HIGH COURT OF JUSTICE (CHANCERY DIVISION)—3RD, 4TH AND 6TH JUNE, 1957

COURT OF APPEAL—2ND, 3RD AND 21ST OCTOBER, 1957

HOUSE OF LORDS—27TH AND 29TH OCTOBER, AND 25TH NOVEMBER, 1958

Carson (H.M. Inspector of Taxes)

v.

Cheyney's Executor[1]

Income Tax, Schedule D—Copyright royalties—Payable to executor of author under agreement made in his lifetime—Income Tax Act, 1952 (15 & 16 *Geo.* VI & 1 *Eliz. II, c.* 10), *Schedule D, Cases III, V and VI.*

Under contracts made by an author before writing certain books (and before the making of a French translation of a book already written) copyright royalties were payable on the number of copies sold. In computing the author's liability in his lifetime to Income Tax under Case II *of Schedule D royalties were consistently credited as receipts as they fell due for payment. The royalties falling due after his death were included in assessments made on his executor under Schedule D for the years* 1951–52 *and* 1952–53.

On appeal the General Commissioners accepted the executor's contention, based on the decision in Purchase *v.* Stainer's Executors, 32 T.C. 367, *that the sums in question were receipts of the profession of the deceased and could not be taxed under Case* III *or Case* VI *of Schedule D.*

Held, *that the sums in question could not be taxed under Case* III, *Case* V *or Case* VI *of Schedule D.*

Purchase *v.* Stainer's Executors, 32 T.C. 367, *followed;* Bennett *v.* Ogston, 15 T.C. 374, *distinguished.*

CASE

Stated under Section 64 of the Income Tax Act, 1952, by the Commissioners for the General Purposes of the Income Tax for the Division of Bromley in the County of Kent for the opinion of the High Court of Justice.

1. At a meeting of the said Commissioners held on 29th March, 1956, at the Court House, South Street, Bromley, Kent, William Alexander Roy Collins, the sole surviving executor of the will of Reginald Evelyn Peter Southouse Cheyney, deceased, (hereinafter called " the executor "), appealed against assessments to Income Tax made upon him under Schedule D of the Income Tax Acts, 1918 and 1952, for the years 1951–52 and 1952–53, the first and additional assessments totalling £10,000 for the year 1951–52 and £18,000 for the year 1952–53. The question for our determination was

[1] Reported (Ch. D.) [1958] Ch. 345; [1957] 3 W.L.R. 344; 101 S.J. 590; [1957] 2 All E.R. 698; 224 L.T.Jo. 23; (C.A.) [1958] Ch. 345; [1957] 3 W.L.R. 768; 101 S.J. 868; [1957] 3 All E.R. 391; 224 L.T.Jo. 264; (H.L.) [1958] 3 W.L.R. 740; [1958] 3 All E.R. 573; 226 L.T. Jo. 305.

whether certain sums paid to the executor after the death of Reginald Evelyn Peter Southouse Cheyney as royalties under agreements entered into by him as hereinafter mentioned were assessable to tax under Cases III or VI of Schedule D.

2. The following facts were admitted or proved:

(*a*) Reginald Evelyn Peter Southouse Cheyney (hereinafter called Peter Cheyney) was a well-known writer of detective fiction, who died on 26th June, 1951.

(*b*) During his lifetime Peter Cheyney had entered into some 50 to 60 agreements with publishers to write books or for the publication of books already written. Four only of such agreements were put in evidence, and it was agreed between the parties that the decision of the Court as regards sums paid under those four agreements should apply to moneys paid under all other agreements, unless the Court should distinguish one of these four agreements from another. All the agreements made by the deceased from which royalties arose could, as regards form, be classified into one of the categories of which these four agreements are representative. There were also produced to the Commissioners lists of the titles of books to which the representative royalty agreements refer and of the amounts received. These lists are not exhibited but may, if necessary, be referred to as part of the Case.

(*c*) Peter Cheyney during his lifetime was assessed under Case II of Schedule D in respect of the royalties he received from his said agreements as being profits arising from the carrying on of his profession as an author after deducting therefrom all proper and allowable expenses of carrying on such profession, and the Crown admitted that he was properly so assessed. For the purpose of computing the Case II tax liability the rule consistently followed was to credit the copyright royalties as receipts on the day they fell due for payment under the agreements with the publishers.

(*d*) The assessments for the two years in question comprised sums received by the executor from contracts made by Peter Cheyney and also sums received by the executor from contracts which he had entered into with the publishers subsequently to Peter Cheyney's death. In respect of sums received under contracts made by the executor, the executor admitted his liability to tax under Schedule D, without prejudice as regards sums received under contracts made by Peter Cheyney to the alternative contention (*a*) contained in paragraph 3 below advanced on his behalf.

(*e*) The executor's actual receipts were as follows:—

	1951–52			1952–53		
	£	*s.*	*d.*	£	*s.*	*d.*
Under contracts made by Peter Cheyney ...	11,725	19	10	12,026	0	5
,, ,, ,, the executor ...	598	13	0	2,195	15	1
	£12,324	12	10	£14,221	15	6

3. It was contended on behalf of the executor that the sums received by him after Peter Cheyney's death arising from contracts made personally by Peter Cheyney were remuneration earned by the said Peter Cheyney during his lifetime in following his profession and, notwithstanding that his profession had ceased on his death, such payments could not be taxable as annual payments under Case III or as annual profits or gains under Case VI of Schedule D.

In the alternative it was contended on behalf of the executor :

(*a*) that if the royalties were annual payments falling within Case III of Schedule D then insofar as they were payable wholly out of profits or gains brought into charge to tax no assessment could be made upon the executor ;

(*b*) that if the royalties were annual profits or gains falling within Case VI of Schedule D they must be considered as accruing from day to day and be computed so far as concerned the year 1951–52 by excluding such portions of the royalties as had accrued to the date of Peter Cheyney's death.

4. It was contended on behalf of the Inspector of Taxes that the sums in question received by the executor which arose from agreements entered into by Peter Cheyney were annual payments assessable under Case III of Schedule D, or in the alternative that these sums were assessable under Case VI of Schedule D.

5. The following cases were referred to :

Purchase v. *Stainer's Executors,* 32 T.C. 367 ; [1952] A.C. 280.

Bennett v. *Ogston,* 15 T.C. 374.

6. Particulars of the four agreements referred to in paragraph 2 (*b*) hereof and forming exhibit A to this Case[1] are as follows :

Memorandum of agreement made 9th September, 1942, between Peter Cheyney and Faber and Faber, Ltd.

Memorandum of agreement made 19th September, 1950, between Peter Cheyney and William Collins, Sons & Co., Ltd.

Memorandum of agreement made 12th March, 1946, between Peter Cheyney and Dodd Mead and Co., Inc.

Memorandum of agreement made 4th November, 1947, between Peter Cheyney and Les Presses de la Cité.

7. We, the Commissioners who heard the appeal, adjourned the same for consideration and on 19th April, 1956, gave our decision as follows.

This is an appeal brought by the executor of R. E. P. S. Cheyney, who died on 26th June, 1951, concerning assessments raised against him under Schedule D, Case VI, on certain royalties received by him after the date of death. The assessments totalled £10,000 for the year 1951–52 and £18,000 for the year 1952–53.

The deceased was an author who in the course of his profession had entered into some 50 or 60 contracts with publishers to write books and the royalties were received by the executor as a result of those contracts. It was agreed that four only of such contracts should be used in evidence. The actual sums were £11,725 19*s.* 10*d.* for the year 1951–52 and £12,026 0*s.* 5*d.* for the year 1952–53.

There is no dispute between the Inland Revenue and the executor about the facts of this appeal or as to the sums mentioned above and no witnesses have been called to give evidence.

It is the executor's case that these royalties are not subject to tax because they were solely remuneration earned by the deceased in his lifetime in following his profession as an author ; and that, his profession having come to an end with his death, they cease to be taxable under Case II or any other

[1] Not included in the present print.

Case of Schedule D. The executor relied entirely on the case of *Purchase* v. *Stainer's Executors,* 32 T.C. 367, reported as *Gospel* v. *Purchase,* [1951] 2 All E.R. 1071.

For the Crown it was contended that there was a difference between that case and the case now under appeal, and that a distinction could be drawn although there was a surprising similarity of facts. We were told that if the executor was right there would have been created a fount of untaxed income for a period of 50 years after the deceased's death. It was also argued that an author is not paid for writing but for producing an asset in the form of a copyright which is exploited by agreements producing royalties.

We were referred to *Bennett* v. *Ogston,* 15 T.C. 374, which concerned assessments to tax on the interest carried by certain promissory notes taken by a moneylender in the course of his business, the interest being subsequently received by his executors. The Crown invited us to say that a parallel could be drawn in this case ; that just as the promissory notes continued to produce interest or income, so do the copyrights created by an author, and that the copyrights themselves were income-bearing assets. In view of the decision in *Stainer's* case the Crown were unable to argue that the deceased's contracts were themselves income-bearing assets. If we accept the Crown's contention, then the royalties would fall to be taxed under Cases III or VI as being receipts arising from a different source from those under Case II.

In our opinion Peter Cheyney derived his remuneration during his lifetime from his professional activities as an author in writing books, whether pursuant to agreements or otherwise. When he wrote them, either before or after entering into contracts, he created copyrights. It is our view that a copyright, whether in the manuscript of a book or a piece of music, has only a potential value in producing capital money or income, according to how and when or maybe where it is used or exploited. Some further act is necessary, apart from writing the words or music, in order to procure some monetary reward for the work. In the words of Lord Asquith in *Stainer's* case(1), it does not by its independent vitality generate income. It does not, therefore, in our view fall within this definition and become an income-bearing asset any more than does the contract which may have brought the writing and thus the copyright into existence.

We have decided that these sums were, as in *Stainer's* case, the rewards for professional services rendered or carried out by the deceased in his lifetime and his death did not alter or change the nature or character of the payments so as to make them taxable under Case III or Case VI.

The appeal will therefore be allowed, and the assessments made upon the executor in respect of each of the two years under appeal will be discharged so far as those assessments relate to royalties from contracts entered into by the deceased.

We left the figures of the assessments in respect of royalties from contracts made by the executor to be agreed between the parties.

8. On 31st May, 1956, when the appeal came before us for final determination, we discharged the assessments for the two years under appeal so far as those assessments related to royalties received by the executor from contracts made by Peter Cheyney, and so far as they related to royalties arising from contracts made by the executor we determined the assessments at £598 for the year 1951–52 and £2,195 for the year 1952–53.

(1) 32 T.C. 367, at p. 412.

9. The Inspector of Taxes immediately after the determination of the appeal declared to us his dissatisfaction therewith as being erroneous in point of law and in due course required us to state a Case for the opinion of the High Court pursuant to the Income Tax Act, 1952, Section 64, which Case we have stated and do sign accordingly.

The question of law for the opinion of the Court is whether our decision as set out in the last two preceding paragraphs is erroneous in point of law.

Wm. A. Hurst
Percy W. Straus
A. L. Priest
H. J. Lester
} Commissioners for the General Purposes of the Income Tax for the Division of Bromley in the County of Kent.

22nd February, 1957.

The case came before Harman, J., in the Chancery Division on 3rd and 4th June, 1957, when judgment was reserved. On 6th June, 1957, judgment was given against the Crown, with costs.

Mr. Hilary Magnus, Q.C., Sir Reginald Hills and Mr. Alan Orr appeared as Counsel for the Crown, and the Hon. B. L. Bathurst, Q.C., and Mr. C. N. Beattie for the taxpayer.

Harman, J.—This is an appeal by the Crown from a decision of the General Commissioners of Income Tax in favour of the executor of the late Peter Cheyney arising out of receipts by him of large sums in the Income Tax years 1951–52 and 1952–53 representing periodical payments arising out of contracts made by Mr. Cheyney during his lifetime in the course of carrying on his profession as an author. The point may be shortly stated, though none the easier for that. It is whether these payments are to be regarded as remuneration for personal services or professional activities of the deceased received after the cesser of the professional activity, or whether they should be regarded as moneys arising from the exploitation of the author's property, namely the copyrights in sundry of his books.

The facts are stated in the Case, to which are annexed four representative contracts, agreed to illustrate all the contracts made by the author producing money in the years in question. There is, as it seems to me, a considerable difference between the first three agreements and the fourth, for the first three deal with works to be written and in which, therefore, no copyright or property could exist when the agreements were made, whereas the fourth agreement deals with the exploitation in the French language of an existing work being itself the subject-matter of copyright, though the proposed translation would, when made, have copyright of its own.

It is the contention of the taxpayer that the decision of the House of Lords in the case of *Purchase* v. *Stainer's Executors*, 32 T.C. 367; [1952] A.C. 280, which is, of course, binding upon me, is indistinguishable from the present case. That case concerns receipts by his executors arising out of the professional activities of a film actor known as Leslie Howard, and certainly bears a strong resemblance to the present case. The actor there agreed to perform in and to produce certain film stories in consideration of remuneration which in part was dependent upon the success of the films and the profits which might be derived from their exploitation. It was, as the House of Lords held, an agreement for personal services, the written contracts simply

providing the machinery by which the services were to be remunerated. When the actor died, the results of his professional activities were still in the course of being exploited. He had done everything which the contracts demanded of him, and the payments after his death were, as the House of Lords held, merely residual receipts arising out of his professional activities, and as such not the subject-matter of taxation. This principle is well stated by Rowlatt, J., in *Bennett* v. *Ogston,* 15 T.C. 374, at page 378, and as this is a classic statement on the subject I think I should read it again :

> " When a trader or a follower of a profession or vocation dies or goes out of business . . . and there remain to be collected sums owing for goods supplied during the existence of the business or for services rendered by the professional man during the course of his life or his business, there is no question of assessing those receipts to Income Tax ; they are the receipts of the business while it lasted, they are arrears of that business, they represent money which was earned during the life of the business and are taken to be covered by the assessment made during the life of the business, whether that assessment was made on the basis of bookings or on the basis of receipts."

The subject-matter of each of the agreements in *Stainer's* case(1) was a film to be brought into existence. This it was which could be exploited and produce income, and not the mere posturings of the actor. Nevertheless the House of Lords held that the payments were not payments arising from the exploitation of the film, but payments for the services of the actor. So here it is said that in the first three cases anyhow the author agrees to bring into existence a book or books and to give the right of publishing to the publisher, being remunerated on a royalty basis, and that the royalties are payments for the services rendered by the author in writing the book and are not to be treated as the income of property, namely the copyright.

Again, it is agreed that during the professional life of the actor in *Stainer's* case and during the professional life of the author in the present case the receipts from agreements of this sort were part of professional remuneration and were taxable under Case II of Schedule D accordingly. Now, the House of Lords held in *Stainer's* case that the payments were mere professional remuneration and therefore could not be taxed under any but Case II, and as it was admitted that taxation under that Case must cease when death caused the end of the professional activity it followed that the Crown had exacted all the tax exigible and could not tax the same subject-matter again by having recourse to Case III or Case VI. The same is said to be true here. These royalties were not taxable under Case III or Case VI during the author's lifetime because they were not what Lord Greene, M.R., in *Asher* v. *London Film Productions, Ltd.,* [1944] 1 K.B. 133, at page 140, styled " pure income profit " : in other words, the expenses of carrying on the profession could be deducted before paying the tax. It is argued that the same subject-matter, namely payments under these contracts which would have been taxable under Case II had the author lived, cannot change their nature and become taxable under Case III because he is dead.

The Crown on its side seeks to distinguish *Stainer's* case and relies on *Bennett* v. *Ogston.* That was a case of a moneylender who when he died had outstanding promissory notes on which the debtors continued to pay interest, and it was held that his executors were liable to pay tax under Case III although in his lifetime the interest on the notes had been taxed under Case I as part of the profits of the moneylender's trade. Now, if this be right, and in spite of hesitation expressed by Lord Simonds, L.C., in *Stainer's* case, [1952] A.C. 280(2), I do not feel at liberty to say that it is not, it seems to show that at least one class of payment, namely " interest of

(1) 32 T.C. 367. (2) At p. 288; 32 T.C. 367, at p. 411.

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money", may be taxable under Case III after the trading activity has ceased though taxed under Case I while a trade was in progress. It was easy to see in that case that debts outstanding at the moneylender's death earning interest by virtue of the promissory notes continued to be a taxable subject-matter. So, says the Crown, royalties outstanding at the death may be taxed under Case VI. The former is the result of a trade activity, namely moneylending, and the latter the result of a professional activity, namely the writing of books. The distinction seems to me to be an extremely fine one, and to be well expressed by Jenkins, L.J., in *Stainer's* case in these words[1], after discussing *Bennett v. Ogston*[2]:

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

Now, so far as the classes represented by the first three contracts here are concerned, I feel that the royalty payments ought to be regarded as professional remuneration to the author for his services to be rendered in writing the book contracted for. In these cases there was nothing in the nature of copyright in existence to be exploited like the money in the moneylender's case, and I think they fall within the second category specified by the Lord Justice. I feel much more doubt about the fourth case because there was already at the date of the contract a subject-matter, namely copyright, in existence, which it may be said that the owner was exploiting. In other words, this was not a contract for services to be rendered, but a contract to receive payments for a licence to be given. On the whole, however, I feel that the distinction is too fine and that all the contracts should be looked at as part of the professional activities of the author. These should be taxed year by year, and if the Crown did not take these potential receipts into account while the professional activities were continuing it must be taken to have exacted all the tax exigible and cannot by appealing to another Case exact further tax for the same activity. It is to be observed that in at least one of the instances in *Stainer's* case the scenario of the film (in itself the subject-matter of copyright) was in existence and was the actor's property, but this was held to make no difference.

I think I ought, before concluding, to read the speech of Lord Asquith in *Stainer's* case, [1952] A.C. 280[3]. His Lordship said this:

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

He then cites the passage I have already read in *Bennett* v. *Ogston*[4], and continues:

> "It is, however, contended by the Crown that in *Bennett* v. *Ogston* the reason why the principle involving exemption did not apply was that when the moneylender died there was outstanding an income-bearing asset (namely, that part of the principal which was then unrepaid) which continued to earn income, as it were, in its own right. It was argued for the Crown that the same was

(1) 32 T.C. 367, at p. 404.
(2) 15 T.C. 374.
(3) At pp. 290–1; 32 T.C. 367, at p. 412.
(4) 15 T.C. 374, at p. 378.

> the case here, the income-bearing asset consisting of the contracts made by Leslie Howard whereunder the payments in question were posthumously made. There seems to me, however, to be a very clear distinction between 'income-bearing assets' for the purpose of this type of case and the contracts in question. If Mr. Leslie Howard had stipulated for payment in blocks of shares or bonds, or any other instruments which by their independent vitality generate income, the dividends or interest might well have been taxable in the hands of his executors. The contracts in the present case enjoy, in my view, no such independent vitality. The consideration for what Mr. Howard was to do—to act or manage—was not the grant of a contract or contracts but the payment of money under the terms of those contracts. Mr. Howard acted for money; he did not act for contracts. The contracts were mere incidental machinery regulating the measure of the services to be rendered by him on the one hand and, on the other, that of the payments to be made by his employers; they were not the source, but the instrument of payment, and his death, in my view, did nothing to divest them of that character."

Every word of that could serve for a description of the present case, and I think I am bound by it to hold that the conclusion I ought to reach must be the same and to dismiss this appeal, which I do.

Mr. B. L. Bathurst.—Will your Lordship dismiss the appeal with costs?

Harman, J.—Yes.

The Crown having appealed against the above decision, the case came before the Court of Appeal (Jenkins, Parker and Pearce, L.JJ.) on 2nd and 3rd October, 1957, when judgment was reserved. On 21st October, 1957, judgment was given unanimously against the Crown, with costs.

Mr. Hilary Magnus, Q.C., and Mr. Alan Orr appeared as Counsel for the Crown, and the Hon. B. L. Bathurst, Q.C., and Mr. C. N. Beattie for the taxpayer.

Jenkins, L.J.—The judgment I am about to read is the judgment of the Court.

This is an appeal by the Crown from a judgment of Harman, J., dated 6th June, 1957, affirming a decision of the General Commissioners of Income Tax for the division of Bromley, Kent, in favour of the Respondent, who had appealed against assessments to Income Tax, Schedule D, for the years 1951–52 and 1952–53 made upon him as sole surviving executor of the will of the late Mr. Peter Cheyney, a well-known author of detective fiction, in respect of royalties received by the Respondent after Mr. Cheyney's death under contracts with publishers made in his lifetime.

Mr. Cheyney died on 26th June, 1951. It is common ground that down to the date of his death he had been carrying on the profession of an author, and accordingly that during his lifetime the royalties received by him under his contracts with the various publishers of his works were properly assessable under Case II of Schedule D as profits of his profession, and not as annual payments under Case III or, as annual profits or gains not falling under any other Case and not charged by virtue of any other Schedule, under Case VI. During the continuance of the profession Case VI was by definition excluded because the royalties fell under Case II, and Case III had no application because Case II applied, and accordingly the proper subject of tax was not simply the amount of the royalties received

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under each of the various contracts considered individually, but consisted of the balance of profit arising from the totality of Mr. Cheyney's professional activities, arrived at by deducting from the aggregate of his professional receipts the aggregate of the outgoings properly allowable as expenses of his profession : see *Davies* v. *Braithwaite,* 18 T.C. 198 ; see also *Asher* v. *London Film Productions, Ltd.,* [1944] 1 K.B. 133, at page 140, where Lord Greene, M.R., distinguishes annual payments constituting " pure income profit ", and as such taxable under Case III, from payments which are merely an element in the computation of profits and accordingly are not so taxable.

This having admittedly been the position as regards royalties received in Mr. Cheyney's lifetime, the question in the case is whether, as is contended on the part of the Crown, the discontinuance of Mr. Cheyney's profession by reason of his death had the effect of changing the character of the royalties thereafter received from that of profits or gains of Mr. Cheyney's profession to that of annual payments taxable under Case III or alternatively of annual profits or gains taxable under Case VI. This very question was, on closely comparable facts, decided against the Crown by the House of Lords in *Purchase* v. *Stainer's Executors,* 32 T.C. 367, at page 408. The Commissioners and the learned Judge regarded the present case as concluded against the Crown by that authority, which is, of course, binding upon us as it was upon them. Mr. Magnus, on behalf of the Crown, sought to persuade us that this case was distinguishable on its facts from *Purchase* v. *Stainer's Executors* and that we were free to decide it, and ought on the merits to decide it, the other way. We are not so persuaded.

In order to do justice to Mr. Magnus's submission it will be necessary to make a comparison between the facts of the two cases, but before doing so we should refer to a passage, quoted in both of them, from the judgment of Rowlatt, J., in *Bennett* v. *Ogston,* 15 T.C. 374, at page 378, which was accepted by the House of Lords in *Purchase* v. *Stainer's Executors* as embodying a correct statement of the relevant principle of Income Tax law : see *per* Lord Simonds, L.C., 32 T.C. 367, at pages 410–11, and *per* Lord Asquith of Bishopstone, at page 412. In *Bennett* v. *Ogston,* at page 378, Rowlatt, J., said this :

> " When a trader or a follower of a profession or vocation dies or goes out of business—because Mr. Needham is quite right in saying the same observations apply here—and there remain to be collected sums owing for goods supplied during the existence of the business or for services rendered by the professional man during the course of his life or his business, there is no question of assessing those receipts to Income Tax ; they are the receipts of the business while it lasted, they are arrears of that business, they represent money which was earned during the life of the business and are taken to be covered by the assessment made during the life of the business, whether that assessment was made on the basis of bookings or on the basis of receipts."

We should add that the particular case before Rowlatt, J., was concerned with the question whether the interest element in instalments on promissory notes falling due after the death of a deceased moneylender and collected by his executors was taxable in their hands as " interest of money " under Case III of Schedule D or was simply a deferred receipt of the discontinued business and as such not taxable under that Case ; and that after stating the principle to be applied in the passage quoted above he went on to decide that question in favour of the Crown in the following words (at page 378) :

> " But this is not that case ; because here the interest in question is not the accrued earnings of the capital during the life of the deceased or the time

> the business was carried on; it is the earnings of the capital, or so much as is left of it since the death, and this interest has been earned over the time which has elapsed since the death."

And on the next page he said:

> "I think when you are dealing with what is interest and nothing but interest you cannot say it is in the nature of business, because it is payment by time for the use of money."

While accepting as correct Rowlatt, J.'s statement of the principle to be applied, Lord Simonds, L.C., in *Purchase* v. *Stainer's Executors,* 32 T.C. 367, at pages 410–11, expressed a doubt, which he found it unnecessary to decide, on the question whether the learned Judge correctly applied the principle in the case before him. But so far as the principle itself is concerned, *Purchase* v. *Stainer's Executors* must be taken as establishing the general proposition that where after the discontinuance of a business or profession sums are received which represent money earned during the life of the business or profession they are not assessable to tax but are taken to be covered by the assessment made "during the life of" (that we take to mean, down to the date of discontinuance of) "the business". Moreover, in view of the nature of the receipts with which *Purchase* v. *Stainer's Executors* was concerned, that case must further be regarded as establishing that this general proposition is not displaced by the circumstance that the receipts in question are periodical payments in the nature of royalties or shares of profits which are not payable or quantified or capable of quantification until after the date of discontinuance. After referring to *Bennett* v. *Ogston*[1], Lord Simonds, L.C., at page 411, said this:

> "If so"

—that is to say, if Rowlatt, J., had correctly stated the relevant principle—

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

We will return later to Rowlatt, J.'s actual decision in *Bennett* v. *Ogston,* on which some reliance was placed by Mr. Magnus.

We now pass to a comparison of the facts of the present case with those of *Purchase* v. *Stainer's Executors.* As to the latter, Leslie Howard Stainer, better known by his professional name of Leslie Howard, was a distinguished film actor and producer whose profession was discontinued by his death in 1943. Prior to his death he had in the ordinary course of his profession entered into certain contracts with film-producing companies under which he was to render services, in the shape of producing, directing and acting in specified films, for remuneration which included percentages or shares of the profits or receipts to be derived from the exploitation of the films when made. It appears that in one instance Mr. Howard was the owner of the story and shooting script of the proposed film, both of which he was to assign to the company, but no part of the payments to be made by the company was expressed to be attributable to this assignment as distinct

(1) 15 T.C. 374.

(Jenkins, L.J.)

from the services to be rendered by Mr. Howard. In each case the copyright in the film when completed was to belong to the company. Mr. Howard in each case duly performed the services contracted for. After his death sums were from time to time received by his executors in respect, *inter alia*, of the percentages or shares of profits or receipts payable under the contracts in question. It is to be observed (*a*) that the contracts gave Mr. Howard no proprietary interest in the completed films; (*b*) that in the one case in which he owned the story and shooting script the contract required him to make it over to the company; (*c*) that the percentages or shares of profits were in the nature of remuneration for services, save in so far as some undefined part of such payments in the case in which he owned the story and shooting script should be held attributable to his assignment of those items to the company; and (*d*) that the amounts which might from time to time be received by the executors by way of percentages or shares of profits were unpredictable, depending as they did on the popularity of the films and the energy and success with which they might be exploited.

As to the facts of the present case, we would refer to paragraph 2 of the Case stated by the General Commissioners, which reads as follows:

> "The following facts were admitted or proved: (*a*) Reginald Evelyn Peter Southouse Cheyney (hereinafter called Peter Cheyney) was a well-known writer of detective fiction, who died on 26th June, 1951. (*b*) During his lifetime Peter Cheyney had entered into some 50 to 60 agreements with publishers to write books or for the publication of books already written. Four only of such agreements were put in evidence, and it was agreed between the parties that the decision of the Court as regards sums paid under those four agreements should apply to moneys paid under all other agreements, unless the Court should distinguish one of these four agreements from another. All the agreements made by the deceased from which royalties arose could, as regards form, be classified into one of the categories of which these four agreements are representative. There were also produced to the Commissioners lists of the titles of books to which the representative royalty agreements refer and of the amounts received. These lists are not exhibited but may, if necessary, be referred to as part of the Case. (*c*) Peter Cheyney during his lifetime was assessed under Case II of Schedule D in respect of the royalties he received from his said agreements as being profits arising from the carrying on of his profession as an author after deducting therefrom all proper and allowable expenses of carrying on such profession, and the Crown admitted that he was properly so assessed. For the purpose of computing the Case II tax liability the rule consistently followed was to credit the copyright royalties as receipts on the day they fell due for payment under the agreements with the publishers. (*d*) The assessments for the two years in question comprised sums received by the executor from contracts made by Peter Cheyney and also sums received by the executor from contracts which he had entered into with the publishers subsequently to Peter Cheyney's death. In respect of sums received under contracts made by the executor, the executor admitted his liability to tax under Schedule D. . . . ."

There are certain qualifications to that to which I need not refer.

We should next refer to the four specimen agreements with publishers exhibited to the Case. The first of the specimen agreements, dated 9th September, 1942, and made between Mr. Cheyney (therein called "the Author") and Faber and Faber, Ltd. (therein called "the Publishers"), was expressed to relate to a work provisionally entitled "Making Crime Pay" which was to be written by Mr. Cheyney. By clause 1 the author granted to the publishers

> "the sole right of publishing and selling the said work in volume form in the English language for the period of unrestricted copyright throughout the world except the United States of America."

By clause 2 the author was to deliver to the publishers the manuscript of the said work by 31st January, 1943. By clause 3 the publishers agreed to publish the said work within six months of the delivery of the manuscript

to them unless prevented by circumstances beyond their control, and reserved to themselves the final decision on all other details of publication and on the issue price of subsequent editions. By clause 4 the publishers agreed during the term of unrestricted copyright to make payments to the author in the shape of royalties consisting of specified percentages of the published price, or in certain circumstances of the amounts received by the publishers, in respect of all copies sold. The author was to receive £250 at the time of publication on account of and in advance of royalties. By clause 5 all details as to the manner of production, publication and advertisement were to be left to the discretion of the publishers, who were to bear all expenses in connection therewith. Clause 6 contained machinery for the calculation and payment of the sums from time to time due to the author in respect of royalties. Clause 7 gave the author certain rights to receive copies free or at reduced prices. Clause 8 contained a provision for the reverter of all rights in the work to the author if the work should be out of print and the publishers should not within six months from the receipt of a written notice from the author issue a new edition, or if the publishers should fail to make accountings and payments as therein provided within one month of receipt of written notification of any such default. Clause 9 contained a warranty by the author that the work was not a violation or infringement of any existing copyright or proprietary right at common law and contained nothing obscene, indecent or libellous. Finally, clause 10 related to the correction of proofs by the author.

The second specimen agreement, dated 19th September, 1950, and made between Mr. Cheyney (" the Author ") and William Collins Sons & Co., Ltd. (" the Publishers "), related to five novels to be written by the author, and as in the case of the first specimen agreement the grant of copyright contained in clause 1 was limited to the publication of the five novels in question in volume form throughout the world with the exception of the United States of America. It contained in clause 4 more elaborate provisions for the payment of royalties by the publishers, which in some instances were to be in the form of percentages of the price of copies sold and in others in the form of a fixed sum per copy sold, and also a provision for the payment in advance of royalties of the sum of £1,500 on delivery of the manuscript of each novel to the publishers. There was in clause 10 an express reservation to the author of all dramatic, cinematograph, serial, translation and other rights not specifically granted. There were in clauses 9 and 11 comparable provisions for reverter. Although different in form, we do not think that the second specimen agreement is for the present purpose distinguishable from the first in any material respect.

The third specimen agreement, dated 12th March, 1946, and made between Mr. Cheyney (" the Author ") and Messrs. Dodd Mead and Co., Inc. (" the Publishers "), in this instance an American company, related to four works to be delivered by the author to the publishers which the publishers were to publish within eight months of the delivery of each work. The copyright granted by the author to the publishers (by clause 1) comprised the exclusive right of printing and publishing the works in volume form in the United States of America. As in the other agreements, the author was (by clause 6) to be remunerated on a royalty basis dependent on copies sold, with a provision for a specified payment in advance of royalties (clause 7). There were comparable provisions for reverter to the author in certain events (clauses 11 and 12). By clause 14 the proceeds of sale of selection, abridgement, digest and second serial rights were to be equally divided between the author and the publishers, and by clause 15 the right of translation,

dramatisation and all other rights not specified in the agreement were expressly reserved by the author. Again we do not think there is for the present purpose any material point of distinction between the third agreement and the first, although different in form.

The fourth specimen agreement, dated 4th November, 1947, was made between Mr. Cheyney (therein called " the Proprietor ") and Les Presses de la Cité (" the Publishers "), in this instance a French firm. The proprietor granted to the publishers the sole licence to translate and publish the work " Making Crime Pay " in volume form in the French language for a payment of 50,000 francs in advance of royalties and a royalty of 12 per cent. on the published price of every copy sold in the French translation up to 5,000 copies, and 15 per cent. on all copies sold thereafter. The publishers were to bring out their edition of the work within six months of the date of the agreement (clause 4), and by clause 6 it was provided that the translation of the work should be made faithfully and accurately and that abbreviations or alterations should only be made in the text with the written consent of the proprietor or his agent. There were provisions in clauses 8 and 10 for the termination of the licence in the event of the publishers not issuing their edition within six months, the work going out of print or the publishers becoming bankrupt or committing any breach of the agreement.

It is to be observed that the first and second specimen agreements related to works to be written by Mr. Cheyney. It seems probable that the third also in fact related to works to be written, although it only refers in terms to the delivery of the works in question. On the other hand, the fourth specimen agreement is simply a licence of the French language rights in an existing work.

Laying side by side the facts of *Purchase* v. *Stainer's Executors*[1] and those of the present case, we ask ourselves whether such differences as there are between them would suffice to justify this Court in reaching a different conclusion here from the conclusion reached by the House of Lords in *Purchase* v. *Stainer's Executors*. What are the differences? Mr. Howard was a professional film actor and producer. His profession consisted in producing and acting in films for reward. Mr. Cheyney was a professional author. His profession consisted in the writing of literary works for reward. The sums sought to be taxed in Mr. Howard's case, so far as now material, consisted of percentages or shares of the profits arising from the exploitation of films to the making of which he had contributed his professional services as an actor or producer or director, and constituted his reward for those services. The sums sought to be taxed in the present case, so far as the contracts made in Mr. Cheyney's lifetime are concerned, consisted of royalties based on sales of books written by him in the ordinary course of his profession, and constituted his reward for his professional activities in the shape of the writing of those books. Indeed, in those instances in which the books dealt with by Mr. Cheyney's contracts with publishers were yet to be written, one may say that the royalties constituted, in part at all events, remuneration for his professional services in writing the books. In each case everything required to be done by Mr. Howard or Mr. Cheyney in order to earn the sums in question had been done during the continuance of the profession. In each case the sums in question were in the nature of periodical payments which did not become payable, and were not quantified or capable of quantification, until after the profession had been discontinued.

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(1) 32 T.C. 367.

So far the parallel between the two cases seems as close as it well could be, given the differences in the character of the two professions. We can found no material distinction on the circumstance that, whereas the sums in question in Mr. Howard's case can be described with complete accuracy as remuneration for professional services, the sums in question in Mr. Cheyney's case are more aptly described as the reward for his professional activities. It is clear that the principle stated in *Bennett* v. *Ogston*[1] applies to professional activities whether or not they consist of the rendering of services: see *per* Lord Simonds, L.C., in *Purchase* v. *Stainer's Executors*, 32 T.C. 367, at page 411, in the passage already quoted, where he says of the payments in Mr. Howard's case that they

> "retained the essential quality of being the fruit of his professional activity":

see also the second paragraph of Lord Asquith's speech, at page 412, where he says:

> "It seems quite clear that the payments whose liability to tax is in issue were exclusively the fruit or aftermath of the professional activities of Mr. Leslie Howard during his lifetime."

Mr. Magnus has argued that there is an essential ground of distinction between the two cases. He says that, whereas the sums in question in Mr. Howard's case were simply and solely remuneration for professional services rendered during the continuance of the profession, the sums in question in Mr. Cheyney's case were payments for property in the shape of the copyrights. He puts it that every time Mr. Cheyney wrote a book he created for himself property in the shape of the copyright in the work, and that the copyright in each work as and when brought into existence constituted a potential source of income which became an actual source of income when a contract providing for royalty payments was entered into with a publisher. Therefore, says Mr. Magnus, the royalties in the present case were income from property, namely the copyrights. He admits that during the continuance of the profession the royalties received were receipts of the profession to be included in the computation of its profits under Case II of Schedule D and could not be taxed under Case III or Case VI; but he says that on discontinuance the royalties lost their character as profits or gains of the profession and became simply income from property, namely the copyrights, which thenceforth were substituted for the profession as their source and as such became taxable under Case III or Case VI.

We do not feel able to accept this argument consistently with the speeches in *Purchase* v. *Stainer's Executors*. We quote again from the speech of Lord Simonds, L.C., 32 T.C., at page 411, where he said:

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

(1) 15 T.C. 374.

(Jenkins, L.J.)

> for the Crown, with the argument that the remuneration of Mr. Howard took the form of an 'income bearing asset' which became assessable after his death in the hands of his executors. I am not sure that I correctly apprehend the argument, though I can well understand that if a professional man receives as remuneration for his services the sum of £1,000 2½ per cent. Consols. and retains them he will suffer deduction of tax from the interest. But I do not understand in what sense the sums of money receivable by Mr. Howard can be described as an income bearing asset. At one time it appeared to be urged that the several contracts, which at once imposed obligations upon Mr. Howard and created rights in him, were income bearing assets, the income being the remuneration paid under them. Jenkins, L.J., described this argument as 'placing a strained and artificial construction upon these contracts'(1) and I am content to dismiss, without using more vigorous language, a contention that wholly disregards both the forms and substance of the transaction. If I am right in thinking that the sums in question were not assessable under Case III because they were nothing else than remuneration professionally earned by Mr. Howard in his lifetime, this disposes also of the alternative claim under Case VI."

We would refer also to the speech of Lord Asquith, at page 412(2), from which, although it has been set out *in extenso* in the judgment of Harman, J., we venture to quote this passage :

> "Applying this principle"

—i.e., the principle stated in *Bennett* v. *Ogston*(3)—

> "to the facts of the present case *prima facie* the resulting conclusion can only be that the payments in issue escape tax. It is however contended by the Crown that in *Bennett* v. *Ogston* the reason why the principle involving exemption did not apply was that when the moneylender died there was outstanding an income bearing asset (namely that part of the principal which was then unrepaid) which continued to earn income, as it were, in its own right. It was argued for the Crown that the same was the case here, the income bearing asset consisting of the contracts made by Leslie Howard whereunder the payments in question were posthumously made. There seems to me however to be a very clear distinction between 'income bearing assets' for the purpose of this type of case and the contracts in question. If Mr. Leslie Howard had stipulated for payment in blocks of shares or bonds, or any other instruments which by their independent vitality generate income, the dividends or interest might well have been taxable in the hands of his executors. The contracts in the present case enjoy, in my view, no such independent vitality."

It is no doubt true that Mr. Cheyney obtained his royalties by licensing the copyright in his works to publishers. But the copyright did not drop from the skies. It was brought into existence by his professional activity in the writing of books and by nothing else, and it was just as much part of his profession to turn his literary labours to account by licensing the copyright he had created to publishers as it was to write the books in which the copyright subsisted. Mr. Magnus, in reliance on the actual decision in *Bennett* v. *Ogston*, has submitted that the royalties received after Mr. Cheyney's death were in the same case as the interest received after the moneylender's death. The interest, says Mr. Magnus, was taxable because it was attributable to a period subsequent to the discontinuance of the moneylender's business. So here, he submits, the royalties received after the death of Mr. Cheyney were attributable to the use of the copyright for periods subsequent to the discontinuance of Mr. Cheyney's profession. We do not think this comparison is sound. The royalties were not payable by reference to periods of time but by reference to copies sold. They were the measure of the reward to be received by Mr. Cheyney for his professional activity in the production of original and therefore copyright works. If Mr. Cheyney had chosen to license or assign any of his copyright works to publishers for a lump sum, the sum received would have differed from the royalties only in point of

(1) 32 T.C. 367, at p. 405. (2) 32 T.C. (3) 15 T.C. 374.

quantification and mode of payment, and not in the essential character common to both, namely that of a reward for professional activities wholly completed at the date of discontinuance.

Mr. Magnus has also raised an argument based on Mr. Cheyney's residual interests in the copyrights. For example, the rights granted by the first and second specimen agreements were limited to publication and sale in volume form in the English language, while those granted by the third specimen agreement were limited to publication in volume form in the United States of America, with an additional provision for the equal division of the proceeds of sale of selection, abridgement and second serial rights. So, says Mr. Magnus, Mr. Cheyney was left with potential but untapped sources of income in the shape of the rights in other modes of reproduction or in respect of publication in other parts of the world. We do not see that this makes any difference. So far as these residual rights were disposed of on a royalty basis by contracts made during the continuance of the profession they would go to swell the profits or gains of the profession taxable under Case II of Schedule D. So far as they were similarly disposed of by contracts made after discontinuance the proceeds in the form of royalties would admittedly fall within Case III or Case VI of the Schedule. That does not so far as we can see displace the conclusion that on the principle of *Purchase* v. *Stainer's Executors*[1] the proceeds of such contracts as Mr. Cheyney did make during the continuance of his profession were professional earnings and nothing else, whether received before or after discontinuance.

It is interesting to note that in *Purchase* v. *Stainer's Executors,* as reported at [1952] A.C. 280, leading Counsel for the taxpayers at the conclusion of his reply said this (at page 286):

> "These sums are remuneration. The case is not like that of a copyright which resembles a block of shares, acquired in the course of exercising a profession, which afterwards continues to produce income."

This implies recognition that different considerations might apply to a case such as the present one. But it overstates the point in favour of the Crown, inasmuch as copyrights do not produce income "in their own right" or *proprio vigore.* Contracts licensing or disposing of copyrights may result in the receipt by the person licensing or disposing of them of valuable consideration which may be in the form of periodical payments or in the form of a lump sum, and the question is as to the quality or character of those receipts.

We confess we regard this case as perhaps providing a somewhat stronger argument for the Crown than did *Purchase* v. *Stainer's Executors,* but giving the matter the best consideration we can we see no sufficient ground to justify this Court in distinguishing that case, and would accordingly dismiss this appeal.

Mr. B. L. Bathurst.—Your Lordships dismiss the appeal with costs?

Jenkins, L.J.—The appeal should be dismissed with costs.

Mr. Hilary Magnus.—I am instructed to ask your Lordships' leave to go to the House of Lords, and I am authorised to give certain undertakings as to costs.

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(1) 32 T.C. 367.

Jenkins, L.J.—That, I think, would be very proper.

Mr. Bathurst.—If your Lordship pleases. As I see it, this is the third hearing and there has been unanimous opinion all the way along the line. It may well be that this hole in the Income Tax net would be more effectively filled by promoting legislation. I would submit this to your Lordships: it should only be on the footing that they pay the costs in any event.

Jenkins, L.J.—What was the undertaking proposed?

Mr. Magnus.—I was instructed to undertake to pay my learned friend's costs here and below in any event.

Jenkins, L.J.—That is right. That seems to us the proper Order in the circumstances. It is only now that the field has been reached, so to speak, where there can be a wholly unlimited discussion of these matters. It all turns on the fact that there is a decision in the House of Lords which seems to have been close to the one in point.

Mr. Bathurst.—One does feel about these Income Tax cases that there are more possibilities of appeal than in almost any other form of litigation.

Jenkins, L.J.—That is the Order we propose to make.

Mr. Magnus.—If your Lordship pleases.

The Crown having appealed against the above decision, the case came before the House of Lords (Viscount Simonds and Lords Morton of Henryton, Reid, Tucker and Keith of Avonholm) on 27th and 29th October, 1958, when judgment was reserved. On 25th November, 1958, judgment was given unanimously against the Crown, with costs.

The Attorney-General (Sir Reginald Manningham-Buller, Q.C.), Mr. Hilary Magnus, Q.C., and Mr. Alan Orr appeared as Counsel for the Crown, and Viscount Bledisloe, Q.C., and Mr. C. N. Beattie for the taxpayer.

Viscount Simonds.—My Lords, the question for your Lordships' determination is whether the Commissioners for the General Purposes of the Income Tax, Harman, J., and the Court of Appeal were all wrong in holding that the Respondent, who is the executor of a well-known writer of detective fiction known as Peter Cheyney, is not assessable to Income Tax under Schedule D in respect of royalties which were received by him as such executor under contracts made by Peter Cheyney during his lifetime.

I will summarise the facts as they appear in the Case stated by the General Commissioners and the annexed documents. Peter Cheyney was a writer by profession and he carried on his profession, as writers often do, by entering into contracts with publishers, under which in return for royalties of varying amounts the copyright in his works became vested in them. These contracts, which were numerous, took various forms. In some cases, notably in a contract made with Faber & Faber, Ltd., relating to a work described as " provisionally entitled ' Making Crime Pay ' ", the work in question had not yet been written or at any rate not completed at the date of the contract. In

others the work had been completed and there was therefore an existing copyright in it. In one case which has been regarded as demanding special consideration the contract took the form of a licence to translate an existing work into French. Subject to what may be said about the last-mentioned contract, I do not think that any distinction can validly be made between any of the contracts. In all of them the author carried on his profession by exploiting his work in the usual way. A writer might I suppose carry on his profession without doing so, but the Income Tax Acts contemplate the carrying on of a profession for gain, and that is what Peter Cheyney did. He was accordingly assessed during his lifetime under Case II of Schedule D in respect of the royalties so received by him after deducting therefrom all proper and allowable expenses of carrying on his profession. There is no doubt that he was rightly so assessed, and the learned Attorney-General very properly admitted that he could not lawfully have been assessed under any other Case or any other Schedule. It must be recorded also that he was consistently assessed upon a form of receipts basis, being credited with royalties upon the day when they fell due for payment, and no account being taken of the present value of royalties due at a future date. Peter Cheyney died on 26th June, 1951. Royalties falling due under the several contracts after his death were received by his executor, and upon him first and additional assessments were made under Schedule D for the years 1951–52 and 1952–53 in the sums of £10,000 and £18,000 respectively. The question is whether they were rightly made. The executor also received sums in respect of contracts made by him with publishers after Peter Cheyney's death and admitted his liability to assessment in such sums. He may have been right or wrong in doing so. That question has not been in dispute nor have your Lordships seen the contracts. The matter is irrelevant to the present issue.

The assessments for 1951–52 are governed by the Income Tax Act, 1918, and those for 1952–53 by the Income Tax Act, 1952, but there is no material difference between the relevant provisions of the two Acts. It is enough therefore to refer to Section 123 of the 1952 Act, under which Income Tax is chargeable under Case III of Schedule D in respect of

> " any interest of money, whether yearly or otherwise, or any annuity, or other annual payment ",

under Case V

> " in respect of income arising from possessions out of the United Kingdom ",

and under Case VI in respect of any annual profits or gains not falling under any of the Cases I to V and not charged by virtue of Schedules A, B, C or E. It was not stated in the assessments under which of the Cases of Schedule D they were made, and I understand that it is not considered necessary to do so. Before the Commissioners and before the Courts below it was contended that they were properly made under Case III, or alternatively under Case VI. Before this House Case V was also invoked, but in the view which I take nothing turns on this.

My Lords, it was inevitable that a large part of the argument should turn on a recent decision of this House in which two of your Lordships and I took part, the Respondent contending that it governed the present case, the Crown that it was distinguishable. I refer to *Stainer's Executors* v. *Purchase*(1), [1952] A.C. 280. In that case I said that I agreed with and adopted every word of the judgment of Jenkins, L.J., in the Court of Appeal, and I repeat what I then said in regard to the judgment of the Court of Appeal

(1) 32 T.C. 367.

(Viscount Simonds.)

delivered by the same Lord Justice in the present case. I therefore absolve myself from the need to compare at length the facts of the two cases, and will state as shortly as I can the facts and the principles which appear to emerge from the earlier decision.

Stainer's case(1), as I will call it, was concerned with assessments made upon the executors of Stainer, a professional film actor and producer who went by the name of Leslie Howard, in respect of payments made to them under contracts for the exploitation of films to the making of which Leslie Howard had given his professional services as actor or producer or director. The payments consisted of percentages or shares of the profits of exploitation. During his lifetime he was assessed under Case II, his receipts in respect of all his professional activities being brought into account against his proper expenses of carrying on his profession. After his death further payments were made to his executors under the same contracts. It was not suggested that anything further had to be done to earn these payments. They were the reward for Leslie Howard's professional services rendered during his lifetime. It was however contended on behalf of the Crown, just as it has been contended in the present case, that they had after the death of Leslie Howard acquired a new taxable quality, and as they were no longer assessable under Case II, since no profession was being carried on, were assessable under Case III or Case VI. This contention was decisively rejected. Jenkins, L.J., said(2):

> "I think it is equally clear that the assessment to tax of the profits of a profession under Case II of Schedule D down to the date of discontinuance is to be taken as covering all remuneration earned in the course of such profession whether received prior to or after such discontinuance and that, the liability to tax being thus exhausted so far as remuneration is concerned, nothing which is in truth remuneration so earned can afterwards be charged to tax merely because the mode of ascertaining and paying it is such that it might have been charged to tax under some other Case if it had not been remuneration so earned."

In a speech in which the other members of the House concurred I expressed the same view with equal emphasis and less felicity. The principle which emerges is clear. Payments which are in historical fact—I adopt the language of the late Lord Asquith of Bishopstone in the same case—exclusively the fruit or aftermath of professional activities do not change their taxable character when the profession is discontinued.

But there was another aspect of *Stainer's* case which is relevant to the present case. Perhaps it is no more than a different way of stating the same point. It was urged that the contracts made by Leslie Howard were "income-bearing assets" and that the payments made to his executors were the income of such assets. To this the same noble Lord gave an answer which I venture to quote(3), so completely does it dispose of a similar argument in the present case.

"The contracts",

he said,

> "in the present case enjoy, in my view, no such independent vitality. The consideration for what Mr. Howard was to do—to act or manage—was not the grant of a contract or contracts but the payment of money under the terms of those contracts. Mr. Howard acted for money: he did not act for contracts. The contracts were mere incidental machinery regulating the measure of the services to be rendered by him on the one hand, and on the other, that of the payments to be made by his employers: they were not the source but the instrument of payment, and his death, in my view, did nothing to divest them of that character."

(1) 32 T.C. 367. (2) *Ibid.*, at p. 404. (3) *Ibid.*, at p. 412.

(Viscount Simonds.)

My Lords, I do not see how in face of this decision the Crown's argument can succeed without a degree of refinement which is to be avoided in the realm of fiscal law. In *Stainer's* case[1] it could not be denied that the taxpayer acquired under his contracts certain contractual rights nor that those rights could in a certain context be called property. So it was argued that the payments were the income and the contracts were the "income-bearing assets". I will again content myself with the description given to this argument by Jenkins, L.J., and ask how it is to be distinguished from the argument in the present case. When I do so I find myself using again the same language that Lord Asquith used and I used in *Stainer's* case. What else were these payments than the fruit of Peter Cheyney's professional activities? How is it relevant that in order to reap his harvest he had to enter into contracts under which he acquired rights and incurred obligations, as did the publishers with whom he contracted? And how is it relevant that it was a term of those contracts that there should be vested in the publishers a right created by the law to protect him in the exploitation of his work? It was by entering into such contracts that he was able to carry on his profession gainfully. It was because he did so that he was assessable to tax under Case II of Schedule D. I reject therefore the plea that the royalty payments could, whether during the carrying on of the profession or after its discontinuance, be regarded as "income from property" constituting "a substantive subject matter of taxation under Schedule D"—I use the words of the Crown's formal Case. I will only add, in deference to the ingenious argument of the Attorney-General, that the realities of the situation are not changed by saying that the royalties were throughout paid in consideration of the grant of a licence to use copyright and were therefore the income of property, that during the carrying on of the profession they could be regarded as income under Case II, but that having always the character of income of property they became taxable in that character when the profession was no longer carried on. This is really only saying the same thing in other words and is to be similarly answered. First and last and all the time the payments are professional earnings, whatever be the mechanism through which they are paid. Upon this part of the case I will offer a final consideration. In *Stainer's* case I said[2]:

> "If in all the circumstances it was not possible to bring the sums into account in the years in which they were earned . . . the result is not to change the character of the payment but to exhibit that some professional earnings may escape the Income Tax net."

There I believe lies the root of the trouble. *Prima facie* there is no reason why a professional man should not be taxed on an earnings basis, but in the case of an author whose earnings depend on the unpredictable popularity of his books in future years an assessment in the earning year would be so arbitrary as to be patently unfair. But that, I repeat, does not entitle the Crown to regard payments in future years as anything but what they essentially are.

An attempt was made, as I observed some time ago, to distinguish the contract under which Peter Cheyney granted a licence to translate one of his novels into French. Harman, J., felt some difficulty about the royalties paid under this contract, but I have come to the conclusion, as did the Court of Appeal, that the distinction is too fine to be material. It appears to me that by this as by his other contracts the author was exploiting the work of his brain. The fees or royalties that he got were part of his professional earnings and during his life were no doubt included in his assessment under Case II. After his death they cannot validly be distinguished.

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(1) 32 T.C. 367. (2) *Ibid.*, at p. 411.

(Viscount Simonds.)

It is not necessary, my Lords, to say anything about Case VI or Case V. The reasons for dismissing an appeal which relies on Case III are fatal to them also.

In the course of the argument a number of authorities were referred to. Apart from *Stainer's* case[1] and the case of *Bennett* v. *Ogston,* 15 T.C. 374, concerning which I can say no more than I said in *Stainer's* case, I do not think that any of them throw any light on the present problem. I doubt not that in a proper context royalties may be described as income of an investment, as in *Commissioners of Inland Revenue* v. *Sangster,* 12 T.C. 208, nor that, as in *Jarvis* v. *Curtis Brown, Ltd.,* 14 T.C. 744, copyright royalties may be merged in the receipts of a trade, but I do not think that these cases assist in the solution of the problem now before the House.

The appeal should in my opinion be dismissed with costs.

Lord Morton of Henryton.—My Lords, it appears from the Case Stated that during his lifetime Mr. Peter Cheyney had entered into from 50 to 60 agreements with publishers to write books or for the publication of books already written. Four only of such agreements were put in evidence, and it was agreed between the parties that the decision of the Court as to sums paid under these four agreements should apply to moneys paid under all other agreements, unless the Court should distinguish one of these four agreements from another. It was further agreed that all the agreements made by the deceased from which royalties arose could as regards form be classified into one of the categories of which these four agreements are representative. The agreements were exhibited to the Case and marked respectively " A (i) ", " A (ii) ", " A (iii) " and " A (iv) ".

My Lords, as regards the agreements A (i) and A (ii), there is to my mind no valid distinction between the present case and the case of *Stainer's Executors* v. *Purchase,* [1952] A.C. 280 ; 32 T.C. 367. In the present case Mr. Cheyney was remunerated for writing books which were " to be written " ; in *Stainer's* case Mr. Leslie Howard was remunerated for producing or directing or acting in films. It is possible to point to differences in the form which the remuneration took, but in each case the remuneration was for professional activities to be carried out by a man carrying on a profession.

In the case of A (iii) it is not quite clear whether the four works to be " delivered " to the publishers had been written or were about to be written, but I see no reason for assuming, in favour of the Crown, that they had already been written, and the Attorney-General did not at any time seek to distinguish this agreement from A (i) and A (ii). Agreement A (iv) is of a somewhat different nature, in that it related to a work already published entitled " Making Crime Pay ". By the agreement the author granted to the publishers the sole licence to translate the work and publish it in volume form in the French language. It could possibly be said that the author had finished his professional activity in regard to the book by writing it, and that the sums to be received under this agreement were income arising from property, namely from the copyright in the book, within Section 122 of the Income Tax Act, 1952, and were taxable under Section 123 of the same Act, either as coming within Case III or, as the publishers were a French firm, within Case V. However, no point of this kind was raised by the Crown

(1) 32 T.C. 367.

during the author's lifetime, and the Attorney-General did not seek now to draw any distinction between this agreement and the other three. I think it can fairly be said that these sums had

> " the essential quality of being the fruit of his professional activity ",

to quote from the speech of Viscount Simonds, L.C., in *Stainer's* case[1], and none the less so because they were received in respect of a completed work. As Jenkins, L.J., put it in delivering the judgment of the Court of Appeal[2]:

> " It "

—that is the copyright—

> " was brought into existence by his professional activity in the writing of books and by nothing else, and it was just as much part of his profession to turn his literary labours to account by licensing the copyright he had created to publishers as it was to write the books in which the copyright subsisted."

If the sums in question had the quality of professional earnings during the author's lifetime, I cannot see that his death in any way changed their quality.

I would dismiss the appeal.

Lord Reid.—My Lords, Mr. Peter Cheyney, who died on 26th June, 1951, was a well-known author. At that date he had some 50 or 60 agreements with publishers in this country and abroad under which he was entitled to receive from time to time royalties and other sums. During his lifetime he was assessed to Income Tax under Case II of Schedule D in respect of his earnings in his profession of authorship. The " full amount of the profits or gains " of his profession was computed by taking as his receipts in each year all sums falling due to be paid to him during the year under these agreements and deducting all allowable expenses incurred by him during the year. No question arises as to tax due in respect of the period before his death. Royalties due under these agreements continued to be paid to Mr. Cheyney's executor after his death, and in respect of these royalties assessments under Schedule D were made on the executor totalling £10,000 for the year 1951–52 and £18,000 for the year 1952–53. The executor, the Respondent in this appeal, appealed against these assessments, and the assessments were discharged by the Commissioners. An appeal against this decision by the Crown was dismissed by Harman, J., and a further appeal was dismissed by the Court of Appeal on 21st October, 1957.

A taxpayer who in any year earns a right to receive money by trading or by the exercise of his profession may not receive that money or it may not become payable during the year when he acquired the right to receive it. So when his trade or profession is discontinued there may be sums, often large sums, outstanding, and there may also be expenses allowable as deductions which he has not yet paid. The question may then arise whether or to what extent such postponed receipts can be taken into computation for Income Tax purposes. By one method of accounting, his profits or gains during each year can be computed by taking not the sums which he has actually received during the year but the sums which he has earned during the year. Receipts during the year which have been taken into computation in previous years as having been earned then will not swell the computation for the year in question, but this computation will take account of what has been earned during the year in question though not yet received. In that way money

(1) 32 T.C. 367, at p. 411. (2) *See* page 254 *ante*.

(Lord Reid.)

earned during the continuance of the trade or profession but not payable or received until after its discontinuance would not escape from computation for Income Tax. But that method was not adopted in the present case. Probably it could not have been adopted, if only because it was impossible to determine the amount of royalties which might ultimately accrue ; any estimate of their amount would have been a mere guess.

In the ordinary case of professional earnings which are outstanding when the profession is discontinued and which cannot be brought into computation for the period before the discontinuance, it has long been recognised that there is no provision in the Income Tax Acts which subjects them to charge and that they therefore escape from taxation. I need only refer to the statement of the law by Rowlatt, J., in *Bennett* v. *Ogston,* 15 T.C. 374, quoted with approval by my noble and learned friend Lord Simonds in *Stainer's Executors* v. *Purchase,* [1952] A.C. 280, at page 288 ; 32 T.C. 367, at page 410 :

> " When a trader or a follower of a profession or vocation dies or goes out of business . . . and there remain to be collected sums owing for goods supplied during the existence of the business or for services rendered by the professional man during the course of his life or his business, there is no question of assessing those receipts to Income Tax ; they are the receipts of the business while it lasted, they are arrears of that business, . . . and are taken to be covered by the assessment made during the life of the business, whether that assessment was made on the basis of bookings or on the basis of receipts."

That does not expressly deal with the case where the sums remaining to be collected are of such a character that they could be regarded as annual payments.

Turning to the facts of the present case, it appears to me that the first question to be determined is whether these royalties were professional earnings assessable under Case II during Mr. Cheyney's lifetime, and the second question is whether if they were professional earnings they also had some other character by virtue of which they could be assessed to tax under some provision other than Case II, either during his lifetime or later. There is no dispute about the first question. These royalties were in fact assessed under Case II in so far as they were payable during Mr. Cheyney's lifetime. It is not suggested that that was wrong, and I think it was clearly right. One way, and perhaps the commonest way, for an author to make money out of his profession is to make agreements with publishers under which he receives royalties. And it appears to me to be impossible to argue that, though an instalment of royalties payable the day before Mr. Cheyney died was part of his professional earnings, an instalment payable the day after his death was not. It might have some other character in addition, but it could not cease to be a part of his professional earnings.

The question then is whether these royalties had a dual character, whether in addition to being professional earnings they were of such a character that they could be assessed under some other Case than Case II. The assessments which the Crown seeks to support were simply made under Schedule D and they would be valid if they could be justified under any Case of that Schedule. The Attorney-General expressly admitted that during Mr. Cheyney's lifetime they could not have been assessed under any Case other than Case II. In my opinion that admission was properly made, and for this reason. A taxpayer carrying on a profession is entitled to

set against his gross receipts all allowable expenses which he has incurred in earning those receipts. He can do that if assessed under Case II but he could not do it otherwise. The Crown's case must therefore be that, although royalties payable before Mr. Cheyney's death could not be assessed under any Case other than Case II, royalties payable after his death can be so assessed.

It is quite possible for receipts to have such a dual character that the Crown can elect under which Case they shall be assessed. We were referred to some of the insurance company cases where a large part of the receipts of the company consisted of dividends or interest from investments. Instead of assessing the company on the profits of its business under Case I the Crown is entitled to assess under Case III on the amount of the annual payments received by the company. But that right does not arise only after the company has ceased to carry on business; the nature of the payments received by the company is such as to bring them within the scope of Case III whether the company is carrying on business or not. But in the present case it is admitted that that is not so; the nature of these royalties is such that they cannot be assessed under any Case other than Case II so long as the author is following his profession. But it is argued that they can be so assessed after the profession is discontinued. The nature of the royalties does not change on the death of the author; they are still payable under the same contracts and as I have said they are still part of professional remuneration. But the circumstances are different because the profession has been discontinued. No further expenses allowable as deductions can be incurred and assessment under Case II is no longer possible. Can this change of circumstances bring within the scope of Case III payments which had formerly not been within its scope?

That question arose in *Stainer's* case[1]. But before I proceed to examine that case it may be well to see what are the differences between the facts in the present case and the facts in that case. In both cases the payments in respect of which the executors were assessed were payments of royalties due under contracts made by the deceased which only became payable after the date of his death. In *Stainer's* case they were royalties due to a producer of films; in this case they are royalties due to a writer of books. In both cases earlier payments under the same contracts made during the lifetime of the deceased were admittedly part of his professional earnings. In *Stainer's* case the payments had been earned chiefly by Mr. Stainer, who was known professionally as Leslie Howard, giving his professional services as a producer and actor; there was also an element of copyright in the case, but I am prepared to regard *Stainer's* case as simply a case of payment for professional services, the payment taking the form of royalties spread over a considerable period. In the present case there was an element of rendering professional services because some of the contracts were contracts under which Mr. Cheyney undertook to write books for publication by the publishers. But much stress was laid by the Crown on the contention that the contracts were really means adopted by Mr. Cheyney for exploiting property which he had created, his copyright in books which he had written. Some of the contracts were of that character; and if the Crown cannot succeed with regard to these contracts it certainly cannot succeed with regard to the others. So I shall consider the present case on the footing most favourable to the Crown, i.e., that the sums assessed were instalments of fees payable under contracts obtained by

(1) 32 T.C. 367.

(Lord Reid.)

Mr. Cheyney in exploiting his copyright in books written by him by licensing publishers to publish or translate them.

But I must add that even so there is an essential difference between that case and the case of a person who buys a copyright from the author and then proceeds to exploit it by granting licences to publishers. Where the author exploits his own copyright by granting licences to publishers, the fees which he receives are admittedly part of his professional earnings and are not taxable as annual payments under Case III, at least during his lifetime. But where the author sells his copyright, the price which he receives is part of his professional earnings and the fees which the purchaser gets from granting licences to publishers are from the beginning taxable as annual payments to him irrespective of whether the author is still practising his profession. They are no part of the author's professional earnings.

In *Stainer's* case, 32 T.C. 367, the majority of the Court of Appeal held that the payments due after Mr. Howard's death were taxable under Case III as annual payments. I think it useful to take some quotations from the judgments because they appear to me to assist in determining what was really decided in that case in this House. Sir Raymond Evershed, M.R., said, at page 390 :

> " the question in each case must be whether the sums in question, once they have ceased to be capable of taxation under Case II by reason of the fact that the professional man who acquired the right to receive them has died or ceased to exercise his profession, nevertheless have such characteristics as fairly bring them within the compass of the relevant words of Class III " ;

and Somervell, L.J., said, at page 394 :

> " Accepting in favour of the executors the Commissioners' view that these sums, if paid, could not, while Mr. Howard was exercising his profession, have been assessed otherwise than under Case II because they were not in his hands 'pure income profit' (see *Asher* v. *London Film Productions, Ltd.*, [1944] 1 K.B. 133), it does not, in my opinion, follow that their nature may not change if the profession has ceased before they become payable and are paid."

Jenkins, L.J., dissented, and with regard to his judgment my noble and learned friend Lord Simonds said, with the concurrence of all noble Lords present, at page 409:

> " I am conscious that I can add little or nothing to the dissenting judgment of Jenkins, L.J., with every word of which I agree."

I quote two passages from this judgment, the first of which is at page 402 :

> " It appears to me that the argument for the Crown involves not merely the exercise of an option but the assertion of a new and distinct liability to tax arising upon the discontinuance of the profession with respect to payments on account of the shares of receipts or profits received after such discontinuance. Perhaps the best way of putting the point is to describe the shares of receipts or profits as possessing the dual character of (*a*) professional earnings and (*b*) annual payments, the argument being in effect that so long as the profession was carried on their character as earnings precluded their assessment as annual payments under Case III of Schedule D, but that on the discontinuance of the profession this obstacle was removed and the sums in question became thenceforth simply annual payments to which the previously potential but suspended liability to tax under Case III of Schedule D thereupon attached."

Having dealt with *Bennett* v. *Ogston*[1], he noted that the Solicitor-General had argued that the instalments were income earned by the exploitation of the films after Mr. Howard's death, just as the interest in *Bennett* v.

(1) 15 T.C. 374.

Ogston was income earned after the moneylender's death by the use of the money lent in his lifetime. He then said, after dealing with the case of an income-bearing asset received as remuneration—a point to which I shall return later—at page 404(1) :

> "I think it is equally clear that the assessment to tax of the profits of a profession under Case II of Schedule D down to the date of discontinuance is to be taken as covering all remuneration earned in the course of such profession whether received prior to or after such discontinuance and that, the liability to tax being thus exhausted so far as remuneration is concerned, nothing which is in truth remuneration so earned can afterwards be charged to tax merely because the mode of ascertaining and paying it is such that it might have been charged to tax under some other Case if it had not been remuneration so earned."

In this House my noble and learned friend Lord Simonds, after approving the principle stated by Rowlatt, J., in *Bennett* v. *Ogston*(2), expressed a doubt whether that principle was correctly applied in that case—a doubt which I share. He then said with regard to the instalments, at page 411:

> "It appears to me wholly irrelevant that they were not payable until after his death and equally so that they were not and could not be quantified until after that event. They retained the essential quality of being the fruit of his professional activity. . . . The source of these payments was the professional activity of Mr. Howard: it was never anything else. It is true that his remuneration took the form of annual payments which, if other conditions were satisfied, might fall within Case III. But other conditions were not satisfied, for *ex hypothesi* the source of the remuneration was the exercise of a profession falling within Case II."

In my opinion the ground of judgment in this House in *Stainer's* case(3) was that payments which are the fruit of professional activity are only taxable under Case II and cannot be taxed under Case III, even when it is no longer possible when they fall due to tax them under Case II, and when looked at by themselves and without regard to their source they would fall within Case III. I am not sure that I fully appreciate the reasons for the decision but I have no doubt that that is what was decided, and I am bound by that decision whether I agree with it or not.

The basis on which the Crown seeks to distinguish *Stainer's* case is, if I understood the argument rightly, that although payments under the agreements in this case had to be treated as falling within Case II and as excluded from Case III so long as Mr. Cheyney was alive, they were not truly the fruit of his professional activity but were truly the fruit of his exploitation of property. I did not understand the Attorney-General to argue that these payments changed their character when Mr. Cheyney died ; his argument was that they never had been the fruit of professional activity. I must confess that I do not understand how a payment which is not truly the fruit of professional activity can fall within Case II at any time. Section 123 (1) of the Act provides:

> "Tax under Schedule D shall be charged under the following Cases respectively, that is to say— . . . Case II—tax in respect of any profession or vocation not contained in any other Schedule ".

I cannot see how " tax in respect of any profession " can be chargeable in respect of a sum which is not the fruit of a professional activity but is the fruit of something else. It appears to me that once it is established that these payments were properly chargeable under Case II it necessarily follows that they must be regarded as the fruit of professional activity, and if that is so this case appears to me to be indistinguishable from *Stainer's* case.

(1) 32 T.C. (2) 15 T.C. 374. (3) 32 T.C. 367.

(Lord Reid.)

Finally I think that I ought to examine certain statements in *Stainer's* case about income-bearing assets, because the Appellant relied on them. Jenkins, L.J., said, 32 T.C. 367, at page 404:

> "I think it is clear that if, in the course of a profession, an income-bearing asset is received as remuneration, the income produced by that asset after the discontinuance of the profession may be taxed as such, just as the interest accruing after the death of the moneylender was taxed in *Bennett* v. *Ogston*[1]."

Lord Simonds said, at page 411:

> "I can well understand that if a professional man receives as remuneration for his services the sum of £1,000 2½ per cent. Consols. and retains them he will suffer deduction of tax from the interest."

And Lord Asquith said, at page 412:

> "If Mr. Leslie Howard had stipulated for payment in blocks of shares or bonds, or any other instruments which by their independent vitality generate income, the dividends or interest might well have been taxable in the hands of his executors."

To my mind, if a person receives as part of his remuneration an asset which yields income, that income is not the fruit of his professional activity any more than it would be if that person had received his remuneration in money and had then used that money to buy that asset. From the moment when the asset comes into his hands the source of any income which it yields is that asset and not his professional activities. There would be no question of the income falling under Case II during his life and then being taxable under some other Case after his death. The receipt by a professional man of income yielded by an asset which has been transferred to him is not a method of gaining professional income, whether or not the asset came to him as professional remuneration. But for an author exploitation of his copyright is a method of gaining professional income. Therefore this matter is of no assistance to the Crown's case.

I am of opinion that this appeal should be dismissed.

Lord Tucker.—My Lords, I agree for the reasons which have been stated that this case is indistinguishable from the decision of this House in *Stainer's Executors* v. *Purchase*, [1952] A.C. 280, and that accordingly this appeal should be dismissed.

Lord Keith of Avonholm.—My Lords, in the view that I take of this case any differences in the specimen agreements produced are immaterial. All are agreements giving certain rights to publishers in respect of books written or to be written in return for remuneration by way of royalties or sums in advance of royalties on the books when published and sold. Three of the agreements may be regarded as agreements assigning to publishers under certain conditions the copyright in certain books written or to be written, and the fourth as conferring rights of translation and publication in French of a book already published in English.

It is conceded that during his life Peter Cheyney was assessed to tax on the royalties obtained under these agreements under Case II of Schedule D as a person carrying on the profession of author. The question is whether royalties coming in after his death continue to attract tax. In *Stainer's* case it was held that the remuneration accruing after death for services given during life as actor and producer did not attract tax, as the profession in respect of which the profits and gains were taxable had ceased at the death. The Court of Appeal, Harman, J., and the General Commissioners have all taken the view that this case is governed by *Stainer's*

(1) 15 T.C. 374.

case and that the assessment should be discharged. But this case cannot I think be treated as a case of remuneration for services rendered. Some of the agreements relate to books already written and the others relate to rights to be conferred in books when they come to be written. An author is not in my opinion making a contract for services by entering into an agreement for the publication of a book already created by him. The position may approximate to a contract for services where the author binds himself to write a book and to transfer the copyright to a publisher, but I do not find in the agreements here any obligation to write a book. Mr. Cheyney's own interests were no doubt sufficient to secure that the book or books would be written. I prefer to treat the case from the angle of approach taken by the learned Attorney-General, that these are agreements relating to property of Mr. Cheyney already in existence or to come into existence.

The case for the Crown as I understand it is that the activities of Mr. Cheyney during his life had a dual character. They were the exercise of the profession of an author in writing books and they were at the same time a dealing with the property in the books so created. During his life, or until his retirement, it was the professional aspect of his activities with which the Crown was concerned and in respect of which he was taxed. With his death this aspect of the matter terminated or disappeared, and we are left it is said only with property in the shape of the books and copyrights created by him. These, so the argument runs, are income-producing assets, on the income from which tax should be levied as income of property. Thus during his life Mr. Cheyney was assessable under Case II of Schedule D, and on his death the royalties from the contracts made by him arising out of the publication of his books were taxable under Case III as annual payments, or alternatively under Case VI, or in the case of royalties accruing abroad under Case V as income from possessions out of the United Kingdom. The learned Attorney-General expressly disclaimed any right of the Crown to opt between Case II and Case III during Mr. Cheyney's life.

I have reached the view that the contentions for the Crown fall to be rejected. But first I would emphasise that we are concerned only with contracts made by Mr. Cheyney. If there are any unexhausted rights in Mr. Cheyney's books which his representatives could turn to account after his death, quite different considerations would arise with which we are not concerned in this case.

I turn accordingly to consider what is involved in the professional activities of an author during his life. An author writes books generally for profit or in the hope of profit. It is only when they make a profit that any question of assessing him on the profits of a profession can arise. It is only by exploiting the work of his brain and his pen that he can make any professional income. The methods of exploitation may take various forms. He may arrange for publication of his works and retain the profits of sale, after deduction of publishers' and printers' and other expenses, for himself. He may sell the copyright of his works in return for lump sum payments or for royalties on sales or for both. He may grant use of his works for translation, for film or stage production purposes, for broadcasting, or in other ways. He may accept commissions to produce books on agreed terms. Mr. Cheyney seems to have adopted all these methods except possibly the first, according to the specimen agreements put before us. In my opinion, whichever of these methods an author adopts he is doing no more than pursuing his profession with a view to pecuniary profit. It would

(Lord Keith of Avonholm.)

be absurd to treat his professional activities as at an end with the production of his typescript or manuscript, and to treat the rest as merely turning property to gain. An author, unlike an artist, necessarily looks to large-scale reproduction of his book, and the greater the number of copies sold the greater will be his income if he has retained the rights in his work in his own hands or has sold them on a royalty basis. He may of course sell the rights for a lump sum, and history records many instances of an author having thus disposed of the fruits of his labour for a very inadequate sum. In this last example the sum received will be a receipt of his profession in respect of which he will be taxable. Equally he will be taxable on receipts in the shape of royalties received, or on the profits of publication where he has retained his rights in the book. It is impossible in my opinion to treat these receipts differently for Income Tax purposes according to the form which they take. They are stamped throughout as the receipts from a professional activity and they do not lose that character on the death of their producer.

In principle there is no difference between the case where an author sells the copyright and the case where he retains the copyright. What he has produced is not copyright but a book. Copyright is an incident attached by law to the book, fortifying that which he has produced and giving it a value which it would not have if it could be reproduced illegitimately in the shape of pirated editions. The property then from which the author obtains his income is the work produced by him, and the method by which that work can be turned to profit during his life is in his own hands and is but a projection of his professional activities, the means by which he earns his livelihood from his professional work. If I take the case where he retains the rights in his work and takes the profits to himself, it seems to me clear that when he dies any profits that come in afterwards from any issue published during his life are still the profits of what was his profession. It is not possible to say that they are mere income of property, "pure income profit" as it has been called. They are profits not only from writing the book but from bearing all the expenses of selling the book to the public, including the expenses of printing and publishing. They are akin to the profits of a trade but are more properly called the profits of a profession. So it is in my opinion where he sells his rights in return for royalties. It is quite unreal to regard these royalties merely as a return from property. They are the reward for all he has put into his work, his labour, his thought, his skill as a writer, and the expenses incurred in creating his book. The position is materially different where rights in a book in return for royalties are granted by another than the author. The elements to which I have referred are entirely absent in such a case. The book is there already made, and the idea of royalties as merely the income of property is a more intelligible conception. In Mr. Cheyney's case the position is in my opinion accurately and concisely summed up in the words of Jenkins, L.J., when he says(1):

> "it was just as much part of his profession to turn his literary labours to account by licensing the copyright he had created to publishers as it was to write the books in which the copyright subsisted."

He was treated by the Crown as earning money in the exercise of his profession by means of the contracts he made. It is not now said, nor could it in my opinion be said, that any change in the character of the payments received took place on his death. What is said is that what

(1) *See* page 254 *ante*.

was latent became patent when his professional activities ceased on his death. But for the reasons I have given there is in my opinion no sound ground for this contention.

The difficulties in this and similar cases arise from the fact that assessments to tax are made on a receipts basis instead of an earnings basis. It may be that in some professions no more satisfactory basis can be adopted. If the result be as was suggested that a large fund of income is thus to go untaxed, the remedy would seem to lie in legislation. This is not a *Stainer* case(1), but the principle of that case I think applies.

I would dismiss the appeal.

Questions put :

That the Order appealed from be reversed.

The Not Contents have it.

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

The Contents have it.

[Solicitors :—Solicitor of Inland Revenue ; Frere, Cholmeley & Nicholsons.]

(1) 32 T.C. 367.