VOL. X.—PART IV.

No. 542.—High Court of Justice (King's Bench Division).—26th and 27th June, 1924.

Court of Appeal.—14th and 24th November, 1924.

House of Lords.—3rd, 5th and 6th November, and 18th December, 1925.

Brighton College *v.* Marriott (H.M. Inspector of Taxes).[1]

Income Tax—Public school—Profits from school fees—Whether profits of trade—Income Tax Act, 1918 (8 & 9 *Geo.* V, *c.* 40), *Section* 37 (1) (*b*), *and Schedule D—Finance Act*, 1921 (11 & 12 *Geo.* V, *c.* 32), *Section* 30 (1) (*c*).

The Appellant College is a company, limited by guarantee, formed to carry on a public school, and under its Memorandum of Association the whole of its income and property is applied solely towards the promotion of the objects of the College, including the remuneration of its officers and other persons for services rendered.

The College was treated as a trustee for charitable purposes and, as such, was granted repayment of the Income Tax deducted from its rents and dividends.

The fees charged for attendance at the school have in recent years exceeded the current expenses, the surpluses being applied in large part in paying interest on, and in reducing, mortgage debts incurred in connection with extensions and improvements of the College.

Held, *that the surplus fees were profits or gains arising from the carrying on of a trade by the College in respect of which the College was assessable to Income Tax under Schedule D, and that such profits were not exempt from tax either under Section* 37 (1) (*b*) *of the Income Tax Act*, 1918, *or under Section* 30 (1) (*c*) *of the Finance Act*, 1921.

Case

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

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[1] Reported K.B.D., 40 T.L.R. 763, C.A., [1925] 1 K.B. 312, and H.L., [1926] A.C. 192.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 11th January, 1923, at York House, Kingsway, London, for the purpose of hearing appeals, Brighton College, hereinafter called the Appellant College, appealed against an assessment to Income Tax in the sum of £2,389 for the year ending 5th April, 1923, made upon it by the Additional Commissioners of Income Tax for the division of Brighton under the provisions of the Income Tax Acts.

1. The Appellant College is a company limited by guarantee established in the year 1873 under the provisions of the Acts relating to public companies.

The objects for which the Appellant College was established were :—

(*a*) To continue with an improved constitution the Brighton College, which has been carried on since the year 1846 in Brighton.

(*b*) To provide thereby a sound religious, classical, mathematical and general education, in conformity with the doctrines of the Church of England.

(*c*) The doing all such other lawful things as are incidental or conducive to the attainment of the above objects.

2. By the Memorandum of Association of the Appellant College it was provided :—

> " The income and property of the College whencesoever derived shall be applied solely towards the promotion of the objects of the College, as set forth in this Memorandum of Association; and no portion thereof shall be paid or transferred directly or indirectly by way of dividend, bonus, or otherwise howsoever by way of profit to the persons who at any time are or have been Members of the College, or to any of them, or to any person claiming through any of them. Provided that nothing herein contained shall prevent the payment in good faith of remuneration to any officers or servants of the College, or to any Members of the College, or other persons, in return for any services actually rendered to the College."

By Special Licence of the Board of Trade the word " Limited " is omitted from the name of the Appellant College.

A copy of the Memorandum and Articles of Association of the Appellant College, including the said licence of the Board of Trade, is annexed to and forms part of this Case(1).

3. The school known as Brighton College, which was continued by the Appellant College, was founded as a public school in the year 1845 for the purpose of providing for the sons of noblemen and gentlemen a thorough liberal and practical education in conformity with the principles of the Established Church.

(1) Omitted from the present print.

4. This school has been carried on by the Appellant College in all ways in accordance with the said Memorandum and Articles of Association. For the purposes aforesaid, the Appellant College has taken over or acquired school, class-room, workshop, residential, and other premises, and employs a staff of masters and other persons for the instruction and care of the boys under its care.

5. Copies of the accounts of the Appellant College for the three years ending 31st August, 1921 (which are annexed to and form part of this Case(1)) sufficiently show the nature of the receipts and payments made by the Appellant College in the course of so carrying out the objects for which it was established.

6. The Appellant College upon an appeal to the General Commissioners of Income Tax for Brighton has, under No. VI of Schedule A, been exempted from Income Tax in respect of its public buildings, offices and premises.

The Appellant College has also received repayment of Income Tax charged by way of deduction upon certain rents and dividends which it has received and applied to the purposes of the College, on the ground that it falls to be treated as a trustee for charitable purposes.

7. The fees charged for attendance at the school carried on by the Appellant College have varied from time to time, and have in recent years produced surpluses as shown in the first column of the following statement :—

	1	2	3	4	
	Surplus.	*Interest.*	*Principal paid off.*	*Net position.*	
In 1910	1,268	886	—	381	profit
,, 1911	1,548	1,033	500	15 5/-	,,
,, 1912	1,633	1,013	500	119 5/-	,,
,, 1913	1,515	994	500	20 5/-	,,
,, 1914	1,583	1,108	500	24	loss
,, 1915	1,371	1,171	500	300 5/-	,,
,, 1916	1,403	1,151	500	248 5/-	,,
,, 1917	1,781	1,124	500	157	profit
,, 1918	1,901	1,095	500	306 5/-	,,
,, 1919	2,142	1,064	1,000	77 5/-	,,
,, 1920	1,729	1,031	—	697 5/-	,,
,, 1921	6,468	1,310	500	4,657 5/-	,,

These surpluses have been to a large extent expended as shown in the second and third column of the above statement in paying interest on mortgages and repaying mortgage indebtedness, the said indebtedness having been incurred in acquiring property for and in extensions and improvements of the College rendered necessary by the large increase in the number of pupils. The fourth column of the above statement shows the net position after deducting the said interest and mortgage redemption.

(1) Omitted from the present print.

8. It was not now necessary that the parents of pupils should be shareholders and pupils are not required to be nominated by a shareholder. The privileges granted by Clause 9 of the said Articles of Association(1), though still exerciseable and as a fact frequently exercised in past years, were no longer in use.

9. In these circumstances it was contended by Counsel on behalf of the Appellant College at the hearing of the appeal :—

(1) That the Appellant College was not carrying on any trade within the meaning of the Income Tax Acts or at all;

(2) That the council of the Appellant College was administering a charitable trust and was not carrying on a trade;

(3) That the income of the Appellant College consists of (*a*) rents and profits derived from lands which are admittedly exempt from tax and (*b*) other annual payments which are applicable to charitable purposes only and are applied to charitable purposes only (see *R.* v. *Special Commissioners of Income Tax*, Ex. p. *Shaftesbury Homes*(2), [1923] 1 K.B. 393), and

(4) That even if a trade were carried on it consisted of the work of education carried on by a charitable institution endowed to enable masters and boys to carry on that work and the said work was " mainly carried on by the beneficiaries of the charity " within the meaning of Section 30 (1) (*c*) of the Finance Act, 1921, and the profits were applied solely for the purposes of the charity and are exempt under that Section.

10. These contentions were resisted by the Inspector of Taxes who contended (*inter alia*) :—

(1) That the Appellant College carried on a trade, profession, employment or vocation of providing education.

(2) That the profits the subject of the said assessment were annual profits or gains arising or accruing to the Appellant College from the said trade, profession, employment or vocation.

(3) That the Appellant College was not a charity.

(4) Alternatively that the work in connection with the said trade was not mainly carried on by beneficiaries of the Appellant College.

(5) That the said assessment was correct and should be confirmed.

11. We, the Commissioners who heard the appeal, decided that a trade was being carried on and after giving effect to certain

(1) Clause 9 of the Articles of Association provides that every member shall have the privilege of nominating to the College one pupil in respect of each share held by him (with a maximum of four). (2) 8 T.C. 307.

agreed alterations, we amended the assessment to £2,414 and determined the appeal accordingly. It is agreed by both sides that in arriving at the liability of the Appellant College under Schedule D, the annual value of the buildings and offices upon which no tax has been levied under Schedule A by reason of the before mentioned decision of the General Commissioners of Income Tax should be deducted. We held that the Finance Act, 1921, Section 30 (1) (*c*), did not apply to the profits so arrived at.

Immediately upon our so determining the appeal, the Appellant College expressed its dissatisfaction with our determination as being erroneous in point of law, and in due course required us to state a Case for the opinion of the High Court under the Income Tax Act, 1918, Section 149, which Case we have stated and do sign accordingly.

W. J. BRAITHWAITE,
N. ANDERSON,
Commissioners for the Special Purposes of the Income Tax Acts.

York House,
23, Kingsway, London, W.C.2.
23*rd October*, 1923.

The case came before Rowlatt, *J.*, in the King's Bench Division on the 26th and 27th June, 1924, when Mr. A. M. Latter, K.C., and Mr. Edwardes Jones appeared as Counsel for the College, and the Attorney-General (Sir Patrick Hastings, K.C., M.P.) and Mr. R. P. Hills for the Crown.

On the latter day judgment was given against the Crown, with costs.

JUDGMENT.

Rowlatt, J.—Now I come to the *Brighton College* case, and I think that is different, because without repeating what I have said in the *Agricultural Society's* case(1) it seems to me there is just this difference, that there is here no such subsidiary trade or undertaking in the nature of a trade as to which you could say: Here is a society which is a non-trading society, but as a matter of subsidiary activity, like the *Religious Tract Society* (2), it has embarked upon a little trading concern out of which it has got an income which it carries to the use of its general purposes. You cannot say that. It seems to me here that the matter depends really upon the extract from the Memorandum of

(1) Royal Agricultural Society of England *v.* Wilson 9 T.C. 62. (2) The Religious Tract and Book Society of Scotland *v.* Forbes, 3 T.C. 415.

(Rowlatt, J.)

Association which is set out on page 2 of the Case(1): "The "income and property of the College whencesoever derived shall "be applied solely towards the promotion of the objects of the "College," and it goes on: "Provided that nothing herein "contained shall prevent the payment in good faith of remunera-"tion to any officers or servants of the College." Now the income which is there spoken of I think is the fees. I do not think they are speaking there of a resultant surplus which may arise from a comparison of the fees and the expenses; I think they are there alluding to the fees, and what is said here is that the fees which this College receives must be applied solely to the promotion of the objects of the College, that is to say they are to be applied to paying the masters or to paying the expenses or to reducing the fees if necessary, if they are too much; and therefore, at that stage—not after a surplus has emerged, but at that stage—the receipts are taken and applied so as to prevent any profit from any trading emerging at all; and the truth of the matter is that what has happened is this, that here they have an income from fees and it is larger than the expenses. Why is it allowed to be larger than the expenses? Merely because there are some other expenses which happen to be of a capital nature and they have to repay the money which they have borrowed, and therefore, they are obliged to allow their fees to run in excess of what they are obliged to pay the masters; they cannot lower the fees to prevent them exceeding the expenses because they have these expenses to meet, but it seems to me that, merely because they do that, and that has had to be done and that state of affairs has had to be allowed in the last few years, to say that you can now come and segregate these two items—segregate what I may call the current expenses and segregate the fees and put one against the other and say: "There "are more fees than expenses, therefore you can find in this a "subsidiary little trading concern," is to take a wrong view of the position. In the *Agricultural Society's* case(2) I thought the contrary; I thought you could segregate their Show and find there a little trade which showed a profit in itself. Under these circumstances I think the Brighton College are entitled to succeed, with costs.

The Crown having appealed against the decision in the King's Bench Division, the case was argued before the Court of Appeal (Pollock, *M.R.*, and Warrington and Scrutton, *L.JJ.*) on the 14th November, 1924, when judgment was reserved. Sir Patrick Hastings, K.C., M.P., and Mr. R. P. Hills appeared as Counsel for the Crown, and Mr. A. M. Latter, K.C., and Mr. Edwardes Jones for the College.

On the 24th November, 1924, judgment was given unanimously in favour of the Crown, with costs, reversing the decision of the Court below.

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(1) See page 214 *ante*. (2) 9 T.C. 62.

JUDGMENT.

Pollock, M.R.—This is an appeal by the Crown from a decision of Mr. Justice Rowlatt dated 27th June, 1924, whereby he reversed the decision of the Commissioners for the Special Purposes of the Income Tax, who had decided that a trade or concern in the nature of trade was being carried on by the College and had held it liable to pay Income Tax upon its profits.

Mr. Justice Rowlatt held that the College was a non-trading Society and did not come within the wide terms of Case I of Schedule D.

The Appellant College is a company limited by guarantee established in the year 1873 under the Companies Acts and its objects as declared in its Memorandum of Association are :— (A) To continue with an improved constitution the Brighton College, which has been carried on since the year 1846 in Brighton. (B) To provide thereby a sound religious, classical, mathematical and general education, in conformity with the doctrines of the Church of England. (C) The doing all such other lawful things as are incidental or conducive to the attainment of the above objects.

By the Memorandum of Association it was provided that : " The income and property of the College whencesoever derived " shall be applied solely towards the promotion of the objects " of the College, as set forth in this Memorandum of Association ; " and no portion thereof shall be paid or transferred directly or " indirectly by way of dividend, bonus, or otherwise howsoever " by way of profit to the persons who at any time are or have " been Members of the College," and they were granted a special licence of the Board of Trade to omit the word " Limited " from the name of the College under Section 22 of the Companies Act, 1867. The school has been carried on by the Appellants in all ways in accordance with its Memorandum and Articles of Association.

The Income Tax Acts provide special exemptions in favour of charitable bodies. " Charity " in its legal sense comprises trusts for the advancement of education. Counsel for the Crown are content not to contest in this case the claim of Brighton College to be treated as a charity although they guard themselves against such an attitude being taken as an admission that all similar institutions are to be treated as charities. The exemptions from tax which Brighton College has accordingly been allowed and received are in respect of its public buildings, offices and premises under No. VI of Schedule A, and repayment of Income Tax charged by way of deduction upon certain rents and dividends which it has received and applied to the purposes of the College.

(Pollock, M.R.)

These exemptions, however, only serve to emphasize the fact that there is under the Income Tax Acts no general exemption for charities, as such, from Income Tax. Unless the charity can justify a claim to the particular exemption allowed in respect of tax collected under the several Schedules, it remains liable to the tax.

Moreover it is clear that under Income Tax law the fact that profits when made are to be devoted solely to the advancement of the charity will not induce an exemption. Profits when made are subject to the tax, and their destination does not secure immunity for them. It is only necessary to refer to the cases, *The Mersey Docks and Harbour Board* v. *Lucas*(1), 8 App. Cas. 891, *Coman* v. *The Rotunda Hospital*(2), [1921] 1 A.C. 1, and to *The Trustees of Psalms and Hymns* v. *Whitwell*, 3 T.C. 7, in support of this proposition. In the *Rotunda Hospital* case profits were derived from letting out rooms for entertainments, and the *Trustees of Psalms and Hymns* sold a hymn book at a profit. The profits were in the one case devoted to the Hospital, in the other to widows and orphans; but as profits they fell under the tax notwithstanding their charitable destination. The motive that brought them into existence does not matter.

Further a charity may carry on an activity severable from its charitable work and if profits are made, they are taxable as in the case of the Rotunda Hospital and the hymn book already cited, and in *Grove* v. *Y.M.C.A.*, 4 T.C. 613, where a restaurant was provided which catered not only for the members of the Y.M.C.A., but also for the public, and its profits were held not immune from taxation.

It was not seriously contended before this Court, although the contention was put before the Commissioners, that the College could, upon the facts found, claim the exemption provided by Section 30 (1) (*c*) of the Finance Act, 1921, "if the "work in connection with the trade is mainly carried on by "beneficiaries of the charity."

Mr. Justice Rowlatt pointed out in his judgment that in the present case there is no possibility of segregating a portion of the activities of Brighton College, such as the fees received from the students and the expenses of their education, and of treating that as a subsidiary activity—a severable trading concern; but applying that reasoning he decided that the whole concern was immune from taxation as not being a trading society at all. He treated the provisions contained in the Memorandum of Association which I have already referred to, that the income and property of the College shall be applied solely towards the promotion of the objects of the College, as indicating a

(1) 2 T.C. 25. (2) 7 T.C. 517.

(Pollock, M.R.)

non-trading body. The cases that I have referred to decide that that test is not exhaustive—even though it is an essential characteristic of a " charity " He treats the surplus realised, which the Crown seek to tax, as arising fortuitously in the course of the administration of the trust and not derived of set purpose or design.

But can Brighton College be treated as the administration of a trust only—as a non-trading society?

In the case of the *University College of North Wales*, 5 T.C. 408, the income in question was derived from investments under a trust and devoted to various educational purposes and the general purposes of the College. No question arose as to fees received from the students and the question decided was whether the College were entitled to one of the particular exemptions already referred to. In *Pemsel's* case(1), 22 Q.B.D. 296, [1891] A.C. 531, the exemption claimed and allowed was in respect of the income from trust estates—no other source of income was in question. The facts of the present case are far different. Fees are charged for attendance at the school which, in the years tabled in the Case, have produced surpluses, varying in the ten years 1910-1920, from about £1,200 to £2,100, and in 1921 reached the figure of nearly £6,500. The surpluses have been used in paying interest on mortgages, or repaying mortgage indebtedness incurred in making extensions to, and improvements in, the College. The surpluses arose nevertheless from the contracts made between the College and the parents of pupils, and the fees payable under those contracts have been varied from time to time as circumstances determined the scale desirable.

Lord Justice Cotton said in *Erichsen* v. *Last*(2), 8 Q.B.D. 414, at page 420: " When a person habitually does " and contracts to do a thing capable of producing profit, and for " the purpose of producing profit, he carries on a trade or " business." That passage was quoted with approval by Lord Esher, Master of the Rolls, in *Werle & Co.* v. *Colquhoun*(3), 20 Q.B.D., at page 759.

The Incorporated Council of Law Reporting for England and Wales(4), 22 Q.B.D. 279, were held to be carrying on a trade in selling their publications. The Council were incorporated under the Companies Acts; all the property and income were applicable solely to the promotion of the objects of the Association—that is preparing and publishing, under gratuitous professional control, reports of judicial decisions. They held a licence under Section 23 of the Companies Act, 1867, dispensing

(1) R. *v.* Special Commissioners of Income Tax (*ex parte* Pemsel), 3 T.C. 53. (2) 4 T.C. 422, at p. 427. (3) 2 T.C. 402, at p. 411. (4) Commissioners of Inland Revenue *v.* The Incorporated Council of Law Reporting, 3 T.C. 105.

(Pollock, M.R.)

them from using the word " Limited " after their name. They were held to be carrying on a trade or business. Lord Coleridge, at page 293(1), said: " It is not essential to the carrying on of " a trade that the persons engaged in it should make or desire " to make a profit by it. Though it may be true that in the " great majority of cases the carrying on of a trade does, in " fact, include the idea of profit, yet the definition of the mere " word ' trade ' does not necessarily mean something by which " a profit is made." The case of the *Arthur Average Association*(2), 10 Ch. App. 542, was cited to us; but it is remote from the point that we have to decide. In so far as it dealt with the question of what is the meaning of carrying on business, it is an authority against the Appellants. Sir George Jessel, at page 547, declared that the mutual Association there in question carried on business with its members. " It is formed for the " purpose of acquiring, first of all, the sums wanted for the " expense of carrying it on, and, secondly, the sums to form a " reserve fund at the end of the year "—facts which indicate a system not unlike that under which the fees paid in the present case are fixed, received and used.

Returning to the words of charge under Case I of Schedule D, the tax is charged " in respect of the annual profits or gains . . . " from any trade," and by Section 237 " ' trade ' includes " every trade . . . or concern in the nature of trade." The contracts made with the parents under which the fees are paid and paid for at a sum—as the accounts attached to the Case prove —not less, but rather more, than cost price of the services rendered, in my judgment, bring the activities of the College within the above words of charge and justify the finding of the Commissioners that " a trade was being carried on."

We have not to consider the case of a school where the education offered is paid for only in part by fees—the cost above what is received therefrom being defrayed out of trust or other funds. The present is a case where the full payment is made by those who send their sons to the institution. The *Shaftesbury Homes'* case(3) bears no analogy to the present. There funds derived from trade were handed over to a trust for the education of poor children, and no fees were charged or received. The exemption under Section 37 (1) (*b*) of the Income Tax Act, 1918, in respect of annual payments was held to apply and the income was directed to be paid over without deduction.

For these reasons, in my judgment, the appeal of the Crown must be allowed with costs here and below, and the assessment confirmed.

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(1) Commissioners of Inland Revenue *v.* The Incorporated Council of Law Reporting, 3 T.C. 105, at p. 113. (2) *In re* Arthur Average Association for British, Foreign and Colonial Ships (*ex parte* Hargrove & Co.). (3) R. *v.* Special Commissioners of Income Tax (*ex parte* Shaftesbury Homes and Arethusa Training Ship), 8 T.C. 367.

Warrington, L.J.— The question in this case is whether the profits, that is to say the surplus of income over expenditure, accruing to Brighton College from the carrying on of the undertaking of maintaining their school at Brighton are annual profits or gains accruing to them from a trade, profession, employment or vocation in respect of which Income Tax is charged under Schedule D of the Income Tax Act, 1918.

The Commissioners have answered the question in the affirmative but their finding has been reversed by Mr. Justice Rowlatt and the Crown appeals.

Brighton College is a company limited by guarantee and was registered under the Companies Acts in the year 1873.

The objects of the Company as expressed in the Memorandum of Association were :—(A) To continue with an improved constitution the Brighton College, which had been carried on since the year 1846 in Brighton. (B) To provide thereby a sound religious, classical, mathematical and general education. (C) The doing all such other lawful things as are incidental or conducive to the attainment of the above objects.

It was also provided that the income and property of the College whencesoever derived should be applied solely towards the promotion of the objects of the College as set forth in the Memorandum of Association and no portion thereof should be paid or transferred directly or indirectly by way of dividend bonus or otherwise howsoever by way of profit to the persons who at any time should be or have been members of the College. This provision was inserted as an essential condition of the granting of a special licence by the Board of Trade for the omission of the word " Limited " from the name of the College.

It is admitted by the Crown, for the purposes only of the present argument, that the object for which the College was established is a charitable object within the meaning of the Statute of Elizabeth.

The contention on the part of the College is that the object for which the School is carried on being charitable in the sense above mentioned, the profits in question are not profits or gains accruing to the College from any trade, profession, employment or vocation carried on by them.

In my opinion this contention cannot be supported on principle and is directly contrary to authority.

The College is open to the public generally, and it is not suggested that the fees payable by the parents or guardians are fixed on any different principle than such as would be adopted by an individual or a company carrying on such a school for profit on an ordinary commercial basis.

(Warrington, L.J.)

The profits accruing to such an individual or company would clearly be profits or gains accruing from the carrying on of a trade, profession or vocation. Which of the three terms should properly be applied to such work is of course quite immaterial, inasmuch as they are all used in the description of profits under Schedule D. It matters not whether the person or company is regarded as supplying for reward an immaterial commodity, that is to say, the benefit of the education afforded to the pupils, or as performing for reward certain services actually rendered by the professional men—masters and so forth—employed in the work.

Unless therefore there is some circumstance which distinguishes the undertaking of the College from that of such an individual or company as is referred to above the profits in question would be profits of a trade, profession, or vocation. The only distinction suggested is that the object of the College is a charitable object and that the profits are and must be devoted to that object and cannot be divided amongst the members. It is suggested that the business is not carried on with a view to profit and that for this reason it cannot properly be treated as a trade or profession. This suggestion is not supported by the facts. If the accounts are looked at and the amount received for fees is compared with the amount expended in supplying the commodity or performing the services in question the excess is so great that it is impossible to regard it as casual or accidental. The fact is, as I have already said, that the fees appear to be fixed on an ordinary commercial basis so as not only to provide a safe margin as a security against loss but to enable the College to expend money on the improvement and extension of what I may call without offence the plant employed in the business. But even if the suggestion could be supported in fact it would not in my opinion be of any avail in law. On this point I need only refer to the judgment of Chief Justice Coleridge in *Commissioners of Inland Revenue* v. *The Incorporated Council of Law Reporting for England and Wales*(1), 22 Q.B.D. 279, and particularly to the passage near the foot of page 293.

But to return to the main contention I should be of opinion that if the business of the College is in its nature a trade, profession or vocation, it is none the less so that the profits, if any, derived from it are and must be devoted to the charitable object for which it is established.

This view is abundantly established by authority. I need only refer on this point to the well known case of the *Mersey Docks & Harbour Board* v. *Lucas*(2), 8 App. Cas. 891, and the case of *The Port of London Authority* v. *The Commissioners of Inland Revenue*, [1920] 2 K.B. 612. These were cases

(1) 3 T.C. 105, at p. 110. (2) 2 T.C. 25.

(Warrington, L.J.)

of public bodies carrying on public undertakings the profits of which were to be devoted to improving the ports in the management of which they were respectively engaged.

But the same principle is in my opinion involved in the decisions of the cases of *The Religious Tract Society* v. *Forbes*, 3 T.C. 415, and *Grove* v. *The Young Men's Christian Association*, 4 T.C. 613. With all respect to the learned Judge I cannot think that the fact that the undertaking, the profits of which were in these cases held to be subject to tax, was in a sense separate from the main charitable undertaking was material. In each case the body in question was insisting that, by applying to the charitable purpose for which it was established the profits accruing from what was in its nature a trade, they escaped the liability for Income Tax in respect of the profits so applied. This was the real meaning of their contention that they were entitled to set off the profits of the trade against the deficiency on the charity account. Their contention was rejected in each case. These decisions were accepted and acted on in the House of Lords in *Coman* v. *The Rotunda Hospital, Dublin*(1), [1921] A.C. 1. I can see no real distinction between the above mentioned cases and the present.

Nor is there in my opinion anything in the decision or the dicta in the *Eccentric Club Company's* case(2), [1924] 1 K.B. 390, inconsistent with the views I have expressed. That case was decided on its own facts and the judgments ought to be read in the light of those facts.

Unless therefore the profits in question are exempted by some statutory provision they are in my opinion profits chargeable with tax under Schedule D, falling within either Case I or Case II, under which Case is immaterial. There is no statutory exemption which applies to these profits.

The result is that in my judgment the appeal ought to be allowed, and the decision of the Commissioners restored with costs here and below.

Scrutton, L.J.—Brighton College was established to provide for the sons of noblemen and gentlemen an education in conformity with the principles of the Established Church. In 1873 it was taken over by a Company whose Memorandum of Association provided that its income should be applied solely to the promotion of the objects of the College, and that no portion should be paid by way of dividend, bonus or profit to the members of the College, except as payment for services rendered. The Governing Body accordingly provide a school and equipment and enter into the usual contracts with parents who desire that their boys should be educated at the College. The parents are not

(1) 7 T.C. 517. (2) Commissioners of Inland Revenue v. Eccentric Club, Limited.

(Scrutton, L.J.)

necessarily or usually members of the Company; in other words, the Company makes contracts under which it supplies for payment education to the sons of other persons contracting with it. It was assessed for the year 1922–23 in a sum of £2,389, as profits of a trade carried on by it, and the Special Commissioners substantially confirmed the assessment on the ground that the Company carried on a trade. Mr. Justice Rowlatt reversed that decision on the ground that the Company was not a trading body as a whole and you could not find in their activities a subsidiary trade such as the bookshop in the *Religious Tract Society's* case (1), 3 T.C. 415, the restaurant in the case of *Grove* v. *The Young Men's Christian Association*, 4 T.C. 613, or the entertainment hall in the case of *The Rotunda Hospital* v. *Coman*(2), [1921] 1 A.C. 1. The Crown appeal.

Schedule D, Cases I and II, taxes profits arising from a trade, profession, employment or vocation, and Case VI taxes any annual profits and gains not falling under any other Schedule. It is clear that a private schoolmaster would be assessed as carrying on a profession, but it has been decided in *Esplen's* case(3), [1919] 2 K.B. 731, that a limited company employing professional men to do professional work does not carry on a profession; it must be assessed, if at all, as carrying on a trade. It is also clear that if a trade is carried on the fact that the profits do not go to any individual but are employed for public or charitable purposes is immaterial.

In the present case the Company habitually makes contracts with non-members to render educational services for which it receives payment to the full value of those services; and in the year of assessment these payments, after deducting the cost of supplying them, left profits or gains which the Company applied in developing the school and furthering the purposes of the Company.

The question seems to be whether these habitual transactions between the Company and non-members constitute a trade. It is said they do not because the purposes of the Company are charitable, to promote education, and any gains the Company makes are applied to those purposes.

The only express statutory allowances are that, under Section 37 of the Act of 1918, a trust established for charitable purposes only need not pay tax on yearly interest or other annual payment—which does not cover the present case; and that under the Finance Act, 1921, Section 30, the profits of a trade carried on by any charity are free from tax, if (1) the work in connexion with the trade is mainly carried on by beneficiaries of the charity, and (2) the profits are applied solely to the purposes of

(1) The Religious Tract and Book Society of Scotland *v.* Forbes.
(2) 7 T.C. 517.
(3) William Esplen, Son and Swainston, Ltd., *v.* Commissioners of Inland Revenue.

(Scrutton, L.J.)

the charity. The first ingredient is missing here, as it is impossible to regard the masters and officials of the Company, paid salaries for their work, as beneficiaries of the Company.

The question then is: Do the Company in carrying on the school carry on a trade? In my view, when any person habitually and as a matter of contract supplies money's worth for full money payment, he "trades" within the meaning of Schedule D. It is the Company's "business" to supply education; they bind themselves legally to supply it, and they have legal rights to be paid the full price for it. *The Silloth Golf Club* case(1) shows that a transaction is not stopped from being a "trade" because the transaction is a sporting one. I am unable to see that such a transaction as I have described, because the money's worth supplied promotes a charitable object, ceases to be a trade or business carried on on business lines and producing business profits. This is not a case where persons subscribe to enable transactions to be carried on, which could not be carried on by the commercial returns alone. There is no subscription test here, and the Special Case in twelve years shows nine years' profits amounting to £6,431 and three years' losses amounting to £573, while in the year of assessment the average of three years, after deducting Schedule A and B assessments, gives £2,400 profits.

I have considered the *Eccentric Club* case (2), by which of course I am bound. So far as one member of the Court thinks that a company cannot trade with its members, we have recently disapproved that *ratio decidendi*, on the authority of the *Arthur Average Association*(3), 10 Ch. App. 542, and *Padstow*(4) cases, 20 Ch.D. 137, which were not cited to the first Court. The case then rests on the view that a company supplying social amenities to its members does not trade I imagine that, within the *Padstow* case as an unregistered association of more than twenty members, the Eccentric Club would carry on business for gain of the Company or its members. But I do not feel bound to extend the *Eccentric Club* decision from social amenities to educational advantages supplied for full payment, though for public purposes and with no object of individual gain. My respectful criticism on the judgment of Mr. Justice Rowlatt is that I find in this case not a subsidiary and separate trade or business, but a business which is the whole object of the Company, a business of supplying habitually and on business lines money's worth for full money value, which is not saved from being a business or trade by the fact that the profits derived from it are devoted to the improvement of the school and

(1) Carlisle and Silloth Golf Club *v.* Smith, 6 T.C. 198. (2) Commissioners of Inland Revenue *v.* Eccentric Club, Limited. (3) *In re* Arthur Average Association for British, Foreign, and Colonial Ships (*ex parte* Hargrove & Co.). (4) *In re* Padstow Total Loss and Collision Assurance Association.

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cannot be the subject of gain to the individual members. It seems to me that all and not part of the operations of the Company are a business.

The Case does not raise the question whether Schedule A assessment can be deducted from Schedule D profits, and I express no opinion on it. I may add that, if not assessable under Case I of Schedule D, I should have thought the College was assessable under the Sixth Case of that Schedule.

The appeal must be allowed with costs here and below and the assessment confirmed by the Commissioners restored.

Notice of appeal having been given by the College against the decision in the Court of Appeal, the case came on for hearing in the House of Lords before Viscount Cave, *L.C.*, and Lords Atkinson, Buckmaster, Carson and Blanesburgh on the 3rd, 5th and 6th November, 1925, when judgment was reserved.

Mr. A. M. Latter, K.C., Mr. Edwardes Jones, K.C., Mr. Dighton Pollock and Mr. Beagley appeared as Counsel for the College and the Attorney-General (Sir Douglas Hogg, K.C., M.P.) and Mr. R. P. Hills for the Crown.

On the 18th December, 1925, judgment was delivered unanimously in favour of the Crown, with costs. confirming the decision of the Court below.

JUDGMENT.

Viscount Cave, L.C.—My Lords, in this case the Court of Appeal, reversing the decision of Mr. Justice Rowlatt, has held that the Appellants, a corporation bearing the name of Brighton College, were properly assessed to Income Tax for the year ending on the 5th April, 1923, and the question for your Lordships' decision is whether the tax was rightly so assessed.

The school known as Brighton College was founded in or about the year 1846 for the purpose of providing for the sons of noblemen and gentlemen a liberal and practical education in conformity with the principles of the Established Church, and was for some years conducted under the terms of a Deed of Establishment dated the 11th September, 1848. In the year 1873 the school was taken over by the Appellant Company, which was then incorporated under the Companies Acts as a company limited by guarantee, its principal objects being defined by the Memorandum of Association as follows :—" (*a*) To continue with " an improved constitution the Brighton College, which has been " carried on since the year 1846 in Brighton. (*b*) To provide

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" thereby a sound religious, classical, mathematical, and general " education, in conformity with the doctrines of the Church of " England." The Memorandum of Association contained a provision to the effect that the income and property of the College, whencesoever derived, should be applied solely towards the promotion of the objects of the College as set forth in the Memorandum of Association, and no portion thereof should be paid or transferred directly or indirectly by way of dividend, bonus or otherwise by way of profit to the members of the College; and the Board of Trade, pursuant to Section 22 of the Companies Act, 1867, granted a licence for the registration of the Company without the addition of the word " Limited " to its name. The Articles of Association provided (among other things) that every member should have the privilege of nominating to the College one pupil in respect of each share held by him, and that pupils not so nominated should pay an additional charge; but this privilege, although still in existence, is not now used by the members. The Articles also provided that the Council should have the general care and management of the College and should regulate the tuition and other fees to be paid by the pupils.

The school has been carried on by the Appellant Company in accordance with the Memorandum and Articles of Association. The Company has taken over or acquired the land required for the school and has improved the school premises, borrowing considerable sums for that purpose on mortgage or debentures. It employs a large staff and charges fees for the education given. The school is not assisted by any subscriptions, and there is nothing to show that the fees are fixed on other than commercial principles. For many years past the receipts of the College have considerably exceeded the working expenses, and the surplus has been applied to the payment of interest on the debt secured by the mortgages and debentures and of instalments of the principal debt. In the years 1912 to 1921 these surpluses were as follows :—

	Surplus.	*Interest.*	*Principal paid off.*
	£	£	£
1912	1,633	1,013	500
1913	1,515	994	500
1914	1,583	1,108	500
1915	1,371	1,171	500
1916	1,403	1,151	500
1917	1,781	1,124	500
1918	1,901	1,095	500
1919	2,142	1,064	1,000
1920	1,729	1,031	--
1921	6,468	1,310	500

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In these circumstances the Additional Commissioners of Income Tax for the division of Brighton made an assessment upon the Appellants under Schedule D of the Income Tax Act for the tax year 1922–3; and, on an appeal to the Special Commissioners, those Commissioners decided that a trade was being carried on, and after giving effect to certain agreed alterations they amended the assessment to £2,414 and determined the appeal accordingly. It was agreed by both sides that in arriving at the liability of the Appellant College under Schedule D, the annual value of the buildings and offices upon which no tax had been levied under Schedule A should be deducted. A Case having been stated for the opinion of the High Court, Mr. Justice Rowlatt held that the Appellants were not assessable to the tax, but on appeal to the Court of Appeal that Court reversed the decision of the High Court and affirmed the decision of the Special Commissioners. Hence the present appeal.

It should be added that, for the purposes of the argument before the Court of Appeal and this House, it was admitted by the Crown that the object for which the College was established was a charitable object within the meaning of the statute of Elizabeth.

My Lords, by the Income Tax Act, 1918, Income Tax is chargeable under Schedule D in respect of the annual profits or gains arising or accruing to any person (including a corporation) residing in the United Kingdom from any trade, profession, employment or vocation. Exemption is granted (under Section 37) from (*a*) tax under Schedule A in respect of the rents and profits of any lands or hereditaments belonging to any public school, and (*b*) tax under Schedule D in respect of any yearly interest or other annual payment forming part of the income of any charity. A further allowance is made (under Schedule A, No. VI) in respect of the tax charged on any public school in respect of the public buildings, offices, and premises belonging thereto, and by the Finance Act, 1921, (Section 30) exemption is granted from Income Tax under Schedule D in respect of the profits of a trade carried on by any charity, if the work in connection with the trade is mainly carried on by beneficiaries of the charity and the profits are applied solely to the purposes of the charity. Except in these respects the Acts grant no exemption from Income Tax to educational or other charities. In these circumstances the Appellant Company, which carries on the business of providing education for money, is prima facie chargeable with tax in respect of its annual profits or gains arising from that business; and the question to be determined is whether there is anything in the statute or in the constitution of the Appellant Company which prevents it from being so chargeable.

Upon this question two arguments are put forward on behalf of the Appellant Company.

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First, it is said that the Appellant Company, being admittedly a charity, cannot carry on a trade, and that a surplus of receipts over expenditure arising in the execution of a charitable trust is not properly described as profit; and stress is laid on the fact that, having regard to the provisions of the Company's Memorandum of Association, no part of its income can be distributed among the members. I am unable to agree with this contention. It has long been decided that, if a trade is in fact being carried on at a profit, it is immaterial that the profits must, under the constitution of the trading corporation, be devoted to public objects, *Mersey Docks* v. *Lucas*(1), (1883) 8 A.C. 891; *cf. Re Incorporated Council of Law Reporting*(2), (1888) 22 Q.B.D. 279. It has also been decided, both in the Courts and in this House, that a charitable institution which carries on a trade at a profit is chargeable with Income Tax in respect of its profits or gains in that trade, notwithstanding that they are and can only be applied to the purposes of the charity. Thus, in *St. Andrew's Hospital, Northampton* v. *Shearsmith*(3), (1887) 19 Q.B.D. 624, a hospital for the care of insane persons was charged with Income Tax on the profits earned by receiving wealthy patients, although such profits were applied only for the benefit of the poorer patients and the improvement of the hospital. In *Religious Tract and Book Society* v. *Inland Revenue*, (1896) 23 R. 390, 3 T.C. 415, a society whose object was to promote religion by the circulation of tracts and books, was held chargeable with tax in respect of profits earned by carrying on a bookseller's business. In *Grove* v. *Young Men's Christian Association*, (1903) 4 T.C. 613, a society formed for the improvement of young men was held liable to tax on profits made by carrying on a restaurant which was open to the public as well as to its members. And in *Coman* v. *Governors of the Rotunda Hospital, Dublin*(4), [1921] 1 A.C. 1, the governors of a hospital were held to have been rightly assessed to tax under Schedule D in respect of profits earned by letting certain rooms for entertainments. In all these cases the profits earned by the particular trade or business were applicable and applied only to the general purposes of the charities, but this was held to make no difference.

On behalf of the Appellants, an endeavour was made to distinguish these cases from the present on the ground that in the cases cited the trades carried on were only subsidiary to the charitable purpose, while in the present case the carrying on of the school is the main purpose and object of the charity. I do not think this a sound distinction. If a corporation established for charitable purposes and carrying on a subsidiary trade for the benefit of its main objects is chargeable with tax, the tax is equally chargeable where the very purpose and object of the

(1) 2 T.C. 25. (2) 3 T.C. 105. (3) 2 T.C. 219. (4) 7 T.C. 517.

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charity is to carry on a trade. The surplus receipts in such a case, even if they were not profits, are certainly gains, and so fall under the burden of the tax. The above-cited case of the *Incorporated Council of Law Reporting*(1) supports this view; and the reference in Section 30 of the Finance Act, 1921, to "the "profits of a trade carried on by any charity" shows the understanding of the Legislature.

But secondly it is argued that the profits from the school are exempt from taxation on the ground that they are an "annual "payment forming part of the income" of the Company, within the meaning of Section 37 of the Income Tax Act, 1918. The answer is twofold, namely, first, that the fees received from the scholars are not properly described as an annual payment (see *St. Andrew's Hospital, Northampton*(2), 19 Q.B.D. 628), and secondly, that it is not sought to tax the fees but the profits. It was not suggested before your Lordships that the profits are within the exemption contained in Section 30 of the Act of 1921.

Upon the whole I have come to the conclusion that the Appellants have been properly charged with tax. It has been suggested that a decision to that effect will throw a heavy charge upon many places of education, such as colleges and public schools, not carried on with a view to individual profit. I think this improbable. The real property and investments of these bodies are exempt from taxation; and the cases in which such a college or public school can show (as in the present case) a substantial profit earned year after year and applied for capital purposes, must be rare. In any case, your Lordships have only to determine the true construction of the statute, and upon this I do not feel any doubt. In my opinion the appeal fails and should be dismissed with costs, and I move your Lordships accordingly.

Lord Atkinson.—My Lords, I have had the pleasure and advantage of reading the judgment which has just been delivered by my noble friend upon the Woolsack. I thoroughly concur, and have nothing to add.

Lord Buckmaster (read by Lord Carson).—My Lords, the detailed facts of this case have already been stated. But in order to make plain the principles which have formed my opinion it is desirable that I should summarise what I regard as the relevant matter.

Brighton College is carried on as an undertaking under the Companies Acts. The sole purpose of the Company is to provide education at Brighton College in conformity with the doctrines of the Church of England, and this is wholly a charitable object.

(1) 3 T.C. 105. (2) 2 T.C. 219.

(Lord Buckmaster.)

The surplus income after providing for the annual expense is devoted to the improvement of the institution and cannot be divided in any way or under any pretence among the members of the Company. The tax that it is sought to exact from these surplus profits is claimed by the Crown under Schedule D of the Act of 1918 as annual profits or gains arising from a trade carried on in the United Kingdom. If the purpose for which the school was established and the objects to which the surplus income is devoted be disregarded, the tax would, in my opinion, be properly charged, and the two questions on this appeal are first whether the circumstances I have stated prevent the carrying on of this institution from being a trade, and, secondly, if this be answered in the negative, whether the exemptions under Section 37 of the Income Tax Act, 1918, and Section 30 of the Finance Act, 1921, will relieve the Appellants from liability.

With regard to the first of these propositions it is, I think, clear that the purpose to which the profits are applied is not material. In the *Religious Tract Society* v. *Forbes*, 3 T.C. 415, it was definitely decided that the destination of the profits does not secure immunity from tax, and this principle is, in my opinion, involved in the case of *Coman* v. *The Rotunda Hospital*(1), [1921] 1 A.C. 1. It seems to me to make no difference so far as this point is concerned whether the trade from which the profits arose formed the whole or part only of the charity. The main argument, indeed, was in fact devoted to the contention that where the whole purpose of the undertaking was in fact the carrying on of the charity it ceased to be a trade. I am unable to accept this proposition, although it found favour before Mr. Justice Rowlatt and formed the basis of his judgment.

If the undertaking must be regarded as a trade and would be so regarded if it formed a branch only of a larger institution, it seems to me it must equally be a trade when it is the sole and only purpose. In accordance, therefore, with authorities which have stood too long to be now revised, I think that this tax was properly charged under Schedule D. It remains to be considered whether, in these circumstances, it is exempted. The relief granted by Section 37 of the Act of 1918 from tax is first under (*a*) in respect to the rents and profits of lands and tenements belonging to a public school or vested in trustees for charitable purposes, and this has been allowed. It must be under Subsection (*b*), if anywhere, that the relief must be sought. This grants exemption in respect of any yearly interest or other annual payment forming part of the income of any body established for charitable purposes only. This Company certainly satisfied that condition. The only point is whether the surplus profits can be regarded as yearly interest or annual payment. It is certainly

(1) 7 T.C. 517.

(Lord Buckmaster.)

not interest, nor do I think it can be regarded as an annual payment, for an annual payment to a company cannot cover the profits that may be made in carrying on a trade. Nor can exemption be claimed under Section 30 of the Finance Act of 1921, for the work done by the masters and staff in carrying on the school is work done by them in the exercise of their various callings, and none of them can be regarded as beneficiaries of the charity.

It is for these reasons that I think the judgment of the Court of Appeal is correct and ought to be affirmed.

Lord Carson.—My Lords, I agree with the judgments already delivered and with the motion that has been proposed from the Woolsack.

Lord Blanesburgh.—My Lords, I agree that this appeal should be dismissed for reasons which I can state in a very few words.

Brighton College is none the less in legal language a charity, because it was established as a school for the sons of noblemen and gentlemen; nor does the institution lose its charitable character, nor do its educational activities become a trade occupation or business merely because fees are charged for the education which the scholars at the College receive—*Attorney-General* v. *Lonsdale*, 1 Sim. 105. Whether in any particular case activities which may properly and exclusively be described as charitable have become trading or commercial must always be a question of fact, one important consideration being whether these activities are being conducted with commercial considerations in view and on commercial principles,—see the *Religious Tract and Book Society of Scotland* v. *Forbes*, 3 T.C. 415.

Any hesitation which, in view of the decided cases on this subject, I have felt in relation to this appeal is attributable to the doubt I entertain whether the Commissioners when arriving at their finding that a trade is in fact being carried on by the Appellants have had sufficient regard to the considerations to which I have referred.

While still dubious, and while myself holding the opinion that the taking of fees in such a case as the present does not by itself carry the question very far, I cannot affirm on the Case as stated that there was no evidence to support the finding of the Commissioners to which I have just referred.

In these circumstances it is not open to me to criticise that finding and accordingly I concur in the motion which has been proposed from the Woolsack.

Questions put:

That the Order appealed from be reversed.

The Not Contents have it.

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

The Contents have it.
