VOL. XII.—PART XI.

No. 55*.—High Court of Justice (King's Bench Division).—1st July, 1924.

Court of Appeal.—5th, 6th and 7th November, 1924.

House of Lords.—21st January, 1926.

The Commissioners of Inland Revenue *v.* The Cornish Mutual Assurance Co., Ltd.[1]

Corporation Profits Tax—Company carrying on trade or business—Mutual trading concern—Mutual insurance company—Finance Act, 1920 (10 & 11 *Geo.* V, *c.* 18), *Sections* 52 *and* 53 (2) (*h*).

The Respondent Company was incorporated under the Companies Acts as a company limited by guarantee to carry on a mutual fire assurance business, the persons insured and the members of the Company being one and the same body of persons.

Assessments to Corporation Profits Tax were made on the Company in respect of its receipts from interest on investments and the surplus on transactions with members.

Held, *that the Company was carrying on a trade or business within the meaning of Section* 52 (2) *of the Finance Act*, 1920, *and that, having regard to Section* 53 (2) (*h*) *of that Act, the surplus arising from the contributions of its members formed part of its profits assessable to Corporation Profits Tax.*

In re Padstow Total Loss and Collision Assurance Association, (1882) 20 Ch. D. 137, *applied.*

Dicta of Lord Watson in New York Life Assurance Co. *v.* Styles, 2 T.C. 460, *explained.*

Case

Stated under the Finance Act, 1920, Section 56 (6), and the Income Tax Act, 1918, Section 149, by the Commissioners for the General Purposes of the Income Tax Acts for the Division of West Powder in the County of Cornwall for the opinion of the King's Bench Division of the High Court of Justice.

1. At a meeting of the Commissioners for the General Purposes of the Income Tax Acts for the Division of West Powder in the County of Cornwall held on the 26th October,

(1) Reported K.B.D., 40 T.L.R. 792, C.A., 94 L.J.K.B. 237, and H.L., [1926] A.C. 281.

1922, at 31, Lemon Street, Truro, for the purpose of hearing appeals, the Cornish Mutual Assurance Company, Limited, (hereinafter called " the Company ") appealed against assessments to Corporation Profits Tax in the sums of £65 (duty £3 5*s*.) for the accounting period ended 30th June, 1920, and £3,138 (duty £156 18*s*.) for the accounting period ended 30th September, 1921, made upon the Company under the provisions of the Finance Act, 1920.

2. The Company is a company limited by guarantee and was incorporated under the Companies Acts, 1862 to 1903, on 10th October, 1903. The Company carries on a mutual fire insurance business in the Counties of Devon and Cornwall and has no subscribed capital.

The Memorandum and Articles of Association of the Company as amended by Special Resolution duly passed and confirmed on 25th March, 1920, are annexed hereto marked " A " and form part of this Case(1).

By the Company's Memorandum of Association it is provided (*inter alia*) as follows :—

" (3) The said Company is limited by guarantee not having a capital divided into shares."

The objects for which the Company is established as specified in its Memorandum of Association are (*inter alia*) :—

" (1) To carry on in the United Kingdom and elsewhere the business of a Fire, Accident, Guarantee and General Insurance Company and Insurance in all its branches (excepting the issuing of policies of assurance on human life).

(21) To invest and deal with the moneys of the Company upon such securities and in such manner as the Directors may from time to time determine, and in particular to subscribe for, take, acquire, underwrite, hold and deal in stocks and shares, to lend and invest on mortgages, bonds and dispositions in security, or by the purchase or otherwise of any real, heritable, or personal property in the United Kingdom, and in securities of all kinds.

(29) To distribute among the members of the Company in kind any property of the Company, and in particular any shares, debentures or securities of other companies belonging to this Company or of which this Company may have the power of disposing."

By the Company's Articles of Association as amended by Special Resolution as aforesaid it is provided (*inter alia*) as follows :—

(2) The number of members of the Company for the purposes of registration shall be unlimited.

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(1) Omitted from the present print.

(3) The business of the Company shall comprise all or any of the objects mentioned in the Memorandum of Association, and all matters incident or enabling thereto, and shall be conducted under the absolute control of the Directors according to the terms of these presents and of the rules for the time being of the Company or of any of the classes thereof.

(5) Any person desirous of becoming a member of the Company may apply in writing to the Company requesting that he be admitted as a member. . . . .

(6) The issue to any person and the acceptance by him of a contract of insurance with the Company shall constitute such person a member of the Company notwithstanding that no formal application for membership may have been made. . . . .

(7) Every person who becomes a member of the Company shall pay such entrance fee as the Directors may determine.

(8) The members may be divided in classes according to the risks against which they respectively shall be protected and indemnified by or through the Company, and any member may belong to one or more classes at the same time.

(9) A member of the Company shall cease to be such in each and every of the events following that is to say :—

(*a*) as soon as his right to protection or indemnity by or through the Company terminates;

(*b*) at the expiration of one month after he shall have given notice in writing under his hand to the Company that he resigns his membership;

(*c*) if he shall become bankrupt or insolvent, or suspend payment, or compound or make any other arrangement with his creditors;

(*d*) if the Company shall, by notice in writing to any member, his executors or administrators, determine his or their membership.

(14) The Directors may from time to time make rules as to the terms and conditions on which policies shall be issued, and as to the form and mode of execution of policies, and as to the conditions to be endorsed or otherwise embodied therein. . . . .

(15) The Directors shall have power as and when they think fit to make calls on the members of any class with a view to providing funds for the general expenses of the Company, for paying claims, for creating a reserve fund, and for such other purposes as in the opinion of the Directors shall be necessary

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or desirable, such calls shall be made upon the members of any class in proportion to the amounts at which they are respectively rated for contribution by the outstanding policies for the time being of such class.

(87) Without prejudice to . . . general powers . . . the Directors shall have the following powers.

(6) To set aside out of the funds of the Company such sums as they think proper as a reserve fund to meet contingencies, or for repairing, improving and maintaining any of the property of the Company, and for such other purposes as the Directors shall in their absolute discretion think conducive to the interests of the Company, and to invest the several sums so set aside upon such investments as they may think fit, and from time to time deal with and vary such investments and dispose of all or any part thereof for the benefit of the Company, and to divide the reserve fund into such special funds as they think fit.

(88) All moneys received by the Company, whether for entrance fees or from any other source and not directly applicable to the payment of claims, pursuant to the regulations for the time being of the Company, shall be applicable to any of the purposes of the Company as the Directors may from time to time determine, and in the meantime, until so applied, the Directors may either place the same on deposit, or on current account with the bankers of the Company, or may place the same on any other form of investment.

Forms of policies issued and brought into use by the Company as and from 21st August, 1917, and 24th June, 1920, respectively are annexed hereto marked " B " and " C " and form part of this Case(1). The said form of policy marked " B " was cancelled and superseded by the form of policy marked " C " issued as and from 24th June, 1920. By the form of policy marked " C " it is provided (*inter alia*) as follows :—

8. Until otherwise determined by the Directors the entrance fee payable by members entered in this class shall be 3*s*. 6*d*. per centum on the sum as rated for contribution and is charged once only, viz., on entrance. If the sum insured is subsequently increased, the entrance fee is charged on such increase only. Insurances effected after 30th September in

(1) Omitted from the present print.

any year will be charged 1*s*. per centum extra, but such insurance shall be relieved to the extent of 1*s*. per centum on the amount rated for contribution out of the first call made in the following year. In reckoning the entrance fee any fraction of £100 under £50 shall be considered as £50 and any fraction over £50 shall be considered as £100.

12. The Directors shall have power as and when they think fit to make calls on the members of any class with a view to providing funds for the general expenses of the Company, for paying claims, for creating a reserve fund, and such other purposes as in the opinion of the Directors shall be necessary or desirable. Such calls shall be made upon the members of any class in proportion to the amounts at which they are rated respectively for contribution by the outstanding policies for the time being in such class, but so that fractions under 6*d*. may be reckoned as 6*d*. and fractions over 6*d*. and under 1*s*. at 1*s*.

13. As the risk of insurance varies according to the nature of the property insured, some being more or less hazardous than others, it is manifest that the members should contribute in proportion to the risk incurred under their respective policies. With the view, therefore, of requiring each member to contribute as far as possible on an equitable basis, the Directors shall have power at their discretion to make such addition to or reduction from the sums assured on the different descriptions of property as they consider proper, and the members shall be rated for contribution accordingly. Provided nevertheless that fractions of £100 in the total sum rated for contribution under £50 may be reckoned as £50, and fractions of £100 over £50 may be reckoned as £100.

14. Whenever the Directors make a call on the members, such call is to be made by resolution of the Directors, and notice thereof is to be given to the members and the notice in each case shall specify the amount of the call payable by the member upon whom it is made and the time, not being less than seven days from the date of such notice when such call is to be paid, and to whom the same is to be paid, and every member shall be bound to pay to the Company, at the time and place so fixed, the amount of every call so made on him and no member shall be entitled to question or dispute any call on the ground that the amount thereof is excessive, or that it is not made in proper proportion or otherwise, the intention being that the determination of the Directors in regard to these matters shall be conclusive.

3. The interest and other income of the Company arising from investments and the surplus of the Company arising from transactions with members of the Company for the accounting period ended 30th June, 1920, amounted to £315 and for the accounting period ended 30th September, 1921, to £3,638. Upon these sums less the statutory allowance of £500 (or a proportionate part thereof) the said assessments to Corporation Profits Tax were made.

4. At the hearing of the appeal the Company appealed on a point of law and contended that the actual figures could eventually be agreed in accordance with the decision as to law arrived at by the Commissioners.

5. In these circumstances, Mr. C. V. Thomas, solicitor, Camborne, on behalf of the Company, contended (*inter alia*) :—

(*a*) That there are three points which must be established before the Company can be held to be liable to assessment to Corporation Profits Tax.

(i) That the Company is a British company as defined by Section 52 of the Finance Act, 1920.

(ii) That the Company is carrying on a trade or business within the meaning of the Finance Act, 1920.

(iii) That the Company if carrying on a trade or business is making profits on such trading or business.

(*b*) Are we carrying on a trade or business? We cannot be said to carry on business with ourselves. We must carry on business with somebody other than ourselves for which some consideration passes to us. Whether I am individual or whether I am not, I cannot trade with myself, *Dillon* v. *Corporation of Haverfordwest*, [1891] 1 Q.B. 575. Baron Pollock cited : " There " are no vendors and no vendees." Our business is with ourselves—we are all members—we cannot trade with ourselves and therefore we cannot trade at all.

Submitted that if a company is carrying on trade and making profits one thing must eventually follow; that those who form the company are entitled to have the profits divided. All that members have is a policy of insurance plus liability to be called upon in case there is a fire.

(*c*) That there is no definition in the Act of what are to be considered profits and, that being so, it is necessary to adopt the ordinary meaning of the English language namely, that profits must be what land may yield or pecuniary gain or advantage from whatever source derived.

(*d*) That in order that trade or business may be carried on there must be two parties; that one cannot trade with oneself and that members of the Company do not carry on any trade or business with other persons and therefore no profits can be derived from the carrying on of ordinary transactions of the Company as a mutual assurance company, the members of which have a common interest.

(*e*) He also cited *Mersey Docks Harbour Board* v. *Lucas*(1), *New York Life Assurance Company* v. *Styles*(2), and *Dublin Corporation* v. *McAdam.*(3)

(*f*) That the liability of the members is limited by guarantee and cannot exceed the sum of £5 per member and that only in the event of the Company being wound up, but members are liable to be called upon to contribute to the funds subject to the above limitation in case the Directors shall consider the fund insufficient to meet liabilities.

(*g*) There is no reference in the Articles of Association to the distribution of profits or dividends.

It was contended on behalf of the Commissioners of Inland Revenue (*inter alia*) :—

(1) That the Company was a British company carrying on a trade or business or an undertaking of a similar character including the holding of investments within the meaning of Section 52 of the Finance Act, 1920.

(2) That the Company was a mutual trading concern within the meaning of Section 53 (2) (*h*) of the said Act.

(3) That the moneys in respect of which the said assessments had been made upon the Company were profits of the Company within the meaning of Part V of the said Act; and

(4) That the assessments were correct and should be confirmed.

The Commissioners were of opinion that the accumulated fund has been subscribed by members of the Company and is not profits arising from carrying on any trade or business and is therefore not liable to assessment to Corporation Profits Tax and they accordingly allowed the appeal.

The Inspector of Taxes thereupon expressed dissatisfaction with the determination of the Commissioners as being erroneous in point of law, and duly required us to state and sign a Case for the opinion of the High Court, which Case we have stated and do sign accordingly.

ARTHUR P. NIX,
J. HITCHINS,
A. C. POLWHILE,
} Commissioners of Taxes for the Division of West Powder in the County of Cornwall.

TRURO,
28*th December*, 1923.

(1) 2 T.C. 25. (2) 2 T.C. 460. (3) 2 T.C. 387.

The case came before Rowlatt, *J.*, in the King's Bench Division on the 1st July, 1924, when judgment was given against the Crown, with costs.

The Attorney-General (Sir Patrick Hastings, K.C.) and Mr. R. P. Hills appeared as Counsel for the Crown, and Mr. Tindal Atkinson for the Respondent Company.

JUDGMENT.

Rowlatt, J.—In this case, apart altogether from the *Eccentric Club* case(1), my own view certainly would have been in favour of the contention of the Crown, but I do not think I can distinguish this case from the *Eccentric Club* case in view of the ground upon which the decision in that case is put in the judgment of Lord Justice Sargant. If I had nothing more than the judgments of the two other Lords Justices I should not have felt quite so much pressed with this as a conclusive authority, but I think that Lord Justice Sargant's judgment really leaves me no option. He puts his decision, not upon the ground that the subject matter, which was amenities with a view to social intercourse, had no taint of commerciality about it, but upon the ground of the limitation of the activities to a system of self supply; and he relies on the reasoning of the majority of the House of Lords in the *New York Life Assurance Company* v. *Styles*(2), which is a case in which I think the position was the same as it is here, that is to say, that people insured themselves with the Society and thereupon became members of the Society, having before been outsiders. What Lord Justice Sargant says about it, [1924] 1 K.B. 430, after referring to the speeches in that case in the House of Lords, is this(3) : " The second point " made by the four Lords was that in the case of such a scheme " of mutual insurance, not only were there no profits, but— " the important point here—there was no question of a trade or " business in any ordinary sense of the words."

I do not think I can possibly avoid taking the view that that concludes this case; and therefore I must dismiss this appeal with costs.

The Crown having appealed against this decision, the case came before the Court of Appeal (Pollock, *M.R.*, and Warrington and Scrutton, *L.JJ.*) on the 5th, 6th and 7th November, 1924, when on the last named date judgment was given unanimously in favour of the Crown, with costs, reversing the decision of the Court below.

The Attorney-General (Sir Patrick Hastings, K.C.) and Mr. R. P. Hills appeared as Counsel for the Crown, and Mr. Tindal Atkinson and Mr. Hildesley for the Company.

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(1) The Commissioners of Inland Revenue *v.* The Eccentric Club, 12 T.C. 657. (2) 2 T.C. 460. (3) 12 T.C. 657, at p. 703.

JUDGMENT.

Pollock, M.R.—This is an appeal from a judgment given by Mr. Justice Rowlatt on the 1st July this year, and the question involved is whether the Cornish Mutual Assurance Company, Limited, is liable to assessment to Corporation Profits Tax. The appeal was taken by the Cornish Mutual Assurance Company from the decision on the original two assessments, which were for two accounting periods—ended 30th June, 1920, and 30th September, 1921—made upon the Company under the provisions of the Finance Act, 1920, which imposed the Corporation Profits Tax. It appeared that in both these two accounting periods there was a surplus to the credit of the Assurance Company, and it is in respect of and upon those surpluses that the assessments were made.

Now the Company is a company limited by guarantee, and it was incorporated under the Companies Acts on the 10th October, 1903. The Company carries on a mutual fire insurance business in the counties of Devon and Cornwall, and has no subscribed capital. The Memorandum and Articles of Association, which are to be taken as annexed to the Case, need not be referred to in detail, but the first object specified in the Memorandum of Association is that the Company is established to carry on in the United Kingdom and elsewhere the business of a fire, accident, guarantee and general insurance company. Section 52 of the Finance Act, 1920, imposes the Corporation Profits Tax upon profits of a British company carrying on any trade or business. Now it is quite clear that this is a British company, and the question that we have to determine is whether or not it is carrying on a trade or business. The actual terms of Section 52, Sub-section (2) (*a*), are: " the profits of a British " company carrying on any trade or business, or any undertaking " of a similar character." It is said that this company does not carry on a trade or business, because its business is that of mutual fire insurance. The Commissioners were of opinion that the accumulated fund has been subscribed by the members of the Company, and is not profits arising from carrying on any trade or business, and is therefore not liable to assessment to Corporation Profits Tax. That determination of the Commissioners was affirmed by Mr. Justice Rowlatt, who on his own view would have been in favour of the contention of the Crown, who are the Appellants here, but Mr. Justice Rowlatt felt himself compelled by the decision of this Court in the *Eccentric Club* case(1), [1924] 1 K.B. 390, and by the decision in the *New York Life Insurance Company* v. *Styles*(2), 14 App. Cas. 381, to give his judgment affirming the decision of the Commissioners.

I have pointed out that Section 52 of the Act of 1920 says " the profits of a British company carrying on any trade or " business, or any undertaking of a similar character." Those

(1) Commissioners of Inland Revenue *v.* The Eccentric Club, 12 T.C. 657.
(2) 2 T.C. 460.

(Pollock, M.R.)

last words, "any undertaking of a similar character," are difficult to understand, but perhaps it is sufficient to say that a British company is liable if it carries on a trade or business or an undertaking of a similar character. It is claimed on the part of the Crown that those words show the very wide character of Sub-section (2), because it includes all British companies, and not only those who are strictly carrying on a trade or business, but those who are carrying on an undertaking of a similar character, whatever may be the precise determination or meaning of those words, which seem to be inserted by way of addition to and not by way of restriction upon the words "carrying on a "trade or business."

Now Section 53 is the section which determines how the profits are to be ascertained. Primarily they are to be ascertained in accordance with the rules applicable to Income Tax, but there are certain alterations and amendments of that system in the proviso, which contains a number of different items. In particular it includes (*h*), and (*h*) is: "Profits shall include in the "case of mutual trading concerns the surplus arising from trans-"actions with members." It would seem, therefore, if one has regard to (*h*), that it was inserted for the purpose of including under the word "profits" not only profits which it is easy to determine and define as being profits, but also cases in which greater controversy has arisen, namely, surpluses arising from the mutual transactions of members, which, be it remembered, are here referred to as "mutual trading concerns." Paragraph (*h*) also gives exemption to societies registered under the Industrial and Provident Societies Act, and in their case any sum that is repaid to the members by way of bonus or discount or dividend on purchases is to be treated as trade expenses, and it is worth noting, in passing, that those words seems to have been necessary in order to prevent the bonus which would arise from the trading of industrial and provident societies otherwise being caught by the earlier portion of (*h*) and included under the words of Section 52, Sub-section (2).

In the present case there was a surplus, and in Clause 3 of the Case it is stated: "The interest and other income "of the Company arising from investments and the surplus of "the Company arising from transactions with members of the "Company for the accounting period ending 30th June, 1920, "amounted to £315, and for the accounting period ending 30th "September, 1921, to £3,638. Upon these sums, less the "statutory allowance or a proportionate part thereof, the assess-"ments to Corporation Profits Tax were made." It is clear, therefore, that there was a surplus arising from transactions with members, but the question is, Did it arise from mutual trading? It arose from mutual transactions, but were those mutual transactions trading? It is said that mutual concerns do not trade,

(Pollock, M.R.)

and that it has been so decided in the case of the *New York Life Insurance Company* v. *Styles*(1). Before I come to that case I wish to deal with two earlier cases, which were not referred to either in the case of *Last* v. *The London Assurance Corporation*(2) or in the case of *The New York Life Insurance Company* v. *Styles* in the House of Lords, and they were not referred to before the learned Judge from whom this appeal is taken. The first is the case of the *Arthur Average Association for British, Foreign, and Colonial Ships*, 10 Ch. App. 542. The question that had to be determined there was whether or not the Association came within Section 4 of the Companies Act, 1862, and the words of that Section are: " No company, association, or partner- " ship consisting of more than twenty persons shall be formed " after the commencement of this Act for the purpose of carrying " on any other business " (i.e., other than banking) " that has " for its object the acquisition of gain by the company." The case as reported is on appeal from a decision of the Master of the Rolls, Sir George Jessel, who had said in his judgment, on page 547, although it was a mutual association, " Why is not " that an association made for the purpose of profit, even using " the term ' profit ' instead of ' gain '? Between the association " and its members it carries on business with a view of getting " more than it shall pay." The facts were that it was provided in their rules that, should the amount contributed exceed the amount of the claims for loss or damage sustained by the members during each year respectively, such excess should stand to the credit of each mutual member proportionately as he may have contributed—I need not state more than that. That was held by Sir George Jessel to indicate that it was carrying on business, and for the purpose of reaching gain. Lord Justice James, at page 554, in referring to the judgment of the Master of the Rolls, said that he had read it, and " it would require some argument " to make me differ from him " upon any of the points which are dealt with in it. Then came a case, which I will not refer to in detail, of *Smith* v. *Anderson*, 15 Ch. D. 247. I only refer to the existence of that case because in it, on page 280, Lord Justice Brett expressed some doubt as regards the *Arthur Average Association* case, an opinion which he subsequently withdrew. I call attention to that because it gives more emphasis to the decision in the case which I am now coming to, and that is the case of the *Padstow Total Loss and Collision Assurance Association*, 20 Ch. D. 137. In that case there was a mutual assurance association, and again Sir George Jessel says that although it was a mutual association it was carrying on business; at the bottom of page 143 he says: " In the first place, Is this a com- " pany which carried on business? Upon this point I think " there can be no doubt." He is there giving a decision in

(1) 2 T.C. 460. (2) 2 T.C. 100.

(Pollock, M.R.)

accord with his own decision in the *Arthur Average* case, and he says that it was equally plain that the object of the association was the acquisition of gain by individual members. Lord Justice Brett, as he then was, says " these people were attempting to " form themselves into an association or partnership for the purpose of carrying on a business," and he comes to the conclusion that, although it was on mutual terms, it was an association formed for the purpose of carrying on business, and on page 148 he withdraws the observation which he had made in *Smith* v. *Anderson* on the question of the *Arthur Average Association* case. Finally, Lord Justice Lindley, as he then was, referring to the terms of the section which had to be construed—the same section of the Companies Act—said, " Looking to the language of the " section, it appears to me that it is wide enough, and was " intended to be wide enough, to include all such associations " as this, and that the language properly construed applies to " such associations as the present." Now those two cases appear to me definitely and clearly to indicate that there is direct authority that a mutual association does carry on business with the object of the acquisition of gain by its individual members.

In 1885 the House of Lords had before them the case of *Last* v. *The London Assurance Corporation*(1), and the question arose whether or not in that particular case an insurance company, which divided its profits as to two-thirds to the participating policies, was liable to Income Tax in respect of those profits and gains which went to its own members. It was held that it was liable, and the ground explained afterwards was that the London Assurance Corporation traded not merely with its own members but also with others outside it. It was suggested in that case that the sums which were received back by the participating policies were not in the true nature of profits and gains, but mere surpluses—I use a neutral term.

I pass from the case of *Last* v. *The London Assurance Corporation*(1), which I have referred to only to show that I have not forgotten it, and because it is always necessary to refer to *Last's* case whenever one deals with the case of the *New York Life Insurance Company* v. *Styles*(2), 14 App. Cas. 381. There the main question was whether or not the life insurance company, which had no shares or shareholders, and which returned the surplus over expenditure to policy holders on mutual trading, was liable to pay Income Tax in respect of that surplus. The Court of Appeal had held that they were bound by the decision in *Last's* case, and it is, I think, of importance to take note of the question on which the case was taken to the House of Lords. The company in their reasons, which are set out in the case, which we have obtained from the Bar Library, say this, as the primary reason for disputing the decision of the Court of Appeal:

(1) 2 T.C. 100. (2) 2 T.C. 460.

(Pollock, M.R.)

" Because the surplus of trading does not constitute profits or " gains within the meaning of the Income Tax Acts." There is in the reasons stated no suggestion that the reason that they should not be liable is because they are not trading at all, but only that the surplus is not profits or gains within the meaning of the Income Tax Acts. The question that arose for decision, and in my opinion decided, was this: That, when you look at the substance of the matter, persons who are carrying on mutual trading may be still treated as a mutual association, even though they adopt the structure and form of a company. Lord Bramwell says this (1): " The Appellants do not carry on a " profession, trade, employment or vocation from which profits " or gains arise or accrue within the meaning of the Income Tax " Act. It is for the respondent to make out that they do. I " think it can be shown negatively that they do not. I speak, " of course, of the mutual insurance business. They are a " corporation, but the case may be, as is admitted, dealt with as " though they were an unincorporated association of individuals." Lord Macnaghten, on page 411, says(2), " The fact, therefore, " that the insured, who are also the insurers, carry on their " business through the medium of a company, was properly " treated as immaterial," and he comes to the conclusion that he is not bound by *Last's* case(3), and he holds that in respect of the surpluses they were not gains or profits within the meaning of the Income Tax Acts. That was really the point which was raised, as I have pointed out, by the appeal to the House of Lords, and the point which in my judgment was decided. It is quite true that Lord Watson and Lord Herschell refer to the question of whether the association were or were not trading, and Lord Watson, in words which have been pressed upon us, says(1): " I cannot conceive why they should be regarded as " traders, or why contributions returned to them should be " regarded as profits," and Lord Herschell says(4), " Can it " be said that the persons who are thus associated together for " the purpose of mutual insurance, carry on a trade or vocation " from which profits or gains accrue to them ? " It is said that we ought to take note that those two noble Lords expressed the opinion that a mutual association, a body of persons associated together for the purpose of mutual insurance, do not carry on a trade, but it is to be observed that that is not the basis of the decision, and both those noble Lords, when they are dealing with the question of trading, refer to it incidentally in order to arrive at whether or not the profits or gains which are the result of that are subject to Income Tax. They do not refer to the question of trading *per se* and alone, but only to the question of trading incidental to the question which they had to decide,

(1) 2 T.C. 460, at p. 471. (2) *Ibid.* at p. 484. (3) 2 T.C. 100.
(4) 2 T.C. at p. 482.

(Pollock, M.R.)

namely, whether the surplus was subject to Income Tax. As I have pointed out, both the *Arthur Average Association* case and the *Padstow* case were not cited to the noble Lords, and therefore we have this position, that in the *Arthur Average* case and the *Padstow* case it was determined that a mutual assurance company does trade. There are dicta in the House of Lords to say that they do not, but in a case in which those dicta were not necessary for the decision of the case, and the main decision in the *Styles* case(1) was upon the question of whether or not the surpluses were profits and gains.

Now I cannot think, in the state of the authorities, and having regard to the fact that the *Arthur Average* case and the *Padstow* cases are *primâ facie* binding upon this Court, unless displaced by what has been done by the House of Lords, that it is possible for us to say that it has been decided, or that we are bound to or ought to decide, that a mutual association is not also trading, and trading for the purposes of gain derived from its members. Here we have to deal with the actual words which are to be found in clause (*h*) of Section 53 of the Act of 1920.

I must now say a word about the *Eccentric Club* case(2), [1924] 1 K.B. 390. What had to be determined there was whether or not the Eccentric Club, which carried on a social club, was liable in respect of its profits. I think my brother, Lord Justice Warrington, and I both used the *New York Life Insurance Company* v. *Styles*(1) for the purpose of seeing whether or not we could look at the substance of the matter rather than the structure of the company. In my judgment on page 414(3) I refer to the well recognised principle in revenue cases that regard must be had to the substance of the transactions relied on to bring the subject within a charge to a duty, and that the form may be disregarded. Then I refer to the observations made by Lord Herschell and Lord Macnaghten as to the question of the form of the company, and I go on on page 415 to say, "Although " the *New York Life Insurance Company's* case was decided " upon the Income Tax Acts . . . . the reasoning in it " may be used when, as in the present case, one has to decide " whether the form of the Eccentric Club alone is to be looked " at, or whether one may test the question whether the company " is carrying on business, by looking at the nature and purpose " and substance of the transaction by which the members of the " club are aggregated in the company. It seems a somewhat " far-fetched interpretation of the relevant section of the Act to " hold that the association and activities of the members of the " club connote the carrying on of business." So I think both Lord Justice Warrington and I determined that, looking at the

(1) New York Life Insurance Co. *v.* Styles, 2 T.C. 460.
(2) 12 T.C. 657. (3) *Ibid.* at p. 690.

(Pollock, M.R.)

substance of the matter, it was impossible to say that, even if there was a company in existence, the members of a social club were carrying on a business. Lord Justice Sargant agreed with that view, but it is true he went further, and cited the passages which have been referred to from Lord Watson's and Lord Herschell's speeches in the House of Lords in the case of *Styles*(1) as indicating that a mutual association does not trade; but it was not necessary to reach the decision that he should go as far as that. It does not seem to me that, having regard to the decision reached in the *Eccentric Club* case(2), and the judgment given, we are bound by the dictum of Lord Justice Sargant, and I think that falls into the same place as the dicta of Lord Watson and Lord Herschell in the *Styles* case.

In that state of the authorities, therefore, I come back to the actual words of this Section, and it seems to me paragraph (*h*) was expressly put in in order to secure that a surplus of a mutual association, which is treated as mutually trading—and, upon the authority of Sir George Jessel's decision, rightly treated as trading—therefore falls within the meaning of the word "profits," and so is liable to tax.

For these reasons it seems to me that in a careful review of the authorities we are not bound as Mr. Justice Rowlatt felt he was bound, and that we are able to give the decision which he would have wished to give, that is to say, a decision in favour of the Crown. The appeal therefore should be allowed, and allowed with costs.

Warrington, L.J.—I am of the same opinion. The question in this case is whether the profits of the Respondent Company are profits to which Part V of the Finance Act, 1920, applies. Part V is the part of the Statute which imposes the Corporation Profits Tax, and imposes that tax upon all the profits being profits to which this part of this Act applies, and which arise in certain periods which I need not specify. It provides that the profits to which it applies include "the profits of a British "company carrying on any trade or business, or any undertaking "of a similar character."

The Company in this case is a British company, but it insists that it is not carrying on any trade or business or any undertaking of a similar character. Is this contention well founded? Mr. Justice Rowlatt, contrary to his own unaided opinion, has held that it does not carry on any trade or business or undertaking of a similar character, feeling himself bound not by the decision, but by the reasons given by Lord Justice Sargant in the case of the *Commissioners of Inland Revenue* v. *The Eccentric Club*(2), [1924] 1 K.B. 390.

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(1) New York Life Insurance Co. *v.* Styles, 2 T.C. 460. (2) 12 T.C. 657.

(Warrington, L.J.)

I will consider the question first without reference to authority. The Company is a mutual fire insurance company. It is incorporated under the Companies Act as a company limited by guarantee and without any share capital. The first of the object clauses of the Memorandum of Association is as follows: To carry on in the United Kingdom and elsewhere the business of a fire, accident, guarantee, and general insurance company and insurance in all its branches except the issue of policies of insurance on human life. The issue to any person of a policy constitutes him a member. The funds necessary for the general expenses of the Company for paying claims and so forth, including the formation of a reserve fund, are provided by entrance fees and contributions of the members; these funds are in the Articles of Association referred to as the funds of the Company. The affairs of the Company are conducted by a Board of Directors, and provisions are made for general meetings of the members. The business of an ordinary meeting is, amongst other things, to receive and consider the accounts of receipts and payments. In fact, without going more into detail, the Articles are substantially those of an ordinary commercial company of such a nature as this, except that, there being no shareholders, they are silent on the question of profits and dividends. The Company does not insure any persons except its own members. The obligation expressed in the policies issued by the Company is that of the Company itself, and throughout the Company is dealt with in the policy as the insurers and the particular member as the insured. In the absence of authority I should have thought that it was plain that this Company, for the purpose at all events of the Act of 1920, is carrying on a trade or business, namely, that of insuring against loss or damage by fire. It appears that the Company has made profits represented by income on investments and the surplus of members' contributions over expenses. Again, it seems to me that these are profits of the Company and as such are liable to assessment, and that that is made clear by sub-paragraph (*h*) of Sub-section (2) of Section 53 of the Act of 1920.

But it is said that there is authority, by which we are bound, for the proposition that a mutual insurance company which deals only with its members does not carry on any trade or business. The authority relied upon consists, first, of certain statements made by some of the learned Lords who took part in the decision of the case of *The New York Life Insurance Company* v. *Styles*[1], reported in 14 App. Cas. 381, and, secondly, the reasons given by Lord Justice Sargant for his judgment in the *Eccentric Club* case[2] to which I have already referred. The actual question in the case of *The New York Life Insurance Company* v. *Styles*[1]—and I take the question from the argument of Mr. Finlay, as he then was, on page 387

(1) 2 T.C. 460. (2) 12 T.C. 657.

(Warrington, L.J.)

—was "whether, where members of a mutual insurance company make contributions towards the expected expenses, and there is a surplus after paying the expenses, Income Tax is payable upon the surplus which is returned on the contributors?" That was the question which the learned Lords had to determine. The abstract question of whether the Company was carrying on business so far as its mutual branch was concerned did not really arise for decision and was not mentioned in the reasons specified in the case, and it was not mentioned in argument until the close of Mr. Finlay's reply for the Appellant, when he is reported to have contended: "There has been no trade; a man cannot trade with himself. These members do not trade between themselves; they enter into a combination for mutual benefit." The passages in the judgment which are relied upon are these: The first and most important, because it goes further than any of the others, is that of Lord Watson on pages 393 and 394; at the bottom of page 393 he says(1): "The individuals insured and those associated for the purpose of receiving their dividends, and meeting policies when they fall in, are identical; and I do not think that their complete identity can be destroyed, or even impaired, by their incorporation. The corporation is merely a legal entity which represents the aggregate of its members; and the members of the Appellant company are its participating policy-holders," and then he goes on to say: "When a number of individuals agree to contribute funds for a common purpose, such as the payment of annuities, or of capital sums, to some or all of them, on the occurrence of events certain or uncertain, and stipulate that their contributions, so far as not required for that purpose, shall be repaid to them, I cannot conceive why they should be regarded as traders, or why contributions returned to them should be regarded as profits." It is to be observed, therefore, that the noble Lord there divides what he is saying into two matters and expresses a view upon them separately, first by saying he cannot see why such persons should be regarded as traders, and secondly, why contributions returned to them should be regarded as profits. All that was necessary for the decision was that he should deal with the last of those two questions. The passages in the speeches of the other learned Lords are, first, that of Lord Bramwell on page 394, where he says(2): "The Appellants do not carry on a profession, trade, employment, or vocation from which profits or gains arise or accrue within the meaning of the Income Tax Act." Without reading the other passages in Lord Herschell's judgment and in Lord Macnaghten's judgment, it is enough to say that in those passages the learned Lords then addressing the House do confine themselves to the question which they had to consider, namely,

(1) 2 T.C. at pp. 470 and 471. (2) *Ibid.* at p. 471.

(Warrington, L.J.)

whether this was a company carrying on business from which profits or gains were being derived so as to render them liable to be assessed on those profits and gains to Income Tax, and they do not express their opinion on the separate question whether, if they were making profits or gains or not, they were persons carrying on a trade or business.

Now an inferior Court is bound to accept and apply to a case before it the decision of a superior Court, and any statements of law necessary for that decision, but it is not bound by the opinions of individual members except so far as they are necessary for the decision of the Court as a whole. It seems to me that, applying that principle, there is nothing in these dicta which prevents us from finding that in this case the simple question "Does the Company carry on a trade or business?" must be answered in the affirmative. As to the judgment of Lord Justice Sargant, I have only this to say. He alone of the three Judges expressed the view that the case fell within, and was covered by the *New York Life Insurance Company* v. *Styles*(1). There were other reasons expressed by the other members of the Court for their conclusions. I do not say whether I agree or do not agree with the views of Lord Justice Sargant. I simply say that in the present case, and on the present facts, this Company was carrying on a trade or business.

But, on authority, the matter does not stop there. In two cases not cited in the House of Lords, the question whether an unincorporated mutual insurance company of more than 20 members formed for the purpose of carrying on business which had for its object the acquisition of gain by the Company or by individual members thereof, and therefore requiring registration under the Companies Act, 1862, was illegal, was considered and decided in the affirmative. Those two cases are the *Arthur Average Association*, reported in 10 Ch. App. 542, and the *Padstow Total Loss and Collision Assurance Association*, 20 Ch. D. 137. In the first of those cases the question whether such an association was illegal, or, rather, what was the result of its illegality, did not directly arise, but Sir George Jessel, in giving judgment in the case, recognising and stating in terms that what he was going to say was not necessary to the decision, expressed in the clearest possible way that such a company was not only carrying on business, or, rather, formed for the purpose of carrying on business, which was the material thing there, but was so formed for the purpose of carrying on business with the object of gain for itself or for its individual members. That judgment was accepted, or it was not dissented from—I will not say more than that—and Lord Justice James said that he would require a good deal of argument to convince him it was wrong. However, that does not matter. The

(1) 2 T.C. 460.

(Warrington, L.J.)

question came up again, this time distinctly and requiring decision, in the case of the *Padstow Total Loss and Collision Assurance Association*, in which Sir George Jessel considered the matter again, and, after stating the facts, said: " Now was " that company, which clearly carried on the business of marine " insurance, a company formed for the purpose of carrying on a " business, other than banking, which had for its object ' the " ' acquisition of gain by the company, association, or partner- " ' ship, or by the individual members thereof ? ' " He says that in his view it clearly carried on the business of marine insurance, and he proceeded to say that in his opinion it also carried it on for the purpose of gain, and he gave his reasons. Lord Justice Brett again says on page 147 in that case: " I think that this was an " association formed for the purpose of carrying on a business. " It was formed for the purpose of carrying out a long consecutive " number of transactions all of a similar kind and through a long " period. It was, therefore, to my mind, an association formed " for the purpose of carrying on and was carrying on a business. " And what business ? The well-known business of insurance." Then he proceeds to consider whether it was carrying on business for the purpose of gain either to the company or to its individual members, and, incidentally, at the end of his judgment, he withdraws some expression of opinion to the contrary which he had given in the case of *Smith* v. *Anderson*, 15 Ch. D. 247.

All that we have to do here is to say if this Company carries on a trade or business of fire insurance, the object for this purpose being immaterial. I have no doubt what either Sir George Jessel or the other members of the Court of Appeal would have said if this abstract question by itself had been before them, and I think therefore that, so far from there being authority binding either Mr. Justice Rowlatt or ourselves to come to the conclusion at which Mr. Justice Rowlatt arrived, there is authority binding us the other way. I agree therefore that the appeal ought to be allowed.

Scrutton, L.J.—As we are differing from the learned Judge in the Court below I express my judgment in my own words, though I agree with the result at which my brothers have arrived. There is perhaps an additional reason why I should express my own judgment, in that the Judge below has felt himself bound by the decision in the *Eccentric Club* case(1). I was not a party to that decision. My two brothers were. Their views are of the highest authority as to what they meant to say, but perhaps I take a more external view of what they actually did say in that case.

The question is whether the Cornish Mutual Assurance Company, Limited, is liable to the Corporation Profits Tax. The Commissioners have decided that it is not. The learned Judge

(1) 12 T.C. 657.

(Scrutton, L.J.)

would have taken a different view but thought himself bound by the decision in the *Eccentric Club* case to affirm the decision of the Commissioners. Now the Cornish Mutual Assurance Company carries on the business of a fire, accident, guarantee and general insurance company, or has power to carry on that business, and its business is of the ordinary nature of a mutual insurance company. It only insures its members, but persons become its members by taking a policy from it, so that it deals with the whole world but converts the whole world into its members when the assured takes its policy. As is usual in mutual insurance societies or clubs, the member pays a fixed premium—sometimes called an entrance fee, sometimes called a premium—and, if the sum total of these entrance fees or premiums is not enough to meet the claims under the policies, calls are made on the members proportionate to the risks insured of the particular classes in which they appear. That is now a very well-known form of insurance, particularly marine insurance, where a very large portion of the business is carried on by the clubs as distinct from individual underwriters at Lloyd's or companies. The assessment is made in this case on the surplus fund which has been accumulated by the premiums or entrance fees of members exceeding the claims which have been made under the policies of members on the club, some of which is in a fund and some of which is invested and produces interest.

Now the Corporation Profits Tax, by Section 52 of the Act of 1920, is imposed on the profits of a British company carrying on a trade or business, or any undertaking of a similar character. I do not propose to embark on the fascinating pursuit of speculating as to what " any undertaking of a similar character " to trade or business is. Perhaps the persons who put in those words know what they meant by them; I do not. But, if you stop there, I think there is no doubt that the decision of the House of Lords in the case of the *New York Life Insurance Company* v. *Styles*(1) would prevent this insurance company having to pay on this surplus fund, because the tax is imposed on profits and the House of Lords has held in the *New York Life Insurance Company* v. *Styles* that such an accumulated fund is not profits of the company, and that decision binds us whether we might or might not have agreed with the reasoning apart from that decision. Having imposed the tax in those words, Parliament has gone on to explain what, in this particular Act, they mean by some of those words, and in Section 53, Sub-section (2) (*h*), they have said in the plainest terms " profits " shall include in the case of mutual trading societies the " surplus arising from transactions with members," and I take that to be a perfectly clear legislative enactment that, whatever the House of Lords may have said as to Income Tax, in this

(1) 2 T.C. 460.

(Scrutton, L.J.)

tax you are to include any profits, sums, or funds which, under the decision of the House of Lords, you would not include in profits. It appears to me quite clear that the object of putting (*h*) in was to negative the decision in the *New York Life Insurance Company* v. *Styles*(1) as applied to Corporation Profits Tax. But it is said, " Yes, you may have meant that or you may not have meant it, but you have said ' in the case of mutual trading concerns ' and a mutual insurance society is not a trading concern, and Lord Watson said so in the House of Lords; consequently, whatever Parliament may have meant by putting in the words ' mutual trading concerns,' they have taken out or destroyed the exclusion which apparently they meant to give by the rest of the clause." Now, of course, that turns upon whether we are bound to say that a mutual insurance company does not carry on a trade. The position as to that is that before the *New York Life Insurance Company* v. *Styles* was decided in the House of Lords there had been a most lively controversy, exciting the greatest interest in commercial circles, as to whether a mutual insurance society carried on a trade, for when first these clubs were formed (which, I think, was mainly in marine insurance) they were formed as unregistered societies, that is to say, it was an association of members not in the form of a company, and, one of these associations coming to grief, the question arose whether it could be wound up, and it could not be wound up if it was an association formed for the purpose of carrying on a business that had for its object the acquisition of gain either by the company or its members. So that if the mutual insurance company did not carry on a business and had more than 20 members it was not illegal, but if it carried on a business and had more than 20 members—as all these mutual assurance companies had—it was illegal and could not be wound up. It was therefore necessary to consider whether mutual insurance societies of the nature of the company dealt with in the *New York Life Insurance Company* v. *Styles* case did carry on a business that had for its object the acquisition of gain by the company or by the individual members thereof. By the three cases that my brethren have referred to, namely, the *Arthur Average* case(2), *Smith* v. *Anderson*(3) (which was a case not of a mutual insurance company, but of a pool to deal with shares) and the *Padstow Total Loss and Collision Assurance Association* case(4) (which was a case of a mutual insurance company) it had in the result been decided that mutual insurance companies carried on a business not for gain to the society but for gain to the individual members. The decision in the *Padstow* case, which is a decision of this Court, I think, quite clearly held by all the three judges who were concerned—by

(1) 2 T.C. 460. (2) 10 Ch. App. 542. (3) 15 Ch. D. 247.
(4) 20 Ch. D. 137.

(Scrutton, L.J.)

Sir George Jessel, page 144, Lord Esher, page 147, and Lord Lindley at page 149—that a mutual insurance company did carry on a business. Now, for some reason which I do not profess to understand, those cases were not referred to either in the *London Assurance Corporation* v. *Last*(1) or the *New York Life Insurance Company* v. *Styles*(2). The question of trading was only mentioned, as far as I can see, in *Styles*' case at the extreme end of the reply by the Appellants' counsel, and it may be, therefore, that the Respondent's counsel did not appreciate the importance that might be attached to the fact of whether the company traded at all. It may also be that the explanation is to be found in the fact that I have frequently noticed that counsel concerned in Revenue cases and other parties treat Revenue cases as a mystery which has no relation to actual facts or any other branch of life, and therefore that decisions on the Companies Act as to whether a company carried on a trade could have no possible relevance in dealing with a Revenue question. At any rate, I am quite sure if this case had been cited to the House of Lords much more consideration would have been given to the question whether the Company carried on business than was apparently given. One of the noble Lords did, in terms, say, I think, that such a company did not trade—that was Lord Watson at page 394, where he said(3) : " I cannot conceive why " they should be regarded as traders or why contributions " returned to them should be regarded as profits." Now Lord Watson would hardly have spoken in that very off-hand and positive manner if he had before him the fact that the three judges in the Court of Appeal, Sir George Jessel, Lord Esher (whose experience in marine insurance was unrivalled) and Lord Lindley, had all said that such a company did trade. I do not find that the other noble Lords dealt separately with that question. When Lord Herschell uses the phrase as he does(4) " Can it be said that the persons who are thus associated together " for the purpose of mutual insurance, carry on a trade or voca- " tion from which profits or gains accrue to them ? ", I do not think he is separately thinking of the question of trade as compared with the question whether profits or gains accrue to the company. Of course, in the *Padstow* case(5) it had been decided that profits or gains did not accrue to the company, in accordance with the decision of the House of Lords in the *New York Life Insurance Company* v. *Styles*(2). Lord Macnaghten is even more obscure on the subject of trade. The result, it appears to me, is that one noble Lord in the House of Lords does express an opinion that the insurance company does not trade, but the substance of the decision of the House of Lords is that a mutual insurance company does not make profits for

(1) 2 T.C. 100. (2) 2 T.C. 460. (3) 2 T.C. at p. 471.
(4) *Ibid.* at p. 482. (5) 20 Ch. D. 137.

(Scrutton, L.J.)

itself, which is not in disaccord with the decision in the *Padstow* case(1). I therefore take the view that there is nothing in the decision of the House of Lords which requires me to say that a mutual insurance company is not a mutual trading concern. Indeed, if I were bound to say so, I should find the greatest difficulty in understanding why on earth sub-head (*h*) in Section 53 was ever put into the Act, because it would appear to have no object whatever if mutual insurance companies did not trade, which is the suggestion made. Therefore, the first part of Mr. Justice Rowlatt's judgment, where he takes the view that the *New York Life Insurance Company* v. *Styles*(2) decides this matter, does not seem to me to be accurate. In my view we are not bound by the opinion expressed by one member of the House of Lords as to the reasons for a decision, that not being the reason given by the House. It is said, as I understand, by Mr. Justice Rowlatt, that whatever doubts he had on the matter, he is bound by the fact that Lord Justice Sargant in the *Eccentric Club* case(3) does take the view that it was one of the two matters which the House of Lords decided—that the House of Lords decided, first, that the mutual insurance company did not trade, and secondly, that, if it did trade, it did not make profits for itself. Now, I have read the *Eccentric Club* case very carefully, and it seems to me to stand on a quite different footing from mutual insurance club cases. It appears to me that the line which was taken by my brother was this: A club designed to provide social amenities confined to the members is not a trade or business; it is an association for non-commercial purposes. I look at page 413 of the Report and I find the Master of the Rolls says(4), " its object is not business but to " promote social intercourse "; I look at page 421, and I find my brother Warrington saying(5), " a convenient instrument for " enabling the members to conduct a social club, the objects of " which are immune from every taint of commerciality." Nobody would ever say that a mutual insurance society is immune from every taint of commerciality; it reeks with commerciality from the time that it first offers to issue a policy to the time when it ultimately pays a loss. When one comes to Lord Justice Sargant's judgment on page 430 he says(6): " those who are " mutally providing and receiving social amenities, and accord- " ingly that the process of providing these amenities cannot be " considered the carrying on of a trade or business." With that I entirely agree, but when he goes on to say, " any more " than the provision in that case of mutual insurance," then I entirely disagree. It appears to me that the case of mutual insurance is a trade in every sense of the word, and when further the Lord Justice says—and this is a passage which Mr. Justice Rowlatt felt bound to follow—" Each of the majority of four in

(1) 20 Ch. D. 137. (2) 2 T.C. 460. (3) 12 T.C. 657. (4) *Ibid.* at p. 690.
(5) *Ibid.* at p. 696. (6) *Ibid.* at p. 703.

(Scrutton, L.J.).

" the House of Lords recognised the principle that there was no " question of a trade or business in any ordinary sense of the " words," I do not agree with that view of the decision of the House of Lords. I think that only one member took that view, but he took it without having cited to him the decision of the Court of Appeal which had taken exactly the opposite view, that there is nothing in the decision of the House of Lords which overrules the decision in the *Padstow* case(1), and that we are bound by it, as, in fact, I entirely agree with it.

For these reasons I think that Mr. Justice Rowlatt took a wrong view in thinking that he was bound, contrary to his own opinion, by the decision in the *Eccentric Club* case(2) to hold that this particular society was not a trading society and therefore could not possibly come within the charging words of Section 52 of the Finance Act, 1920.

I think, therefore, this appeal should be allowed.

The Company having appealed against the decision in the Court of Appeal, the case came before the House of Lords (Viscount Cave, *L.C.*, and Lords Atkinson, Shaw of Dunfermline, Sumner and Darling) on the 21st January, 1926, when judgment was given unanimously in favour of the Crown, with costs, confirming the decision of the Court below.

Mr. A. M. Latter, K.C., and Mr. Tindal Atkinson appeared as Counsel for the Company, and the Attorney-General (Sir Douglas Hogg, K.C.) and Mr. R. P. Hills for the Crown.

JUDGMENT.

Viscount Cave, L.C.—My Lords, the question to be determined in this case is whether the Appellants, the Cornish Mutual Assurance Company, Limited, have been rightly charged with Corporation Profits Tax.

It appears from the Case stated by the Commissioners for the General Purposes of the Income Tax Acts that the Company is a company limited by guarantee, and was incorporated under the Companies' Acts on the 10th October, 1903; it carries on a mutual fire insurance business in the counties of Devon and Cornwall, and has no subscribed capital. By the Company's Memorandum of Association it is provided that the objects of the Company are (1) " to carry on in the United Kingdom and else- " where the business of a fire, accident, guarantee and general " insurance company and insurance in all its branches (excepting " the issuing of policies of assurance on human life) "; and then,

(1) 20 Ch. D. 137. (2) 12 T.C. 657.

(Viscount Cave, L.C.)

after other objects have been specified, Clause 29 of the Memorandum enables the Company to distribute property of the Company in kind among the members. Of the Articles of Association it is only necessary to quote a few. Article 5 provides that: "Any person who is desirous of insuring with the Com- "pany may become a member of the Company subject to the pro- "visions hereinafter contained, and no person shall be permitted "to insure with the Company unless he is or becomes a member "thereof." Article 6, as altered by a special resolution, provides that: "The issue to any person and the acceptance by him of a "contract of insurance with the Company shall constitute such "person a member of the Company, notwithstanding that no "formal application for membership may have been made." Article 7 provides that: "Every person who becomes a member "of the Company shall pay such entrance fee as the Directors "may determine." Article 15 provides that: "The Directors "shall have power as and when they think fit to make calls on "the members of any class, with a view to providing funds for "the general expenses of the Company, for paying claims, for "creating a reserve fund and for such other purposes as, in the "opinion of the Directors, shall be necessary or desirable." Article 88 provides that: "All moneys received by the Company, "whether for entrance fees or from any other source, and not "directly applicable to the payment of claims pursuant to the "regulations for the time being of the Company, shall be "applicable to any of the purposes of the Company as the "Directors may from time to time determine," and so on. Policies were issued by the Company which fixed the entrance fee payable by members at 3*s*. 6*d*. per centum on the sum as rated for contribution, and which in other respects followed the provisions of the Articles of Association.

It is found in the Case that the interest and other income of the Company arising from investments and the surplus of the Company arising from transactions with members of the Company for the accounting period ended 30th June, 1920, amounted to £315, and for the accounting period ended 30th September, 1921, to £3,638, and upon those sums, less the statutory allowance of £500 (or a proportionate part thereof), the assessments to Corporation Profits Tax have been made.

On these facts the question is whether the Company was liable to this tax. The tax was imposed by the Finance Act, 1920, from which it is only necessary to quote a few words. Section 52, Sub-section (2), provides that the profits to which the tax is applicable are as follows: "(*a*) the profits of a British "company carrying on any trade or business, or any undertaking "of a similar character including the holding of investments." Section 53, Sub-section (2), provides that "Subject to the provi- "sions of this Act profits shall be the profits and gains determined

(Viscount Cave, L.C.)

" on the same principles as those on which the profits and gains " of a trade would be determined for the purposes of Schedule D" of the Income Tax Acts, with a proviso that for the purpose of this part of this Act . . . " (*h*) profits shall include in the case " of mutual trading concerns the surplus arising from trans- " actions with members."

My Lords, there are two questions to be considered, which it is desirable to keep separate. The first question is whether the Appellant Company is, within the meaning of Section 52, Sub-section (2), of the Act of 1920, a company " carrying on any " trade or business, or any undertaking of a similar character." There is no need, I think, to refer further to these last words " or any undertaking of a similar character "; the real question is whether the Company is carrying on a trade or business. Apart from authority, I should have had no manner of doubt upon the subject. By the Memorandum of Association of the Company its main object is to carry on the business of fire insurance. In fact it receives from its members certain moneys which are called entrance fees and calls, but which have a family likeness to premiums; it pays claims, and it conducts the ordinary and well-known business of fire insurance. It is true that it only carries on that business with its own members; but, as every person who chooses to effect a policy with the Company *ipso facto* becomes a member the restriction does not appear to me to prevent the transactions of the Company from being business transactions. That view is supported by the case of the *Arthur Average Association*, 10 Ch. App. 542, and by the well-known case of the *Padstow Total Loss and Collision Assurance Association*, 20 Ch. D. 137; and some observations of Lord Justice Brett which are reported on page 147 of the latter volume clearly show that in his view a mutual assurance company of this kind does carry on a business. On the other hand it is suggested that some expressions used by Lord Watson in a case in this House (*The New York Life Assurance Company* v. *Styles*[1], 14 App. Cas. 381), show that in his view such a company does not carry on a trade or business at all. The point to be decided by the House in that case was whether the Company there concerned was carrying on a trade from which it derived profits which were subject to tax, and the actual decision was that there were no such profits; but in the course of deciding that point Lord Watson certainly said, as reported on page 394 of 14 Appeal Cases, that he could not conceive why the Assurance Company should be regarded as traders, and, again, that the transactions of that Company so far as they related to participating policies did not constitute the carrying on of a trade within the meaning of the Income Tax Acts. The other noble and learned Lords

(1) 2 T.C. 460.

(Viscount Cave, L.C.)

who concurred in the decision did not, in my view, say anything which had that meaning; their observations were directed entirely to the question whether there were taxable profits of a trade within the meaning of the Income Tax Acts, and I do not think that they pronounced any opinion upon the different question, whether there was a trade at all. Lord Justice Sargant in a later case—the *Eccentric Club* case(1), [1924] 1 K.B. 390—gave great weight to the expressions which I have quoted from the judgment of Lord Watson in *Styles'* case, which appeared to him to have been accepted by the other noble Lords who took part in the decision of that case; but with great respect to the opinion of the learned Lord Justice I do not take the same view of the judgments in *New York Life Assurance Company* v. *Styles*(2), and I think that the argument must rest entirely upon the two *dicta* of Lord Watson. I cannot help thinking that that very learned Lord directed his observations only to the real question before the House, namely whether there were taxable profits within the Income Tax Acts; and I cannot believe that he intended to decide that a company of this kind, simply because it was a mutual company, did not carry on any business at all. At all events I feel myself no doubt upon the question.

My Lords, that leads me to the second question, which is this: Admittedly this is a mutual company; and, but for the provision in Section 53 of the Finance Act of 1920, it might have been argued on the authority of *New York Life Assurance Company* v. *Styles*(2), and of other cases, that, assuming a business to be carried on, there are no profits of the business which fall within the tax but only a surplus arising from the members' contributions. But paragraph (*h*) of Section 53 deals expressly with that point, because it provides that in the case of mutual trading concerns the surplus arising from transactions with members shall be treated as profits. It is suggested that the expression "mutual trading concerns" does not include a mutual assurance company; but I do not think the words ought to be so limited. I think the expression "mutual trading con- "cerns" was intended to include all concerns, whether you call them trades or businesses, which are carried on upon the principle of mutual trading; and, in my view, a mutual insurance company like the Appellant Company falls within that description. It can hardly be doubted that the draftsman of the Act of 1920 had in view the decisions in *Styles'* case and other similar cases, and intended to meet in advance an argument that the surplus arising from members' contributions in the case of companies such as those which were in question in those cases did not fall within the term "profits" in Section 52 of the Act.

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(1) The Commissioners of Inland Revenue *v.* The Eccentric Club, 12 T.C. 657.

(2) 2 T.C. 460.

(Viscount Cave, L.C.)

Upon the whole I think that on this point also the argument fails, and therefore that this appeal fails and should be dismissed with costs, and I move your Lordships accordingly.

Lord Atkinson.—My Lords, I concur.

Lord Shaw of Dunfermline.—My Lords, I also agree.

Lord Sumner.—My Lords, I agree.

Lord Darling.—My Lords, I agree.

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.
