NO. 1393—HIGH COURT OF JUSTICE (KING'S BENCH DIVISION)—25TH OCTOBER, 1945

COURT OF APPEAL—25TH FEBRUARY AND 1ST, 4TH AND 29TH MARCH, 1946

HOUSE OF LORDS—19TH, 20TH, 22ND AND 23RD JANUARY AND 27TH FEBRUARY, 1948

NETHERSOLE v. WITHERS (H.M. INSPECTOR OF TAXES)(1)

Income Tax, Schedule D—Vocation—Income or capital—Sums received by dramatist of a single novel as consideration for assignment of film rights—Whether annual profits or gains or capital payments—Income Tax Act, 1918 (8 & 9 *Geo.* V, *c.* 40), *Schedule D, Case* II *or Case* VI.

N, while carrying on the vocation of an actress and a producer of plays, dramatised a novel by virtue of an agreement with the author in 1897. *Under the terms of an agreement entered into in* 1914 *the author agreed to pay N one-third of the sums received by him in respect of the film rights of the novel or play. From* 1916 *onwards the film rights were granted by the author, and by his legal personal representative, to various motion picture companies, and in accordance with the* 1914 *agreement one-third of the sums received from time to time from the grantees by the author and his legal personal representative was handed over to N. Under a grant of film rights for ten years, so made in* 1939, *an American company acquired rights of a comprehensive character in both the story and the play including,* inter alia, *the right to adapt and change the play and combine it with other works.*

On appeal against assessments to Income Tax under Case II *of Schedule D, or alternatively under Case* VI *of that Schedule, for the years* 1937-38, 1938-39 *and* 1939-40, *the Special Commissioners decided* (1) *that N was not carrying on a profession or vocation at the material times covered by the assessments made upon her in respect of dramatic and film rights of the novel in question, and* (2) *that the sums received by her in respect of these rights under the terms of the* 1914 *agreement were in the nature of revenue payments on account of royalties and liable to assessment under Case* VI. *The Crown accepted the Special Commissioners' decision on the first point.*

Held, *that N ceased to be the owner of the portion of the copyright she assigned under the* 1939 *agreement and that the proceeds of the sale were not annual profits or gains within the meaning of Schedule D, Case* VI.

CASE

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

(1) Reported (C.A.) 175 L.T. 108; (H.L.) 64 T.L.R. 157.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 13th June, 1944, Miss Olga Nethersole (hereinafter called "the Appellant") appealed against Income Tax assessments for the six years 1934-35 to 1939-40, inclusive, made in estimated amounts under Schedule D of the Income Tax Acts. The subject-matters of the said assessments were described as follows:—

1934-35: "Royalties on Proceeds from Sale of Film Rights."
1935-36 and 1936-37: "Profit from 'The Light that Failed'."
1937-38 to 1939-40: "Royalties or Proceeds from Sale of Film Rights."

2. By an agreement made in 1897 between the Appellant and Mr. Rudyard Kipling she obtained the exclusive right to dramatise Mr. Kipling's book, "The Light that Failed."

In 1914 the question of a film version of the book or play arose and it was agreed between the Appellant and Mr. Kipling that it should be left to him to arrange for the film rights and he should pay to her one-third of his receipts.

Film rights were duly granted by Mr. Kipling to film producing companies, and between 1914 and 1939 various sums were received by the Appellant in respect of the one-third which he had agreed to pay her. These sums are set out in the statement of receipts referred to in paragraph 6 (D) of this case. The payments of £66 13*s.* 4*d.* and £33 6*s.* 8*d.* received by the Appellant on 31st December, 1937, and 3rd January, 1939, respectively, were the Appellant's share of sums of £200 and £100 paid to the estate of Mr. Kipling by Paramount Films Services, Ltd., in respect of an option to take a further grant of film rights in "The Light that Failed."

3. In 1939, Mr. Kipling having died, his widow, Mrs. Caroline Kipling, made an agreement with Paramount Pictures for the sound and film rights of the book and play. By that agreement she assigned to Paramount Pictures the sole rights for ten years for a lump sum of £8,000, and pursuant to the 1914 agreement the Appellant received one-third, i.e., £2,666, of that sum.

4. The Appellant, who is now an elderly lady, was for many years a celebrated actress and producer of various plays. Early in 1914 she gave up the stage and since that time has done no dramatic work. She has written or been concerned in the writing of no play except "The Light that Failed." In 1916 she joined the British Red Cross, and since the last war has devoted herself to the education of the public in matters of health, in which connection she has held and still holds many important positions without remuneration.

5. In a certified copy from copyright records in the Public Record Office, which is attached to this Case, marked "A", and forms part thereof(1), the author of "The Light that Failed", a play in three acts, is given as Constance Fletcher ("George Fleming"), and Olga Nethersole is described as the proprietor of the sole liberty of representation or performance. The Appellant's state of health did not make it possible for her to appear before us to give evidence and we were therefore unable to ascertain the part played by Miss Fletcher, but in the result this matter is not, in our view, material.

A further disadvantage in presenting the case is that Mrs.

(1) Not included in the present print.

Caroline Kipling and the Executors of the late Mr. Rudyard Kipling are not parties thereto, and it is impossible therefore to attach copies of agreements made by Mr. Kipling with any persons other than the Appellant herself.

6. There are attached to this Case, and form part thereof, copies of:—

(A) The agreement of 15th June, 1897, between Mr. Kipling and the Appellant.

(B) The agreement of 27th June, 1939, between Mrs. Caroline Kipling and Paramount Pictures.

(C) Three letters of 2nd June, 1914, 10th June, 1914, and 29th August, 1914, which passed between the Appellant and Mr. A. S. Watt of A. P. Watt & Son of Hastings House, 10 Norfolk Street, in which the one-third offer is made on behalf of Mr. Kipling and the Appellant and accepted by her.

(D) A statement of receipts by the Appellant covering the period January, 1916, to July, 1939, which is described as "Amounts received in respect of Film rights of 'The "'Light that Failed'."

(E) Three letters dated 31st December, 1937, 3rd January and 7th July, 1939, from Messrs. A. P. Watt & Son to the Appellant relating to the payments made on 31st December, 1937, and 3rd January and 12th July, 1939.

(F) A letter dated 20th June, 1944, which was not before us at the hearing but which was addressed by A. P. Watt & Son to the Appellant's solicitors and which with the consent of both parties is admitted as part of this Case[1].

In this letter Messrs. Watt, who were in 1914 acting as agents for Mr. Kipling, state that he agreed that the Appellant should dramatise his book, and that at a later date, when the question of film rights arose, she should have one-third of any amount for which he might be able to sell the film rights of the book and her dramatisation in conjunction. The letter continues:—

"The film rights were originally sold to Messrs. Pathé Frère "under an agreement which provided for a payment in advance and "on account of royalties. The sums referred to under Pathé Pro-"ductions in the list of amounts received, which you enclosed in your "letter and which I now return, were Miss Nethersole's share of "amounts received under the above agreement from Messrs. Pathé." (The list referred to is the statement mentioned in sub-paragraph (D) above.)

"In due course the Pathé agreement expired or was about to "expire, and in 1923 the rights were sold to Famous Players for "£7,500 for a period of seven years. They were sold again in 1930 "to Paramount Famous Lasky Corporation for £8,000 for a period "of 10 years, and when that agreement expired or was about to "expire, in 1939 to Paramount Pictures Inc. for £8,000 for a period "of 10 years, and that agreement is still running. The last three "amounts were all paid on the dates the agreements were made, and "in each case Miss Nethersole's share was duly paid over to her at "the time."

[1] Not included in the present print.

7. On behalf of the Appellant it was contended :—

(1) that the receipts in question were earnings of the Appellant's former profession or vocation of dramatic authorship;

(2) that such profession or vocation was not being carried on by the Appellant during the years to which the said assessments related;

(3) that the Appellant was accordingly not assessable to Income Tax under Case II of Schedule D, and

(4) that the sums in question were not royalties nor were they otherwise "income" within the meaning of the Income Tax Acts so as to be assessable to tax under Case VI of Schedule D or at all.

Reference was made to the judgment of Rowlatt, J., in *Constantinesco* v. *The King*, 11 T.C. 730, and to the decision in *Desoutter Bros., Ltd.* v. *J. E. Hanger & Co., Ltd.*, [1936] 1 All E.R. 535.

8. On behalf of the Respondent it was contended :—

(1) that the Appellant was carrying on the profession of a dramatist assessable under Case II of Schedule D, and alternatively

(2) that the payments in question were of an income nature assessable under Case VI.

9. Having reserved judgment we, the Commissioners who heard the appeal, issued our decision in writing to both sides as follows:—

On the evidence before us which, with the consent of the Crown's representative, includes a letter of 20th June, 1944, from Messrs. A. P. Watt & Son addressed to Messrs. Laytons, the Appellant's solicitors, we hold :

(1) That the Appellant was not carrying on a profession or vocation at the material times covered by the assessments made upon her in respect of dramatic and film rights of "The Light that Failed".

(2) That the sums received by her in respect of these rights under the terms of the agreement were of a revenue nature being paid to her and received by her on account of royalties.

(3) That on the authority of the judgment of Macnaghten, J., in the case of *Beare* v. *Carter*, 23 T.C. 353, such royalties being income are liable to assessment under Case VI of Schedule D.

The assessments, the subject of this appeal, are therefore confirmed in principle under Case VI. Figures to be agreed.

10. In conformity with our decision above the figures are now agreed, and we have discharged the assessments for the years 1934-35, 1935-36 and 1936-37, no payments having been made to the Appellant under the 1914 agreement in those years.

The assessment for 1937-38 is reduced to £66.
" " " 1938-39 " " " £33.
" " " 1939-40 " " " £2,566.

11. The Appellant immediately after the determination of the appeal declared to us her 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 High Court pursuant to the Income Tax Act, 1918, Section 149, which Case we have stated and do sign accordingly.

MARK GRANT-STURGIS, } Commissioners for the Special Purposes
N. ANDERSON, } of the Income Tax Acts.

Turnstile House,
94/99 High Holborn,
London, W.C. 1.
16th January, 1945.

The case came before Macnaghten, J., in the King's Bench Division on 25th October, 1945, when judgment was given in favour of the Crown, with costs.

Mr. F. Heyworth Talbot appeared as Counsel for Miss Nethersole, and the Solicitor-General (Sir Frank Soskice, K.C.) and Mr. Reginald P. Hills for the Crown.

JUDGMENT

Macnaghten, J.—The Appellant in this case is Miss Olga Nethersole, who some fifty years ago had attained great fame and distinction as an actress and producer of stage plays.

By an agreement dated 15th June, 1897, she obtained from Mr. Rudyard Kipling the exclusive right to dramatise his novel, "The "Light that Failed"; and she then produced a dramatised version of the novel.

In 1914 the question arose of a film version of the novel and the play, and it was agreed between the Appellant and Mr. Kipling that it should be left to him to arrange for the film rights and that he should pay to the Appellant one-third of the moneys received by him in respect thereof.

From 1916, when the film rights were granted by Mr. Kipling to Messrs. Pathé Frères, Mr. Kipling and his widow received various sums in respect of the film rights, and after his death his widow dealt with those rights. One-third of the sums so received by Mr. Kipling and his widow have always been paid over to the Appellant in accordance with the agreement made with the Appellant in 1914.

In 1923 (the Pathé agreement having expired) the film rights were granted to Famous Players for a period of seven years at the price of £7,500, and on the expiration of that period in 1930 they were granted to Paramount Famous Lasky Corporation for a period of ten years at the price of £8,000, and the Appellant received her share of those sums. On 31st December, 1937, the Appellant received £66 13*s*. 4*d*., being one-third of £200 paid by Paramount Pictures Incorporated for an option over the film rights; and on 3rd January, 1939, she received a further sum of £33 6*s*. 8*d*., being one-third of £100 paid by that company for an extension of the option; and on 12th July, 1939, she received £2,566 13*s*. 4*d*., being one-third of £8,000 (less £300) paid to Mrs. Kipling for a grant of the film rights for ten years.

The Appellant has been assessed to Income Tax under Case VI of Schedule D in respect of those three sums of £66 13*s*. 4*d*., £33 6*s*. 8*d*. and £2,566 13*s*. 4*d*., and the question at issue is whether these sums

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were "annual profits or gains" within the meaning of Case VI. The Special Commissioners decided in favour of the Crown. They held that the sums so received by the Appellant were of a revenue nature, being paid to her and received by her on account of royalties.

For the Appellant it is urged that the sums in question were not royalties nor were they otherwise "income" or "annual profits or "gains" within the meaning of the Income Tax Acts.

The argument before me turned mainly on the question of whether the sums in question should be regarded as "capital" or as "income" payments. I fully realise the difficulty of defining the line which separates a payment of capital from a payment of income, but, in my opinion, the payments made by grantees were not only income payments by them, but were "income" receipts in the hands of Mr. Rudyard Kipling and his legal personal representative, and must be regarded as "income" receipts in the hands of the Appellant. I therefore think the decision of the Special Commissioners was right, and the appeal must be dismissed with costs.

An appeal having been entered against the decision in the King's Bench Division, the case came before the Court of Appeal (Lord Greene, M.R., and Somervell and Cohen, L.JJ.) on 28th February and 1st and 4th March, 1946, when judgment was reserved. On 29th March, 1946, judgment was given unanimously against the Crown, with costs, reversing the decision of the Court below.

Mr. F. Heyworth Talbot appeared as Counsel for Miss Nethersole, and the Solicitor-General (Sir Frank Soskice, K.C.) and Mr. Reginald P. Hills for the Crown.

JUDGMENT

Lord Greene, M.R.—The judgment which I am about to read is the judgment of the Court. Miss Nethersole has the misfortune to be involved in litigation which concerns one of the most troublesome questions in Income Tax law. Under a written agreement of 15th June, 1897, she acquired from the late Mr. Rudyard Kipling the exclusive right to dramatise his novel "The Light that Failed", with the exclusive right to produce the play to be so based on the novel, and full power to dispose of all her rights in respect of it. All moneys which she might receive in respect of the play by way of royalties or on sale (exclusive of receipts from performances under her management) were to be divided between the parties in equal shares. The case was conducted on the footing that Miss Nethersole was entitled to the copyright in the play which was duly written and produced. This copyright is, of course, distinct from the copyright in the novel itself, which, subject to the rights acquired by Miss Nethersole under the agreement, remained vested in Mr. Kipling.

In 1914 the question of a film version arose. In order to deal commercially with the film rights, it was obviously necessary to bring in both the copyright in the novel and the copyright in the play. Accordingly an agreement was made between Mr. Kipling and Miss

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Nethersole under which "the entire and exclusive control of the film "or cinematograph rights of 'The Light that Failed'—both the book "and the play—in all countries" was "to be in Mr. Kipling's hands." One-third of the gross amount received by Mr. Kipling for these rights was to be paid to Miss Nethersole. This agreement, the terms of which are set out in a letter of 10th June, 1914, from Mr. A. S. Watt, who was Mr. Kipling's agent, was, we think, no more than an agency agreement under which Miss Nethersole appointed Mr. Kipling her sole agent to deal with her rights in the play in conjunction with Mr. Kipling's own rights in the novel.

Pursuant to the terms of this agreement, Mrs. Kipling, the widow of Mr. Kipling, made an agreement dated 27th June, 1939, with an American company, Paramount Pictures Incorporated, under which she granted to the company for a period of ten years from 27th January, 1940, the sole and exclusive motion picture rights in both the story and the play, together with certain other rights which we will refer to presently. The consideration for the assignment of these rights was the sum of £8,000. Under the agreement of 1914 one-third of this sum, namely, £2,666, was paid to Miss Nethersole, and it is in respect of this sum that the present question has arisen. The Crown maintain that this receipt was of a revenue nature, while Miss Nethersole contends that it was a capital receipt.

One ground upon which the Crown endeavoured to base its claim has disappeared from the case as a result of the finding by the Special Commissioners that Miss Nethersole was not at the material time carrying on a profession or vocation. The Special Commissioners, however, and on appeal from them, Macnaghten, J., held that the receipt was of a revenue nature and liable to assessment under Case VI of Schedule D.

The case on behalf of Miss Nethersole is put in two ways. The 1939 agreement, it is said, must be regarded either as a sale outright for a lump sum of a slice, so to speak, of Miss Nethersole's proprietary rights in the copyright of the play, or as the grant of a licence for a term of years for a capital sum not based on any calculation of a yearly or periodic nature, but arrived at merely as representing the agreed value of a ten-year licence. In either case, it is argued, the sum received is capital.

The terms of the finding of the Special Commissioners are important. They found that the sum received by Miss Nethersole under the 1939 agreement was "of a revenue nature being paid to her and "received by her on account of royalties;" and "that on the authority "of the judgment of Macnaghten, J., in the case of *Beare* v. *Carter*, "23 T.C. 353, such royalties being income are liable to assessment un-"der Case VI of Schedule D."

It was argued on behalf of the Crown that this was a finding of fact which we are bound to accept. We cannot agree. The reason given by the Commissioners for holding that the sum received was of a revenue nature is that it was paid and received "on account of "royalties". A clue to the meaning which the Commissioners attached to the word "royalties" is to be found by referring to the case of *Beare* v. *Carter* to which they refer.

The word "royalty", in connection with a literary or dramatic

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work, is defined in the Shorter Oxford English Dictionary as "a pay-"ment made to an author, editor or composer for each copy of a "book, piece of music, etc., or for the representation of a play." It is in the sense of so much per copy that the word "royalty" is used in the Copyright Act, 1911, itself (see e.g., Sections 3 and 19(3)) and this, in our opinion, is the ordinary meaning of the word. A sum paid "on account of royalties" would naturally mean one of two things, either (*a*) an advance against royalties, to become payable in the future, or (*b*) a sum agreed upon as covering or as estimated to cover a defined or estimated number of copies (in the case of a book) or performances (in the case of a musical or dramatic work). In *Beare* v. *Carter*(1) the word "royalties" is used in the sense above mentioned. That the word "royalties" ordinarily means what we have said is apparent to anyone who takes the trouble to turn over the pages of such a text-book as Copinger on Copyright. The use of the word to signify a percentage of box office receipts is to be found, for example, in the agreement dealt with in *Messager* v. *British Broadcasting Co., Ltd.*, [1929] A.C. 151. If it is in either of the senses above-mentioned that the Commissioners use the phrase "on "account of royalties", there appears to us to be nothing whatever in the agreement, or in the evidence, to justify the finding. There is nothing to suggest that the sum of £8,000 was built up or arrived at on any such basis. If, on the other hand, the phrase as used by the Commissioners merely means that the sum was received in respect of the rights granted by the 1939 agreement, it leads nowhere at all. A statement that because the sum was so received it was therefore of a revenue nature is a mere assertion, and in fact begs the very question which falls to be decided. We are of opinion, therefore, that there is nothing in the findings of the Commissioners which prevents us from dealing at large with the whole matter.

We may add that the Special Commissioners appear to have taken the phrase "on account of royalties" from a letter of 20th June, 1944, from Mr. A. P. F. Watt, which was in evidence. In that letter he referred to an earlier agreement in 1916 with Pathé Frères. That agreement, said Mr. Watt, provided for a "payment in advance "and on account of royalties." From the account of the sums received over a period of some five years under that agreement, it appears that it was on a royalty basis in the sense given above, i.e., either so much per performance or a percentage of receipts. It is not to be disputed that royalties in the above sense are income. Nor, we think, can it be disputed that a sum built up or arrived at by reference to a minimum or an estimated number of copies of a book or performances of a work is also income. The present case is not of that nature. Under the 1939 agreement the sum payable has no reference to, or connection with, any contemplated performances. All that appears is that the American company was paying a lump sum for certain rights. It may or may not have contemplated an exercise of those rights. Equally it may merely have wanted to prevent others from obtaining them, or to preserve the value of films already made under one of the two earlier agreements between the parties. We do not know. The only guidance to be obtained for the purpose of answering the question before us appears to us to be afforded by the language of the agreement itself, and in particular the nature of the rights which, on Miss Nethersole's behalf,

(1) 23 T.C. 353.

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were conferred by it upon the company.

Under Section 5 (2) of the Copyright Act, 1911, the owner of copyright may assign the right "either wholly or partially, and either "generally or subject to limitations... and either for the whole term "of the copyright or for any part thereof". This, it is said, was what Miss Nethersole did in the present case. She owned the copyright in the play (so the argument ran), and she assigned that copyright, in so far as was necessary, to give the rights granted to the company, and she did so, not for the whole term of her copyright, but for a part thereof. Accordingly the transaction, it was said, was a sale by Miss Nethersole of a piece of property belonging to her for a lump sum which was not fixed by reference to periodic payments, or estimated periodic payments, in the shape of royalties, but was just a lump sum and nothing more. Such a lump sum could only be a capital receipt.

The nature of the rights for which a sum is paid is, of course, a factor, and often the deciding factor, in considering whether the sum is of a revenue or of a capital nature. The rights here in question are of a comprehensive character, and comprise a great deal more than would be covered by a licence, or even by a partial assignment of Miss Nethersole's copyright in the play. A short analysis will make this clear. For convenience we will use lettered paragraphs. By the second clause the seller "grants and assigns" for a period of ten years (*a*) "the sole and exclusive motion picture rights" for the whole world in the story and the play, together with the sole and exclusive right (*b*) to adapt and change the story and the play or the title and to combine them with any other works, (*c*) to reproduce by cinematograph the story and the play both pictorially and audibly, (*d*) to exhibit by television or any other process of transmission known or to be devised hereafter, (*e*) to copyright, vend, licence and exhibit such motion pictures, (*f*) by mechanical or electrical means to record and reproduce dialogue from the story and the play, to change such dialogue and interpolate other dialogue and to sell such records.

The greater part of the rights enumerated above no doubt form part of Miss Nethersole's performing rights in the play. Two points, however, call for special attention. The rights to adapt the play, to combine it with other works, to interpolate dialogue, etc., go far beyond what an assignee or licensee of copyright would be entitled to do. The granting of them involves a surrender by Miss Nethersole of any rights she might have to complain, e.g., in an action for libel, of damage done to her by presenting as a film version of her play something which might be a complete travesty of it, or a hotchpot of several works. It can scarcely be disputed that an extensive use of such rights by the company would injure, it may well be irretrievably, the reputation of the play, and thereby destroy, in whole or in part, the value of Miss Nethersole's copyright. She thought it worth while to submit to this, but her doing so formed part (and no doubt a valuable part from the company's point of view) of the consideration for the £8,000.

The other point arises under paragraph (*e*) above, which confers on the company the right to the copyright in any motion picture it may make. It is unnecessary to decide whether this conferred

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any right to exhibit such a picture after the expiration of the ten years. We will assume, for the purpose of this judgment, that it gives no such right. But, in any event, its ownership of the copyright in it would amount to a subtraction from Miss Nethersole's own copyright.

A similar point to that last-mentioned arises under the third clause, whereby the company is granted the right to make and copyright synopses, scenarios or fictionised versions of the motion picture, provided they do not infringe the rights of publication of the story or the play. It is, however, not easy to understand how far this goes.

Under the fourth clause (*a*) the company is granted the right to broadcast the motion picture or excerpts by radio, (*b*) the seller is not to exercise or authorise others to exercise any broadcasting rights in the story of the play until 18 months after the first general release in the United States of America of the first motion picture made or 42 months from the date of the agreement, whichever period first expires, subject to a limited right to broadcast excerpts for the purpose of advertising a legitimate stage production. This clause, we think, operates as an assignment *pro tanto* of Miss Nethersole's broadcasting rights in the play.

By clause 8 the consideration for the rights thereby granted and agreed to be granted is the sum of £8,000 payable on execution of the agreement. By clause 9 the agreement is to bind the parties, their successors and assigns, and the company is empowered to assign the rights granted either in whole or in part.

In our opinion the agreement operates as an assignment of what, for short, we will call the film rights of the play for a period of ten years. It cannot, we think, be construed as a mere licence, and, if we are right in this, the company acquired the rights conferred by Sub-section (3) of Section 5 of the Copyright Act, 1911. That Sub-section provides as follows: "Where, under any partial assignment "of copyright, the assignee becomes entitled to any right comprised "in copyright, the assignee as respects the right so assigned, and "the assignor as respects the rights not assigned, shall be treated "for the purposes of this Act as the owner of the copyright, and the "provisions of this Act shall have effect accordingly." Besides being a partial assignment of Miss Nethersole's copyright in the play, the agreement, as we have pointed out, confers on the company certain rights which fall altogether outside copyright.

We will now consider the law to be applied to this subject-matter. We find it difficult to extract any clear principle from the decided cases, except that all relevant circumstances must be considered, which is not particularly helpful. One might perhaps have expected that where a piece of property, be it copyright or anything else, is turned to account in a way which leaves in the owner what we may call the reversion in the property, so that upon the expiration of the rights conferred, whether they are to endure for a short or a long period, the property comes back to the owner intact, the sum paid as consideration for the grant of the rights, whether consisting of a lump sum or of periodical or royalty payments, should be regarded as of a revenue nature. We emphasise the word "intact" — *salva rei substantia*, to use the expression adopted by Lord Fleming in *Trustees of Earl Haig* v. *Commissioners of Inland Revenue*, 22 T.C.

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725, at page 735—since (save in the special cases of wasting property) if the property is permanently diminished or injuriously affected, it means that the owner has to that extent realised part of the capital of his property as distinct from merely exploiting its income-producing character.

A principle on some such lines as these would not, we think, be out of accord with the popular idea of the distinction between capital and income. But it is not, we think, open to this Court to adopt it as in itself affording a sufficient test; moreover we think that, on the facts of this case, even the adoption of such a test would not lead to a decision in favour of the Crown for a reason which we will explain later. Such a principle, if it had been the correct one, would by itself have afforded a simple answer in the case of *Constantinesco* v. *The King* (11 T.C. 730) where the inventor retained his patent. Although the fact that he retained it was regarded as a relevant consideration by the House of Lords, it was not, if we read the opinions correctly, regarded as sufficient. The decisive matter was, we think, that the compensation awarded was merely a lump sum payment in respect of a particular past user by the Crown on a royalty basis. The fact that the sum was fixed *ex post facto* by the Royal Commission instead of by agreement could not alter its character. In the case of *Mills* v. *Jones*, 14 T.C. 769, an attempt was made to distinguish the *Constantinesco* case on the ground that the award covered future as well as past user. The General Commissioners had held that the future user would be negligible, and on this ground the House of Lords held that the suggested distinction broke down. The case does not help us. We may refer to the judgment of the Master of the Rolls in *Commissioners of Inland Revenue* v. *British Salmson Aero Engines, Ltd.*, 22 T.C. 29, for a discussion of these two cases.

But there is positive authority which makes it impossible to adopt so simple a principle. Even if, in the present case, there was nothing more than the grant of a licence for a period of ten years, the sum received by Miss Nethersole would, in our opinion, still be a capital receipt. We have already drawn attention to the fact that this sum had no relation whatever to any "royalty" calculation, and, this being so, we think that it cannot be regarded as a receipt on revenue account. The authorities are as follows. *Desoutter Bros., Ltd.* v. *J. E. Hanger & Co., Ltd.*, [1936] 1 All E.R. 535, was a case of a five-year licence for the use of a patent granted in consideration of a lump sum payment of £3,000. This sum had no reference to any particular contemplated production under the licence; it might have been large, or there might have been none at all. MacKinnon, J., as he then was, quoted with approval the following passage from the judgment of Rowlatt, J., in the *Constantinesco* case, 11 T.C., at page 740: "I have not the least doubt that you may pay "a lump capital sum in lieu of royalties, or to capitalise what is "really a royalty, if you like to put it that way, for the use of a "patent. Now has that been done ? Mr. Montgomery put a case "to me—an obvious case. Supposing, before the user, it is said: "'Now pay £25,000'—or whatever sum the parties agree to—'and "'use it as much as you like, for a definite time or for the whole "'length of the patent.' That will clearly be a lump sum. It would "not be parting with the patent, because other people might use it, "but it would be clearly a capital sum, in my judgment." Mac-

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Kinnon, J. (whose decision, of course, is not binding upon this Court), then said that the case before him was precisely that contemplated by Rowlatt, J. It was not, he said, the case of an estimated sum after the patent had been used. We may add that it was not the case of an estimated sum before the patent had been used—it was a sum in gross having no reference to user, but paid merely for the purpose of acquiring the right to use as much or as little as the licensee might desire.

Commissioners of Inland Revenue v. *British Salmson Aero Engines, Ltd.*, 22 T.C. 29, was a decision of this Court. There the agreement was for a ten-year licence to use a patent. The consideration was a lump sum payment of £25,000 payable in three instalments, and a sum of £2,500 a year "as royalty." It was held by this Court, affirming Finlay, J., who upheld the decision of the Special Commissioners, that the £25,000 was, but that the sums of £2,500 were not, a capital payment. This decision is a clear authority, so far as this Court is concerned, that a lump sum payment received for the grant of a patent licence for a term of years may be a capital and not a revenue receipt; whether or not it is so must depend on any particular facts which, in the particular case, may throw light upon its real character, including, of course, the terms of the agreement under which the licence is granted. If the lump sum is arrived at by reference to some anticipated quantum of user it will, we think, normally be income in the hands of the recipient. If it is not, and if there is nothing else in the case which points to an income character, it must, in our opinion, be regarded as capital. This distinction is in some respects analogous to the familiar and perhaps equally fine distinction between payments of a purchase price by instalments and payment of a purchase price by way of an annuity over a period of years.

In the present case, whether the agreement operates (as we think) as an assignment, or as a licence, the result is, in our opinion, the same. But, as we have indicated, there are other circumstances which in any event make it impossible to regard this sum as a revenue receipt. In addition to the assignment or licence, whichever it may be, the agreement operates as a partial realisation by Miss Nethersole of her capital asset, viz., the copyright in the play. She confers rights upon the company which, as we have pointed out, cannot, if exercised, fail to affect injuriously the value of her copyright. Any consideration referable to this could not, we think, in any view be anything but capital. It is obviously impossible to split the sum received, and the Crown cannot in any event point to any part of that sum as being revenue.

We find support for this view of the case in the decision of the Court of Session in *Trustees of Earl Haig* v. *Commissioners of Inland Revenue*, 22 T.C. 725, already referred to. There the trustees put the testator's war diaries (the copyright in which belonged to them) at the disposal of a biographer who made full use of them in writing the biography. The profits to be derived from the sale of the biography were to be equally divided between the biographer and the trustees. It was held, reversing the decision of the Special Commissioners, that the sums received by the trustees under this agreement were capital payments. There, of course, the copyright in the diaries remained in the trustees, subject only to the licence granted

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to the biographer to make use of them for the purposes of his book. But, as the Lord President (Normand) said, at page 732: "The re-"sult of the transaction is that to a large extent the publication "value of the diaries is exhausted, because the author has in fact "made full use of the material so far as the public interest permitted, "though it may be that in future years further use of the diaries may "be practicable and permissible"; and lower down on the same page: "In the actual case the asset itself—the publication rights— has "been diminished". On page 733 there is a passage which we find helpful on the general question in this case. It is as follows: "But "then it was said that the finding that the receipts were remunera-"tion for the use of and access to the diaries necessarily means that "they were something more than the receipt of the capital value of "the asset. There was some discussion of the word remuneration, "and the Solicitor-General, I think rightly, accepted the view that "it meant merely consideration. I do not know that much hangs on "the choice between these two words, for it seems to me that to "say that what the Appellants got was remuneration or considera-"tion for the use of and access to the diaries is a colourless descrip-"tion of what was done and does not in itself advance the conten-"tions of either side. The argument for the Inland Revenue was "that payment for the use of a thing is of the nature of rent or "royalty or the like and cannot be merely the price of the thing. "But that only brings the argument back to a discussion of the "nature of the thing and of the use made of it."

Lord Fleming, at page 735, said that the transaction "was not "merely a use of the subject *salva rei substantia* but necessarily in "volved the realization of a considerable part of its capital value." This conclusion was apparently based on the finding of the Commissioners that the biographer had made full use of the material contained in the diaries. We should have thought ourselves, with respect, that the question whether or not the trustees were realising part of the capital value of their copyright was to be answered, not by reference to what the licensee in fact did under the licence, but by reference to the powers which the licence conferred upon him. So, here, Miss Nethersole was being paid for, among other things, the right to cut her play to pieces and combine the story with other stories, a right which, whether it should be exercised or not, amounted to a right to diminish the value of the copyright in the play.

Having regard to all the circumstances of the case and giving such weight to each of them as it appears to us to deserve, we have come to the conclusion that the appeal ought to be allowed. We should perhaps add that Macnaghten, J., gave no reasons for his opinion that the sum in question was of a revenue nature.

Mr. Talbot.—The appeal is allowed with costs?

Lord Greene, M.R.—Yes.

Mr. Talbot.—I am instructed that the whole of the amount of duty involved has been paid. I do not know that it is necessary for your Lordships to order repayment, but I think it is usual to fix the rate of interest. I think 3 per cent. has been customary.

Lord Greene, M.R.—3 per cent., Mr. Hills?

Mr. Hills.—I think 3 per cent. has been customary for some years.

Lord Greene, M.R.—Then it will be 3 per cent.

Mr. Hills.—I am instructed that the agreement in this case is in the common form in which, in the case of film rights, owners of copyright get their profit from their property. Therefore I have to ask your Lordships' leave in case, after considering your Lordships' judgment, my clients think it necessary to appeal to the House of Lords.

Lord Greene, M.R.—If this had been an isolated case it would not be a case where we should grant leave, because it is a very special type of contract and the case turns entirely on its own individual facts and on the particular terms of the special agreement. But you tell us that there are other agreements in this form, and that the Crown naturally wishes to have the opinion of the House, therefore, upon the general matters.

Mr. Hills.—I am instructed that this is the typical form of a copyright licence or assignment in the case of film rights.

Lord Greene, M.R.—Our decision is not intended to say anything about whether the company's own payment is an income payment, or a capital payment, at all.

Mr. Hills.—I am not looking at it from that point of view. I am looking at it from the point of view of people who exploit their works or things they own through films, which is one of the commonest ways of doing things in these days. I can only say that I am instructed this is the common form in which it is done—I do not say every single word is the same, but it is the general idea. It is always for a long period, and that kind of thing, as we were told on the last occasion.

Lord Greene, M.R.—We all think in the circumstances you can have leave, but on the usual terms in such cases, namely, that the Crown will not seek to disturb the Order as to costs made by this Court, and will submit to an Order in the House of Lords, if the House so thinks fit, to pay the solicitor and client costs of Miss Nethersole of the appeal to the House of Lords.

Mr. Hills.—I am quite sure there will be no objection to those terms. It is a very small sum of money, so far as Miss Nethersole is concerned, but it would appear, having regard to the universal use of films, to be a very large matter so far as the Revenue are concerned.

Lord Greene, M.R.—It is a very proper attitude for the Revenue to take, if I may say so. I should have asked you, Mr. Talbot, if you had any objection to leave being granted on those terms.

Mr. Talbot.—No, my Lord, I could not object on those terms. It is undoubtedly a point of principle and of some importance.

Lord Greene, M.R.—I thought you could not object.

Mr. Talbot.—If your Lordship pleases.

The Crown having appealed against the decision in the Court of Appeal, the case came before the House of Lords (Viscount Simon and Lords Porter, Uthwatt, du Parcq and Oaksey) on 19th, 20th, 22nd and 23rd January, 1948, when judgment was reserved. On 27th February, 1948, judgment was given unanimously against the Crown,

with costs, confirming the decision of the Court below.

The Solicitor-General (Sir Frank Soskice, K.C.) and Mr. Reginald P. Hills appeared as Counsel for the Crown, and Mr. F. Heyworth Talbot and Mr. Desmond C. Miller for Miss Nethersole.

JUDGMENT

Viscount Simon.—My Lords, this is an appeal by the Crown from an Order of the Court of Appeal (Lord Greene, M.R., and Somervell and Cohen, L.JJ.) allowing an appeal by the Respondent from an Order of the King's Bench Division (Macnaghten, J.) whereby an appeal by the Respondent on a Case stated by the Commissioners for the Special Purposes of the Income Tax Acts was dismissed and the decision of the Commissioners was affirmed.

The material facts to be gathered from the Case Stated and the documents annexed to it may be summarised as follows. In 1897 the Respondent obtained from the late Mr. Rudyard Kipling the exclusive right to dramatise his novel, "The Light that Failed", to produce the play to be so written, and to dispose of all her rights in respect of it. The play was duly written and produced and it is common ground that the Respondent has at all times been entitled to the copyright in the play. In 1914 the question of a film version arose and, inasmuch as a grant of film rights would concern both Mr. Kipling as owner of the copyright in the novel and the Respondent as owner of the copyright in the play, it was agreed between Mr. Kipling and the Respondent that the entire control of the film rights in both the novel and the play should be in Mr. Kipling's hands and that one-third of the gross amount of all sums received by Mr. Kipling for the film rights should be paid, as and when he received them, to the Respondent. From 1916 onwards the film rights were granted by Mr. Kipling, and later by his legal personal representative, to various film-producing companies and one-third of the sums received from time to time were duly paid over to the Respondent. The transaction, however, with which this appeal is immediately concerned is the following. On 27th June, 1939, an agreement was made between Mrs. Caroline Kipling, the widow and legal personal representative of the late Mr. Kipling (in the agreement called "the "Seller"), and Paramount Pictures Inc. (in the agreement called "the Purchaser"), under which the seller "grants and assigns" to the purchaser for a period of 10 years from 27th January, 1940, "the "sole and exclusive motion picture rights throughout the world" in and to and in connection with the novel and the play, together with the exclusive right to adapt and change this material, to reproduce by cinematograph both pictorially and audibly, to exhibit by television, to interpolate other dialogue, to make records, etc. — rights some of which, as the Master of the Rolls pointed out, went beyond what a transfer of copyright of motion picture rights necessarily involved. The consideration under the agreement was £8,000, and one-third of this, namely, £2,666, was paid to the Respondent and was the amount which the Crown claimed was assessable against her to Income Tax.

The claim was primarily based on the view that the Respondent was at the material time carrying on the profession of a dramatist and that the sum in question was annual profits and gains of her

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profession and thus assessable under Case II of Schedule D. This contention failed, as the Special Commissioners decided that the Respondent had given up the profession many years before. The Crown therefore fell back on its alternative claim, under Case VI of Schedule D, that the amount was "annual profits or gains not "falling under any of the foregoing Cases, and not charged by virtue "of any other Schedule".

Subject to the Case Stated, the Special Commissioners decided this issue in favour of the Crown, and the first matter to be considered is whether this finding is a finding of pure fact, such as cannot be reviewed by an appellate tribunal.

The Stated Case, after setting out the material facts which I have summarised above, recorded that the Special Commissioners reserved judgment and later issued their decision on the alternative claim as follows:

"We hold ....
"(2) That the sums received by her in respect of these rights "under the terms of the agreement were of a revenue nature "being paid to her and received by her on account of royalties.
"(3) That on the authority of the judgment of Macnaghten, J., "in the case of *Beare* v. *Carter*, 23 T.C. 353, such royalties being "income are liable to assessment under Case VI of Schedule D."

The Appellant contended that the Special Commissioners' decision "that the sums received by" the Respondent "were of a revenue "nature" was itself a finding of fact which could not be disturbed on appeal, but I agree with the Master of the Rolls that this is not so. As was said in *Bomford* v. *Osborne*, [1942] A.C. 14, at page 22 (23 T.C. 642, at page 685), "No doubt, there are many cases in "which commissioners, having had proved or admitted before them "a series of facts, may deduce therefrom further conclusions which "are themselves conclusions of pure fact, but in such cases the "determination in point of law is that the facts proved or admitted "provide evidence to support the commissioners' conclusions." Lord Sumner's speech in *Usher's Wiltshire Brewery, Ltd.* v. *Bruce*, [1915] A.C. 433, at page 466 (6 T.C. 399, at page 435), contains an observation to a similar effect. But here it is plain that the extract from the Special Commissioners' decision quoted above is not a decision of pure fact but raises a question of law in support of which a previous decision is cited. The question of law is whether the facts set out in the Case and the documents annexed to it establish that the amount paid to the Respondent under the agreement of 27th June, 1939, is "annual profits or gains" falling under Case VI of Schedule D. If the Respondent had been carrying on a profession or vocation at the relevant time and the agreement of 27th June, 1939, had been entered into in the course of it, the figure of £2,666 would come into the calculation of her annual profits or gains under Case II not indeed as the actual sum to be taxed but as a figure entering into the computation of the amount to be charged, subject to the deductions inferentially authorised by Rule 3 of the Rules applicable to Cases I and II. But when the application of Case II is negatived, can the amount received in the circumstances above set out be caught under Case VI ?

The House has had an interesting and sustained argument from the Crown in the course of which much has been said about the

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Respondent's "exploitation" (in the inoffensive sense) of her copyright and about the amount being paid in respect of the "user" of the copyright. While various phrases and illustrations are naturally employed in developing an argument about the alleged application of the words of the Income Tax Acts to a particular transaction, it is nevertheless necessary to have primary regard to the statutory words themselves and to their proper judicial construction. Every part of Schedule D is concerned with "annual profits or gains", and, while there is not express mention of capital assets, there is more than one mention of tax "in respect of income"; and no one can dispute that there is implied a contrast, frequently referred to in past decisions, between receipts of a revenue nature and receipts of a capital nature. Much emphasis was laid by the Crown on Rule 19 (2) of the General Rules, which begins: "Where any royalty, "or other sum, is paid in respect of the user of a patent"; but the Solicitor-General did not dispute the Master of the Rolls' proposition (which is plainly correct) that "other sum" in the phrase quoted means other sum which is of a revenue nature and does not include a capital sum.

Rule 19 (2), however, deals only with patents. In this case we are not concerned with patents but with copyright. Copyright is a species of incorporeal property. The Copyright Act, 1911, which is a consolidating Act repealing earlier Acts, makes it perfectly clear that the ownership of copyright can be transferred by assignment either wholly or partially and "either for the whole term of the "copyright or for any part thereof". So far as the property is assigned, the assignee becomes the owner instead of the assignor. The Act also provides that, in contrast with an assignment of copyright, the owner may grant a licence which, though it permits the licensee to use the copyrighted matter within the limits of the licence without breach of copyright, does not involve any change of ownership in the copyright at all. It appears to me that the argument for the Crown does not sufficiently allow for this distinction. It is not disputed that the present case is a case of assignment; the Respondent, under the relevant agreement, made a partial assignment of her copyright and ceased to be the owner of the portion assigned, receiving a sum of money in exchange. This amounts to a sale of property by a person who is not engaged in the trade or profession of dealing in such property, and the proceeds of such a sale is, for Income Tax purposes, a sum in the nature of untaxable capital and not in the nature of taxable revenue.

The Solicitor-General referred to a number of reported cases, the first of which is *Constantinesco* v. *The King*, 11 T.C. 730. That was a Petition of Right in which the suppliant, who owned patents for an invention used by the Crown under Section 29 of the Patents and Designs Act, 1907, in the making of some 27,000 gears, and to whom an award was made by the Royal Commission on Awards to Inventors, with the approval of the Treasury, of £70,000, claimed that the amount was a capital receipt not subject to deduction for Income Tax. Rowlatt, J., and, on appeal, the Court of Appeal and the House of Lords, all in turn held that the claim failed on the ground that the sum awarded was in substance a total of royalties calculated with reference to the extent of past user. All the Courts emphasised that the suppliant had not parted with his patents at all; he was a licensor, albeit a compulsory one. The contrast between the

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Constantinesco decision[1], and the present case, in which there was an actual assignment of property in the copyright, is obvious.

The next case is *Mills* v. *Jones*, 14 T.C. 769, which also went through all the Courts, and arose out of the Crown's compulsory user of a patent in connection with the making of a definite number of bombs. An award of £37,000 was in respect of "all user past present "and future". The Commissioners found that future user could be disregarded as negligible. The case was therefore governed by the *Constantinesco* decision.

In *Desoutter Bros., Ltd.* v. *J. E. Hanger & Co., Ltd.*, [1936] 1 All E.R. 535, MacKinnon, J., had before him the reverse case of a payment of a lump sum of £3,000 paid in advance in consideration of a five-year licence for the use of a patent. The sum had no reference to any particular contemplated production under the licence; it might have been large or small or there might have been none at all. The learned Judge quoted with approval Rowlatt, J.'s observation in the *Constantinesco* case as follows: "I have not the "least doubt that you may pay a lump capital sum in lieu of royalties, "or to capitalise what is really a royalty . . . for the use of a "patent[2]." The Master of the Rolls in the present case points out that *Desoutter's* case was not the case of an estimated sum to represent royalties before the patent had been used — it was a sum in gross having no reference to user, but was paid merely for the purpose of acquiring the right to use as much or as little as the licensee might desire.

In all the above cases what was granted was a licence to use the patent — not necessarily an exclusive licence at all, and moreover the owner of the patent itself remained owner throughout, whereas in the present case the Respondent actually transferred the ownership of her copyright to a new owner for the time being. Neither does *Commissioners of Inland Revenue* v. *British Salmson Aero Engines, Ltd.*, 22 T.C. 29, assist the Crown's argument. There the company acquired a sole licence to manufacture and sell in the British Commonwealth a type of aeroplane engine, and the consideration was the sum of £25,000 and in addition sums of £2,500 payable "as royalty" during each year of the currency of the licence. The Special Commissioners were upheld by the Court of Appeal in deciding that the sum of £25,000 was a capital payment, but that the ten further payments of £2,500 were royalties or other sums paid in respect of the user of a patent. The judgment of the Master of the Rolls in the present case seems to me to summarise very accurately the effect of the earlier decisions, and I would in particular adopt his observation that "a lump sum payment received for the grant of "a patent licence for a term of years may be a capital and not a "revenue receipt; whether or not it is so must depend on any "particular facts which, in the particular case, may throw light "upon its real character, including, of course, the terms of the "agreement under which the licence is granted." [3]

The previous decisions cited by the Appellant do not really assist his argument. Here we have the sale and transfer outright of an item of property which previously belonged to the Respondent, not the licence to use it granted by its unchanged owner, and this does not give rise to annual profits or gains unless the sale takes place in the course of carrying on a trade or profession.

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(1) 11 T.C. 730 (2) *Ibid.*, at p. 740 (3) *See* page 512 *ante*.

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I move that the appeal be dismissed. The Crown will pay the Respondent's costs in this House as between solicitor and client.

Lord Porter.—My Lords, the sole question for your Lordships' decision in this case is as to whether certain sums received by the Respondent in respect of film rights are capital or income receipts, or, to put it more accurately, whether they are or are not annual profits or gains within the meaning of Schedule D, Case VI.

Originally the Crown put forward an alternative claim that the Respondent was carrying on the profession or vocation of dramatic authorship at the material dates and that the receipts in question were the earnings of that profession or vocation. The Special Commissioners decided against this alternative contention, and that finding has been accepted by the Revenue authorities, who relied in all subsequent proceedings upon the decision of the Special Commissioners that the sums in question were of a revenue nature, being paid to and received by her on account of royalties.

The fact that the Special Commissioners have held these sums to have been so paid and received, however, is not determinative of the question at issue. The agreements under which the payments were made are attached to this Case and their legal effect can be ascertained. In my view the sums were not received on account of royalties; they are assignments and not licences; a parting by Miss Nethersole with part of her capital assets, not a stipulation for royalties.

In dealing with this matter it has to be remembered that copyright occupies a position and character of its own, and the effect of any dealing with it must not be judged merely on principles which may be applicable in other cases but in the light of the terms of the Copyright Act of 1911.

Whatever may be the result of granting rights partial in quantity or length of time in other cases, as to which I should desire to express no opinion, Section 5 of that Act permits the assignment of copyright either wholly or partially, either generally or subject to limitation of place, and either for the whole term or for any part thereof. Any such assignment is a parting with the whole rights, limited, it is true, to a particular place or places or for a particular period, but still to that extent a complete diverting of the property in the copyright from one owner to another. The Act itself in the same Section marks the distinction between such an assignment of part of the copyright and an interest in the right by licence by enacting that the owner shall also be entitled to grant such an interest.

Finally it provides that in the case of a partial assignment the assignee shall be the owner of the right in the part assigned, and the assignor of the right in that not assigned. It is true that this provision is qualified by the words "shall be treated for the purposes "of this Act as the owner of the copyright, and the provisions of "this Act shall have effect accordingly." But the right is still assigned, though the assignment is only partial, and the property must pass under it. I cannot accept the view that assignor or assignee can be owner for one purpose and not for another. To my mind such a provision divests the owner of part of his property, not merely of the use of it, and even if the argument put forward on the part of the Crown, that the distinction between capital and income is to be

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tested by asking whether the owner had parted with the property itself or merely with the use of it, be accepted, I should hold that in the case of copyright it is possible to assign for a limited period of time and in so doing to part with the property itself. The owner in such a case is not granting a royalty but selling part of the capital asset.

For these reasons, which are substantially those of the Court of Appeal, I would dismiss the appeal to your Lordships' House.

Lord Uthwatt.—My Lords, I agree with the views which have been expressed as to the effect of the Case Stated and do not propose to add anything upon that topic.

By Section 5 (2) of the Copyright Act, 1911, the owner of the copyright in any work is entitled to assign wholly or partially the right either for the whole term of the copyright or for any part thereof. A partial assignment can only mean an assignment of some of the rights included in the copyright. The effect of a partial assignment of copyright for a period less than the whole term is not to create any new right but only to divide the existing right. In the result there are two separate owners each with a distinct property. Neither holds under the other. Nothing new except a position which may give rise to friction has been created.

The only requisite for an effective assignment in such a case is that in a document, complying as to form with the requirements of the Act, the transfer intended should be expressed to be made, the rights to be transferred and the period being stated with certainty.

In this case the agreement of 27th June, 1939, states with certainty the rights which are the subject matter of the transaction; the intention to transfer that subject matter for a definite period is apparent; and an assignment is expressed to be made. The circumstance that the document contains provisions which state independently some of the rights necessarily involved in the assignment or which add to or substract from those rights — however relevant that circumstance might be if the document were ambiguous as to its intended operation — cannot render it something other than an assignment. In my opinion it is an assignment of the motion picture rights and is not a licence.

The agreement dealt with motion picture rights all over the world. In the absence of evidence to the contrary I assume that the agreement had, as respects copyright all over the world, the same effect as it had with regard to copyright subsisting by virtue of the Copyright Act, 1911.

If I am right in the construction of the agreement, the fate of this appeal as regards the sum paid under the agreement is to my mind obvious. Miss Nethersole has been found to be a person not engaged in any trade or business. The assessment is made under Case VI of Schedule D on the footing that the consideration falls within the category "annual profits or gains". The relevant fact is that an owner of an asset, entitled by law to divide it into two distinct assets, has done so by selling one of those assets for an agreed consideration payable in a lump sum. A sale, not in the way of trade, of an asset does not attract tax on the consideration. Whatever else comes within the ambit of annual profits or gains, the consideration received by Miss Nethersole does not.

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Nothing turns on the fact that Miss Nethersole was the authoress of the play. The previous dealings are irrelevant — they indeed could bear only on the question whether Miss Nethersole was engaged in a trade or business, and she has been found not to be so engaged. The fact that the asset sold has a value only when put to commercial use is irrelevant. The fact that the same commercial result as that produced by the assignment might equally well have been achieved by an appropriately worded licence is irrelevant. It is irrelevant that the consideration may be assumed to represent the value of the whole copyright so far as it relates to motion pictures for a period of years. But the consideration was not paid in respect of the temporary use of another's property but for the purchase of property with a limited life. Miss Nethersole may have exploited her property, but she did so only by dividing it and selling part of it.

It is unnecessary to consider separately the position of the sum received in 1937 in respect of an option to take up a renewal of the grant of film rights for 8 years or the sum received in 1939 as consideration for an extension of that option. Neither sum was assessable under Case VI of Schedule D, for neither sum was paid or received except in relation to the grant of an option to purchase.

In the view I take of the transaction it is unnecessary to deal with the authorities to which reference is made in the judgment of the Court of Appeal, and accordingly I do not propose to do so.

I would dismiss the appeal.

Lord du Parcq.—My Lords, I agree, and I am authorised by my noble and learned friend, **Lord Oaksey,** who is unable to be present today, to say that, having read the opinions which have been delivered, he also agrees and has nothing to add.

Questions put:

That the Order appealed from be reversed.

The Not Contents have it.

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

The Contents have it.

That the Appellant do pay to the Respondent her costs in this House as between solicitor and client.

The Contents have it.

[Solicitors:—Messrs. Laytons; Solicitor of Inland Revenue.]