on the radical changes in the constitution therein proposed, and having on 5th October 1959 passed a bye-law enabling a meeting of all shareholders to be held for such purpose, called such a meeting for 18th December 1959. B The secretary on 4th November 1959 circulated all shareholders with notice of the meeting, together with copies of the draft petition and supplementary royal charter and an explanatory letter. The said documents are printed at pages 119 *et seq.* of the Appendix *in causa* Mrs. Dorothy Brown against Carron (exhibit H).

(6) The meeting of shareholders duly took place on 18th December 1959. C Certain amendments to the draft charter, together with certain consequential amendments to the draft petition, were then approved, and it was resolved that a petition in terms of the amended draft should be presented to Her Majesty in Council praying for the grant of a supplementary royal charter in terms of the draft charter as amended, or as subsequently amended by the Privy Council. The subsequent events leading up to the grant of the supplementary charter by D the Privy Council in 1963 are noted in para. V below.

(7) The constitutional changes which the Company sought to accomplish by obtaining the grant of a supplementary royal charter are summarised in the explanatory letter dated 4th November 1959 referred to above. The amendments which were approved at the meeting held on 18th December 1959 only related to matters of detail, and none of the main changes referred to in the explanatory letter E were substantially affected. When the draft supplementary charter was considered by the appropriate Committee of the Privy Council certain further amendments were suggested and adopted, but again none of these amendments effected any substantial alteration to the broad scheme of the supplementary charter. Accordingly, the supplementary charter as granted by Her Majesty reflected in all its essential matters the constitutional changes adumbrated in F the explanatory letter. A print of the supplementary royal charter is annexed as exhibit B.

(8) Following upon the grant of the supplementary royal charter, and in order to complete the modernisation of its constitution, the company, at an extraordinary General Court held on 11th March 1963, adopted a new and comprehensive set of bye-laws in place of the original and additional articles and G the subsequent bye-laws passed under the provisions of the charter of 1773. A print of the bye-laws. incorporating one amendment passed at the extraordinary General Court held on 11th March 1963 and certain further amendments made since then, was produced to us, but it is not annexed hereto. A copy of the explanatory letter issued by the Company dated 5th February 1963 is annexed as exhibit C. The new bye-laws are on similar lines to the regulations contained in H Table A of Sch. 1 to the Companies Act 1948, with certain alterations rendered necessary by virtue of the fact that Carron is incorporated by royal charter and not under the Companies Acts, and by virtue of certain of the particular provisions of the charter of 1963.

(9) The expenses incurred by the Company in connection with the grant of the supplementary charter amount to £3,107.

IV. *Mr. W. G. Stevenson's participation in the affairs of Carron.*

(1) Mr. W. G. Stevenson is a grandson of the late Mr. A. G. Brown, a former secretary of Carron, who died in 1924, his mother having been a daughter of Mr. Brown. He is a nephew of Dr. H. Hilton Brown, who until recently was vice-chairman of Carron, and of the late Mr. C. M. Brown, who succeeded his father, Mr. A. G. Brown, as secretary of Carron and remained in that office until his death in 1949. After service in the Army during the 1939–45 war, Mr. Stevenson was admitted to the Faculty of Advocates in 1948.

(2) On the death of his mother in 1946 Mr. Stevenson succeeded to one share in Carron, and was duly registered as the proprietor thereof. From the outset he displayed a keen interest in Carron's affairs, but as he did not possess the necessary minimum number of ten shares required by the provisions of the constitution referred to in para. III(2)(*d*) above he was not entitled to vote or take any part in the management.

(3) Notwithstanding his lack of qualification, not long after he became a member of Carron Mr. Stevenson made a personal request to certain of the then voting partners that he should be admitted to be a voting partner. This request involved the consequence that, if it were to be granted, Mr. Stevenson would have had to be provided with the necessary shares to enable him to qualify to be admitted a voting partner.

(4) The voting partners to whom he made this request did not consider that Mr. Stevenson was a suitable person to be admitted a voting partner, and the request was refused. Mr. Stevenson then stated that if the voting partners would not agree to admit him to be a voting partner he would take every opportunity open to him to attack their conduct of Carron's affairs, past and future, and would make it his object to acquire the voting qualification of ten shares required by the charter of 1773. To this end Mr. Stevenson thenceforward devoted a large part of his time to a study of the history and constitution of Carron, while his professional avocation afforded him the opportunity to further this object by acquiring a comprehensive knowledge of the law relating to chartered companies.

(5) The first overt step in Mr. Stevenson's campaign to achieve the objects stated above occurred in 1951, when he raised an action in the Court of Session against Carron, in which he alleged, *inter alia*, that Carron had failed to comply with the provisions of the charter of 1773 with reference to providing shareholders with information as to Carron's accounts. The conclusions of the summons were, *inter alia*, as follows:

> "1. For declarator that the Royal Charter dated 19th June, 1773, together with the two deeds of co-partnery of 1760 and 1771 hereinafter condescended upon, together regulate the affairs of the Defenders, the Carron Company, and the rights of the partners or shareholders in the said Company, and that where the Royal Charter and the deeds of co-partnery are inconsistent the terms of the Royal Charter prevail.
>
> 2. For declarator that every partner or shareholder in the said Company, voting or non-voting, is entitled to access to accounts in terms of the Royal Charter.

A 3. For declarator that the accounts prescribed by the Royal Charter as being open to inspection and examination by members of the Company are the same accounts as those submitted to the voting partners, from which the abstracts are made up.

4. For declarator that the abstracts of Balance Sheets issued to the Pursuer are not accounts prescribed to be made available in terms of the B Royal Charter.

5. For decree ordaining the Defenders to give to the Pursuer access to proper accounts in terms of the Royal Charter as at 31st December, 1949, and for access to the Pursuer to proper accounts at all times in the future so long as the Pursuer remains a partner or shareholder of the Company."

C The first conclusion in this action was of particular significance in relation to the contentions subsequently advanced by Mrs. Dorothy Brown in the action raised by her against Carron (*vide* para. V below).

The action was defended. On 19th December 1951 the action was dismissed by Lord Blades as irrelevant.

[Sub-paragraphs (6) to (14) recite steps taken by Mr. Stevenson to acquire D further shares in Carron, and steps taken by the Company in opposition, with the upshot that by November 1959 he had become the registered proprietor of nine shares (i.e., one fewer than the number required to qualify him to vote in terms of the charter of 1773) and that on 28th November 1959 Mrs. Dorothy Brown executed in his favour a deed of *mortis causa* donation of one of her shares, but no transfer of it was registered.]

E (15) Meanwhile, prior to the general meeting of the shareholders of the Company held on 18th December 1959, Mr. Stevenson submitted to the secretary of Carron a list of numerous amendments to the draft supplementary charter which he stated it was his intention to propose at the meeting. Mr. Stevenson duly attended the meeting in company with Mrs. Brown, and proposed these amendments, a number of which were approved.

F (16) Mr. Stevenson ceased to be a member of Carron in 1962, the circumstances being fully narrated in para. V below.

V. *Mrs. Dorothy Brown's participation in the affairs of Carron Company.*

(1) Mrs. Dorothy Barron Pentland Forwell or Brown is the widow of Mr. Charles Marshall Brown W.S., who until his death in 1949 was a voting partner and secretary of Carron. Mr. C. M. Brown's family connection with G Carron is described in para. IV(1) above.

(2) Mr. Brown in his will bequeathed the residue of his estate to Mrs. Brown. The residue included 17 shares of Carron of which Mr. Brown was the registered proprietor at his death. The shares in question were duly transferred to Mrs. Brown and the transfer was registered in Carron's books.

(3) Carron having been previously advised by Counsel that the terms of the H existing constitution precluded a female from being a voting partner, on 20th October 1949 Mrs. Brown signed a document addressed to the secretary of

Carron in which, upon the narrative that she had the liferent of 17 shares of Carron, she nominated and appointed Dr. Henry Hilton Brown to vote as her proxy in the direction and management of the affairs of Carron. The proxy was duly lodged and noted in Carron's books.

(4) From then until 1959 the existence of the proxy was only noted four times in 1953 in the minutes of the General Court. In the minutes in question it was noted that Dr. Henry Hilton Brown attended as proxy for Mrs. Brown. On all other occasions Dr. Hilton Brown's presence at meetings of the General Court was not noted as being in respect of Mrs. Brown's proxy. In particular, at meetings of the General Court at which bye-laws were passed and confirmed no reference was made in the minutes to Dr. Brown having attended and voted on behalf of Mrs. Brown, nor were there any such references in the minutes of the adjourned General Court held on 5th October 1959 at which resolution no. 7781 was confirmed as a bye-law, nor at the half-yearly General Court held on 28th October 1959, at which the Court approved the terms of the draft supplementary charter and authorised the calling of the general meeting to be held on 18th December 1959.

(5) Throughout the period in question Mrs. Brown was never treated as being a voting partner, and documents circulated to the voting partners as such were never sent to her. Accordingly she was not personally consulted concerning the terms of the draft supplementary charter and received no intimation from Carron of its intention in that regard until in common with other shareholders she was sent the circular letter dated 4th November 1959.

[Sub-paragraph (6) recites that in November 1959 Mrs. Brown and Mr. Stevenson showed a partner in Messrs. John C. Brodie & Sons W.S. (who were solicitors both to Mrs. Brown and to the Company) a draft of a deed of *mortis causa* donation by Mrs. Brown in favour of Mr. Stevenson of one of her shares in Carron, and that the partner, feeling himself placed in a difficult position, made a non-committal reply.]

(7) On 9th December 1959 Mrs. Brown wrote to the secretary of the Company in the following terms:

> "Dear Mr. Smith, I note that on page 20 of the draft Supplementary Charter recently sent to me it is stated that the Voting Partners whose names are detailed are the whole partners of Carron Company entitled to vote. I strongly object to this statement as I have been a Voting Partner by virtue of my late husband's shares since his death and am not prepared to allow my rights as a Voting Partner and in particular my right to be offered shares for sale under the pre-emption clause to be taken away without my consent. In these circumstances I would be obliged if you would see me at my house at your earliest convenience. I shall arrange to have my nephew George Stevenson and my brother-in-law Dr. Brown with me. I would like you to telephone me at DON 7156 to arrange a suitable time."

The secretary did not go to see Mrs. Brown at her house as she invited him to do in the letter, but a meeting was arranged for 15th December 1959 with Mrs. Brown and Mr. Stevenson's solicitor, Mr. Johnston, of Messrs. Laing & Motherwell W.S., who had by then been consulted by Mrs. Brown concerning this particular matter. At this meeting Mr. Johnston asked that Carron should

concede that Mrs. Brown was a partner entitled to vote in Carron's affairs and that an amendment be proposed to the draft supplementary charter adding Mrs. Brown's name to the list of proposed first directors of Carron under the new constitution, who were to be all the voting partners under the old constitution. He did not state categorically that if this request was acceded to Mrs. Brown would not take any further objections to the proposed supplementary charter at the meeting arranged for 18th December 1959, but Carron's secretary and law agents were left with the impression that no further difficulties would be made by Mrs. Brown if the request was granted. Counsel was immediately consulted concerning the matter and advised that the concession should be offered, because if this were not to be done there would be a grave risk of Mrs. Brown attempting to interdict the holding of the meeting on 18th December.

(8) Accordingly on 16th December Carron's law agents telephoned Mr. Johnston and informed him that Carron was prepared to make the concession and propose the amendment to include Mrs. Brown as a director in the hope and on the understanding that this would be an end to the difficulties raised by her.

(9) On 17th December 1959 Mr. Johnston's firm wrote to the secretary of the Company in the undernoted terms:—

"Dear Sir,

Mrs. Marshall Brown

We refer to our Mr. Johnston's meeting with you and the Company's Law Agents on 15th inst., and to their telephone call to us yesterday when they informed us that the Company now conceded that our client is a Partner of the Company entitled to vote. The situation which has now arisen is, you will no doubt agree, vastly different from that which was thought to exist by you and the voting Partners of the Company other than our client when the notices calling tomorrow's meeting were sent out, and although your Law Agents gave us an undertaking yesterday that you will intimate at the outset of said meeting that our client is a Partner entitled to vote, despite the statement on page 20 of the draft proposed Supplementary Charter, we would point out that our client was not consulted in connection with any step of the proposed procedure for a new Charter and, in point of fact, she strongly objects to many of the proposals contained in said draft Charter which, she contends, are contrary to her contractual rights under the Additional Articles of 1771 as confirmed by the Charter of 1773 and, of course, these contractual rights cannot be taken away without her consent. It has been suggested that, in view of the fact that our client's brother-in-law, Dr. H. H. Brown, was at some time in the past given a proxy by our client, she is therefore bound by any decisions made by him, but as the Company did not know until you received our client's recent letter and did not concede until yesterday that our client was a Partner entitled to vote, we cannot understand how it is possible for the Company to now say that since the granting of said proxy Dr. Brown has been voting on her behalf. In any event, our client does not agree that Dr. Brown as her proxy had any authority, actual or ostensible, to agree to proposals which would have the effect of depriving her of her said contractual rights. In these circumstances our client has instructed us to say that she wishes to have the draft

Charter amended to accord with her said contractual rights so far as these are insisted upon by her and, therefore, she requests that the resolutions proposed to be put to tomorrow's meeting should not be put, other than No. 1. In view of the above and in order that tomorrow's meeting may be fully informed as to our client's position we should be glad to have your assurance by return that this letter will be read by you to the meeting. It is only proper that we should point out at this stage that in the event of the meeting, despite what is stated in this letter, deciding to vote on and carry the resolutions, other than No. 1, our client's instructions to us are to take whatever steps may be open to her to protect her said contractual rights."

(10) The assurance sought in the letter that it would be read to the meeting to be held on the following day was given, and no attempt was made by Mrs. Brown to interdict the holding of the meeting. Mrs. Brown attended the meeting and sat beside Mr. Stevenson. Mr. Johnston also accompanied Mrs. Brown to the meeting, but the Company had previously been advised by Counsel that Mr. Johnston could not claim admittance to the meeting, and he was accordingly refused admittance. Mr. Stevenson spoke on Mrs. Brown's behalf at the meeting and, supported by Dr. H. H. Brown, endeavoured to prevent the meeting from agreeing to petition Her Majesty to grant a supplementary charter in terms of the draft submitted to the meeting. This attempt was not successful, and the meeting proceeded to a discussion on the terms of the draft supplementary charter; and after numerous amendments, mostly proposed by Mr. Stevenson, had been voted upon, the following resolutions were passed:

"(1) That a Petition be presented to Her Majesty in Council applying for a Supplementary Charter.

(2) That the draft Supplementary Charter, for the purpose of identification signed by the Chairman, a copy of which is appended to this Resolution, be approved as amended.

(3) That the draft Petition submitted to the Meeting, and for the purpose of identification signed by the Chairman, be approved.

(4) That the Seal of the Company be affixed to the said Petition.

(5) That the undernoted Dr. Henry Hilton Brown of 38 Inverleith Place, Edinburgh; Captain Charles Keith Adam, D.S.O., R.N. (Rtd.) of Blair Adam, Kinross; Charles Henry Burder of 29 St. John's Wood Terrace, London; Dr. Archibald Alexander Hilton Brown of 38 Inverleith Place, Edinburgh; Ian Scott Smith, Chartered Accountant of 5 Thistle Street, Edinburgh; Colin Strathearn Ropner Stroyan, Writer to the Signet, of 5 Thistle Street, Edinburgh and Air Commodore Colin Simson Cadell, C.B.E., R.A.F. (Rtd.) of Grange, Stirlingshire, members of the Standing Committee of the Voting Partners of the Company or the majority of them be authorised as they are hereby authorised, to agree to any amendments required by the Privy Council of the terms of the draft Supplementary Charter other than adjustments which might or may have the effect of continuing the unlimited liability of members of the Company for future debts and to adjust the said terms to meet any representations which may be made to the Privy Council or otherwise."

(11) The Petition was on 21st December 1959 duly presented to the Privy Council.

(12) On 8th January 1960 there was served upon Carron the summons in an action at the instance of Mrs. Brown against Carron, the conclusions in which were *inter alia* as follows:

"(3) For production and reduction of a pretended Bye-Law passed by an adjourned General Court of the Defenders held at Carron on 27th July, 1959, and which the General Court of the Defenders held at Carron on 5th October, 1959, purported to confirm.

(4) For production and reduction of the pretended resolutions of a pretended Extraordinary General Meeting of the Defenders held on 18th December, 1959."

The summons was considered by the monthly committee of Carron at its meeting on 25th January 1960, when, advice having been received from Counsel that Carron would have reasonable prospects of success if they were to defend the action, the committee resolved (Dr. Henry Hilton Brown and Dr. A. A. Hilton Brown dissenting) that Carron defend the action. At this meeting it was also resolved (Dr. Henry Hilton Brown dissenting) that the secretary and law agents be instructed that they should not disclose any information relevant to Carron's defence of the action to any person except on the express authority of the chairman.

(13) On 11th February 1960 the Clerk of the Privy Council wrote to Carron's law agents in the following terms:

"Gentlemen, I write to inform you that Her Majesty has referred the Petition of Carron Company to a Committee of Council. In view of the proceedings that have been commenced by Mrs. Brown, Their Lordships have decided to take no further action in the matter for the time being. They will defer consideration of the Petition until the outcome of the Court proceedings is known."

(14) Defences were duly lodged on behalf of Carron, and during the course of the adjustment of the pleadings a note was received from Counsel in the following terms:

"Note for the Defenders *In causa* Mrs. Dorothy Brown, Pursuer, Against Carron Company, Defenders. The concession that Mrs. Brown was a voting partner by virtue of her interest in her husband's estate was made on 16th December after a request by her agent put forward on the previous day. The extraordinary general meeting which was to pass the resolutions relating to the petition for a supplementary charter was due to be held on 18th December. At the time, and having regard to the unfortunate history associated with the grant of a mandate by Mrs. Brown in favour of a voting partner, it seemed more politic to make the concession than to refuse it, in order that the meeting should take place as arranged and presentation of the petition should not be delayed—perhaps by proceedings for interdict. Accordingly the concession was made with the intention of meeting Mrs. Brown's objections to the passage of the new charter: it was not intended to have, nor could it have, the effect of giving to Mrs. Brown rights which

she did not previously have. Indeed, no concession could confer a right upon Mrs. Brown enforceable against the shareholders in Carron Company, because such right can only be conferred by the means prescribed in the Company's Constitution. Unfortunately, the concession has been ineffective in preventing Mrs. Brown from impeding the passage of the charter through the Privy Council. It seems to us, therefore, that it should now be withdrawn. On a proper construction of the charter and of the articles, it seems to us that the bequest of the fee of her husband's shares does not give Mrs. Brown the status of "voting partner" in the Company; and since she is not a liferentrix she is not entitled to the privilege of voting in respect of her deceased husband's shares by means of a proxy held by a voting partner. Such an argument, if successful, would be a complete defence to the action as presently laid, which would then be quickly disposed of. We need hardly add that if the concession is to be withdrawn, and in any event so long as her rights are *sub judice*, the Company should not allow Mrs. Brown to take any part in its affairs, and a vote by Dr. Brown as her proxy should not be accepted. In our opinion the Company should formally consider at the next General Court whether formally to withdraw the concession (for what is was worth). If it is decided to do so Mrs. Brown should be so informed. It will not have escaped notice that Mrs. Brown impliedly spurned the concession by voting against the amendment designed to give it effect."

(15) While the pleadings were in course of adjustment the Company's senior counsel was asked to enter into discussion with counsel for Mrs. Brown with a view to ascertaining upon what, if any, terms Mrs. Brown would be prepared to arrive at a settlement of the action. In due course counsel reported on these negotiations in a note in the following terms:

"In accordance with my instructions I have had various conversations with Counsel for the pursuer as to a possible basis on which further delay in securing the grant of a new Charter might be eliminated. I have now been informed that the only solution acceptable to Mrs. Brown (*sic*) is as follows: (1) that Mr. Stevenson be now elected as a voting partner unconditionally; (2) that Mr. Stevenson should thereafter consider in what respects the draft charter should be amended; (3) that when the voting partners have agreed to accept such amendments as Mr. Stevenson may think necessary the present action may be taken out of Court on joint minute. I gather that Mr. Stevenson feels he will be better equipped to deal with amendments to the charter when he has access as a voting partner to information in the hands of the Company. I need hardly say that I find myself unable to advise acceptance of this solution. Indeed, in my opinion, it would, if it were accepted, only make the position of the Company worse than it now is."

(16) While the pleadings in the action were being adjusted the conclusions of the summons were amended in the light of the withdrawal of the concession that Mrs. Brown was entitled to vote in the direction and management of the Company's affairs, and when the record was closed the conclusions were in the following terms:

"(1) For declarator that the Pursuer is a partner entitled to vote in the direction and management of the Defenders' affairs.

A (2) For declarator that, without the consent of the Pursuer, the Defenders are not entitled to confer a vote in the direction and management of the Defenders upon any person unless such person be possessed of and hold in his own right at least ten shares of the capital stock of the defenders.

(3) For declarator that, without the consent of the Pursuer, the Defenders are not entitled to take any steps to effect changes in the rights B conferred upon the Pursuer by the Defenders' Additional Articles of Co-partnery dated 6th May and subsequent dates 1771.

(4) For production and reduction of a pretended Bye-law passed by an Adjourned General Court of the Defenders held at Carron on 27th July, 1959, and which the General Court of the Defenders held at Carron on 5th October, 1959, purported to confirm.

C (5) For production and reduction of the pretended Resolutions of a pretended Extraordinary General Meeting of the Defenders held on 18th December, 1959.

(6) For the expenses of the action."

(17) The action was heard in the Debate Roll before Lord Walker in July 1960, and on 9th August 1960 his Lordship issued an Interlocutor dismissing D the action. A copy of his Lordship's opinion is printed at page 45 of the Appendix (exhibit H).

(18) Mrs. Brown lodged a reclaiming motion against Lord Walker's judgment. The reclaiming motion was heard by the First Division of the Court of Session in January 1961, previously to which the pleadings in the action had been extensively amended at the instance of Mrs. Brown. The terms of the E Closed Record as amended are printed on pages 1 to 38 of the said Appendix.

(19) On 24th February 1961 the First Division of the Court of Session refused the reclaiming motion. Their Lordships' Interlocutor is printed on pages 43 to 44 of the said Appendix, and their Lordships' judgments are printed at pages 56 to 110 thereof.

(20) Following upon the dismissal of the reclaiming motion and during F the period within which Mrs. Brown was entitled to lodge an appeal to the House of Lords, an approach was made to the assistant secretary of Carron by Mrs. Brown's solicitor, who intimated that Mrs. Brown was prepared not to appeal to the House of Lords if the following conditions were agreed to by the Company: (*a*) that her shares would be purchased at break-up value, which she understood to be about £5,600; (*b*) that the price would be payable on the G granting of the supplementary charter; (*c*) that the offer to purchase the shares at this price would be extended to all the members of the Brown family who held shares in the Company; (*d*) if the Company agreed to these conditions then Mr. George Stevenson would sell his whole holding of shares in the Company at the above-mentioned prices and would thereafter give an undertaking to refrain from interfering in the Company's affairs.

H This offer was referred by the chairman to all the voting partners other than Dr. H. Hilton Brown and Dr. A. A. Hilton Brown, and the assistant

secretary was instructed by them to write refusing this offer, which was done in the following terms: A

"Dear Sir,

Mrs. Brown *v.* Carron Company

I refer to our recent meeting when you put forward a proposal on behalf of Mrs. Brown and which I have now had an opportunity of communicating to all members of the Standing Committee. After careful B consideration by those concerned I have been instructed to write to you in the following terms by the five members of the Standing Committee other than Dr. H. Hilton Brown and Dr. Archibald Brown, who clearly cannot comment on a matter from which they might benefit financially. If Mrs. Brown's proposals were acceded to in whole and all the Brown family paid out at the figure suggested the cost to the Company would be C over a quarter of a million pounds, which would be a crippling blow in our present financial circumstances and is therefore unacceptable. In any event the Standing Committee would find it difficult to justify such a substantial payment to one group of shareholders to the exclusion of others, especially as two of those concerned are members of the Standing Committee. The present position is that the Company has defended your D client's action against it successfully both in the Outer House and in the Inner House. The Standing Committee feel it would be very difficult in these circumstances to make such a large payment to compromise an action which has so far gone in the Company's favour. Shareholders might well question their motive for doing so, especially as the result of an adverse decision on appeal to the House of Lords might not leave the Company in E a very different position with regard to the obtaining of a Supplementary Charter which could then presumably be presented to the Privy Council on a majority vote of the new Voting Partners. I would be obliged if you would pass these views on to your client."

(21) Following on the refusal of this offer Mrs. Brown duly lodged an appeal to the House of Lords against the judgment of the First Division. The F appeal was set down for hearing in January 1962. In the meanwhile, however, Mrs. Brown's solicitor again approached the assistant secretary of Carron to reopen negotiations for a compromise settlement, in the course of which he handed to Carron's secretary a document in the following terms:

"1. Mrs. Marshall Brown considers that Carron has been very badly directed in the recent past and has no confidence in the present direction or G management. Even if Carron does pull up this will take a considerable time and Mrs. Marshall Brown wishes to have the use of her money now while she can still enjoy it. Accordingly she wishes to be paid out now on a basis which will enable her by the purchase of first-class equities to be compensated for what she could expect if Carron were reasonably successful. She also wishes to have the free use of her capital and is not interested in H annuities. If the Company are not prepared to pay her out then she is determined to proceed with the present action in order that she and W.G.S. may obtain a voice in the direction of the Company's affairs in which their capital is invested. She would prefer, however, to be paid out because

(1) she is tired of litigation, (2) she considers that to proceed with the present action to the House of Lords may result in consequences for the Company which would be better avoided. It should be noted that the Judicial Committee of the House of Lords are also members of the Judicial Committee of the Privy Council, and therefore whatever emerges in the proceedings in the House of Lords will of necessity be considered by the Judicial Committee of the Privy Council when any draft Supplementary Charter is remitted to them by the Queen for their consideration and report thereon, which, of course, always takes place as part of the procedure for the granting of a supplementary Charter. The whole question of the Company's capital (see *Sovereign Life Assurance Company* [1892]3 Ch.279) and consequently of the former purchase of shares by the Company may then have to be considered by them. If, however, the present case is not taken to the House of Lords the Judicial Committee of the Privy Council, whatever doubts they may have at impliedly confirming the past actings of the Company by advising the Queen to proceed to grant the charter presently sought, will not take any objections provided the judgment of the First Division is allowed to stand. This judgment although in Mrs. Brown's view incorrect is undoubtedly of great value to the Company if allowed to stand, and indeed, this may well have been in the Lord President's mind.

2. The Company appear to consider that even if Mrs. Marshall Brown wins her appeal to the House of Lords they will by a majority of the new voting partners be able to proceed with the present charter. This view is completely unsound, because not only will the Privy Council consider what has transpired in the Lords but also, although Mrs. Brown has no objection to a great deal of the Charter, yet she does object to the provisions regarding voting qualifications for Standing Committee and borrowing. On these points she will take objection, which will not only prevent any charter being obtained for a very considerable time but will certainly prevent in any supplementary Charter whenever finally obtained any alteration of the qualifications for voting and Standing Committee and will also prevent the provisions for borrowing. It should be noted that there are definite limits to the powers of the Crown in Council to alter grants whatever majority may seek such alteration. Individual rights cannot be abrogated without consent. It should also be noted that a four-fifths majority of new voting partners may not be obtained and it is understood that this is a Crown practice in connection with new grants.

3. In these circumstances, and as a final attempt at a compromise, Mrs. Marshall Brown is prepared to modify her former requirements for a settlement. She is prepared to drop her requirements that other members of the family apart from herself and W.G.S. be bought out, but she and W.G.S. must be treated on the same footing. She is therefore prepared to settle the action if the Company will buy out nine of her shares and W.G.S.'s nine shares at amounts equivalent to the break-up value of the shares. W.G.S. is also prepared, albeit unwillingly, to agree to this. The Company is to have one year from the date of the settlement to pay the sums in question with interest at 5 per cent. thereon from settlement until payment. In addition the Company to pay all the expenses of the action on the basis of agent and client. This is a final offer.

4. If Mrs. Brown loses the present action, which we think most unlikely, then the result will be that the additional Articles are upheld in all particulars and objection will then be taken by Mrs. Brown and others in the Courts to the fact that no resolution for the presenting of a Petition for a new Charter has yet been passed with the unanimous consent of all the voting partners (the two Drs. Brown having dissented at the only meeting at which such a resolution was put forward)." A B

(22) Further negotiations took place in the late summer and autumn of 1961, which terminated in the following correspondence between Carron's solicitors and Mrs. Brown's solicitors:

(*a*) *Letter from Messrs. John C. Brodie, Cuthbertson & Watson W.S. to Messrs. Laing & Motherwell W.S. dated 29th November* 1961.

"Dear Sirs, C

Carron Company

Mrs. Dorothy Brown

Mr. W. G. Stevenson

Mrs. Dorothy Brown *v.* The Company

With reference to the negotiations for a settlement of the above action which have been proceeding between us, we now, on behalf of the Committee D of Carron Company which has been charged with the conduct of the action on behalf of the Company with full powers, write formally to determine whether your client, Mrs. Brown, and Mr. W. G. Stevenson will agree to bind themselves to enter into the contract narrated below with the Company by formal deed, if the Company so resolves, at the earliest possible half yearly General Court held in accordance with the provisions of the present E Royal Charter occurring after the date of your acceptance of the terms of this letter, in consideration of those Voting Partners who form said Committee binding themselves as individual Voting Partners to vote in favour of said contract at such General Court. The proposed contract is as follows:

1. Mrs. Brown agrees that she will offer nine of her seventeen shares in Carron Company, and Mr. W. G. Stevenson agrees that he will offer F his nine shares in the Company, for sale in terms of Bye-Law No. 7567, such offers to be made at the first term of Whitsunday (15th May) or Martinmas (11th November) occurring after the signing of this contract at the standard price per share obtaining at the date of such offers. The provisions of the said Bye-law shall thereafter be applied in respect of the said offers. If the said shares or any of them are not purchased by the G Company or by any of the Voting Partners thereof in accordance with the provisions of the said Bye-law, Mrs. Brown and Mr. W.G. Stevenson shall respectively (as the case may be) be bound, notwithstanding the terms of Clause (4) of the said Bye-law, to sell such unpurchased shares at the said standard price only to such person or persons as the Company may nominate, with the exception of Mr. E. J. Leaver, the present Manager of the Company, H the Company being bound to obtain a purchaser or purchasers for the

said unsold shares and to take such purchaser or purchasers bound to make payment of the said standard price in respect of such shares to Mrs. Brown and Mr. W. G. Stevenson or either of them (as the case may be) in exchange for a valid transfer thereof within one month of the date of the granting by the Secretary of the Company of a Certificate of Sale in terms of said Clause (4) of the said Bye-law.

2. The Company agrees to become bound to pay Mrs. Brown and Mr. W. G. Stevenson each respectively the sum of £41,900. The said sums shall each be payable within eighteen months from the date of this contract, or within three months of the Company being granted a Supplementary Charter in consideration of the present Petition to Her Majesty therefor, whichever is the earlier, and Mrs. Brown and Mr. W. G. Stevenson shall each be entitled to interest at 5 per centum per annum on the said sums of £41,900 from the date of this contract until payment of the said sums is made to them, such interest to be paid at two terms in the year Whitsunday (15th May) and Martinmas (11th November), commencing the first payment of such interest at the first term of Whitsunday or Martinmas occurring after the date of this contract to such term, and so forth termly and proportionally thereafter until payment of the said sums of £41,900.

3. Mrs. Brown agrees that she will immediately after the date of this contract withdraw her appeal to the House of Lords in her present action against the Company.

4. The Company agrees to meet Mrs. Brown's whole expenses incurred in connection with her present action against the Company, taxed on the Solicitor and Client Scale, as they may be adjusted or, failing adjustment, as they shall be taxed on such scale by the Auditor of the Court of Session. Payment of said expenses will become due on the expiry of two months from the date of such adjustment or taxation as the case may be.

5. Mrs. Brown agrees that she will immediately after the date of this contract withdraw her Deed of *mortis causa* Donation of one share in the Carron Company in favour of Mr. W. G. Stevenson dated 28th November, 1959, and will exhibit to the Company such withdrawal in writing within two weeks of the date of this Contract.

6. Mrs. Brown undertakes to raise no action against the Company in respect of any matter whatsoever in connection with the Company's affairs, or in connection with her rights as a shareholder in the Company, which may have occurred prior to the date of this contract, nor to raise any action designed to prevent the further consideration by the Privy Council of the Petition for a Draft Supplementary Charter which is at present before the Privy Council, or to make any representations to the Privy Council in connection therewith.

7. Mr. W. G. Stevenson undertakes never again to purchase in his own right any shares in Carron Company or to enter into any transaction which would have the result in the future of his acquiring the beneficial right to shares in Carron Company.

8. Mr. W. G. Stevenson undertakes as an individual to raise no action against the Company in respect of any matter whatsoever in connection with the Company's affairs, or in connection with his rights as shareholder in the Company, which may have occurred prior to the date of this contract, nor to raise any action designed to prevent the further consideration by the Privy Council of the Petition for a Draft Supplementary Charter which is at present before the Privy Council nor to make any representations to the Privy Council in connection therewith.

9. Mr. W. G. Stevenson undertakes that if at any time in the future he should again become a shareholder in Carron Company in a fiduciary capacity while the provisions of the present constitution of the Company (comprising the Royal Charter of 1773, Original and Additional Articles of Co-Partnery, Deed of Renewal and Bye-laws) in relation to voting rights remain in force, he will not offer himself for election as a Voting Partner in respect of such shares as he may become the holder of in such a capacity.

10. In the event of the standard price referred to in Condition 1 hereof being less than £900 per share when said shares come to be offered in terms thereof, then in that event wherever the figure of £41,900 occurs in Condition 2 hereof there shall be substituted therefor the figure of £41,900 plus nine times the difference between £900 and the said standard price.

11. The parties to this contract consent to the registration of the same for preservation and execution.

If your clients, Mrs. Brown and Mr. W. G. Stevenson, agree to the above proposals we shall be glad to have your confirmation of this on their behalf, whereupon we shall let you have our confirmation on behalf of the Voting Partners who are members of the said Committee to the effect that they as individual Voting Partners will vote in favour of said contract."

(b) Letter from Messrs. Laing & Motherwell W. S. to Messrs. John C. Brodie, Cuthbertson & Watson W.S. dated 30th November 1961.

"Dear Sirs,

Mrs. Dorothy Brown
Mr. W. G. Stevenson
Carron Company
Mrs. Brown *v.* The Company

With reference to your letter of 29th inst., we confirm on behalf of our clients, Mrs. Brown and Mr. W. G. Stevenson, that they bind themselves to enter into the contract the terms of which are set forth in your said letter with the Company by formal deed, if the Company so resolves at the earliest possible half yearly General Court held in accordance with the provisions of the present Royal Charter, in consideration of those Voting Partners who form the Committee of Carron Company which has been charged with the conduct of the above action binding themselves as individual Voting Partners to vote in favour of said contract at such General Court. We shall be glad to have by return your confirmation on behalf of the Voting Partners who are members of the said Committee that they as individual Voting Partners will vote in favour of said contract at the said General Court."

(*c*) *Letter from Messrs. Laing & Motherwell W.S. to Messrs. John C. Brodie, Cuthbertson & Watson W.S. dated 1st December* 1961

"Dear Sirs,

Mrs. Dorothy Brown
Mr. W. G. Stevenson
Carron Company
Mrs. Brown *v.* The Company

With reference to the undertaking by our client, Mr. W. G. Stevenson, referred to in your letter of 30th ult., and our reply of even date, we confirm that our client, Mr. W. G. Stevenson, undertakes that he will not, either in his professional or private capacities, assist any shareholder of Carron Company in any steps designed to prevent the Supplementary Charter presently sought being obtained provided that the offer by Mrs. Dorothy Brown and Mr. W. G. Stevenson contained in our letter of 30th ult. is accepted by those voting partners who are members of the Committee appointed by Carron Company to deal with the above action, and subject to the condition that the undertaking will cease and have no effect if Carron Company do not agree to the Contract, referred to in your letter of 29th ulto., with Mrs. Dorothy Brown and Mr. W. G. Stevenson at the earliest possible half yearly General Court held in accordance with the provisions of their present Royal Charter."

(*d*) *Letter from Messrs. John C. Brodie, Cuthbertson & Watson W.S. to Messrs. Laing & Motherwell W.S. dated 19th December* 1961.

"Dear Sirs,

Carron Company
Mrs. Dorothy Brown
Mr. W. G. Stevenson
Mrs. Brown *v.* The Company

With reference to your letter of 30th November, 1961, we confirm on behalf of those Voting Partners who are members of the Committee of Carron Company which has been charged with the conduct of the above action, namely, the Chairman, Mr. C. H. Burder, and the Secretary, Mr. I. S. Smith, and also on behalf of Captain C. K. Adam, Mr. C. S. R. Stroyan and Air Commodore C. S. Cadell, all as individual Voting Partners of Carron Company, that they as individual Voting Partners of the Company will, when the terms of settlement set forth in our letter to you of 29th November, 1961, come before the earliest possible half yearly General Court of the Company for consideration as set out in our letter of 29th November, vote in favour of the said contract."

(23) The advice of the Company's senior counsel, Mr. G. C. Emslie Q.C., was obtained upon the terms of the proposed settlement, and Counsel advised in the following terms on 29th November 1961:

"I have considered the draft containing the terms of the proposed Settlement. In my opinion if the Company can reasonably finance this

settlement it will be in its best interests to effect it. In the absence of such a settlement, and whether the Company is or is not successful in the House of Lords, it is reasonably clear that there will be no end to the strife and the divisions which have in the past imposed quite intolerable burdens upon the proper conduct of the Company's business affairs. It will further probably prove difficult to achieve any improvement in the Company's borrowing position in sufficient time to meet its immediate needs. As I understand the position, the primary anxiety of the Company at the moment is to secure new borrowing powers which will enable it to function competitively in the contemporary business scene. The long-term anxiety of the Company is presumably to secure freedom from the adverse influences of deep rooted internal antagonisms. To obtain relief from both these anxieties, even at the cost proposed by the appellant, would, in my opinion, be of very considerable advantage to the Company."

(24) In order to enable the terms of the proposed settlement to be considered by the General Court of Carron at its next meeting in March 1962, the hearing of the appeal in the House of Lords was postponed. The terms of the proposed settlement were discussed at the meeting of the General Court held on 5th March 1962, when the Court resolved by a majority (Dr. H. Hilton Brown and Dr. A. A. Hilton Brown dissenting) to enter into the proposed contract of settlement with Mrs. Brown and Mr. Stevenson on the terms and conditions set forth in the correspondence quoted above by formal deed as adjusted between Carron's law agents and the law agents for Mrs. Brown and Mr. Stevenson.

(25) A formal minute of agreement embodying the above contract of settlement (a copy of which is attached as exhibit D) was duly executed on 5th and 6th March 1962. Following thereon Mrs. Brown withdrew her appeal to the House of Lords and executed a revocation of the deed of *mortis causa* donation in favour of Mr. Stevenson referred to above, Mr. Stevenson duly sold all his shares and Mrs. Brown sold nine of her 17 shares in Carron, and Carron made payment to Mrs. Brown and Mr. Stevenson of the sums provided in the contract of settlement.

The withdrawal of Mrs. Brown's appeal to the House of Lords was duly intimated to the Privy Council, which then proceeded with its consideration of the draft supplementary charter.

In terms of the agreed settlement Carron paid the expenses incurred by Mrs. Brown to her legal advisers in connection with the action, amounting to £1,666, and did not enforce any of the awards of expenses made in its favour in the course of the proceedings. Carron also paid the expenses incurred by it to its own legal advisers for the action, amounting to £2,641.

VI. *Effects of settlement with Mrs. Brown.*

(1) During the post-war period and particularly during the second half of the 1950s Carron's commercial performance suffered a progressive decline. The root cause of this decline lay in ineffectual deployment of Carron's resources by a management which was not adequately fit or qualified for the task. Even given capable management, however, there was a further obstacle to progress which would have made the task virtually impossible for any management,

A however capable, namely, the restriction of Carron's borrowing powers under its royal charter of 1773 to £25,000.

(2) So far as the managment is concerned, the constitution resulted in a separation of control between, on the one hand, the voting partners, who were not possessed of technical qualifications and did not work full time in the Company's service, and, on the other hand, the manager employed by the B Company to run the day-to-day commercial business, but who was not a voting partner nor indeed a shareholder of the Company. The person who held the post of manager from 1954 onwards, Mr. E. J. Leaver, was not of sufficient calibre to perform the task of improving the Company's performance. He was a cost accountant by training, and prior to his being appointed in 1954 he had been employed by Carron as its accountant, and he had no prior experience of the C technical aspects of the business. During the period of Mr. Leaver's managment the average annual rate of trading profit after balancing losses made in certain years against profits made in other years was very small in relation to the size of the business (*vide* exhibit G); this particular period was a "boom" period for iron foundries. During the period of his administration of Carron's affairs a considerable proportion of Carron's assets was spent on buildings which were D expensive and useless to the then manufacturing programme; several unsuitable appointments were made to the posts of departmental managers, and the accounting affairs of Carron in terms of cost accounts and profit and loss accounts were not properly dealt with, with the result that projects were not properly costed and turned out to be unprofitable. No diversification had been attempted, and Carron was still continuing to produce goods in much the same way and E from much the same materials as had been its practice over the last hundred years. A further disadvantage of the constitution in this regard was that there was no way by which senior executives could aspire to becoming voting partners, with the result that executives of character, ability and initiative were often not inclined to remain but sought posts elsewhere where there were prospects of promotion to a board of directors.

F (3) While the voting partners had by 1960 become convinced of the necessity for replacing Mr. Leaver, the majority of them took the view that so long as Carron continued to function under the constitution it then had they could not expect to attract to the post of manager a person of sufficient calibre, and accordingly that if Mr. Leaver's services were to be dispensed with Carron might be no better off with whoever they could find to replace him.

G (4) So far as the restriction on borrowing to £25,000 is concerned, this gravely hampered Carron, as during the period in question its current assets had to be drawn upon for the financing of projects, whereas if borrowing facilities had been available the necessary finance could readily have been obtained through banking channels. The result was that by 1960 the current assets had been greatly depleted, while Carron had become committed to trade H creditors for sums expended in connection with its various operations to such an extent that in the absence of further banking facilities in excess of £25,000 it had begun to have difficulty in meeting its obligations to its creditors timeously, which, in turn, had an adverse effect on its credit-worthiness. Matters were by then getting to the stage at which without increased borrowing powers all Carron's assets could have been absorbed in meeting obligations to its creditors, leaving

it only with its fixed assets, which, although of considerable value, were to a large degree unrealisable except on a break-up basis. A

(5) Accordingly the majority of the voting partners considered that it was impossible for Carron to put its operations on to a sound commercial basis until (i) its capital and voting structure could be altered so as to enable it to replace Mr. Leaver by a person of sufficient calibre who could be offered the post of managing director with a seat on the board, and also in the future to offer suitable B senior executives promotion to the board of directors, and (ii) the restriction on borrowing powers to £25,000 had been removed. Both of these obstacles to progress were attributable directly to the provisions of the consitution, and any attempt to elide these provisions in an unconstitutional manner would have rendered Carron vulnerable to attack by a shareholder, and in particular by Mr. Stevenson as the most likely person to make such an attack. Accordingly, C the only remedy which would remove the obstacles concerned was the grant of a supplementary royal charter.

(6) This was the situation in which Carron found itself in 1960 and 1961 when, having applied for the grant of a supplementary charter in December 1959, it found that further progress towards this goal was barred by the action raised against it in the Court of Session by Mrs. Brown. This action remained in D dependence throughout 1960 and 1961. After having been successful in the Inner House in February 1961, hopes of achieving the grant of a supplementary charter were postponed by reason of the appeal by Mrs. Brown to the House of Lords. Meanwhile the commercial difficulties were becoming more and more acute. Mr. Leaver's lack of success as manager, coupled with the voting partners' resulting loss of confidence in him, led to a deterioration in the relations between E the voting partners and Mr. Leaver which culminated in his offering his resignation on 23rd October 1961. This matter is more fully dealt with in sub-para. (13) below. The hampering effects of the restriction on borrowing, as noted in sub-para. (4) above, were becoming more and more acutely felt, and Carron was having increasing difficulty in meeting its obligations to its trade creditors.

(7) Accordingly, by the summer of 1961 matters were in the situation that F there was no hope of the draft supplementary charter being considered by the Privy Council with a view to a grant by the Crown at least until and unless the Company was successful in the appeal to the House of Lords, which was set down for hearing in January 1962, so that the result of the appeal would probably not be available until February 1962.

(8) If Carron were to be unsuccessful in the appeal—and as to its prospects G of success in the House of Lords its senior counsel, Mr. G. C. Emslie Q.C., was dubious—its hopes of obtaining a supplementary charter would be postponed indefinitely into the future: success in the House of Lords would have put Mrs. Brown into a position in which she could virtually have vetoed any provisions of the draft supplementary charter which did not meet with the approval of herself and her nephew Mr. Stevenson. The document handed by Mrs. Brown's H solicitor to Carron's assistant secretary in the course of the negotiations for the settlement of the action referred to in para. V(21) above gives an indication of the difficulties with which the Company would have had to contend in the event of Mrs. Brown being successful.

(9) It was also made clear by Mrs. Brown's solicitor that, even if the Company were to be successful in the appeal to the House of Lords and Mrs. Brown were to lose her action, there were still further legal points which Mrs. Brown considered she could take in connection with the procedure adopted by Carron for presenting the petition to the Crown for the grant of a supplementary charter, and that she would raise a further action against Carron on those grounds, which would once more postpone indefinitely the consideration of the draft supplementary charter by the Privy Council.

(10) Accordingly, it seemed that, whether or not Mrs. Brown's appeal to the House of Lords was successful, Carron would be faced with a potentially unending vista of litigation which would postpone indefinitely the grant of any supplementary charter. It also seemed to the majority of the voting partners that the continuance of the old constitution in the meanwhile would exacerbate the difficulties in managing Carron referred to above to an extent which could well render ultimate recovery impossible and might result in liquidation.

(11) The situation as it appeared to the majority of the voting partners at the time can be summarised thus:

(*a*) The essential factor for the restoration of Carron to a profitable basis was the grant of a supplementary charter which included in its provisions (i) a widening of the capital and voting structure to enable the appointment of an adequate managing director, and (ii) the removal of the restriction on borrowing to £25,000.

(*b*) In order to obtain the grant of such a charter the present litigation between Carron and Mrs. Brown had to be determined on such a basis as left Carron with the judgment in its favour, and the prospect of any future litigation with Mrs. Brown which would have the effect of precluding the Privy Council considering the draft supplementary charter had also to be avoided.

(*c*) In order to achieve (*b*) a settlement had to be effected with Mrs. Brown.

(*d*) The terms required by Mrs. Brown for such a settlement included the payment not only of £41,900 to her but also of a similar sum to her nephew Mr. Stevenson, and she would not settle on any terms which did not provide for both of such payments.

(*e*) Accordingly, the making of the payments was essential in order to achieve the supplementary charter and hence the ability for Carron to recover its fortunes and make profits.

(12) These, therefore, were the considerations which induced the majority of the voting partners to agree to the terms of settlement of Mrs. Brown's action which are set out in detail in para. V above and which were settled in principle in correspondence between Carron's solicitors and Mrs. Brown's solicitors at the end of November 1961. If they had not been convinced that settlement of the action on those terms was a *sine qua non* to achieving the grant of a supplementary charter, they would never have agreed to £83,800 of Carron's funds being used for the purpose of being paid to Mrs. Brown and Mr. Stevenson in order to end a legal battle with them.

(13) The difficulties with regard to Mr. Leaver culminated, as noted in sub-para. (6) above, by his intimating his resignation on 23rd October 1961. At this date the negotiations with Mrs. Brown's agents had reached the stage at which

there was a reasonable prospect of their coming to fruition, and in that situation the majority of the voting partners, while adhering to the views set out in sub-para. (3) above, felt in a position to look for a person who could be offered the post of managing director once the grant of a supplementary royal charter was made, and that if such a person could be found he could be offered the post of "chief executive" in the intervening period until he could be made managing director. In the meanwhile, however, they considered that it was essential to retain Mr. Leaver's services until such a person could be found. They accordingly entered into discussions with Mr. Leaver on that basis, and Mr. Leaver agreed to the following terms as minuted in resolution no. 7900 of the General Court held on 25th October 1961:

> "Resolved to offer Mr. Leaver a continuation of his position as Manager on the following terms and conditions, which were accepted by him:
>
> 1. The Standing Committee will appoint a 'Chief Executive' as soon as possible, to be in effect a technical director, though owing to the Company's Constitution he cannot be a director. He will be responsible to the Standing Committee for proper functioning of the Company's Works at Carron.
>
> 2. Mr. Leaver will remain as Manager of Carron Company under the 'Chief Executive' at the same salary and perquisites as before and with the same title.
>
> 3. Mr. Leaver will be given a three year contract from the present date.
>
> 4. During the interim period before the appointment of the Chief Executive, the Standing Committee will agree not to interfere with or contact any employee of the Company who is at present under control of the Manager at the Works.
>
> 5. When the Chief Executive is employed then the Standing Committee will normally deal with him and not with the Manager.
>
> 6. The Manager will withdraw his notice of retiral. Dr. H. Hilton Brown expressed his strong disapproval of this proposition, but agreed in order that the Standing Committee might present, in the critical circumstances, a unanimous front."

(14) During November 1961 approaches were made on behalf of the standing committee of voting partners to Mr. H. C. Wilson-Bennetts, who earlier in that year had retired from the position of managing director of Allied Iron Founders Ltd. after 25 years' with that company. Mr. Wilson-Bennetts made it clear to the voting partners that he was only prepared to enter Carron's service upon the understanding that he would eventually become managing director and would obtain a substantial shareholding in the Company. The adjustment of the terms of settlement with Mrs. Brown, which only required the formal confirmation of the General Court at its statutory meeting in March 1962 to be made binding upon the parties, enabled the voting partners in December 1961 to say to Mr. Wilson-Bennetts that there was now a reasonable prospect of obtaining the grant of a supplementary royal charter in terms which would permit of his appointment to the board of directors after the charter was

granted and of his obtaining a shareholding, and on that understanding Mr. Wilson-Bennetts agreed to take up the appointment of chief executive as from 1st February 1962. Before the settlement with Mrs. Brown and Mr. Stevenson was agreed to, Mr. Wilson-Bennetts was consulted by the then voting partners concerned with the negotiations. He advised that, although the price of settlement was large, he considered that the increase in the Company's profits which would accrue from the removal of the difficulties under which it was then labouring would be sufficient to justify the expenditure and that on commercial grounds the settlement should be proceeded with.

(15) Mr. Wilson-Bennetts duly took up his duties with the Company in February 1962. The differences between Mr. Leaver and the voting partners continued, and in June 1962 terms were negotiated between Mr. Leaver and the voting partners whereby he agreed to resign his appointment as manager as from 31st August 1962.

(16) Following upon the grant of the supplementary royal charter in January 1963 and the adoption of new bye-laws in March 1963 Mr. Wilson-Bennetts was duly appointed managing director, and Carron was able to appoint two of its senior executives who had been in its service for a considerable time, namely, Mr. Keith and Mr. Lambie, to join the board of directors, and these gentlemen joined the board as from August 1963 and June 1964 respectively. In addition Mr. Graham Firth became a shareholder and director in July 1965.

(17) Since the grant of the supplementary royal charter Carron's fortunes have materially changed for the better. The withdrawal of the restriction on borrowing to £25,000 enabled it to obtain adequate overdraft facilities from the bank and thus to avoid the drain on its current assets which had been taking place during the period prior to the grant of the supplementary charter. As a result of the changes in the capital and voting structure, the management now proceeds along similar lines to that of a company incorporated under the Companies Acts in that the board of directors, which includes the managing director and Messrs. Keith and Lambie as working directors, now has full control over Carron's activities. The business has been expanded and broadened and subsidiary and associate companies have been formed. These include: (*a*) A new subsidiary company, Chatelaine Ltd., which is working closely with the National Coal Board in the production of new appliances for the coal industry; (*b*) Carron Stainless Products Ltd., which has been formed to manufacture stainless steel sinks and other stainless steel appliances and goods; (*c*) Carron National Plastics Ltd., which was formed in conjunction with Courtaulds Ltd., in which Carron has the majority holding but in which Courtaulds Ltd. are also shareholders. (*d*) During the last three years Carron, which has made cast iron bath tubs for many years but formerly was a minor producer, has now become the second largest producer of bath tubs in the country. The Company has recently acquired another bath producing company in the London area, which will further improve its position in that field.

The capital has been reorganised and is now realistically related to the assets. The trade has increased; and unprofitable sides of the business have either been discontinued or reorganised in such a way as to make them profitable or potentially profitable. In general Carron is now making the profits which it was unable to earn before the grant of the supplementary charter. In the view of

Carron's management none of these benefits could have been achieved without the grant of the supplementary royal charter, and they thus stem directly from the payment of £83,800 to Mrs. Brown and Mr. Stevenson which opened the way to the grant of the supplementary royal charter. A

VII. It was contended on behalf of Carron:

(1) that each of the sums in dispute was expenditure incurred wholly and exclusively for the purpose of Carron's trade; B

(2) that each of the said sums was expended on revenue account and not on capital account, and was deductible in computing Carron's profits for the purpose of the assessment under appeal, which should be reduced accordingly.

VIII. It was contended on behalf of the Commissioners of Inland Revenue:

(1) that none of the sums in dispute was incurred wholly and exclusively for the purposes of Carron's trade; C

(2) alternatively, that the said sums were incurred on capital account;

(3) that none of the said sums were deductible in computing Carron's profits for the purpose of assessment to income tax.

IX. We, the Commissioners who heard the appeal, gave our decision as follows:

(1) *Cost incurred in obtaining the supplementary charter.* On the evidence D the object of the supplementary charter was not to acquire a framework within which the business could be carried on; the framework was already there. Nor was it to extend the framework to carry on a new sort of business, but to repair the old framework and maintain it against time and circumstances. The provisions of the new charter covered a number of points which had little to do with the trade, but it seemed to us on the evidence that the really significant E points of the supplementary charter and the objects of Carron were (i) to remove the limitation on the borrowing power and (ii) to deal with the restriction on the shares and the qualification for voting, which were obstacles to the proper management and conduct of the business. Those were the really significant objects and were concerned with the management and conduct of the business. We found that the cost was wholly and exclusively for the purposes of Carron's F business. We could not see any new capital asset and concluded that it was revenue expenditure and allowable.

(2) *The Company's costs in the action of Mrs. Brown.* We found that the action was defended because to have given way to Mrs. Brown's claim would have resulted in the continuation of the existing system of management, which was contrary to the proper and efficient conduct of the business. We thought that G the expenditure was wholly and exclusively for the trade and could not see any new asset brought into existence. We concluded that it was revenue expenditure and allowable.

(3) *The sums paid in pursuance of the terms of settlement.* In the light of the authorities we had to consider, firstly, why Carron settled the action and, secondly, what Carron got for the disbursement. We found that Carron settled H

A the action because it wished the judgment of the Court of Session to stand so that it could go ahead and obtain a supplementary charter. For the expenditure Carron got the various terms of the settlement. We felt that we should look at these terms globally, and in doing so we found that Carron really got nothing more or less than the removal of the obstruction to the new charter. Predominantly it got up-to-date borrowing powers and the ability to secure proper
B management. Those considerations prompted Carron to pay the sums which it did. We thought that the sums paid in pursuance of the terms of the settlement were wholly and exclusively for the purposes of the trade and revenue expenditure allowable in computing Carron's profits.

The appeal having succeeded on all heads, we reduced the assessment to £128,632 (agreed capital allowances £128,632).

C X. The Commissioners of Inland Revenue immediately after the determination of the appeal declared to us their dissatisfaction therewith as being erroneous in point of law, and in due course required us to state and sign a Case for the opinion of the Court of Session as the Court of Exchequer in Scotland, which Case we have stated and signed accordingly.

The question of law for the opinion of the Court is whether, in the light of
D the facts found by us, we were correct in law in holding:

(*a*) that each of the sums mentioned in para. I(2) of this Case was expended wholly and exclusively for the purposes of Carron's trade, and

(*b*) that none of the said sums was capital expenditure.

R. A. Furtado
R. W. Quayle
} Commissioners for the Special Purposes of the Income Tax Acts.

E

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

29th July 1966.

F The case came before the First Division of the Court of Session (the Lord President (Clyde) and Lords Migdale, Guthrie and Cameron) on 28th February and 1st and 2nd March 1967, when judgment was reserved. On 10th March 1967 judgment was given unanimously against the Crown, with expenses.

The Lord Advocate (*Gordon Stott Q.C.*) and *C. K. Davidson* for the Crown.

Hon. Henry S. Keith Q.C., *J. P. H. Mackay Q.C.* and *J. J. Clyde* for the
G Company.

The following cases were cited in argument in addition to those referred to in the judgments:—*Bradbury* v. *United Glass Bottle Manufacturers Ltd.* (1959) 38 T.C. 369; *Archibald Thomson, Black & Co. Ltd.* v. *Batty* 7 T.C. 158; 1919 S.C. 289; *Texas Land & Mortgage Co.* v. *Holtham* (1894) 3 T.C. 255;

Collins v. *Joseph Adamson & Co.* 21 T.C. 400; [1938] 1 K.B. 477; *Robert Addie & Sons' Colleries Ltd.* v. *Commissioners of Inland Revenue* 8 T.C. 671; 1924 S.C. 231; *Rhodesia Railways Ltd.* v. *Collector of Income Tax, Bechuanaland* [1933] A.C. 368.

The Lord President (Clyde)—This is a Case stated for the opinion of the Court by the Special Commissioners in regard to certain sums of money paid by Carron Company in connection with the carrying through of a supplementary charter. The Special Commissioners came to the conclusion, after a detailed consideration of the complicated and unusual circumstances in which these payments were made, in the first place, that each of these sums was expended wholly and exlusively for the purposes of the Company's trade, and, secondly, that none of them was capital expenditure. The two questions in the case are whether the Special Commissioners were correct in law in these two conclusions.

The items of expenditure to which the case relates fall under three heads: firstly, legal expenses incurred by the Company in connection with the obtaining of a supplementary charter; secondly, legal expenses incurred in connection with an action brought in the Court of Session against the Company by a Mrs. Dorothy Brown; and thirdly, sums paid to Mrs. Brown and to a Mr. Stevenson pursuant to an agreement to settle this action. In the arguments presented to us no differentiation was made between these three items in regard to the issues raised in the case.

The circumstances out of which these sums came to be paid are very briefly as follows. Carron Company obtained a royal charter in 1773 to carry on the business of ironfounders, a business which it has continuously carried on ever since. The terms of this royal charter had until recently remained virtually unaltered. The Special Commissioners have found that this charter had become archaic and unsuited for modern commercial practice, and as such imposed insurmountable obstacles to the profitable development of the Company's business in contemporary economic and commercial conditions.

The Special Commissioners found that there were two features of this charter which led to this difficulty. In the first place, the restrictions on transfers of shares, coupled with the stringent qualifications on voting rights, which confined the control of the Company to a small number of "voting partners", none of whom possessed any qualification for managing the Company's business on the technical side. The technical side was in consequence entrusted to a salaried official who under the constitution could not enjoy the status of a managing director. All this disabled the Company from obtaining the services of persons of sufficient calibre to carry out the increasingly responsible duties under modern conditions of the management of a concern of this magnitude. The other aspect of the original charter which in the view of the Commissioners formed a further obstacle to progress was the restriction in the charter of the borrowing powers of the Company to £25,000. As a result the Company was compelled to rely for the financing of its projects on its current assests. By 1960 these assets were greatly depleted, and the Company was beginning to have difficulty in meeting its obligations. Although in the second half of the 1950s other ironworks were busy, Carron Company was suffering a progressive

A **(The Lord President (Clyde))**

decline, which the Commissioners attributed to defects in its management structure. They held that the only remedy to overcome these difficulties was a supplementary charter, which involved an application to the Privy Council.

But these were not the only difficulties with which Carron Company had to deal. In 1946 a Mr. Stevenson, who held one share in the Company, requested B to be admitted as a voting partner, the qualification for which was ten shares. He was not considered a suitable person to be admitted a voting partner and his request was refused. He then informed the Company that he would take every opportunity open to him to attack the voting partners' conduct of the Company's affairs past and future, and would make it his object to acquire the additional nine shares he required. This declaration of war was carried out by C a sustained attack in the following years against the Company in a series of litigations, in which he ultimately obtained the co-operation of his aunt Mrs. Brown, who was also a shareholder in the Company. By the summer of 1961 it was apparent that, unless a settlement with these two shareholders could be arrived at, an unending vista of litigation faced the Company. This would indefinitely postpone the grant of any supplementary charter and the consequent D recovery of the Company's trading. A settlement was ultimately arrived at between these two shareholders and the Company under which, for a payment to each, plus their expenses in their litigations with the Company, their interest in the Company was bought out and the way was clear for the presentation of the supplementary charter. After it was granted the trading activities of the Company markedly improved. The Commissioners have found that the making E of these payments to the two shareholders was essential in order to secure the supplementary charter, and hence the ability for Carron to recover its fortunes and make profits. If the Company had not been convinced that a settlement on the terms arrived at was a *sine qua non* to the grant of the supplementary charter the Company would never have made them. From the trading results at once achieved by the Company after the supplementary charter was obtained F the sums paid to extinguish the obstruction of these two persons seem to represent a good bargain from the Company's point of view, substantial though these sums were.

The first question in the case is whether the sums to which I referred at the beginning of this opinion, and which were the conditions precedent to the obtaining of the supplementary charter, were expended wholly and exclusively G for the purposes of the Company's trade. This phrase was explained by Lord Cave L.C. in *British Insulated & Helsby Cables Ltd.* v. *Atherton*(1) [1926] A.C. 205, at page 212 (and his statement has been accepted with approval in later cases, as, for instance, by Lord Reid in *Morgan* v. *Tate & Lyle Ltd.*(2) [1955] A.C. 21, at page 50), in the following terms:

> ". . . a sum of money expended not of necessity and with a view to a H direct and immediate benefit to the trade, but voluntarily and on the grounds of commercial expediency, and in order to facilitate the carrying on of the business, may yet be expended wholly and exclusively for the purposes of the trade".

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(1) 10 T.C. 155, at p. 191. (2) 35 T.C. 367, at p. 418.

(The Lord President (Clyde)) A

In the present case the Special Commissioners have held that the expenditure in question was all incurred by the Company to modernise its structure by securing additional borrowing powers and as a means of engaging managerial staff of the required calibre. These purposes are obviously purposes which are in their nature capable of being for the purposes of the trade, and as these are the purposes which the Commissioners held were in fact the Company's B purposes their conclusion is one of fact for them: see *per* Lord Reid in *Commissioners of Inland Revenue* v. *Dowdall O'Mahoney & Co. Ltd.*(1) [1952] A.C. 401, at page 411.

The Crown's contention was that the purpose of the Company in incurring this expenditure was in order to obtain a supplementary charter. But the findings of the Commissioners are against this view, and a commercial company would C not spend money on a mere piece of paper as an end in itself. The supplementary charter was a mere stepping stone to the real practical purpose of improving their trading potential. The Crown also argued that, even although the Special Commissioners were entitled to find, as they did, what were the Company's purposes in obtaining the supplementary charter, yet this conclusion was vitiated because that charter also contains incidental provisions not directly D concerned with trading. But there is no finding in the Case that any such incidental provisions were attributable to any other purpose than a trading purpose, and in any event such merely incidental benefits will not prevent the whole and exclusive purpose of the expenditure in question being for the purpose of the expender's trade: see *per* Lord Sumner in *Usher's Wiltshire Brewery Ltd.* v. *Bruce*(2) [1915] A.C. 433, at page 469. The Commissioners obviously E considered any incidental benefits as *de minimis*, and in no way derogating from the exclusive trading purpose behind the expenditure in question. The relevant consideration is the purpose which the Company had in view (*Morgan* v. *Tate & Lyle Ltd.*(3), *per* Lord Morton, [1955] A.C., at page 38), and that purpose was in fact a twofold purpose directly related to the Company's trading.

On this whole aspect of the case, therefore, in my opinion the Special F Commissioners were correct in law, and I turn therefore to the only other question, whether they were also correct in law in holding that none of the sums in question was capital expenditure.

The determination of this question is a matter largely of common sense and not the strict application of any single legal principle: *per* Lord Reid in *Strick* v. *Regent Oil Co. Ltd.*(4) [1966] A.C. 295, at page 313. So viewing the matter, it G appears to me that what was achieved by these payments was the removal of disabilities to the Company's trading operations which prejudiced its operations in its competition with its rivals. This was achieved without the acquisition of any tangible or intangible new asset and without the creation of a new branch of its existing trading activities. From a commercial and business point of view nothing in the nature of additional fixed capital was thereby obtained. The H benefit was essentially of a revenue character because the Company became able more easily to finance its day-to-day transactions, and more efficiently to carry on its day-to-day manufacture.

(1) 33 T.C. 259, at p. 277.
(2) 6 T.C. 399, at p. 437.
(3) 35 T.C. 367, at p. 409.
(4) 43 T.C. 1, at pp. 29–30.

(The Lord President (Clyde))

It was argued for the Crown that the payments secured an advantage to the Company within the meaning of the test laid down by Lord Cave L.C. in *British Insulated & Helsby Cables Ltd.* v. *Atherton*[1] [1926] A.C., at page 213, and were therefore of a capital nature. But what Lord Cave said was that:

> ". . . when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital."

But in the first place, this was said in a very different type of case from the present. For there the expenditure consisted in moneys used to establish a pension fund for employees and was obviously wholly different from a trading expense. Moreover, Lord Cave did not regard his test as a conclusive one, for he recognised that special circumstances might very well lead to an opposite conclusion. There have been several cases in which a sharp distinction has been drawn between the removal of a disability on the one hand, payment for which is a revenue payment, and the bringing into existence of an advantage, payment for which may be a capital payment: see *Anglo-Persian Oil Co. Ltd.* v. *Dale*[2] [1932] 1 K.B. 124, approved by Lord Reid in *Strick* v. *Regent Oil Co. Ltd.*[3] [1966] A.C., at page 318; *Mitchell* v. *B. W. Noble Ltd.*[4] [1927] 1 K.B. 719, approved in *B.P. Australia Ltd.* v. *Commissioner of Taxation* [1966] A.C. 224, at page 263; *Associated Portland Cement Manufacturers Ltd.* v. *Commissioners of Inland Revenue*[5] [1946] 1 All E.R. 68, *per* Lord Greene M.R., at page 72. This factor points strongly in my opinion in the present case in favour of the expenditure being a revenue and not a capital expenditure. For in the present case the Company were not bringing into existence an advantage within the meaning of those decisions, but merely removing a disability or disabilities under which they were confined in their trading under their out-of-date charter of 1773.

In my opinion, therefore, the Special Commissioners were correct in treating the expenditure as wholly revenue expenditure. Both branches of the question put to us should therefore be answered in the affirmative.

Lord Migdale—The question raised in the appeal is whether the Special Commissioners were correct in law in holding (*a*) that the payments made by Carron Company were expended wholly and exclusively for the purposes of its trade, and (*b*) that none of the sums was capital expenditure. The sums expended were (1) legal expenses of £3,107 incurred in obtaining a supplementary charter; (2) legal expenses of £4,307 incurred in connection with an action brought by a shareholder, Mrs. Brown, against Carron, and (3) two sums each of £41,900 paid to Mrs. Brown and Mr. W. G. Stevenson pursuant to an agreement which resulted in the former agreeing to settle her action against Carron and in the latter parting with his shares and undertaking not to acquire further shares in the Company. Although Junior Counsel for the Crown treated

(1) 10 T.C. 155, at p. 192. (2) 16 T.C. 253. (3) 43 T.C. 1, at p. 33.
(4) 11 T.C. 372. (5) 27 T.C. 103, at p. 118.

(Lord Migdale) A

these as separate matters, the Lord Advocate conceded that the three items were so closely interconnected that they could for the purpose of this case be treated as one.

The Special Commissioners have found that a majority of the "voting partners" considered that it was impossible for Carron to put its operations on to a sound commercial basis until (i) its capital and voting structure could be B altered so as to enable it to appoint a managing director with a seat on the board and (ii) the restriction to £25,000 on its borrowing powers had been removed. Both these obstacles to progress were attributable directly to the provisions of the constitution, and any attempt to elide them in an unconstitutional manner would have exposed them to an attack by Mr. Stevenson. Accordingly the only way which would remove the obstacles was to get a supplementary charter. C Attempts to obtain a supplementary charter were hindered and impeded by a series of litigations brought by Mrs. Brown and Mr. Stevenson against Carron. In order to get the charter it was necessary to bring the litigation to an end. To do this it was necessary to arrive at a settlement with Mrs. Brown. She demanded payment of £41,900 to herself and a similar sum to her nephew Mr. Stevenson. In the view of the Special Commissioners the making of these D payments was essential in order to obtain the supplementary charter, and hence to achieve the ability for Carron to recover its fortunes and profits.

Put shortly, the Special Commissioners have found that a majority of the shareholders, alarmed by the falling off in the Company's trade, came to the conclusion that this could be remedied only by placing the running of the Company in the hands of a managing director who would have the necessary E technical qualifications and at the same time get a seat on the board of management; and also that the restriction on the amount of money it could borrow must be removed. These objects could only be attained by means of a supplementary charter which would amend the royal charter of 1773. This supplementary charter would not be granted so long as the Company was involved in litigation with two of its shareholders. The only way to get rid of their opposition and F so clear the way for the supplementary charter was to buy them off.

The supplementary charter was granted on 2nd October 1962. After reciting the provisions of the royal charter of 1773 it made certain alterations. The limitation of the power to borrow to £25,000 was no longer to apply. The management of the Company was to be placed in the hands of a standing committee of directors, who were empowered to regulate the internal arrange- G ments "for the right conduct of its business". These alterations achieved the objects which led the Company to apply for the charter. In addition it incorporated certain other matters. While the capital remained at £150,000, it was to be divided into 150,000 shares of £1 each instead of 600 shares of £250 each. The Company was empowered to increase its share capital if at any time in the future it wished to do, and also to capitalise any part of its reserve fund. The H right it formerly had to buy its own shares was annulled, and the shareholders were given limited liability for the future.

Counsel for the Crown contended that on these findings of fact the Special Commissioners had erred in law in holding that these disbursements were of a revenue nature. The question we have to determine is whether in law they

A **(Lord Migdale)**

could be regarded as revenue payments. If they can be so regarded then the decision of the Special Commissioners must stand.

Section 137 of the Income Tax Act 1952 sets out certain deductions which are not allowable:

> "(*a*) any disbursements or expenses, not being money wholly and
> B exclusively laid out or expended for the purposes of the trade . . ." and "(*f*) any capital withdrawn from, or any sum employed or intended to be employed as capital in, such trade".

It was not seriously contended that para. (*f*) covered the disbursements in this case. It is clear that they did not bring in any capital or asset which could be regarded as capital. The contention between parties turned on two points.
C First, whether the fact that the supplementary charter, in addition to giving the Company the advantages of increased borrowing power and a reconstructed board of management, which might be advantages of a revenue nature, effected also improvements in the constitution of the Company which touched on its capital structure meant that the expenditure could not be regarded as money "wholly and exclusively expended for the purposes of the trade". The words
D "wholly and exclusively expended for the purposes of the trade" have been considered in many cases and a number of tests have been laid down. It is important to remember that no one test is necessarily conclusive. If a particular payment satisfies several of the accepted tests it may well be that it is a capital or a revenue expenditure according to the outcome of the application of the tests. The question has to be looked at reasonably and has to be determined
E by the Special Commissioners. It may be a difficult decision in borderline cases. Viscount Simon, in *Bean* v. *Doncaster Amalgamated Collieries Ltd.*(1) [1946] All E.R. 642, at page 645, said:

> "The borderline between revenue and capital expenditure is sometimes difficult to draw, and there may be cases in which the conclusion is properly reached by the Commissioners as a question of fact which will not be
> F disturbed."

One of the tests to be applied in ascertaining whether a payment is of a revenue or capital nature was laid down by Lord Davey in *Strong & Co. of Romsey Ltd.* v. *Woodifield*(2) [1906] A.C. 448, at page 453:

> "These words . . . appear to me to mean for the purpose of enabling a person to carry on and earn profits in the trade. I think the disbursements
> G permitted are such as are made for that purpose."

I do not quote the next words in view of the observations in the House of Lords in *Smith Potato Estates Ltd.* v. *Bolland*(3) [1948] A.C. 508.

Lord Cave L.C. in *British Insulated & Helsby Cables Ltd* v. *Atherton*(4) [1926] A.C. 205, at pages 211–2, said:

H

(1) 27 T.C. 296, at p. 312.
(2) 5 T.C. 215, at p. 220.
(3) 30 T.C. 267.
(4) 10 T.C. 155, at p. 191.

(Lord Migdale)

> "It was made clear in the . . . cases of *Usher's Wiltshire Brewery* v. *Bruce*(1) and *Smith* v. *Incorporated Council of Law Reporting*(2) that a sum of money expended, not of necessity and with a view to a direct and immediate benefit to the trade, but voluntarily and on the grounds of commercial expediency, and in order indirectly to facilitate the carrying on of the business, may yet be expended wholly and exclusively for the purposes of the trade; and it appears to me that the findings of the Commissioners in the present case bring the payment in question within that description."

This passage was quoted with approval by Lord Reid in *Morgan* v. *Tate & Lyle Ltd.*(3) [1955] A.C. 21, at page 50. Accordingly, it would appear to be proper for the Special Commissioners to consider the reasons or motives which lay behind the expenditure of the moneys in this case, and if they reached the conclusion that the motive was to facilitate the carrying on of Carron's business, as they have done, to treat them as expended wholly and exclusively for the purposes of the trade.

Counsel for the Crown contended that, although the motive behind the move to obtain a supplementary charter may have been to improve the trade of the Company, which might be a "revenue" motive, the result as embodied in the charter brought in other additional benefits of a capital nature, and as the expenditure was for the charter as a whole it was not exclusively for purposes of a revenue nature. I think the answer to that is twofold. First, the expenditure was to improve the revenue position of the Company. The charter was only one step in achieving that end. There is nothing in the Case to suggest that it would have cost less if the so-called capital provisions had been omitted. Second, the fact that certain of the benefits may not be of a wholly revenue character does not mean that the expenditure was not wholly and exclusively for the purpose of the trade, if that was the object in view. This was decided in the case of *Usher's Wiltshire Brewery Ltd.* v. *Bruce*, where their Lordships held that voluntary expenditure by the brewer, who was also the landlord, made to the tenant was "wholly and exclusively laid out or expended for the purposes of such trade" because it was expended to keep the tied houses in a condition to earn a profit by selling the brewer's goods, and that notwithstanding that some of the expenditure was such as would normally be borne by the tenant. Lord Sumner, [1915] A.C., at page 469(4), said:

> "Where the whole and exclusive purpose of the expenditure is the purpose of the expender's trade, and the object which the expenditure serves is the same, the mere fact that to some extent the expenditure enures to a third party's benefit, say that of the publican, or that the brewer incidentally obtains some advantage, say in his character of landlord, cannot in law defeat the effect of the finding as to the whole and exclusive purpose."

In my view in the present case the Special Commissioners were correct in law in finding that these sums were moneys wholly and exclusively laid out or expended for the purposes of the trade.

(1) 6 T.C. 399.
(2) 6 T.C. 477; [1914] 3 K.B. 674.
(3) 35 T.C. 367, at p. 418.
(4) 6 T.C., at p. 437.

A **(Lord Migdale)**

The second point debated before us was whether the sums, and in particular the large amounts paid to Mrs. Brown and Mr. Stevenson, were of a revenue or a capital nature. Counsel for the Crown contended that they fell within the well-known dictum of Lord Cave L.C. in *British Insulated & Helsby Cables Ltd.* v. *Atherton*(1) [1926] A.C. 205, at page 213:

B "But when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital."

It is to be noted that his Lordship recognises that this is a guide and may not C apply in special circumstances. Counsel said that these payments were made once and for all and were intended to bring an advantage which was for the enduring benefit of Carron. It is clear, however, that a single payment may bring an advantage which is to the enduring benefit of a company's trade and yet be of a revenue nature. I refer to *Mitchell* v. *B. W. Noble Ltd.*(2) [1927] 1 K.B. 719, a decision of the Court of Appeal which has been approved in the Privy Council D in *B.P. Australia Ltd.* v. *Commissioner of Taxation* [1966] A.C. 224, at page 263. In *Mitchell's* case a lump sum was paid to get rid of a director whose position on the board was regarded by his fellow directors as hurtful to the prosperity of the company. It was held to be a revenue payment. Lord Hanworth M.R. said(3), [1927] 1 K.B. 719, at page 737, that the payment

"was made not in order to secure an actual asset to the company but E to enable the company to continue to carry on, as it had done in the past . . . unimperilled by the presence of one who . . . might have caused difficulty."

That case comes near to the present one, for I can see no essential differences between a director who in the opinion of his fellow directors is hindering the progress of the company and shareholders one of whom at least had openly avowed his intention to cause as much difficulty as he could. If the payment in F the former case can be held to be one of a revenue nature, I cannot see why the payments in this case should not be regarded in the same way.

In *G. Scammell & Nephew Ltd.* v. *Rowles*(4) [1939] 1 All E.R. 337 payments made to get the assent of other parties to a compromise and in settlement of legal costs were held to be expenditure for the purposes of the appellants' trade and of a revenue nature and were deductible. In *Southern* v. *Borax Consolidated* G *Ltd.*(5) [1941] 1 K.B. 111 money spent on fighting an attack on the title of land held by a subsidiary was held to be money wholly and exclusively laid out for the purposes of the trade and therefore deductible. In *Anglo-Persian Oil Co. Ltd.* v. *Dale*(6) [1932] 1 K.B. 124 a company paid a large sum to cancel an agency contract for a very wide area with the result that they were thereafter able to deal directly with their customers in that area. Of that case Lord Reid, in *Strick* H v. *Regent Oil Co. Ltd.*(7) [1966] A.C. 295, at page 318, said:

(1) 10 T.C. 155, at p. 192. (2) 11 T.C. 372. (3) *Ibid.*, at p. 421. (4) 22 T.C. 479.
(5) 23 T.C. 597. (6) 16 T.C. 253. (7) 43 T.C. 1, at p. 33.

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> "This certainly entailed an extensive change in the organisation of their business. But the payment was held to be a revenue expense because the cancellation of the agreement 'merely effected a change in its business methods and internal organisation, leaving its fixed capital untouched' (*per* Lawrence L.J.(1))."

That is also true of the payments in the present case.

In *Commissioners of Inland Revenue* v. *Dowdall, O'Mahoney & Co. Ltd.*(2) [1952] A.C. 401, at page 411, Lord Reid said:

> "If certain payments made by a taxpayer are of such a kind that they are capable in law of being regarded as coming within the exception in Rule 3(*a*) [now s. 137(*a*) of the Income Tax Act 1952] then no doubt it is for the Commissioners to determine whether the circumstances of the case are such that in fact they do come within that exception. But it is in my judgment a question of law whether particular payments are of a nature capable of coming within the exception."

In the present case the Special Commissioners have held that these payments are deductible. In view of the cases to which I have referred it is clear that these payments are capable in law of being so.

In *Strick* v. *Regent Oil Co. Ltd.* Lord Reid said(3), [1966] A.C., at page 313:

> "One must, I think, always keep in mind the essential nature of the question [whether a particular outlay by a trader can be set against income or must be regarded as a capital outlay]. The Income Tax Act requires the balance of profits and gains to be found. So a profit and loss account must be prepared setting on one side income receipts and on the other expenses properly chargeable against them." Later his Lordship says: "The question . . .must be answered in light of all the circumstances which it is reasonable to take into account, and the weight which must be given to a particular circumstance in a particular case must depend rather on common sense than on strict application of any single principle."

Looked at broadly and as a matter of common sense, I think Mr. Keith is right in saying that these outlays were for the purpose of improving the working of the existing machinery of the Company. "To oil the workings" was the phrase he used, and not to create new machinery or to add to the capital assets of the Company. This is the decision in law reached by the Special Commissioners on the facts found by them. I think they were entitled to do so.

I would accordingly answer both branches of the question in the affirmative.

Lord Guthrie—The facts in this case have been fully and clearly set forth by the Special Commissioners in a well-arranged order. The matter at issue is whether Carron Company was entitled to deduct from the profits of its trade certain expenses for the purpose of its assessment to income tax, Schedule D, Case I, for the year 1964–65. These expenses were: (1) legal expenses of £3,107

(1) 16 T.C., at p. 270. (2) 33 T.C. 259, at p. 277. (3) 43 T.C. 1. at pp. 29–30.

(Lord Guthrie)

incurred by the Company in connection with obtaining the grant of a supplementary charter; (2) legal expenses of £2,641 incurred in connection with an action against the Company by a shareholder, Mrs. Dorothy Brown; (3) a sum of £41,900 paid to Mrs. Brown in settlement of that action, together with her expenses amounting to £1,666, and a sum of £41,900 paid to her nephew, Mr. W. G. Stevenson, who was also a shareholder in the Company. The Special Commissioners held that all these sums were expended wholly and exclusively for the purposes of the Company's trade, and that none of them was capital expenditure. The question of law for the opinion of the Court is whether, on the facts found by them, they were correct in law in so holding.

It is important to note that the Lord Advocate stated at the outset of his speech to us that no distinction could be drawn between the various payments which are the subject of this case. Therefore all were or were not expended wholly and exclusively for the purposes of the Company's trade, and all were or were not capital expenditure. This statement enables me to deal with the matter at issue more briefly.

The essential facts seem to me to be these. The Company was incorporated in 1773 by royal charter to carry on business as ironfounders, and has done so ever since. Its constitution is contained in the charter, certain articles of copartnery and bye-laws passed by the Company. Its archaic constitution placed voting power in the hands of a small number of shareholders with certain qualifications, called "voting partners". These voting partners had the management of the Company's business, but not having the necessary technical qualifications, they entrusted the day-to-day management of the business to a manager, who was technically qualified but who was not a partner. The members had unlimited liability for the Company's debts. The Company's borrowing powers were restricted by the charter of 1773 to £25,000.

> It is found by the Special Commissioners that the constitution
> "imposed insurmountable obstacles to the profitable development of the Company's business in contemporary economic and commercial conditions."

They emphasise the significance of two of these obstacles, first, that the limitation of borrowing powers prevented the financing of any large-scale commercial project, except by selling assets; second, that the administration of the Company suffered through the lack of technical qualification of the voting partners, and the difficulty of obtaining a manager of sufficient calibre because he did not enjoy the status of a managing director. The effect of these obstacles was that by 1960 the Company's current assets had been greatly depleted, and that it had begun to have difficulty in timeously meeting its obligations to creditors. Therefore the majority of voting partners decided that it was necessary, in order to put the Company's operations on a sound financial basis, for its capital and voting structure to be altered, so as to enable it to obtain a suitable managing director with a seat on the board of directors and to offer executives promotion to the board, and also so as to remove the restriction on its borrowing powers, The only remedy which would get rid of the obstacles was the grant of a supplementary royal charter, which required the presentation of a petition to the Privy Council. This was done on 21st December 1959.

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Mr. Stevenson had been involved in a number of litigations with the Company at his instance, and was determined to oppose the management in every possible way. His aunt, Mrs. Brown, who was advised and encouraged by him, on 8th January 1960 raised an action, the object of which was to prevent the Company from proceeding with the petition. The action was dismissed as irrelevant by the Lord Ordinary, and his interlocutor was affirmed in the Inner House. But Mrs. Brown appealed to the House of Lords, and the Company decided that in order to obtain the supplementary charter it was necessary to settle with Mrs. Brown so as to leave standing the judgment of the Court of Session. A settlement was ultimately arranged under which the Company paid both Mrs. Brown and Mr. Stevenson £41,900, and in addition Mrs. Brown's expenses in the action. Thereafter the supplementary royal charter was granted. A managing director was appointed, with a seat on the board, and new directors, including working directors, were appointed to the board. Adequate overdraft facilities were obtained from the Company's bank. The result has been that the fortunes of the Company have improved, trade has increased, and substantial profits have been earned, which the Company could not earn before the grant of the supplementary charter.

From these facts it appears that the purposes of the Company were to obtain sufficient finance for the conduct of its business, and to acquire directors, and especially a managing director, of suitable qualifications to enable it to earn profits. The expenditure in question was all incurred necessarily to enable these purposes to be fulfilled. The costs of the presentation of the petition to the Privy Council were necessary to remove the obstacles which the archaic constitution had placed in the way of the profitability of the Company in modern conditions. To secure the grant of that petition, and thus to fulfil both of these purposes, the defence to Mrs. Brown's action and the settlement with her and with Mr. Stevenson were essential steps. All the payments, among which, as the Lord Advocate said, no distinction can be drawn, were made "for the purpose of earning the profits": see *Strong & Co. of Romsey Ltd.* v. *Woodifield*(1) [1906] A.C. 448, *per* Lord Davey, at page 453.

The Lord Advocate submitted that the purpose of the expenditure was to obtain the supplementary charter, and that a reorganisation of the constitution was not what he called a "trading purpose". But the obtaining of the charter was not the purpose of the Company but a means for the fulfilment of its purposes, the obtaining of working capital and skilled directors to enable it to earn profits. He also argued that, because the alterations effected by the supplementary charter involved other constitutional changes in the Company, notably the abolition of the unlimited liability of the members, and these changes were material, the sums expended to obtain the charter were not expended "wholly and exclusively for the purposes of the Company's trade". But s. 137(*a*) of the Income Tax Act 1952 requires the Court to consider for what purposes the money was expended, that is, what objects it was intended to secure. If the compelling reason for the expenditure was the purposes of the trade, the mere fact that other incidental results followed does not mean that the expenditure was not wholly and exclusively incurred for the purposes of the

(1) 5 T.C. 215, at p. 220.

A **(Lord Guthrie)**

trade, and does not disentitle it from being a deduction in computing profits: see *Usher's Wiltshire Brewery Ltd.* v. *Bruce*(1) [1915] A.C. 433, *per* Lord Sumner, at page 469.

I am therefore of opinion that, when the Special Commissioners had found that "the really significant objects" of the Company were the removal of the B limitation on borrowing power and to improve the management and conduct of the business, they were well entitled to conclude on the facts found by them that the sums were expended wholly and exclusively for the purposes of its trade.

The other matter raised by the case is whether the sums were or were not capital expenditure. On this matter we were referred to a large number of reported decisions. These decisions have recently been considered by the House of Lords C in *Strick* v. *Regent Oil Co. Ltd.*(2) [1966] A.C. 295 and by the Privy Council in *B.P. Australia Ltd.* v. *Commissioner of Taxation* [1966] A.C. 224. Accordingly it is not necessary in this opinion to refer to the facts in most of these cases, nor to quote from many of the judicial opinions to which we were referred.

I have found this problem more difficult than the first matter discussed, because the facts of the present case are special, and because the circumstances D do not all point in the same direction. Therefore it is necessary to find out what considerations predominate, and what the expenditure was calculated to effect from a practical and business point of view: *B.P. Australia Ltd.* v. *Commissioner of Taxation* [1966] A.C., at page 264. In *British Insulated & Helsby Cables Ltd.* v. *Atherton*(3) [1926] A.C. 205, at page 213, Viscount Cave L.C. suggested a test which has often been quoted:

E > "But when an expenditure is made not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to the opposite conclusion) for treating such expenditure as properly attributable not to revenue but to capital."

Counsel for the Crown maintained that, judged by this test, the expenditure in F question in this case was capital.

The Lord Advocate pointed out in his speech that the expenditure was incurred in connection with the obtaining of a supplementary charter, and in order to improve the position of the Company. Thus by the grant of the charter an advantage was obtained, and the benefit of that advantage was of an enduring character. The revision of the constitution of the Company "affected the whole G conduct of the business": *Strick* v. *Regent Oil Co. Ltd.*(4) [1966] A.C. 295, *per* Lord Reid, at page 318. He also maintained, and I think rightly, that the expenditure cannot reasonably be regarded as recurring, since it is most unlikely that another supplementary charter will be applied for in the forseeable future. The cost of a new factory is regarded as non-recurring, and is capital expenditure, although the duration of the building will be limited to a period of years.

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(1) 6 T.C. 399, at p. 437.
(2) 43 T.C. 1.
(3) 10 T.C. 155, at p. 192.
(4) 43 T.C. 1, at p. 33.

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But, while I appreciate the strength of these considerations, I do not think that they are sufficient to overturn the conclusion reached by the Special Commissioners. In dealing with the costs of the application for a new charter, they have said tersely: "We could not see any new capital asset". They also held that the Company's expenses in defending Mrs. Brown's action did not bring any new asset into existence. With regard to the sums paid to Mrs. Brown and Mr. Stevenson, the ground of their decision was this:

> "Carron really got nothing more or less than the removal of the obstruction to the new charter. Predominantly it got up-to-date borrowing powers and the ability to secure proper management."

All expenditure is incurred in order to procure an advantage of some sort, and in deciding whether the payment is a capital or revenue disbursement it is necessary to consider the nature of the advantage. In the present case the advantage secured by the expenditure was the removal of two obstacles to the successful trading of the Company, obstacles which rendered it more difficult for it to compete with other manufacturers. The obstacles were, first, the limitation of borrowing power, so that adequate floating capital could not be obtained, and, second, the inability to obtain skilled directors. Therefore the advantage secured was in the internal administration from day to day of the Company's affairs, in increased efficiency. In *Strick* v. *Regent Oil Co. Ltd.*(1) [1966] A.C., at page 318, Lord Reid said, with reference to *Anglo-Persian Oil Co. Ltd.* v. *Dale*(2) [1932] 1 K.B. 124, approving of the opinion of Lawrence L.J. in that case:

> "But the payment was held to be a revenue expense because the cancellation of the agreement 'merely effected a change in its business methods and internal organisation, leaving its fixed capital untouched' ".

In the present case the fixed capital was left untouched. No tangible asset was created by the expenditure which could appear in its balance sheet. No new trading sphere was acquired, as in *Van den Berghs Ltd.* v. *Clark*(3) [1935] A.C. 431.

Therefore, although an advantage was obtained by the expenditure in question, and although that advantage conferred enduring benefit upon the Company, I am of opinion that the special circumstances of this case lead to the conclusion that the advantage was not a capital asset, and that the decision of the Special Commissioners should be affirmed.

Lord Cameron—The question of law which is put by the Special Commissioners in this Stated Case is whether they were correct in the conclusions at which they arrived. Both of these conclusions appear to me to turn essentially upon the inference to be drawn from the facts found by the Commissioners. I am of opinion, like your Lordships, that the inferences which the Commissioners drew were those which they were entitled to draw upon the facts found by them; that they did not in any way misdirect themselves in law, and that therefore their conclusions should not be disturbed. Both branches of the question of law should therefore be answered in the affirmative.

(1) 43 T.C. 1, at p. 33. (2) 16 T.C. 253. (3) 19 T.C. 390.

(Lord Cameron)

The narrative of facts in the Case is lengthy and somewhat complicated but can be compressed in comparatively small compass. The Respondent Company was in the late 1950s operating under a royal charter of 1773, the terms of which placed serious and crippling restraints on the Company's trading capacity in two particular directions, one in limiting its borrowing power to the quite unrealistic figure of £25,000, and the other, because of the curious management structure, limiting severely its power to recruit managerial staff of adequate calibre. These restraints were strangling the Company in its trade, and unless a remedy could be rapidly found would in all probability lead to its destruction as a trading concern and to liquidation. The remedy was obvious and urgent: to obtain freedom in these two respects. The only means by which this end could be achieved was by way of supplementary charter, a process which was specifically foreshadowed in the original charter of 1773.

The way to obtaining this supplementary charter so urgently needed was obstructed by the harassing tactics of two shareholders, a Mrs. Brown and her nephew, a Mr. Stevenson, who for some years prior to the decision to seek a supplementary charter had intimated a deliberate intention to cause the maximum trouble to the Company in consequence of the Company's refusal to assist him to become a "voting partner" by the acquisition of a qualifying number of shares. To acquire the status of "voting partner" was to acquire a right to share in the management of the Company. Mr. Stevenson, though an assiduous student of the law of chartered companies and of the charter and bye-laws of the Respondents, was not (so far as the Case discloses) technically qualified to give material assistance in directing the affairs of the Company. In the years subsequent to 1951 Mr. Stevenson had sought by a persistent course of litigation against the Company, and with varying degrees of success, to force his way into the desired status. In 1959 he had been joined in litigation by his aunt, Mrs. Brown, also a shareholder, who was seeking to assert a right to be and act as a "voting partner" with the plain objective of hampering and delaying the presentation of a petition for a supplementary charter. The Stevenson-Brown campaign and litigation (which by this time had reached the House of Lords) was halted on the threshold of a hearing by a comprehensive settlement, the terms of which covered not only the compromise of Mrs. Brown's action but also the sale of Mr. Stevenson's shares and certain of Mrs. Brown's, and (put shortly) an agreement by both to leave the Company in peace in future to pursue its lawful business, Mr. Stevenson binding himself never again to acquire or become owner of the Company's shares. The sums at issue in the case represent (1) the Company's expenses in the supplementary charter proceedings, (2) the Company's expenses in Mrs. Brown's action and (3) the sums paid to Mrs. Brown and Mr. Stevenson in settlement of Mrs. Brown's action.

In approaching the issue in the case, Counsel for both parties presented their arguments on the footing that all the claims of expenditure stand or fall together, and I think they were correct in so doing. This is a recognition that the transactions to which they relate are essentially linked together and, as I hold, form part of one operation. The contention of the Crown basically was that the operation was the obtaining of a supplementary charter and that this was a "once-for-all" operation which brought "long-term" advantages of a substantial character. The motive of the Company in seeking the charter was

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irrelevant. Consequently, upon one or other basis, and either upon the view that the sums were not laid out wholly and exclusively for the purposes of the trade of the Company or upon the view that they were employed as capital in the trade, the conclusions of the Commissioners were wrong and the Crown was entitled to succeed. The Respondents' argument was that the object of the operation was to free the Company from the stranglehold of the limitation on borrowing powers and to enable it to attract managerial ability of the requisite calibre, and that consequently the sums were expended wholly and exclusively for the purposes of the trade and in any event were not capital employed in the business in the sense of s. 137(*f*) of the Income Tax Act 1952, or indeed capital expenditure within the definition of such expenditure enunciated by Lord Cave L.C. in *British Insulated & Helsby Cables Ltd.* v. *Atherton*(1) [1926] A.C. 205, at page 212, as that definition has been expounded in many subsequent cases.

A number of authorities were canvassed in the course of the debate, but I do not think that it is possible to decide this case by the simple process of trying to find a precedent which will neatly cover the issues here and provide a ready-made and guaranteed solution. In *Strick* v. *Regent Oil Co. Ltd.*(2) [1966] A.C. 295, Lord Morris of Borth-y-Gest said (at page 327):

> "The decided cases . . . show that in the diverse and varying sets of circumstances in which decision has been called for as to whether payments have been of capital or of revenue nature no all-embracing formula has been evolved. No touchstone has been devised. Where definition is lacking then description must do its best."

These somewhat bleak words do not encourage a search for comprehensive definitions or comforting formulae. Nevertheless, I think that some very broad general guidance can be gained from the authorities. I think it is clear that in seeking a decision it is necessary to have regard to all the facts bearing upon the transaction under review, and in this connection to keep in mind that the purpose of a person or of a board of directors in spending money is a pure question of fact: cf. *per* Lord Reid in *Morgan* v. *Tate & Lyle Ltd.*(3) [1955] A.C. 21, at page 48. The interpretation of the facts must, I think, be undertaken with proper regard to the broad picture of the whole operation in respect of which the expenditure has been undertaken. Where (as here) various payments are made to a varied number of persons, but all associated by being themselves attributable to different phases or aspects of the same operation, then I think that the determination of their character between revenue and capital is inevitably affected by the character and purpose of the operation to which they relate. These very general considerations appear to me to apply to both issues in this case.

I take first the question whether the sums expended were expended wholly and exclusively for the purposes of the trade. In *Strong & Co. of Romsey Ltd.* v. *Woodifield*(4) [1906] A.C. 448, at page 453, Lord Davey observed that the words "purposes of the trade"

> "appear to me to mean for the purpose of enabling a person to carry on and earn profits in the trade".

(1) 10 T.C. 155, at p. 191.
(2) 43 T.C. 1, at p. 40.
(3) 35 T.C. 367, at p. 415.
(4) 5 T.C. 215, at p. 220.

A **(Lord Cameron)**

In *Morgan* v. *Tate & Lyle Ltd.*(1) Lord Morton of Henryton accepted the following observation of Jenkins L.J.(2):

> "It is clear on the authorities that Lord Davey's formula includes expenditure for the purpose of preventing a person from being disabled from carrying on and earning profits in the trade."

B It is, I think, of importance to note at the outset that the statutory language is not "for the purposes of trade" but "for the purposes of *the* trade", that is, the trade carried on by the taxpayer. Bearing in mind Lord Reid's *dictum* in *Morgan* v. *Tate & Lyle Ltd.* that the purpose of the directors of a company in expending money is a pure question of fact, this seems to me to narrow the issue on this branch of the case to one of very small compass. Unless it can be shown that C the Commissioners have in some way misdirected themselves in law in their approach to the question to be decided by them, or applied some test or consideration which in law they were not entitled to apply, then I think that their finding on the purpose or purposes of the expenditure is not open to successful attack. In my opinion there was no such misdirection. The Commissioners plainly took into consideration the whole surrounding circumstances of the D transaction as well as the available facts of the transaction themselves; they considered the objects of the Company in incurring the expenditure, upon which they have made specific findings which are not open to challenge; and they have related these objects to the expenditure. In addition they had the illustrative guidance of two cases which have frequently been cited and have been approved in the House of Lords and Privy Council: *Mitchell* v. *B. W. Noble Ltd.*(3) [1927] E 1 K.B. 719 and *Anglo-Persian Oil Co. Ltd.* v. *Dale*(4) [1932] 1 K.B. 124. In both these cases payments by a company, in the first case to get rid of an unsatisfactory life director once and for all, and in the second to terminate an agency, were held to be expenditure made wholly and exclusively for the purpose of the trade. These cases bear directly on the payments made to Mrs. Brown and Mr. Stevenson in settlement of Mrs. Brown's action, and demonstrate sufficiently F that the Commissioners were well entitled in law to consider such expenditure as falling within the category of that which could be held to be "wholly and exclusively . . . for the purposes of the trade".

In addition, the Commissioners were entitled to have regard to the consideration that

> "money expended not of necessity and with a view to a direct and immediate G benefit to the trade, but voluntarily and on the grounds of commercial expediency and in order indirectly to facilitate the carrying on of the business may yet be expenditure wholly and exclusively for the purposes of the trade":

see *per* Lord Cave L.C. in *British Insulated & Helsby Cables Ltd.* v. *Atherton*(5) [1926] A.C. 205, at page 212. It was argued for the Crown, however, that the H true purpose of the Respondents was to secure a supplementary or new charter, and that the supplementary charter contains a number of provisions which were

(1) 35 T.C., at p. 414. (2) *Ibid.*, at p. 402. (3) 11 T.C. 372.
(4) 16 T.C. 253. (5) 10 T.C. 155, at p. 191.

(Lord Cameron)

not directed to any immediate trade benefit, while the very substantial sums paid to Mrs. Brown and Mr. Stevenson were plainly related as much to the removal of long-term or permanent disadvantages as to the immediate advantage accruing from a settlement of Mrs. Brown's litigation. In these circumstances the Commissioners were wrong in treating the expenses incurred in obtaining the charter (and the other expenditure involved in the case) as incurred wholly and exclusively for the purposes of the trade.

I think that this argument, which lies at the root of the Crown's case on both branches of the case, is unsound. The business of the Company was not to obtain or trade in charters; to obtain a supplementary charter was not an end in itself. I think the Crown's contention confuses purpose, objects and means of achieving the objects. As I read the facts, the purpose of the Company was to improve its capacity to trade profitably under modern conditions. The Company's object was to modernise its machinery, to give it adequate power to finance its day-to-day trading transactions and to obtain the requisite managerial skill. The method of execution was by way of obtaining a supplementary charter, with the necessary corollary of getting rid of obstruction in the way of doing so presented by the activities of Mr. Stevenson and Mrs. Brown. The findings of the Commissioners as to the objects of the Respondents, which are set out in their decision as findings on the evidence, are in my opinion critical. The object of the operation was found to be (1) to remove the limitation on the Company's borrowing power and (2) to deal with the restriction on the shares and the qualification for voting which were obstacles to the proper management and conduct of the business. These are unchallenged facts. The plain purpose in pursuing these objects was to enable the Company to finance its trade and to obtain a management fit and qualified for its trade. It is found as a fact in para. VI (5) of the Case that the "only remedy which would remove the obstacles . . . was the grant of a supplementary royal charter". In my opinion, upon these facts the Commissioners were well entitled to find that the sums expended were expended wholly and exclusively for the purposes of the trade. The expenses of the petition would plainly come within such a purpose, because it was only by means of such a charter that the operative machinery of the Company could be repaired and modernised, and in my opinion the other sums also fall within it.

For what other purpose were Mr. Stevenson and Mrs. Brown bought off than to facilitate the presentation of the petition? No doubt the sum paid was substantial—but so was the obstacle which the payments were designed to remove and did remove. It was said for the Crown that the agreement by which settlement of Mrs. Brown's action was achieved included stipulations which bore long-term advantages, e.g., in respect of Mr. Stevenson's obligation as to his future conduct in relation to Carron and its shares. No doubt: but in light of past but very recent history a settlement which left loopholes for further trouble (and trouble could start again the day after the settlement was signed if Mr. Stevenson acquired new shares) would be of little use. In any event it seems to me that this settlement, even down to the terms which relate to the future conduct of Mrs. Brown and Mr. Stevenson, bears close analogy to the

A **(Lord Cameron)**

case of *Mitchell* v. *B. W. Noble Ltd.*(1) [1927] 1 K.B. 719. And I would quote one sentence from the judgment of Lord Hanworth M.R. in that case, at page 737(2), where he said that the payments in settlement were made

> "not in order to secure an actual asset to the company but to enable the company to. . .carry on. . .unfettered and unimperilled by the presence
B of one who . . . might have caused difficulty".

That sentence, in a case in which the payments made were held to be properly classed as revenue payments, appears to me apt to describe the payments made here, payments which were all directed to furthering the objects which the Commissioners found were those of the Respondents, and the purpose of which (so considered) was nothing other than the furtherance of the Company's trade.

C Tested by events, the findings in the Case show that the objects were achieved and the purpose most amply and clearly furthered. That, in achieving the objects which were directed to furthering the purpose for which they were designed, other and incidental objects, possibly of a long-term character or not in themselves serving directly a purpose of the trade, were also attained would not seem to me to qualify or alter the purpose to which the original objects
D achieved were directed: cf. *per* Lord Sumner in *Usher's Wiltshire Brewery* v. *Bruce*(3) [1915] A.C. 433, at pages 469–70. I do not think there is any ground on which it can be maintained that the Commissioners misdirected themselves in law on this branch of the case. I think it is not really open to argument that the conclusion reached by the Commissioners on this branch of the case is not open to attack, once it is decided that there was no misdirection.

E I therefore think the first branch of the question should be answered in the affirmative.

Upon the second branch of the question I am of opinion that the Commissioners reached a conclusion at which they were well entitled to arrive upon the findings which they made. Mr. Mackay, for the Respondents, drew attention to the precise language of s. 137(*f*), and contended that the expenditure here
F was not suggested to be capital withdrawn from the business, nor could it be capital employed as capital *in* the business, and that in any case the expenditure was not capital expenditure at all. I think that there is great force in the argument that upon the facts it could not be said that this was capital employed in the business; but that leaves open the basic question, whether this was capital expenditure at all. The Commissioners have found it was not. I think they were
G right, and were certainly entitled, so to hold. Although the question whether expenditure can fall within the category of capital expenditure in the interpretation of statutory language in a taxing Statute may be treated as a question of law, the solution of the problem is essentially one of fact in which the application of ordinary commercial accounting principles must play a significant part: cf. *Whimster & Co.* v. *Commissioners of Inland Revenue*(4) 1926 S.C. 20,
H at page 25, *per* Lord President Clyde. The question whether expenditure is to be regarded as attributable to capital or revenue for the purposes of the Income

(1) 11 T.C. 372.
(2) *Ibid.*, at p. 421.
(3) 6 T.C. 399, at p. 437.
(4) 12 T.C. 813, at p. 823.

(Lord Cameron)

Tax Acts is generally that laid down by Lord Cave L.C. in *British Insulated & Helsby Cables Ltd.* v. *Atherton*(1) [1926] A.C. 205, which I do not repeat. On that test these observations can be made: (1) it is qualified by the important parenthesis "(in the absence of special circumstances leading to an opposite conclusion)"; (2) the word "enduring" has been glossed to mean enduring as a fixed asset endures, and (3) it is not enough that the expenditure has been incurred "once and for all" to determine its capital character.

It was argued for the Crown that, as the object of the expenditure was to achieve an object the achievement of which brought material long-term advantage, i.e., the supplementary charter, and in the case of the large payments to Mrs. Brown and Mr. Stevenson was not only expending money once and for all but also provided long-term advantages, e.g., in Mr. Stevenson's obligation as to his future abstentions in the matter of shareholding and otherwise, it should be regarded as capital expenditure, and the Commissioners had misdirected themselves in law in failing to take proper account of the long-term aspects of this transaction and had misapplied the test laid down by Lord Cave. The Respondents' reply to this was that no advantage of a fixed capital nature had been gained; all advantage was of a revenue character. The transactions neither enlarged the area of the Respondents' operations, as in *Van den Berghs Ltd.* v. *Clark*(2) [1935] A.C. 431, nor improved the value of the goodwill by removing possible competition by former servants, nor permitted the Company to embark upon a new enterprise. The advantages to be gained were directed specifically to the existing business activities of the Company, and the payments to settle the pending litigation were the price of removing grit which caused and could cause unacceptable failure in the Company's machinery. The trading machinery required repair and modernising—this was the purpose of the expenditure. The fact that ancillary advantages of a long-term character were also to be gained by the supplementary charter did not affect the character of the expenditure as a whole, given the purpose: cf. *Usher's Wiltshire Brewery* v. *Bruce*(3) [1915] A.C. 433, *per* Lord Sumner, at pages 469–70. In any event expenditure towards getting rid of disadvantage (as in the case of Mrs. Brown and Mr. Stevenson) is not something which falls within the *Atherton*(4) definition: cf. *Strick* v. *Regent Oil Co. Ltd.*(5) [1966] A.C. 295, *per* Lord Reid, at page 320. From a practical business point of view these particular payments removed two obstacles to successful day-to-day prosecution of the Company's business without any change in fixed assets, and the advantages so obtained were essentially of a revenue character.

I think that the contention of the Crown is directed to the wrong aspect of the transaction, that it ignores the nature of the Company's actings, and that there is no basis for the argument that the Commissioners have misdirected themselves in law. As I understood the Crown's arguments on the Commissioners' alleged misapplication of the law, it was that, once it appeared in fact that any material advantage of a long-term or permanent character was obtained or disadvantage removed, even though other immediate advantages were also obtained, then the expenditure devoted to obtaining them necessarily acquired

(1) 10 T.C. 155, at p. 192. (2) 19 T.C. 390. (3) 6 T.C. 399, at p. 437.
(4) 10 T.C. 155, at p. 192. (5) 43 T.C. 1, at p. 35.

(Lord Cameron)

a capital character. This seems to me wholly unsound, and is met by Lord Sumner's *dictum* in *Usher's Wiltshire Brewery* v. *Bruce*(1). The wider argument on the test laid down in *British Insulated & Helsby Cables Ltd.* v. *Atherton*(2) laid emphasis on the "enduring" character of the advantages gained or disadvantages removed, but I think it failed to read into that test the proper meaning of "enduring" as its meaning has been explained, i.e., "enduring as a fixed asset endures". I therefore do not accept the argument that the Commissioners are shown to have misdirected themselves in law. If there was no misdirection in law the matter is essentially one of fact for the Commissioners, and I can see no ground on which it can be successfully argued that on the facts found by them the Commissioners were not entitled to reach the decision at which they arrived as to the nature of the expenditure. I think that the Respondents' argument in reply to the Crown's contention correctly focussed the relevant considerations, and that it accurately and precisely described the nature of what was done by the Company and the purpose for which it was done.

I therefore agree that the question should be disposed of as proposed by your Lordship in the Chair.

The Crown having appealed against the above decision, the case came before the House of Lords (Lords Reid, Morris of Borth-y-Gest, Guest, Upjohn and Wilberforce) on 24th and 25th April 1968, when judgment was reserved. On 29th May 1968 judgment was given unanimously against the Crown, with costs.

The Solicitor-General for Scotland (*Ewan Stewart Q.C.*), *J. Raymond Phillips Q.C.* (of the English Bar) and *C. K. Davidson* (of the Scottish Bar) for the Crown.

Hon. Henry S. Keith and *J. J. Clyde* (both of the Scottish Bar) for the Company.

The following cases were cited in argument in addition to those referred to in the speeches:—*Bentleys, Stokes & Lowless* v. *Beeson* (1952) 33 T.C. 491; *Morgan* v. *Tate & Lyle Ltd.* 35 T.C. 367; [1955] A.C. 21; *Associated Portland Cement Manufacturers Ltd.* v. *Kerr* (1945) 27 T.C. 103; *Commissioner of Taxes* v. *Nchanga Consolidated Copper Mines Ltd.* [1964] A.C. 948; *Samuel Jones & Co.* (*Devondale*) *Ltd.* v. *Commissioners of Inland Revenue* 32 T.C. 513; 1952 S.C. 94; *Lawrie* v. *Commissioners of Inland Revenue* 34 T.C. 20; 1952 S.C. 394.

Lord Reid—My Lords, the Respondent Company was incorporated by royal charter in 1773, its business having previously been carried on by a partnership. There were 600 shares of £250 each, and the only provision for management was a General Court of voting partners. To become a voting partner a shareholder had to own at least ten shares and to be elected by the other voting partners. The Company's borrowing power was limited to £25,000.

(1) 6 T.C. 399, at p. 437. (2) 10 T.C. 155, at p. 192.

(Lord Reid) A

The Case Stated narrates that the constitution

> "imposed insurmountable obstacles to the profitable development of Carron's business in contemporary economic and commercial conditions. The most significant disadvantages, for the purpose of the matters in issue, were as follows. (*a*) The limitation of borrowing powers to £25,000 made it impossible for Carron legally to finance any large-scale commercial B project, except by selling its investments or other assets. (*b*) The restrictions on transfer of shares coupled with the stringent qualifications for voting had confined the voting strength to a small number of voting partners, none of whom possessed any qualifications for the management of Carron's business on the technical side, while the practice of delegating the technical side of management to a salaried official who did not enjoy a status C equivalent to that of a managing director—a practice which was in itself an inevitable product of these aspects of Carron's constitution—made it more difficult in changing social and economic conditions to obtain the services of persons of sufficient calibre successfully to carry out the onerous and responsible duties of manager, and contained in itself the seeds of conflict between the manager and the standing committee, to which he D was responsible. These difficulties became increasingly apparent during the tenure of the last manager, Mr. Leaver, who occupied that post from 1954 to 1962."

In 1954 it was decided that application should be made for a supplementary royal charter. But two shareholders were conducting a series of litigations against the Company and it appeared that they had it in their power to delay E indefinitely the possibility of obtaining such a charter. Accordingly the Company negotiated a settlement with them at a total cost of some £88,000. Then in 1963 they obtained a supplementary royal charter, which removed those parts of the old constitution which had been preventing profitable trading. As a result they have enjoyed very much improved trading results. The cost of obtaining this charter was £3,107. F

This case arises out of an appeal against an assessment on the Company to income tax for the year 1964–65 in the sum of £400,000. The Company claimed that the sums which I have mentioned ought to be allowed as deductions. The Crown disputed this on the grounds that none of these sums was incurred wholly and exclusively for the purposes of the Company's trade, or, alternatively, that these sums were incurred on capital account. The Special Commis- G sioners decided in favour of the Respondent Company, and their determination was affirmed by an Interlocutor of the First Division of 10th March 1967.

Although the cost of reaching a settlement with the dissident shareholders was so very much greater than the cost of obtaining the new charter, I need not consider the circumstances in which this settlement was made, because it has been admitted by the Crown that, if the Respondents are entitled to deduc- H tion of the cost of obtaining the charter, they are also entitled to deduct the cost of making this settlement. Accordingly, the first question for decision is whether the sum spent in obtaining the charter was incurred wholly and

A **(Lord Reid)**

exclusively for the purposes of the Company's trade. The finding of the Special Commissioners was:

> "On the evidence the object of the supplementary charter was not to acquire a framework within which the business could be carried on; the framework was already there. Nor was it to extend the framework to
> B carry on a new sort of business, but to repair the old framework and maintain it against time and circumstances. The provisions of the new charter covered a number of points which had little to do with the trade, but it seemed to us on the evidence that the really significant points of the supplementary charter and the objects of Carron were (i) to remove the limitation on the borrowing power and (ii) to deal with the restriction on
> C the shares and the qualification for voting, which were obstacles to the proper management and conduct of the business. Those were the really significant objects and were concerned with the management and conduct of the business. We found that the cost was wholly and exclusively for the purposes of Carron's business. We could not see any new capital asset and concluded that it was revenue expenditure and allowable."

D At that stage it had not been agreed that the sums paid to settle with the dissident shareholders must be treated in the same way as the cost of obtaining the new charter. Now that that has been agreed I need not set out the Commissioners' findings about the former sums. But in the course of those findings the Commissioners said that they

> "found that Carron really got nothing more or less than the removal of
> E the obstruction to the new charter. Predominantly it got up-to-date borrowing powers and the ability to secure proper management. Those considerations prompted Carron to pay the sums which it did."

It was argued for the Crown that no sum spent in obtaining an alteration of a company's constitution, of its memorandum or articles, can in law be regarded as having been expended for the purposes of its trade. No doubt
F there are many cases where such an alteration is not made wholly and exclusively for the purpose of facilitating the company's trading operations. But where an alteration is made for that purpose I can see no reason why its cost cannot be regarded as a proper deduction. So the question is whether in this case that was the sole purpose of obtaining the new charter. The Crown say that this charter, in addition to provisions bearing directly on the Company's
G trading, contained other provisions which had no relation to trading. To that I think there are two answers. In the first place, far-reaching changes had to be made in order to give to the manager or managing director a status necessary to attract a first-class man. It appears to me that such changes, made in this case for that purpose, were just as much connected with facilitating trading operations as the removal of the restriction on borrowing. And secondly, if
H there is anything in the new charter going beyond that (which I doubt) then it can properly be disregarded as coming within the principle of *de minimis*. So I would reject the first contention of the Crown.

I turn now to the more difficult question whether this expenditure ought to be charged to income or capital account. The case for charging it to capital

(Lord Reid) A

might appear to be strengthened by the magnitude of the sums involved, but again I do not think it would be right to take into account the sums paid to the dissident shareholders in deciding what should be done with the cost of obtaining the new charter. If this, taken by itself, is a proper charge against income, it cannot become chargeable to capital because it was first necessary to buy off these shareholders. And if the smaller sum is chargeable against income it is B not suggested that the larger sum could be chargeable against capital. I shall not repeat what I said in *Strick* v. *Regent Oil Co. Ltd.*(1) [1966] A.C. 295, at page 313, with regard to the general manner of approach to this question, nor shall I repeat the analysis of the authorities which I there made.

The main argument for the Crown was that by obtaining the new charter the Company obtained an enduring advantage in the shape of a better administrative structure. Of course they obtained an advantage: companies do not C spend money either on capital or income account unless they expect to obtain an advantage. And money spent on income account, for example on durable repairs, may often yield an enduring advantage. In a case of this kind what matters is the nature of the advantage for which the money was spent. This money was spent to remove antiquated restrictions which were preventing D profits from being earned. It created no new asset. It did not even open new fields of trading which had previously been closed to the Company. Its true purpose was to facilitate trading by enabling the Company to engage a more competent manager and to borrow money required to finance the Company's traditional trading operations under modern conditions. None of the authorities cited is directly in point, and I think that the most apposite general statement E in those authorities is that of Lawrence L.J. in *Anglo-Persian Oil Co. Ltd.* v. *Dale*(2) [1932] 1 K.B. 124, at page 141. It "merely effected a change in its business methods and internal organisation, leaving its fixed capital untouched." As the Lord President put it in the present case(3):

> "The benefit was esentially of a revenue character because the Company became able more easily to finance its day-to-day transactions, and F more efficiently to carry on its day-to-day manufacture."

I would therefore dismiss this appeal.

Lord Morris of Borth-y-Gest—My Lords, I have had the advantage of reading the speech prepared by my noble and learned friend Lord Reid. I agree with it and I would dismiss the appeal.

Lord Guest—My Lords, Carron Company was incorporated by a royal G charter of 1773, which had been preceded by the original articles of co-partnery in 1759 and by additional articles of co-partnery in 1771. With the exception of bye-laws passed by the Company since 1773 under the powers conferred by the charter, this charter continued to regulate the structure of the Company until January 1963. They carried on business as ironfounders. Since 1940 this constitution had become archaic and unsuited for modern commercial practice H and imposed insurmountable obstacles to the profitable development of

(1) 43 T.C. 1, at pp. 29–30. (2) 16 T.C. 253, at p. 270. (3) *See* page 48 *ante*.

(Lord Guest)

Carron's business in contemporary economic and commercial conditions. In particular, the limitation of borrowing powers to £25,000 made it impossible for Carron legally to finance any large-scale commercial project except by selling either its investments or other assets. In addition, the restriction on the transfer of shares and the stringent qualifications for voting had confined the voting strength to a small number of voting partners, who had no technical qualifications for the management of the technical side of the business. This had resulted in the delegation of the technical side of the business to a salaried official who did not enjoy the status of a managing director. The result was that it was difficult to obtain the services of an official of sufficient calibre successfully to carry out the duties of manager. This in turn made it difficult to attract the right type of person to serve on the lower ranks of the management side. There were further disadvantages flowing from the old-fashioned constitution.

In view of these disadvantages the standing committee of the Company decided in 1954 that the situation could only be cured by a complete revisal of the constitution, which would necessitate a petition to the Crown for the grant of a supplementary charter substantially altering the provisions of the 1773 charter. After sundry procedure the supplementary charter was granted in 1963. The expenses of obtaining the supplementary charter amounted to £3,107.

Prior to the obtaining of the charter, Carron had been subjected to considerable interference in the carrying on of its business by the litigious activities of two shareholders, Mr. W. G. Stevenson and Mrs. Brown. Those activities had culminated in a case raised by Mrs. Brown which was pending in the House of Lords on appeal from the Court of Session. Success in this action by Mrs. Brown might have prevented, and would certainly have delayed, the granting of the supplementary charter. Upon the advice of senior counsel a settlement was reached in 1961 whereby the two shareholders sold their shares and agreed to abandon their opposition to the Company. The legal expenses of the settlement amounted to £44,541.

The supplementary charter *inter alia* provided for a modern form of company constitution. In particular, the restrictions on the Company's powers of borrowing were removed and the restrictions on the transfer of shares were also curtailed. In addition, the Company's powers were to be exercised by the Company in general meeting and the regulation of its internal affairs was to be vested exclusively in a board of directors called the standing committee of directors. This will bring the Company in line with ordinary companies incorporated under the Companies Acts.

The Special Commissioners have held that for the purposes of computing the profits of its trade for income tax the Company should be entitled to deduct the legal expenses in connection with the obtaining of the supplementary charter, amounting to £3,107, and also the sum in connection with the settlement of the actions by Mr. Stevenson and Mrs. Brown, amounting *in toto* to £86,441.

(Lord Guest) A

The First Division of the Court of Session affirmed the decision of the Commissioners. It was agreed by the parties that both sums should be treated together on the footing that the legal expenses were intimately connected with the granting of the charter.

The first question which arises is whether these sums were expended wholly and exclusively for the purposes of the Company's trade. This was purely a B question of fact for the Commissioners, and as no error has been shown in their conclusion I agree with the decision of the First Division and for the reasons given by the Judges.

The second question is whether these sums were expended on revenue or capital account. Here again the Commissioners' decision in the Company's favour was affirmed by the Judges of the First Division. The familiar test on C this question is that given by Viscount Cave L.C. in *British Insulated & Helsby Cables Ltd.* v. *Atherton*(1) [1926] A.C. 205, at pages 213–4:

> "But when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade. I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such D an expenditure as properly attributable not to revenue but to capital."

This, however, is only a general guide and may yield, as Lord Cave said, to special circumstances. Lord Reid said in *Strick* v. *Regent Oil Co. Ltd.*(2) [1966] A.C. 295, at page 313, that the determination of what is capital and what is income must depend rather on common sense than the strict application of any single legal principle. There was in this case nothing in the shape of the E acquisition of a capital asset in the sense in which that expression is used in accountancy practice. That it was an advantage was undoubted. But was that of a capital or a revenue nature? It is in this connection that the finding of the Commissioners that the money was expended wholly and exclusively for the purposes of the Company's business is of prime importance. Mr. Phillips, for the Crown, argued that, as the supplementary charter secured a substantial F alteration in the Company's structure, and as the constitution was the basis of the Company's undertaking, this expenditure must be of a capital nature. But this, in my view, is to take too narrow a view of the advantages obtained by the Company under the supplementary charter. The charter was not a mere scrap of paper altering the Company's structure. The real value and purpose inherent in the alteration was to facilitate the trading opportunities of the Company, as G is evidenced by the Commissioners' findings that it was expended wholly and exclusively for purposes of the Company's trade. It is legitimate, in my view, to consider what the expenditure was intended to effect and the way in which the advantage was to be used: *Hallstroms Pty. Ltd.* v. *Federal Commissioner of Taxation* (1946) 72 C.L.R. 634, *per* Dixon J., at page 648, quoted with approval by Lord Pearce in *B.P. Australia Ltd.* v. *Commissioner of Taxation* H [1966] A.C. 224, at page 264. The advantages which the Company obtained by the charter were mainly on two broad lines: (1) the lifting of the restriction on the

(1) 10 T.C. 155, at pp. 192–3. (2) 43 T.C. 1, at pp. 29–30.

A **(Lord Guest)**

borrowing powers enabled the Company to trade more efficiently, and (2) the alteration in the constitution had an advantageous effect on the Company's trading activity. These advantages were used in the day-to-day running of the Company's business. This was not an advantage in the nature of a fixed capital asset. It was rather, in my view, of a revenue character. As Lord Macmillan said
B in *Van den Berghs Ltd.* v. *Clark*(1) [1935] A.C. 431, at page 438, although the distinction between capital and revenue expenditure is well recognised and easily applied, from time to time cases arise where the item lies on the borderline. This is, in my view, one of those cases and is in a sense unique. The case nearest to the present on its facts is *Mitchell* v. *B. W. Noble Ltd.*(2) [1927] 1 K.B. 719. In that case a very large payment was made to get rid of a director
C on the ground that he was inimical to the company's interest. This was held to be of a revenue character. Rowlatt J., at page 728(3), likened that case to a payment made to remove the possibility of a recurring disadvantage. The disadvantages of the 1773 charter were being removed by the supplementary charter. The removal of these disadvantages enabled the Company's business to be carried on more efficiently in its day-to-day trading. The advantage was not
D static but recurring. It was, in my view, an income advantage as opposed to a capital advantage. In conclusion, I should like respectfully to adopt the observations of Lord Cameron(4), 1967 S.L.T., at page 198, where he said:

> "The advantages to be gained were directed specifically to the existing business activities of the company and the payments to settle the pending litigation were the price of removing grit which caused and could cause
E unacceptable failure in the company's machinery. The trading machinery required repair and modernising—this was the purpose of the expenditure."

I would dismiss the appeal.

Lord Upjohn—My Lords, I must confess that I have felt considerable doubts whether at all events some of the sums expended by the Respondent Company in connection with their successful application for a charter sup-
F plemental to their original charter of 1773 could properly be described otherwise than as of a capital nature. But as it is a most difficult and borderline case depending largely upon the facts, and in the unanimous opinion of your Lordships. of the Judges of the First Division and of the Special Commissioners they may otherwise be described, I shall concur in dismissing this appeal.

Lord Wilberforce—My Lords, the learned Judges of the First Division,
G affirming a determination of the Special Commissioners, have decided that the Carron Company, Respondent in this appeal, is entitled to deduct, in the computation of its trading profits for the year 1964–65, an aggregate amount of £91,214. This sum is composed of four items, namely, (i) £3,107 legal expenses of obtaining a supplementary charter; (ii) £2,641 legal expenses in connection with litigation with Mrs. Dorothy Brown; (iii) £41,900 and £1,666
H for legal expenses paid to Mrs. Dorothy Brown in connection with the litigation

(1) 19 T.C. 390, at p. 428.
(2) 11 T.C. 372.
(3) *Ibid.*, at p. 415.
(4) *See* page 64 *ante*.

(Lord Wilberforce)

and (iv) £41,900 paid to Mr. W. G. Stevenson. Although separate considerations might apply to one or other of these items, both sides agree that for the purposes of this appeal, as they were in the proceedings leading to it, they should be taken together and dealt with on the basis that the aggregate amount represents the sum necessary to enable the Company to obtain its supplementary charter.

The Carron Company was incorporated by royal charter in 1773 to carry on the business of ironfounders. Before 1963 its constitutional documents consisted of the charter itself, certain articles of co-partnery of earlier dates, and bye-laws passed under the charter. The main relevant features of the constitution may be summarised from the Case stated by the Special Commissioners as follows. The capital of the Company was restricted by the charter to £150,000, divided into 600 shares of £250 each, but there was no provision for subdivision, increase or reduction. The additional articles of co-partnery allowed the Company to purchase its own shares. The additional articles provided that the right to vote in the Company's affairs was, subject to certain exceptions. limited to partners who possessed ten or more shares of the Company's stock and, being so possessed, had been admitted by ballot by the other partners entitled to vote. Partners who were qualified to vote were known as voting partners, and they composed the governing body, or General Court. The royal charter, however, repeated the requirements relating to the share qualifications of voting partners, but did not specifically refer to the ballot qualification imposed by the additional articles. The royal charter restricted the borrowing powers of the Company to £25,000, and imposed upon the members unlimited liability for all its debts. The transfer of shares was strictly regulated; in particular, shares could not be transferred without first being offered at a fixed price to the Company, and, in the event of the Company declining to purchase, to the voting partners.

There can be no doubt, and the Special Commissioners so found, that these features severely handicapped the Company in the development of its trading activities. It was unable to raise sufficient finance for expansion; the number of voting partners, and consequently the field of choice of suitable managers from among them, was restricted; on the other hand, the voting restrictions made it difficult to recruit managerial staff of sufficient calibre from outside. The administration of the Company's affairs was complicated and cumbersome, and the obscurity of much of the constitution opened a wide field to obstructive action by dissident shareholders. The supplementary charter (granted in January 1963) was designed to remedy these defects by bringing the constitution of the Company into line with those of normal trading companies. The Company was made a limited company with normal powers to increase and reorganise its capital. A board of directors with executive powers was set up, and provision was made for annual general meetings. The restriction in the Company's borrowing powers was removed. The relevance and usefulness of these changes was shown by subsequent events. The Company was able to secure the services of an experienced managing director, under whom its business and profitability expanded. The Special Commissioners quote the view of its present management that none of the benefits of improved trading could have been achieved without the grant of the supplementary charter.

A **(Lord Wilberforce)**

In order to justify deduction of the sums in issue against trading profits, it is necessary for the Company to show two things: first, that they were expended wholly and exclusively for the purposes of its trade: Income Tax Act 1952, s. 137(*a*); second, that they were not expended on capital account.

On the first point there is, in my opinion, no difficulty. What were the B "purposes" of the Company in incurring this expenditure is a question of fact, and I understand this question to have been found in the Company's favour by the Special Commissioners. They find that:

> "the really significant points of the supplementary charter and the objects of Carron were (i) to remove the limitations on the borrowing power and (ii) to deal with the restriction on the shares [*sic*] and the qualification for C voting, which were obstacles to the proper managment and conduct of the business."

It was argued for the Crown that the supplementary charter contained a number of provisions unrelated to the Company's trading and concerned with the domestic and *inter se* relations of the members. I would not readily assume that even so they were without relevance to the Company's trade, but in any D event the answer to the argument is contained in the finding that the objects of Carron were as stated above, i.e., to remove obstacles to profitable trading. If such was their object, the expenditure is brought within s. 137(*a*), and it is immaterial that other advantages came in its train. It would in fact be in accordance with normal practice and legal prudence to use the opportunity of obtaining new powers for essential trading purposes to introduce other con- E venient constitutional amendments, and I agree with the Commissioners that this action cannot disqualify the expenditure.

The second question, whether the expenditure had the character of capital or of revenue expenditure, is difficult, as this type of question invariably is. It is a question of law, so that the Special Commissioners' decision is open to review. Their decision, which they put succinctly on the ground that they F "could not see any new capital asset", was upheld by the First Division, and I have come to the conclusion that it was correct.

The argument for the Crown was put in two ways. The Solicitor-General emphasised both the enduring and the radical character of the changes brought about by the supplementary charter. For the rest of its corporate existence, he said, the Company would have the advantages of freedom to increase its G capital, of a board of directors, of power to borrow and to declare dividends, of rationalised voting rights and of limited liability. These changes were "enduring", as that word was used by Viscount Cave L.C. in his well-known speech in *British Insulated & Helsby Cables Ltd.* v. *Atherton*(1) [1926] A.C. 205, at page 213: within Lord Macmillan's phrase in *Van den Berghs Ltd.* v. *Clark*(2) [1935] A.C. 431, at page 442, they affected the whole structure of the H Company's profit-making apparatus. It might be true that no new capital asset could be identified as having been brought into existence, but this was not essential in order to confer the character of capital expenditure.

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(1) 10 T.C. 155, at p. 192. (2) 19 T.C. 390, at p. 431.

(Lord Wilberforce)

Mr. Phillips's submission was more radical. Disregarding the character of the actual changes made, he argued that the Company's constitution and charter was in itself a valuable thing, not merely as between the members of the Company but as between them and the outside world. Any expenditure on this was by its nature capital expenditure. So general an argument as the latter I am unable to accept. A change in the constitution of a trading company is not and cannot be regarded as an end in itself. To make the distinction between capital and revenue, by nature a commercial distinction, it is necessary to go further and to ascertain the nature and purpose of the changes made, to see whether they are in the capital or in the revenue field. I think, therefore, that we must consider the matter along the more particular lines suggested by the Solicitor-General's argument.

The starting point here, in my opinion, is to be found in the decision of the Special Commissioners that the expenditure was incurred for the purposes of the Company's trade, most significantly, in their opinion, in connection with the management and conduct of the business. The predominant purpose, indeed, and the effect of the changes was to put the Company in a position to recruit efficient managerial staff with freedom of action to develop the Company's trading in an efficient and modern manner. No decided precedent in this field can ever be decisive, but comparison, however approximate, is the best tool that we have. Two cases, to my mind, best mark out the limits of decision, and it becomes a question of deciding which of the two is to form a category with the present. The Solicitor-General invokes *Van den Berghs Ltd.* v. *Clark*(1), the Company *Anglo-Persian Oil Co. Ltd.* v. *Dale*(2) [1932] 1 K.B. 124, and in my opinion the approximation to the latter is the greater and is sufficient to carry this case. There the company had paid a large sum of money in order to terminate an agency, and the payment was treated as a revenue payment. The Court of Appeal thought it relevant that no asset was brought into existence: they considered that it was the same class of case as *Mitchell* v. *B. W. Noble Ltd.*(3) [1927] 1 K.B. 719, where a payment was made in order to get rid of a managing director. In the words of Lawrence L.J., at page 141(4), the company

> "neither enlarged the area of its operations, nor improved its goodwill, nor embarked upon a new enterprise; it merely effected a change in its business methods . . . leaving its fixed capital untouched."

By contrast, in *Van den Berghs*' case the payment was made in consideration of the recipient company cancelling an agreement which regulated the division of trading activity as between it and the paying company. It was in this context that Lord Macmillan used the words invoked by the Solicitor-General—"the whole structure of the appellant's profit-making apparatus"(5)—and it is obvious that he used them in a sense quite different from any sense in which the Carron Company's "profit-making apparatus" may be said to have been affected here. In *Van den Berghs*' case the two companies traded in quite a

(1) 19 T.C. 390. (2) 16 T.C. 253. (3) 11 T.C. 372.
(4) 16 T.C. 253, at p. 270. (5) 19 T.C. 390, at p. 431.

A **(Lord Wilberforce)**

different manner after the agreement from that in which they had traded before; the Carron Company's business was unaffected: it provided itself merely with the means of organising itself more effectively to trade more profitably.

The Special Commissioners decided this part of the case on the basis that they "could not see any new capital asset", and this argument was adopted in
B similar terms by the learned Judges of the First Division. The Lord President said(1) that the Company were not bringing into existence "an advantage" within the meaning of the decided cases. Lord Guthrie found that no tangible asset was created by the expenditure which could appear in the balance sheet: no new trading sphere was acquired, as in *Van den Berghs Ltd.* v. *Clark*(2). There was an advantage, but this was in the internal administration from day to day
C of the Company's affairs, in increased efficiency. Lord Migdale accepted that the outlays were to improve the working of the existing machinery of the Company, not to create new machinery nor to add to the capital assets of the Company: its fixed capital was left untouched. Lord Cameron regarded the payments as removing obstacles to successful day-to-day prosecution of the Company's business without any change in fixed assets.

D These findings were criticised by the Solicitor-General on the ground that, for expenditure to take on the character of capital expenditure, it is not necessary for it to produce any recognisable capital asset. But the authorities he cited did not support the argument. In *British Insulated & Helsby Cables Ltd.* v. *Atherton*(3) it is true that the expenditure did not produce a capital asset of the company, such as would appear as such in its balance sheet: but it did produce
E a permanent and enduring thing—the nucleus of a pension fund—the existence of which would continue to give rise to advantages in the running of the company. Given that the company had power to expend its money in order to create the fund, it seems inevitable to regard it in the same way as if it were an asset of the company. Again, as was pointed out by Lord Morris of Borth-y-Gest in *Strick* v. *Regent Oil Co. Ltd.*(4) [1966] A.C. 295, at page 329, an asset
F may be of a capital nature whether it is of a tangible or of an intangible nature. I respectfully agree, but this does not assist the Solicitor-General's argument. Finally, the Solicitor-General relied for support in his contention upon *Mallett* v. *Staveley Coal & Iron Co. Ltd.*(5) [1928] 2 K.B. 405, but this only shows that the disposition of a source of liability may be equivalent to the acquisition of a source of profit—an extension perhaps, but not an exception, to the principle
G that in some sense or other an asset of a capital nature, tangible or intangible, positive or negative, must be shown to be acquired. If this is correct—and until a case arises which constitutes a true exception I shall continue to think that it is—the present expenditure cannot be brought within the capital class. It procured indeed an advantage—important and not of a transitory nature—but one essentially of a revenue character in that it enabled the management
H and conduct of the Company's business to be carried on more efficiently.

I would dismiss the appeal.

(1) *See* page 49 *ante*. (2) 19 T.C. 390. (3) 10 T.C. 155.
(4) 43 T.C. 1, at p. 41. (5) 13 T.C. 772.

Questions put:

That the Interlocutor appealed from be recalled.

The Contents have it.

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

The Contents have it.

[Solicitors:—Solicitor of Inland Revenue (England) for Solicitor of Inland Revenue (Scotland); Herbert Smith & Co. (for Brodie, Cuthbertson & Watson W.S.).]