No. 813.—HIGH COURT OF JUSTICE (KING'S BENCH DIVISION).—15TH DECEMBER, 1930.

COURT OF APPEAL.—5TH MAY, 1931.

HOUSE OF LORDS.—11TH MARCH, 1932.

STEDEFORD (H.M. INSPECTOR OF TAXES) *v.* BELOE.[1]

Income Tax, Schedule E—Voluntary payment—Pension to retired headmaster.

The Warden and Council of Bradfield College, acting under powers conferred on them by the college statutes, granted the Respondent an annual pension of £500 from the date of his resignation of the office of headmaster of the college. The statutes empowered the Warden and Council to apply certain moneys "to "such purposes as in their absolute discretion they may deem to be "for the benefit of the college including . . . . the payment of any "pension or retiring allowance to any person who may have held "the office of . . . . headmaster," but laid upon them no obligation to pay, or to continue payment of, such a pension.

Held, *that the pension was not assessable to Income Tax.*

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.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 18th March, 1930, The Rev. R. D. Beloe (hereinafter called "the Respondent"), appealed against an assessment to Income Tax in the sum of £500 for the year ending 5th April, 1929, made upon him under the provisions of Schedule E of the Income Tax Acts.

1. The Respondent was in December, 1914, appointed headmaster of Bradfield College, a corporation founded by Royal Charter dated 16th December, 1863, and consisting of a Warden and

(1) Reported (K.B.D.) 47 T.L.R. 175, (C.A.) [1931] 2 K.B. 610, and (H.L.) [1932] A.C. 388.

Trustees who, as the Warden and Council, control the affairs of the college. In February, 1928, he tendered his resignation, which was accepted to take effect at the close of the term ending 2nd April, 1928. His salary had been £1,000 a year, plus a capitation fee of £5 for each boy over 200.

2. The following is a copy of a minute of proceedings at a meeting of the Warden and Council of the college held on the 8th February, 1928.

> " It was decided particularly in view of the headmaster's " ill-health that the resignation must be accepted but with " sincere regret. The Warden was requested to communicate " with Mr. Beloe in suitable terms."

3. The following is a copy of a minute of proceedings at a meeting of the Warden and Council of the college held on the 21st March, 1928.

> " The question of granting a pension to the Rev. R. D. " Beloe, the retiring headmaster, was considered and ulti- " mately it was unanimously resolved that he be granted an " immediate payment of £1,000 and an annual pension of " £500 commencing on the 2nd April next, when the current " term ends, payable out of residue of income as defined in " statute No. 25."

4. Statute No. 25 of the statutes referred to in the charter is as follows :—

> " The Warden and Council shall receive all fees and pay- " ments from the parents or friends of the boys, and out of the " moneys so received shall pay all living and tuition expenses " of the boys, the remuneration of the Warden, Sub-Warden, " headmaster, organist, the assistant masters, officers and " servants, all rents, rates, taxes and premiums of insurance " that may become due and other outgoings in respect of the " college property and premises, the remuneration of the clerk, " the costs, charges and expenses (if any) of the Warden and " Council and of the Trustees, and shall apply the residue of " such payments and any other income which they may " receive to such purposes as in their absolute discretion they " may deem to be for the benefit of the college including in " such purposes the payment of interest on or the repayment " of capital of mortgages, the payment of any pension or " retiring allowance to any person who may have held the " office or position of Warden, Sub-Warden, headmaster, " organist or assistant master, officer or servant in the college " or the payment of any contribution to any fund for the pro- " vision of pensions or retiring allowance for any such person " or persons, and may at their discretion invest the residue

" of any such fees, payments or income received by them after " making provision for all proper expenses in or upon any " securities from time to time authorised by law for the in- " vestment of trust funds and may at the like discretion invest " any income arising from such investments in a similar " manner, with power for the Warden and Council at the like " discretion to vary or transpose any such investments into or " for any other investments of a similar character. And the " Warden and Council may from time to time sell any such " investments and apply the proceeds of such sales as if the " same were income of the college received by them."

A copy of the charter, statutes and regulations is annexed to and forms part of this Case.(1)

5. Evidence was given before us, which we accepted, that the charter contained no provision under which, nor did any scheme exist whereby, the Respondent could have qualified for a pension. No negotiations with regard to a pension took place between the Respondent and the Warden and Council before the said payment was made. The Respondent had received the said sum of £500 for two years. It was paid automatically without a fresh authorisation by the Council each year and was credited every quarter to the Respondent's banking account. The Warden and Council of the college had the right at any time to rescind the said minute and cease payment of the said sum to the Respondent, but had not in fact done so. There was now in existence a superannuation scheme for assistant masters but this scheme did not apply to headmasters. The said sum of £500 was paid out of the general fund of the college. One of the Respondent's predecessors, who was also Warden of the college, Dr. Gray, had upon his retirement in 1910 been voted by way of pension a share of the profits of the college, but had received nothing until 1922, when a commuted payment without reference to profits was made to him. Another predecessor, Dr. White, had received no pension. There were, however, two ex-masters who were receiving pensions from the same source as the Respondent. One of them had been paid for eight years and the other for five. There was no case on record in which a pension so granted by the college had been rescinded.

6. It was contended on behalf of the Respondent that the payment of the said sum of £500 was voluntary and not subject to Income Tax. The case of *Beynon* v. *Thorpe*, 14 T.C.1, was relied on.

7. It was contended on behalf of the Inspector of Taxes (*inter alia*) that the said pension of £500 was chargeable with Income Tax not being in the nature of a personal gift, or charitable donation.

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(1) Not included in the present print.

8. We, the Commissioners held, with considerable doubt, that the payment of the said sum of £500 was voluntary on behalf of the Warden and Council of the college, that, as there was no consideration for the same, the Respondent had no right of action to enforce payment and the said sum was not liable to Income Tax in his hands. We considered that the case of *Beynon* v. *Thorpe*(1) supported this view.

We allowed the appeal and discharged the assessment.

9. The Appellant, immediately upon the determination of the appeal, declared to us his dissatisfaction therewith as being erroneous in point of law and in due course required us to state a Case for the opinion of the High Court pursuant to the Income Tax Act, 1918, Section 149, which Case we have stated and do sign accordingly.

R. COKE,
J. JACOB,
} Commissioners for the Special Purposes of the Income Tax Acts.

York House,
23, Kingsway,
London, W.C.2.

29th August, 1930.

The case came before Rowlatt, *J.*, in the King's Bench Division on the 15th December, 1930, when judgment was given against the Crown, with costs.

The Attorney-General (Sir W. A. Jowitt, K.C.) and Mr. R. P. Hills appeared as Counsel for the Crown, and Mr. A. M. Latter, K.C., and Mr. C. L. King for the Respondent.

JUDGMENT.

Rowlatt, J.—I do not think I can do anything in this case except apply the principle I followed in *Beynon* v. *Thorpe*(1), and the two cases can be conveniently reviewed together.

In this case, under the trust deed these trustees, of course, would only have power to use the trust moneys for a purpose allowed by the trust deed. It happens that it allowed them to grant this pension. If they had been trustees of their own money, they could have granted it irrespective of any deed. I myself do not think the circumstance that there is a deed has any great materiality as regards the point we are on now; it merely means that where you have got limited owners they cannot give away

(1) 14 T.C. 1.

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property without being empowered to do so. That is all it comes to, and I do not think the circumstance that they make the allowance by virtue of a deed gives any further right to the person to whom the allowance is given, whether he is a headmaster or whether he is a broken-down gardener, or whoever he is, I do not think it makes any difference. If a broken-down gardener was in the trust deed perhaps that would be taken as *de minimis*. I think he must be in the same position as a private body of persons, who through ill-health lose a man who has served them well, saying—and saying it, if you like, in a way that makes him think "I can rely upon this"—"We will allow you £500 a year for your life." He knows they will not go back upon it unless disaster overwhelms the firm, or whoever it is. There it is; all he can do is to be thankful when it comes in every year; no doubt a bankers' order is given, so that it comes in quite regularly every year. That is the position. In this case another curious thing—it is a much happier case than *Beynon* v. *Thorpe* in this respect—is that this money is paid out of a fund, and, it being the income of a charity, has escaped Income Tax; and that exposes a very nice little point on behalf of the Revenue. I do not think it makes any difference. It may be said that here there is a fund that has not paid tax, and it is going into a private pocket and does not pay tax there; but I really do not think that has anything to do with the case. They may spend their tax-free money this way, that way, or the other. If the way they spend it creates annual profits or gains, tax is payable, but if it does not create annual profits or gains tax is not payable; I do not think there can be anything in that point, although it is attractive. I remember in *Duncan's*(1) case the Lord President referred to the question of a charity being exempt; but the position as regards the exemption of a charity is only this: If this is not income at all in the hands of Mr. Beloe, nothing arises; if it is income, an annual profit, well, whatever it is they ought to deduct the Income Tax, and if they have not paid it out of profits or gains which have borne tax they will account for it to the Crown; if they have paid it out of profits and gains they would not account for it to the Crown. That is all they mean. So much for that.

We have here the question of it being a voluntary gift. In *Beynon* v. *Thorpe* I think I said I was very clearly of the opinion—I may have been wrong—that these voluntary gift cases are cases where you have got an office, possibly you might have a case where you might have an employment—one can imagine such cases—which office or which employment depends for the profits that it shows partly upon gifts which cannot be sued for; then that is not the less—if that is the true way of looking at the facts of

(1) Duncan's Executors v. Farmer, 5 T.C.417.

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the case—a case of profits due to the office or due to the employment; but the point here is that you have no office and no employment. All you have is an annuity being paid, a sum being paid every year. That is all you have got. It might be a gift which is paid every year; it is just the same as an allowance; that payment is made. It is just the same as all the pensions that are paid to old servants, whether they are paid by individuals or whether they are paid by institutions in this country who pension off old servants; it is exactly that case, although, of course, it is a larger sum in the case of this gentleman, who is in an important position. I do not think in those cases you could get any basis for an annual profit or gain when you have no employment and no office and merely the receipt of so much money every year. There is no background of business in it; there is no question of right at all; it is merely a contribution by some kind person every time, although it may be uncertain that they will continue to do it. That is how I regard it. I said before, in regard to *Duncan's* case, that it, curiously enough, never raised the question that it was not income at all. I do not think it could have been raised, because it is quite clear that this gentleman got this grant, and contract or no contract, it is unthinkable that they would not have realised they were bound to continue it under those circumstances. Anyhow, it was not raised.

I think the Crown must fail in this appeal, with costs.

The Crown having appealed against the decision in the King's Bench Division, the case came before the Court of Appeal (Lord Hanworth, *M.R.*, and Lawrence and Romer, *L.JJ.*) on the 5th May, 1931, when judgment was given unanimously against the Crown, with costs, confirming the decision of the Court below.

The Attorney-General (Sir W. A. Jowitt, K.C.) and Mr. R. P. Hills appeared as Counsel for the Crown, and Mr. A. M. Latter, K.C., and Mr. C. L. King for the Respondent.

JUDGMENT.

Lord Hanworth, M.R.—We need not trouble you, Mr. Latter. This is an appeal from a decision of Mr. Justice Rowlatt who confirmed the decision of the Commissioners, who held that the Rev. R. D. Beloe was not liable to pay Income Tax, under the provisions of Schedule E, upon a sum of £500 received by him during the year ending the 5th April, 1929.

The facts are to my mind of great importance because this and other kindred cases run on rather narrow lines. We are told by the Case that the Respondent, Mr. Beloe, was the

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headmaster of Bradfield College, and was appointed to hold that office in December, 1914. He was to receive during his term of office a salary with a capitation fee on each boy over a certain number. Unfortunately, Mr. Beloe's health did not remain good and compelled his resignation, and on the 8th February, 1928, the Warden and Council of the college were compelled to accept his resignation, which they did with regret. Then at that time, and now, the college was governed by a series of statutes which are contained in the Royal Charter under which the college is constituted. Section 25, which is set out in the Case, says that the Council are to receive all fees and payments and so on; they are to be the collecting body to receive the funds due to the college and then they have power to make the payments in respect of salaries payable to the masters, and to pay out the various outgoings necessary in respect of the college property and keeping up the college in working order, and also they have power to make a payment of any pension or retiring allowance to any person who may have held the office or position of, *inter alia*, headmaster; and they may at their discretion invest the residue.

We are told that, at the time when Mr. Beloe resigned, there was no provision and no scheme in existence whereby the Respondent could have qualified for a pension. In many schools plans to introduce pensions for the masters, whether contributory schemes or not, have been adopted, but in March, 1928, there was no scheme which provided for a payment to be made to the retiring headmaster by way of compensation. No negotiations of any sort took place; no condition was imposed upon the headmaster. The acceptance on the 8th February of his resignation is in unqualified terms. After that, on the 21st March, we have a minute in which the question of granting a pension to Mr. Beloe " was considered and ultimately it was unanimously resolved that he be granted an immediate payment of £1,000 and an annual pension of £500 commencing on the 2nd April next when the current term ends payable out of the residue of income as defined in statute No. 25." That is the statute, to the terms of which I have already referred. It does not matter what exact words are used. Under the Revenue Acts we have to consider the substance of the matter. No importance, therefore, attaches to the fact that in this minute that I am reading the word " pension " is used. If it had not been used the position would be just the same, if it is a pension within the meaning of the Income Tax Act. Whether it is so called or not so called would not be a determining factor to decide whether Mr. Beloe is charged or immune from Income Tax. The fact that he was made a payment of £1,000 immediately indicates that the governors were grateful for his services, sympathetic towards his position, and I do not doubt whether it could be contended that that payment of £1,000 was anything but a gratuity or present in recognition of the regard

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in which he was held by the governing body. That minute, as I said, was passed. It appears, for we are considering the year ending 5th April, 1929, and we are told that the Respondent had received the sum of £500 for two years. That, I suppose, is told us by way of bringing the facts up to date. The Case is stated on the 29th August, 1930, but by the year ending 5th April, 1929, there could have only been one payment of £500 between the time upon which it accrued due or was payable, the 2nd April, 1928, and the 5th April, 1929. We are told that arrangements were made whereby it was to be paid automatically without a fresh authorisation. For the purposes of the case all that we have to consider is that it was a sum paid in that year and it was under these circumstances. The Council of the college had the right at any time to rescind the minute and to cease the payment of the sum. We are also told that there is now in existence a superannuation scheme for assistant masters. The scheme does not apply to headmasters. Then we are given in paragraph 5 some facts, which do not appear to be admissible as evidence upon the question that we have to decide and which, I think, might well have been excluded if objection had been taken on behalf of Mr. Beloe. They do not, however, make any difference to the problem that we have got to consider.

Having received this £500—and I will add this, that whether we are considering the year ending 5th April, 1929, or subsequent years, the facts seem to provide the same result—we have to consider whether this £500 so received in this year 1929, or other years, was a sum which falls to be taxed under the Income Tax Acts. The Commissioners after considering the matter carefully came to the conclusion that the payment of the £500 was voluntary, as there was no consideration for the same and the Respondent had no right of action to enforce payment and they considered that the case of *Beynon* v. *Thorpe*(1) supported that view. They thereupon discharged the assessment. Now I think that this question is what one calls a mixed question of law and fact. There are matters which may be considered questions of degree and, if so, they are questions of fact. If the Commissioners have rightly directed themselves in law we could not vary their decision in fact; but Mr. Hills, on behalf of the Crown, says that they have not directed themselves correctly in law, because the effect of this donation or payment to the man who had been headmaster of Bradfield College was a pension or an annuity or a receipt by him bringing him within the ambit of Schedule E. Schedule E is the Schedule under which taxation is to be made of annuities and sums which are received in respect of a public office or employment of profit. It was, however, decided in *Duncan's Executors* v. *Farmer*—which is reported in 5 Tax Cases(2)—by the Court of

(1) 14 T.C. 1. (2) 5 T.C. 417.

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Session where a man had retired through ill-health and was no longer holding an office, and, indeed, had retired on condition that he completely resigned the parish, that there the income that he received or was paid could not be a sum which was payable to him in respect of his office, for he was clearly, not merely by the fact of his resignation, but by the terms of his resignation, no longer to be deemed to be the holder in any sense of his office. It was, however, held that the annuity was still chargeable with Income Tax and assessable under Schedule D. The law has, however, been altered in respect of that, and our attention has been called to a Section of the Act of 1922(1), whereby offices and employment and pensions have been brought back within the ambit of Schedule E; the result being that the precise question that arose in *Duncan's Executors* v. *Farmer* does not arise now, and Schedule E is once more enlarged so as to be what I might call the section for the purpose of charging pensions. That, however, does not decide or help us to decide this question. What we have to determine is this: Call it what you will, " pension " or " annuity " or " wages " or " perquisite " or " profit "—is it under any of those words a sum which is brought within the ambit of Schedule E?

Now a large part of the argument has dwelt upon this fact, that in the hands of the Council and Warden of Bradfield College they had no power, or would have had no power, to make the payment unless they were armed with the authority under Statute No. 25, and it is said—it was so stated, we are told, by the Attorney-General in the Court below—that the moneys out of which it is paid are deemed to be, and are held to be, immune from payment of tax by reason of their coming within the exceptions in favour of a charity which are provided by Section 37 of the Act of 1918. That immunity, though, does not decide the case. The short sort of argument based upon it is this: " Inasmuch as this £500 came from a source or came from the " hands of those who do not pay Income Tax here is £500 immune " in the hands of the Warden and Council; somebody ought to " pay Income Tax in respect of it, and as it has percolated to the " hands of Dr. Beloe he had better pay." That is not the argument on which chargeability to Income Tax ought to be based. The question is whether in the hands of Mr. Beloe this sum is taxable. Now that is quite clear from the old case of *Herbert* v. *McQuade*. *Herbert* v. *McQuade* is to be found in 4 T.C., at page 489. The question that arose in that case was this, whether a clergyman who had received from the Queen Victoria Clergy Sustentation Fund a sum in augmentation of the income of his benefice was or was not liable to be assessed to Income Tax upon the receipt of that money as being profits accruing to him by

(1) Finance Act, 1922, Section 18.

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reason of his office. It was held that he was. But when the case was in the Court of Appeal, I think it was Lord Collins, who was Master of the Rolls, gave a judgment and discussed the whole of this question, the question which has arisen so often, whether Easter offerings or moneys received by the clergy are in their hands taxable, and he says this. He was then quoting from a case, but he proceeds(1): "Now that, whether the particular facts "justified it or not, is certainly an affirmation of a principle in "law, that a payment may be liable to income tax although it is "voluntary on the part of the persons who make it, and that the "test is whether from the standpoint of the person who receives "it, it accrues to him in virtue of his office; if it does, it does not "matter whether it was voluntary or whether it was compulsory "on the part of the persons who paid." Mr. Justice Rowlatt in *Cowan* v. *Seymour*(2) referred to that principle, and lays that down as one of the principles which have emerged as quite clear and he quotes the very words: "whether from the standpoint of "the person who receives it, it accrues to him by virtue of his "office." In *Cowan* v. *Seymour* the question that arose was as to a sum voted to a man who had acted as secretary to a company without remuneration until his appointment as liquidator, and when the liquidation was completed he was paid a sum by unanimous resolution of the shareholders or the people who had been shareholders. It was held that the sum which was voted by the shareholders to him because he had been liquidator, and not in the course of liquidation, was not chargeable to Income Tax.

We have got here a case in which the man was not entitled to receive any pension. He did not fall within any scheme of pensions; he had no claim at all to receive any money, and it was not paid to him because he remained a schoolmaster. It was paid to him because of services that he had previously rendered, but also it was not paid to him because such a payment falling due after the completion of his term of office was a part of the contract under which he rendered the services. It is not a case, as there have been cases, in which the contract of service contemplated that even when the services were terminated or the office vacated there still would be a right to receive some sum. Those facts do not appear in the present case. As in *Duncan's Executors* v. *Farmer*(3), this Respondent holds no office at all, and he had no right even to look to receive any sum of money from the Council; and he has been paid £500 in this particular year. It could have been withdrawn. The matter could have been reconsidered by the Council, and I cannot see, when looked at from his point of view, he has a right to say that he is entitled to receive, or is receiving, in each year, something which accrues to him by reason of his office, or that it is an annuity that he can surely count

(1) 4 T.C. at p. 500. (2) 7 T.C. 372. (3) 5 T.C. 417.

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on, or that it is a pension to which he is entitled. Those facts, so far as they are facts, appear to be involved in the conclusion reached by the Commissioners and accepted by Mr. Justice Rowlatt.

I do not refer more to the cases about beneficed officers either in the Scottish Church or in the English Church. They are well-known and they fall sometimes on one side and sometimes on the other. We have here facts which seem to exclude the possibility of it being said that the only reason by which this payment was made, such as prevailed in *Herbert* v. *McQuade*, was because it was desired to increase the emoluments received by the Respondent in the capacity of holding an office. Two cases, however, have been referred to which I will deal with. It is said that some guidance was to be obtained from the case of *Drummond* v. *Collins*(1) and from the *Tollemache* case(2). *Drummond* v. *Collins* was a case in which there was a trust for the payment of sums by way of maintenance to the children—nephews, I think, of the testator—that is, at the discretion of the trustees, but there was that trust. It is quite true that the trustees might have refused to make any payment or made a smaller or larger sum, but if and when paid it was received by the guardian of the children as being a payment for the account of the children and for their benefit, they being really a *cestui que trust* or beneficiaries of the trust, and as and when received by them it was held by the Court that that sum, looked at from the point of view of the recipient, was a sum to which they had become entitled under the terms of the will, the conditions for that payment being made to them under the will having been fulfilled.

The *Tollemache* case was a case in which a question arose as to Super-tax. Certain benefits were allowed to the person who was to be taxed, the opportunity, that is to say, of residing in a house—the condition of the house and so on being charged, not directly to the person who was in occupation, but charged to a trust fund. As I think I pointed out in my judgment in that case, it was a case just like the cases where money is paid over tax free. You have got to add to the benefit received the value of the immunity from tax which has been enjoyed. Both those cases seem to be quite wide of the present case. It does not appear possible to hold upon the facts before us that Mr. Beloe was the beneficiary under a trust or a *cestui que trust* enjoying as of right this money, for the facts completely negative it. Under those circumstances it appears to me that the judgment of Mr. Justice Rowlatt and the decision of the Commissioners must be affirmed.

I ought to add that the Attorney-General, on behalf of the Crown, has sought to bring this case before the Court of Appeal in order to ascertain whether the judgment of Mr. Justice Rowlatt

(1) 6 T.C. 525. (2) 11 T.C. 277.

(Lord Hanworth, M.R.)

would be upheld or not, believing that the case may be a guide in a great number of other cases. Under those circumstances, he has undertaken that all the costs incurred by the Respondent as between solicitor and client should be paid by the Crown. That is a wise and generous offer on the part of the Attorney-General and, therefore, the appeal will be dismissed and the Respondent will be entitled to his costs under the terms of that agreement, not merely as between party and party, but as between solicitor and client.

Lawrence, L.J.—I agree, and have very little to add to the judgment delivered by the Master of the Rolls.

In the first place, I think it is clear that the allowance in question is not a profit payable to the Respondent in respect of his having or exercising an office or employment of profit as mentioned in Schedule E. The allowance was only granted after the resignation of the Respondent from the headmastership of the college, and only became payable to him after his office or employment of profit had ceased. There was no kind of bargain made between the Warden and Council of the college and the Respondent as to the payment of the pension, which was a purely voluntary allowance.

The question then arises whether this allowance was an annuity or pension within the meaning of the Income Tax Acts. Before the year 1922 an annuity or pension was chargeable with Income Tax under Schedule D, and is now, under Section 18 of the Finance Act, 1922, chargeable to Income Tax under Schedule E. In my judgment, the Commissioners and Mr. Justice Rowlatt were right in concluding that the allowance to the Respondent was not an annuity or pension chargeable to Income Tax under Schedule E. As I have already stated, the so-called pension was a purely voluntary allowance and could be stopped at any moment. Mr. Hills has relied on the case of *Duncan's Executors* as an authority for the proposition that the allowance in the present case is taxable as an annuity or pension. Now in my judgment, that case is distinguishable from the present case in that there the pension was granted on condition that Mr. Duncan should completely resign from the parish, and the Commissioners stated in the case that the payment to Mr. Duncan was made to him[1] " by virtue of his having held the office of minister of the Parish " of Crichton, and in consideration of his complete resignation " of the parish and surrender of the whole emoluments of the " office to his successor in the pastoral charge of the parish." The Lord President relied upon the fact that the pension granted to Mr. Duncan could not have been revoked; that is to say, that it was granted for good consideration and was payable for the rest of

(1) 5 T.C. at p. 421.

(Lawrence, L.J.)

Mr. Duncan's life as a matter of right which he could have enforced. The learned Lord President expressly distinguishes the case of *Turner* v. *Cuxson*(1) (which was relied on in support of the contrary view) from the case before him, on the ground that the payment in *Turner* v. *Cuxson* was a charitable payment by the Society and was a mere donation given each year with no certioration that it would be repeated the year following, whereas in the case before him—that is in *Duncan's Executors*—there was a regularly constituted annuity granted by the Society. That case, in my judgment, shows the distinction between an annuity or pension which is paid to a man who has the right to receive and could enforce payment of it, and a payment which is purely voluntary amounting in each quarter or half-year when it is paid to a fresh donation to the recipient.

But then Mr. Hills has relied upon another branch of cases illustrated by the case in the House of Lords of *Drummond* v. *Collins*(2), and possibly by the case relating to Super-tax—*Lord Tollemache's* case(3)—before the Court of Appeal. Now in those cases, the payments made were payments to *cestui que trusts* under the instruments in pursuance of which the trustees were acting; they were payments made by trustees of a will either to or in favour of *cestui que trusts* under the will, and although they were made under a discretionary trust, yet it was held that when they were made the recipient received them as a beneficiary under the will. Mr. Hills has suggested that that is the case here, by reason of Clause 25 of the statutes governing the college. That clause is one which is inserted for the purpose of regulating the administration of the affairs of the college, and it provides that the Warden and Council are to receive all fees and payments in respect of the boys and that out of these receipts they are to pay certain expenses, and that they are to apply the balance and any other income which they may receive to such purposes as in their absolute discretion they may deem to be for the benefit of the college, then certain modes in which they may exercise their discretion are indicated. For instance, the repayment of the capital mortgages and the payment of pensions to headmasters or retiring allowances to any person who has held the office of warden, sub-warden, headmaster and so on. Now in my judgment, neither the mortgagees nor the person to whom the allowances are made ever become *cestui que trusts* of the Warden and Council under this clause; it merely contains indications of what would come within their powers when administering the funds for the benefit of the college, which is their sole *cestui que trust*. The payments there indicated are payments made for the benefit of the college, and the persons administering those funds do not, by making those payments, constitute the persons, to whom they make them, their

(1) 2 T.C. 422. (2) 6 T.C. 525. (3) 11 T.C. 277.

(Lawrence, L.J.)

cestui que trusts under the trust created by this clause in their favour. This distinction to my mind is a fundamental distinction between the case of *Drummond* v. *Collins*(1), and the other cases decided on the same lines, and the present case.

For these reasons I agree that the appeal fails and ought to be dismissed.

Romer, L.J.—I agree. The case on behalf of the Crown is put alternatively. They say, in the first place, that this annual allowance is taxable under Schedule E as being a payment made in respect of the office formerly held by the Respondent as headmaster of Bradfield College. In the alternative they say that it is an annuity or other annual profit or gain, such as is mentioned in Rule 1 (*b*) of Schedule D, which was formerly chargeable under that Schedule, but is now chargeable under Schedule E, by virtue of the provisions of Section 18 of the Finance Act, 1922.

In my opinion the Crown is wrong on both points. This annual allowance was not one that was stipulated for by the Respondent at the time when he undertook the office of headmaster; nor was it one to which, as the holder of that office, he had any right or title; it was an allowance made to him by the governing body of the college when he gave up his office, and I share the difficulty that was felt by Lord Dunedin in the case to which our attention was called of *Duncan's Executors* v. *Farmer*(2), in seeing how it is possible to say this payment is made in respect of the Respondent's office, when the whole reason the allowance was given to him was that he was no longer in that office. I do not think, on the other hand, that it is an annuity or other annual profit such as is mentioned in Schedule D. The question whether it is or not seems to turn on this, whether it is to be regarded as an annual payment to which the Respondent has a right, or whether it is to be regarded merely as a series of annual gifts made to him by the governing body of the college. I think it must be conceded that it is to be regarded as a series of voluntary gifts made to him, unless the case can be brought within the principle that was applied in the case of *Drummond* v. *Collins*(1). In that case there was a will by virtue of which the trustees owed a duty to certain children to make provision from time to time out of the income of the share of those children in the trust estate for the suitable maintenance and education of such children, but the amount so to be applied from time to time was to be such as the trustees in their uncontrolled discretion might think necessary or advisable. The trustees in the exercise of their discretion did apply certain income, or rather, send over to this country from America, where they were, certain income for the purpose of being applied in that manner, that is to say, for the maintenance and education of such children, and the question arose as to whether that was to be

(1) 6 T.C. 525. (2) 5 T.C. 417.

(Romer, L.J.)

treated as income of the children and so liable to taxation. Lord Parker in his judgment said this(1): Though the infants "might "be incapable because of their age, of giving a receipt for the "money, it is in my opinion none the less clear that the money in "question was as soon as the trustees had exercised their "discretionary trust held in trust for these infants as beneficiaries." Lord Wrenbury said(2): "but so soon as their"—that is the trustees'—"discretion is exercised in favour of the child, the "resulting payment seems to me, upon the language of the will, "to be a payment of income to which the child is entitled by "virtue of the gift made by the testator." So that the income was there held to be the income of the infants liable to taxation, because, to use the words of Lord Parker, "the money was held "in trust for these infants as beneficiaries", or, to use the words of Lord Wrenbury, the child was entitled to the income.

In the present case, the Respondent, Mr. Beloe, is not entitled to this pension at all, nor is any part of the funds in the hands of the governing body held upon trust for him. When one looks at statute No. 25, the statute referred to in the Charter, you see that the surplus income was to be held upon trust for the benefit of the college to be applied for the benefit of the college in such way as the trustees—that is, the Warden and Council—may in their absolute discretion deem to be most for its benefit. If there be any *cestui que trust* under that, it is the college and no one else. If the clause had stopped there, as it well might have done—because the subsequent words neither enlarge nor diminish the discretion which is given to the Warden and Council—it would have been impossible, I think, for Mr. Hills to argue that when the trustees in the exercise of their discretion applied a part of the income in making this allowance to Mr. Beloe because—this is the only reason they could make it—they considered that payment to be for the benefit of the college, that Mr. Beloe was a *cestui que trust* of theirs or became entitled to the pension, or that anything was held in trust for him. Certain words are added merely for the purpose of indicating to the trustees one or two ways in which they may think it desirable to benefit the college. One of these ways, as pointed out by Lord Justice Lawrence, was to apply the money in payment of interest on, or the repayment of, capital of mortgages. If, in the exercise of their discretion, the trustees so applied part of the money, no one could possibly say that a mortgagee was a *cestui que trust* of theirs, or that a mortgagee became entitled to receive any part of the trust money. It follows, in my opinion, that it is impossible in the circumstances for anyone to say that Mr. Beloe is a *cestui que trust* of the Warden and Council, or that he has any right whatsoever to receive these sums which are from time to time paid to him.

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(1) 6 T.C. at p. 540. (2) *Ibid.* at pp. 540/1.

(Romer, L.J.)

For these reasons it appears to me that this appeal fails and should be dismissed with the consequences which have been indicated by the Master of the Rolls.

The Crown having appealed against the decision in the Court of Appeal, the case came before the House of Lords (Viscount Dunedin and Lords Warrington of Clyffe, Thankerton and Macmillan) on the 11th March, 1932, when judgment was given unanimously against the Crown, with costs, confirming the decision of the Court below.

The Solicitor-General (Sir Boyd Merriman, K.C.) and Mr. R. P. Hills appeared as Counsel for the Crown, and Mr. A. M. Latter, K.C., and Mr. C. L. King for the Respondent.

JUDGMENT.

Viscount Dunedin.—My Lords, in this case the governing body of Bradfield College, who are a corporation founded by Royal Charter, have funds under their control, one of the matters to which they are allowed to apply their funds, if they wish, being to give allowances and pensions to persons who have been headmasters in their school. They did, upon the retirement of the Respondent to this case, grant him a pension. It is admitted in the case that no consideration was given by him for the granting of the pension and that, as a matter of fact, it depends entirely on the goodwill of the governing body, who might at any time, if they wished, rescind the minute under which they granted the pension and the pension would be no longer payable. In these circumstances, the question before us is whether this payment to the Respondent is chargeable to Income Tax.

Now, that it is not chargeable under the old Schedule E is quite clear from the case of *Duncan* v. *Farmer*(1). It is not given to him in respect of his office as headmaster, because he no longer holds that office of headmaster. It is only given to him because he is no longer headmaster.

Then we have the later statute which says that " such profits " or gains arising or accruing to any person from an office, employ- " ment or pension as are, under the Income Tax Act, 1918, chargeable " to income tax under Schedule D . . . . shall cease to be charge- " able under that schedule and shall be chargeable to tax " under Schedule E "(2)—so we are there referred to Schedule D.

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(1) Duncan's Executors *v.* Farmer 5 T.C. 417.
(2) Finance Act, 1922, Section 18 (1).

(Viscount Dunedin.)

Now it must be a real profit under Schedule D and it has been held again and again that a mere voluntary gift is not such a profit because it is not, in the true sense of the word, income. It is merely a casual payment which depends upon somebody else's goodwill.

It was sought by the Crown to show that something else had been held by the Court of Session in the case of *Duncan* v. *Farmer*(1), and, as has been pointed out, in the case of *Duncan* v. *Farmer*, it was held that while he was not liable under Schedule E, he was liable under Schedule D. The point there was that an annuity had been granted upon consideration that he should give up the parish entirely—that is, not have an assistant and successor, but go out of the parish altogether. There is no question that, if the annuity had not been paid, Duncan might have sued for the annuity. I think that, although not said in actual words, is absolutely deducible from the opinion that I pronounced in that case.

My Lords, in these circumstances I am of opinion that here the payment is purely voluntary and cannot be subjected to Income Tax and I move your Lordships that the appeal be dismissed with costs.

Lord Warrington of Clyffe.—My Lords, I agree. It is not here contended that the pension in the present case is a profit from the headmaster's employment as headmaster, for the simple reason that it was not given to him until he had finally resigned his office. Then is it a profit or gain under Schedule D? This question can, in my opinion, only be answered in one way. Here each payment is wholly voluntary. The case is only an instance of a succession of voluntary payments, each of which is voluntary and none of which need necessarily be continued.

Lord Thankerton.—My Lords, I concur, and I just wish to say a word about the case of *Duncan* v. *Farmer*(1). I think the opinion of the noble viscount on the Woolsack makes absolutely clear what the nature of the payment in *Duncan's* case was, and it is consistent with the facts as narrated in the stated Case when he said, distinguishing it from the case of *Turner* v. *Cuxson*(2)—which was the case of a discretionary allowance from a curate's augmentation fund(3) : " That Case did not go on to hold, as I have done, that " the payment there fell under Schedule D, but it did not for this " reason, that it was not an annuity. It was a mere donation, " given each year with no certioration that it would be repeated the " year following, whereas here there is a regularly constituted " annuity by the Society." My Lords, in *Duncan* v. *Farmer* there was a regularly constituted annuity by the Society for consideration afforded by the minister, as my noble and learned friend has pointed out. One could not find better words to describe the present case

(1) 5 T.C. 417. (2) 2 T.C. 422. (3) 5 T.C. at p. 424.

(Lord Thankerton.)

than the contrasted words used by my noble and learned friend(1) : " It was a mere donation, given each year with no certioration that " it would be repeated the year following." That appears to me exactly to describe the grant in the present case and, accordingly, I concur in the motion proposed by my noble and learned friend on the Woolsack.

Lord Macmillan.—My Lords, I also concur.

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.

[Solicitors :—Solicitor of Inland Revenue ; Crossman, Block & Co.]

(1) 5 T.C. at p. 424.