

No. 769.—HIGH COURT OF JUSTICE (KING'S BENCH DIVISION).—
23RD JANUARY, 1929.

COURT OF APPEAL.—13TH AND 14TH JUNE, 1929.

HOUSE OF LORDS.—19TH AND 20TH JUNE, AND 29TH JULY, 1930.

EREAUT (H.M. INSPECTOR OF TAXES) v. THE GIRLS' PUBLIC DAY
SCHOOL TRUST, LIMITED.⁽¹⁾

Income Tax—Schedule A—Exemption—Public School—Income Tax Act, 1918 (8 & 9 Geo. V, c. 40), Schedule A, No. VI, Rule 1 (c).

The Wimbledon High School for Girls was founded by, and its premises are owned and occupied by, a Limited Company incorporated under the Companies' Acts, the present name of which is The Girls Public Day School Trust, Limited. This Trust was established to provide and maintain schools for girls "of all classes" above those provided for by the Elementary Education Acts." The capital of the Trust has been derived from share capital, the dividends on which are restricted to 4 per cent. per annum, monies borrowed on mortgage and, to a very small extent, gifts. Its receipts consist of pupils' fees, Board of Education grants and rents.

The general management of the School is carried on, subject to financial control by the Trust, by a body of Governors one-third of whom are nominated by the Local Education Authority, the remainder being appointed by the Trust.

The General Commissioners held that the school was a public school.

Held, that the finding of the Commissioners was one at which they were entitled to arrive on the evidence.

⁽¹⁾ Reported (K.B.D. and C.A.) [1929] 2 K.B. 274; and (H.L.) 46 T.L.R. 638.

CASE

Stated under Section 149 of the Income Tax Act, 1918, for the opinion of the High Court by the Commissioners for the General Purposes of the Income Tax Acts for the Division of West Brixton.

1. At a meeting of the Commissioners for the General Purposes of the Income Tax Acts for the Division of West Brixton held on the 14th day of July, 1927, we, the undersigned, four of the said Commissioners, heard claims by the Girls' Public Day School Trust, Limited (hereinafter called "the Trust") for allowances under Rule 1 (c) of No. VI of Schedule A of the Income Tax Act, 1918, in respect of the amount of tax for the years 1920-21 to 1926-27 inclusive, charged on premises situate at Wimbledon in the County of Surrey and known as the Wimbledon High School for Girls (hereinafter called "the Wimbledon School") and owned and occupied by the Trust.

2. The sole question for our determination was whether the Wimbledon School was a "public school" within the meaning of Rule 1 (c), No. VI of Schedule A of the Income Tax Act, 1918.

3. The following facts were proved or admitted :—

(A) The Trust was originally incorporated as a Company named the Girls' Public Day School Company, Ltd., on 26th June, 1872, but in 1905 its name was altered to the Girls' Public Day School Trust, Ltd., and subject to the sanction of the Court (as appears hereafter) the memorandum of association was altered and a new memorandum was adopted as appears in the following paragraphs.

(B) The objects for which the Company was established were :—

- (a) To establish and maintain in such parts of London and the provinces as shall from time to time be determined public day schools for the education of girls of all classes above those provided for by the Elementary Education Act and to supply to girls on moderate terms general instruction of the highest class, together with moral and religious training.
- (b) For the above purpose to purchase or acquire such land and erect purchase or hire and furnish such buildings as may be from time to time found desirable for the purposes of the Company.
- (c) In connection with every school established and maintained by the Company, to provide means for training student teachers in the theory and practice of education.
- (d) The doing of all such lawful things as are incidental or conducive to the above objects.

(C) In 1905, by a special resolution confirmed by order of the Court on 16th January, 1906, the objects of the Trust were altered to those stated in the next sub-paragraphs :—

- (i) To establish and maintain in such parts of London and the provinces as shall from time to time be determined public day schools for the education of girls of all classes above those provided for by the Elementary Education Acts and for the education of boys of the same classes while under 12 years of age, and to supply to such pupils on moderate terms general instruction of the highest class, together with physical, moral and religious training and to establish, maintain and subsidise boarding houses for mistresses, student teachers, student pupils and others connected with or attending such schools.
- (ii) To provide in connection with any school maintained by the Trust means for training student teachers and students in the theory and practice of education.
- (iii) With the approval of the Board of Education to purchase or acquire such land and erect, purchase or hire and furnish such buildings as may be from time to time found desirable for the above purposes.
- (iv) To borrow or raise money for the purposes of the Trust by mortgages, debentures, debenture stock or otherwise, in such manner as may from time to time be determined with the approval of the Board of Education.
- (v) To do all such other things as are incidental or conducive to the above objects or any of them.

The clause provided that “ the income and property of the Trust whencesoever derived shall be applied solely towards the promotion of the objects of the Trust as set forth in the Memorandum of Association of the Trust, and no portion thereof shall be paid or transferred directly or indirectly by way of profit to the members of the Trust, provided that nothing herein contained shall prevent the payment in good faith of remuneration to any officer or servant of the Trust or to any member of the Trust or other person in return for any services actually rendered to the Trust nor prevent the payment of interest (at a rate not exceeding 4 per cent. per annum) or repayment of capital in respect of money borrowed from or lawfully due to any member of the Trust nor prevent the payment to the members for the time being of the Trust of interest at a rate not exceeding 4 per cent. per annum (free of Income Tax) on the amount of the respective subscribed and paid up capital held by them respectively and the return to them of such subscribed and paid up capital and if any member of the Trust pays or receives any dividend, bonus or other profit in contravention of the terms of this paragraph of

“ the Memorandum of Association his liability shall be unlimited.
 “ If upon the winding up or dissolution of the Trust there remains
 “ any property whatsoever after the satisfaction of all the debts
 “ and liabilities of the Trust and payment to the members of such
 “ sums (if any) as may lawfully be payable to them in accordance
 “ with the preceding provision, such property shall not be paid to
 “ or distributed among the members of the Trust, but shall be given
 “ or transferred to some other educational institution or institutions
 “ having objects similar to the objects of the Trust such institution
 “ or institutions to be selected by the members of the Trust at or
 “ before the winding up or dissolution or in default thereof by the
 “ Board of Education.”

(D) The memorandum and articles of association of the Trust, as amended by various special resolutions passed by the Company and by the Trust after consultation and discussion with the Board of Education (including the resolutions hereinafter mentioned) are hereto annexed marked A⁽¹⁾ and form part of this Case.

By substantial changes in its memorandum and articles of association made in 1905 there was effected a scheme in which the Board of Education, as Charity Commissioners, became interested in the ultimate charitable trust thereby created. Thereafter ensued a series of consultations and discussions between the Trust and the Board of Education resulting in a further scheme being formulated in 1911, for the purpose of effecting objects which the Board of Education had in view, as stated in the letter of the Board of Education of 7th April, 1911 (hereto annexed marked B⁽¹⁾ and forming part of the Case) namely :—

- (1) That the Company should be converted into an educational trust at the end of a period not exceeding fifty years from 1905.
- (2) That in the event of a winding up before the expiration of that period the surplus assets of the Company should be subject to an educational trust and should not be distributed among the shareholders.
- (3) That during the period mentioned above the dividend paid on share capital should not exceed a sum equal to four per cent. per annum.

Subject to provisions contained in the above mentioned letter the Board of Education accepted the new proposals as effectual for the purposes set forth above.

On 25th August, 1911, in consultation with the Board of Education, the Trust by special resolutions, made (subject to confirmation by the Court) certain extensive alterations in the memorandum and articles of association. Upon application being made to the High Court for confirmation, Mr. Justice Parker

(¹) Not included in the present print.

deferred the hearing of the petition until H.M. Attorney-General had been joined as a party by virtue of his interest under the scheme of 1905.

On 12th December, 1911, Mr. Justice Parker heard Counsel for the Trust and the Junior Counsel to the Treasury representing H.M. Attorney-General who consented to the alterations. His Lordship approved the alteration and extension of the objects intended to be effected by the said resolutions but ordered to be struck out from the memorandum clauses stating that no payment of any kind should be made in respect of the A shares after 15th January, 1936, and that no payment should be made in respect of the other shares after 15th January, 1956.

A copy of the order is hereto annexed marked C⁽¹⁾ and forms part of the Case.

In 1912 the Board of Education and the Treasury on the advice of H.M. Attorney-General, intimated that the Government grants then being made to the Trust must cease unless the Trust made certain alterations in their articles consonant with the memorandum of association as revised to meet the requirements of H.M. Attorney-General as protector of charities and to secure the reversionary interest in the Trust's schools to the public.

On 30th July, 1912, after further consultation and discussions with the Board of Education the Trust by a series of resolutions altering the articles of association gave effect to the requirements of the Board of Education outlined in the memorandum of 4th July, 1912 (annexed hereto marked D⁽¹⁾ and forming part of the Case). The new scheme provided for :—

- (1) Creation of new shares of merely nominal value (1s. each) vested in trustees on trust to hold them and to deal with them in such manner as the Board of Education shall approve, and with special voting powers attached thereto.
- (2) Conversion of all existing A, B, C & D Shares into preference shares of one class.
- (3) The definition of the preference and the new shares to be as follows :—
 - (a) The preference shares to receive out of profits, after setting aside a sinking fund of £1,270 16s. 0d. per annum (the amount then being paid for mortgage redemption) no greater dividend than a preferential dividend at the rate of 4 per cent. per annum (free of Income Tax) on the amounts actually paid up thereon, deficiencies of such dividend in any one year being carried forward against the profits of the next succeeding year, but not later.

(¹) Not included in the present print.

- (b) The preference shares to receive out of assets on winding up the amounts actually paid up thereon without arrears of dividend, except in respect of the last two years before the winding up takes place, when 8 per cent. less any dividends already paid in respect of such two years, is to be paid.
- (c) The preference shares under no circumstances to receive any greater amount than as stated above, either while the Trust continues a going concern or on winding up. The new shares to receive only the nominal amount paid up on them.
- (d) Subject as above the entire property to pass on winding up to an educational institution.
- (e) No dividends are to be paid on the new shares; but until 15th January, 1956, the entire surplus profits remaining after paying the interest on the preference shares to be applied either in reduction of the mortgage debts or in any other manner which may be arranged so as to reduce charges and provide for ultimate extinction or to establish a fund which on winding up may be available for enabling the preference shares to be paid off, so as to avoid, so far as may be, the necessity of selling any of the schools belonging to the Trust or otherwise to increase the capital value of the assets, or for any other purpose approved by the Board of Education whereby the capital assets of the Trust may be increased, the idea being that when winding up comes, the holders of the new shares may, as far as possible, get the schools handed over to an educational institution, free from incumbrances.
- (f) The new shares to have such voting power attached to them as will enable those holding them to compel a winding up at any time after 15th January, 1956 (but not earlier), whether the preference shareholders wish it or not, and in certain circumstances to have voting power to prevent a winding up before that date.
- (g) In most respects the preference shares alone to have the voting power till the fifty years from the 5th January, 1906, have expired and in the year succeeding 15th January, 1957, they to have voting power sufficient to compel a winding up unless they have been paid off previously at par.

The Board of Education by a letter dated 21st November, 1912 (a copy whereof is hereto annexed marked E⁽¹⁾) and forms part of

(¹) Not included in the present print.

the Case) gave their approval, in terms stated therein, to the alteration of the articles of association for the embodying of the above scheme.

On 13th March, 1913, the articles of association were further altered to make more effective the control exercised by the Board of Education to whom the Trust has to give notice of all its meetings.

(E) The nominal capital of the Trust is £200,005 divided into 40,000 preference shares of £5 each and 100 "new" shares of 1s. each. The said new shares were created and issued in 1911. The holders of the 100 new shares do not hold those shares beneficially, but hold them subject to a deed of trust of 7th May, 1913 (a copy whereof is hereto annexed marked F⁽¹⁾) and forms part of the Case) namely, upon trust to deal therewith and to transfer and dispose thereof and to exercise all rights and powers of voting and other rights and powers attached thereto by the Company's articles of association according to any scheme which may at any time hereafter be established in relation thereto by the Board. And meanwhile pending the establishment of any such scheme by the Board upon trust to deal therewith and to transfer and dispose thereof and to exercise such rights and powers in such manner as the Board shall from time to time direct. Certain special voting rights are attached to these 100 shares which enable the Board of Education through the holders of the new shares to exercise in certain circumstances a veto upon any proposals to alter the constitution of the Trust or to wind it up as hereinafter set forth. These shares are not entitled to any dividend.

(F) Up to the 18th April, 1913, 30,575 preference shares of £5 each had been issued fully paid up, and on that date a prospectus was issued inviting the public to subscribe for further preference shares at par.

(G) There have been issued up to 28th July, 1926 (the date of the latest return filed with the Registrar of Joint Stock Companies) 30,659 preference shares of £5 each and 100 new shares of 1s. each all fully paid up. The total number of shareholders is 1,799 and the number of shares held by individual shareholders varies from 1 to 503.

(H) There are no shares other than the said new shares and the said preference shares and no issue of share capital can be made save with the approval of the Board of Education. It is provided by article 40 as amended by a special resolution of 13th March, 1913, that for the purpose of voting against, but not in favour of any resolution which proposes any alteration in the memorandum or articles or the winding up of the Trust each new share is to entitle the holder to 10,000 votes. Furthermore, by

(1) Not included in the present print.

article 40A from and after the 15th July, 1956, every new share entitles the holder to 10,000 votes for all purposes. Both the foregoing provisions, however, are subject to the following qualifications. First, by article 40B if at any time either before or after the 15th January, 1956, the business of the Trust shall be so carried on that for each of the two completed financial years last preceding the proposal of a resolution for winding up the trust, the profits (after providing for certain named annual payments) shall have been insufficient to pay any dividend on the capital for the time being paid up on the preference shares, then no "new" share either before or after the 15th January, 1956, is to entitle the holder to any vote whatever against the resolution to wind up the Trust. Secondly, article 40c states: " Provided also that if the Trust shall " not be wound up before the 15th January, 1956, and if between " the 15th January, 1956, and the 15th January, 1957, the holders " of the new shares shall not have purchased at such price as herein- " after in this clause mentioned, the whole of the preference shares " or offered in writing to purchase at such price the whole of the " preference shares and made due provision to the satisfaction of " the holders of the preference shares for the payment of the price " thereof such price for each preference share being the amount " which under clause 3, sub-clauses (b) and (c) of these special " resolutions the holder of such preference share would have been " entitled to receive in respect thereof on winding up if a winding " up of the Trust had commenced upon the day of the offer to " purchase such preference share and upon the assumption of the " assets of the Trust being sufficient to satisfy in full the whole of " the claims of the preference shareholders under the said sub- " clauses (B) and (C) then if within one year after the 15th January, " 1957, a resolution for winding up the Trust shall be proposed, no " new share shall entitle the holder thereof at any meeting either " for passing or confirming any such resolution for winding up the " Trust to any vote whatsoever against such resolution for winding " up ". From time to time preference shareholders have surrendered their shares. Up to the present there have been so surrendered 492 preference shares representing £2,460.

(I) The Board of Education, pursuant to the Education Act, 1899, and the orders made pursuant thereto, have since 1902 exercised all the powers of the Charity Commissioners under the Charitable Trusts Acts, 1853 to 1904, in respect to educational endowments and under the Endowed Schools Acts, 1869 to 1874. Further under the Secondary Schools Regulations hereinafter referred to, the Board of Education have been and are in a position to withdraw recognition for the purposes of Parliamentary grants failing compliance with any condition that the Board of Education may lawfully impose for the purpose of the said grants or for any other purpose in relation to any of the schools owned and occupied by the Trust. And the alterations made in the memorandum and

the articles of association both of the Company and the Trust since 1902 have been made after consultation and discussion with the Board of Education for the purpose of effecting the objects of the Board of Education as set forth in the letter of the Board of Education of 7th April, 1911 (Exhibit B).⁽¹⁾

(J) The Wimbledon School has been during all material dates recognised by and in receipt of parliamentary grants from the Board of Education. The conditions of the receipt of Parliamentary grants are laid down in the Secondary Schools Regulations and during all material dates required that a school receiving Parliamentary grants must not be conducted for private profit and the Board of Education has held that the Wimbledon School complies with that condition.

(K) The Trust owns 25 schools in London and various parts of the country. Its receipts consist of pupils' fees, Board of Education grants, and certain rents. In each of the two years ended 31st December, 1920 and 1921 respectively, the period from 1st January, 1922, to 31st March, 1923, and the years ended 31st March, 1924 and 1925 respectively, the Trust had an excess of receipts over expenditure, and in the years 1923, 1924 and 1925 it declared dividends of 4 per cent. free of tax and carried forward balances in addition. In 1920 and 1921 no dividends were declared although there were surpluses of receipts over expenses, and in the year ended 31st March, 1926, there was an excess of expenses over receipts amounting to £81 on the year's working and no dividend was paid although the balance carried forward from the previous year was sufficient to pay one. Prints of (1) the balance sheet and profit and loss account of the Company for the year ended 1st March, 1925, (2) statement of income and expenditure at the several schools for the same year and (3) the Regulations for Secondary Schools, 1926, are annexed hereto marked G, H and I⁽¹⁾ respectively and form part of this Case.

(L) The Trust's capital is derived from its share capital and from monies borrowed on mortgage and to a small extent from gifts, and from accumulated profits and profits carried to reserves which amount to £61,191 11s. 6d. The total amount expended on capital account has been £552,170 of which £403,740 1s. 0d. was outstanding on the 31st March, 1926, and the total of loans charged thereon was £128,118. Gifts to the Trust were £1,242 3s. 9d. The balance sheet for year ending 31st March, 1926, is annexed hereto marked J⁽¹⁾ and forms part of this Case.

(M) In addition the Trust holds certain trust investments (on trusts for the advancement of education) amounting in 1926 to £8,987, all of which, however, are the subject of special bequests or gifts and are held by the Trust as trustees, the income being applicable solely to the particular purpose of each trust.

⁽¹⁾ Not included in the present print.

(N) The Company built the Wimbledon School in 1880. The figures of the original cost were not available but the total capital expended on the school to date is £34,374, the whole of which has been provided out of share capital, monies borrowed on mortgage, and surplus receipts over expenses.

(O) Separate accounts are kept for each school, to which are credited the pupils' fees, Board of Education grants and rents applicable to the individual school, and to which are debited the actual expenditure of each school together with the particular school's proportion of the head office expenses. In addition each school is debited with interest on capital of 5 per cent. as rent which is a book-keeping entry whereby this interest is debited to the individual school and credited to the Trust. The aggregate of this rent so charged is considerably in excess of the aggregate interest actually paid by the Trust on temporary loans and money borrowed by way of mortgage with the result that in certain years although the accounts of the individual schools showed a loss by reason of the charging of this rent the interest paid by the Trust and their other expenditure, added together, were exceeded by such rent and consequently the Trust in fact made a profit and was able to declare a dividend. A statement which was put before us in evidence is annexed hereto marked K⁽¹⁾ and forms part of this Case, showing the relative figures as regards the Wimbledon School. This statement shows that after substituting for the interest charged to the Wimbledon School and credited to the Trust as mentioned above, the school's proportion of the interest actually paid by the Trust, the Wimbledon School sustained excesses of expenditure over receipts amounting to £1,041, £1,271 and £228 for the years ended 31st December, 1920 and 1921, and the three months ended 31st March, 1922, respectively and that in the four years ended 31st March, 1923, 1924, 1925 and 1926 the school had excesses of receipts over expenditure amounting to £388, £232, £349 and £139 respectively.

(P) The Wimbledon School is managed by a governing body consisting of not more than 24 persons, one-third of whom are nominated by the Surrey County Council as the Local Education Authority and the remainder are appointed by the council of the Trust. The governors carry on the general management of the School subject to financial control by the Trust. The fees charged at the Wimbledon School vary from £5 a term to £11 a term and under the said Regulations for Secondary Schools must be approved by the Board of Education as suitable. A print of the regulations for the governing body of the Wimbledon School is annexed hereto marked L⁽¹⁾ and forms part of this Case. A print of the prospectus of the Wimbledon School is also annexed hereto marked M⁽¹⁾ and forms part of this Case. Free places are awarded in

⁽¹⁾ Not included in the present print.

the school to the extent of ten per cent. of the total number of pupils admitted the qualifications for such free education being that the pupil should have attended a public elementary school for the preceding two years. In addition certain trust scholarships are awarded as stated in the said prospectus.

(Q) Wimbledon High School was one of the two schools in Surrey owned by the Company, was governed by a governing body appointed pursuant to the scheme for that purpose approved by the Board of Education of whom at least one-third of the members were appointed by the Local Education Authority, namely, the Surrey County Council acting through its Education Committee.

4. Evidence which we accepted, was given that:—

- (a) It has been the duty of the Surrey Education Committee to form an opinion as to the relative position of the schools providing higher education in the county and the type of education provided by them, and that Committee recognised that the King's College School (Wimbledon) for boys and the Wimbledon High School for girls is providing for the residents of the north eastern part of the county what is commonly described as a public school education and the provisions made in the High School for Girls was of the same type and on similar lines to that made in King's College School (Wimbledon) for boys. Of the scholars awarded scholarships by the County Council in the previous week 16 resided in the area served by the Wimbledon High School and 13 out of the 16 elected to go to the High School and 8 went there. The scholarships were permitted by the County Council to be enjoyed by the scholars while receiving education with the Wimbledon High School.
- (b) The council of the Trust consists of persons elected on account of their qualifications to administer education and their sole object is to maintain the schools of the Trust at the highest level of efficiency.
- (c) The standard of education at the Wimbledon High School was in all respects as good as that of Brighton College which had been admitted to be entitled to the allowance under Schedule A as a public school.
- (d) The Board of Education exercises its Charitable Trusts jurisdiction over all the property of the Trust and whenever any land is sold the sanction of the Board to the sale under the Charitable Trusts Acts is obtained.
- (e) So long as the Trust is in receipt of Parliamentary grants from the Board of Education, the Trust cannot refuse to accept a pupil except on such ground as the Board of Education considers to be reasonable, and the Trust

is bound to receive a certain number of free pupils and among such pupils receives scholars to whom scholarships are allotted by the Local Education Authority, namely, the Surrey County Council acting through its Education Committee.

5. It was contended on behalf of the Respondents as follows :—
- (a) That the Wimbledon School was a “ public school ” within the meaning of Rule 1 (c) of No. VI of Schedule A of the Income Tax Act, 1918, and that accordingly the Trust was entitled to the allowance claimed under that Rule.
 - (b) Since the passing of the Endowed Schools Act, 1869 (which expressly provides (S.12) that “ In framing schemes “ under that Act provision shall be made so far as conveniently may be for extending to girls the benefit “ of endowments ”) girls schools had been regarded as on a par with boys schools for all purposes of the Education Acts. The distinction between public and non-public schools drawn by the Education Acts and statutory orders made under those Acts was that schools which complied with the conditions of a Parliamentary grant were public schools and this distinction was and always had been the basis of the definition of a public elementary school. (See Education Act, 1921, s. 27 (d)).
 - (c) An adequate measure of permanence to the School is ensured by (a) the history and present constitution of the Trust (b) the necessity imposed by the Charitable Trusts Amendment Act, 1855, Section 29, of requiring the consent of the Board of Education to a sale of the land used by the school and (c) the statutory power of the governing body to comply with the conditions prescribed for the receipt of grants in the Regulations of the Board of Education notwithstanding any provisions contained in any instrument regulating the trusts or management of the school.
 - (d) Reference was made to Clause 3 of the Trust’s memorandum of association (setting out the objects of the Trust and providing that its income and property should be applied solely towards the promotion of these objects, subject as therein mentioned) and it was contended that in these respects the Trust was in a similar position in relation to the question whether it was a public school as Brighton College, which was the subject of proceedings, in relation to Income Tax, which were terminated by a decision of the House of Lords in *Brighton College v. Marriott*, [1923] A.C. 192.

- (e) In the case of Wimbledon High School there was present an eleemosynary element and the expenditure had exceeded the income over a long period of years.

6. It was contended on behalf of the Appellant :—

- (1) That for the purposes of the present case the term " public school " was to be interpreted not according to its popular meaning nor by reference to distinctions between " public " and " non-public " schools drawn by the Education Acts, nor by reference to the type of education provided, but according to the special meaning attached to that term by the decisions of the Courts under Rule 1 (c) of No. VI of Schedule A of the Income Tax Act, 1918, and Section 61, Schedule A, No. VI of the Income Tax Act, 1842.
- (2) That the admission of Brighton College as a public school by the Revenue was irrelevant to the present issue. Moreover the present case differed from the Brighton College case in that (*inter alia*) in the case of Brighton College there was no share capital and no member of the company which owned that school was entitled to any dividend or payment whatever out of that company's funds.
- (3) That the Wimbledon School was not a public school within the meaning of No. VI of Schedule A of the Income Tax Acts of 1842 and 1918 as interpreted by the Courts in the cases of *Blake v. Mayor etc. of London*, (1886) 18 Q.B.D. 437; (1887) 19 Q.B.D. 79; 2 T.C. 209; *The Trustees of the Cardinal Vaughan Memorial School v. Ryall*, (1920) 36 T.L.R. 694; 7 T.C. 611, and *Birkenhead School v. Dring* (1926) 43 T.L.R. 48; 11 T.C. 273, for the following reasons :—
 - (a) There was no charitable substratum. Neither the Wimbledon School in particular nor any of the Trust's schools were provided by voluntary donations, but solely by the share capital, borrowed monies and accumulated profits.
 - (b) There was not necessarily a perpetual foundation inasmuch as in certain circumstances the Trust could be wound up and the School disposed of.
 - (c) No portion of the income was charitable. The Board of Education grants were paid for services rendered and in consideration of compliance with conditions laid down by the Board, and could not be regarded as charitable.

- (d) Private persons had an interest in the School, inasmuch as the preference shareholders (numbering 1,799) had a substantial pecuniary interest in the School both as to income and capital.
- (e) The making of profit was clearly within the contemplation of the Trust and in fact was a necessary condition of the Trust's existence in that if for two consecutive years the Trust failed to pay a dividend, the preference shareholders could proceed to wind it up and the "new" shareholders were not entitled to oppose such a proposal.

7. After considering the facts and the contentions of both parties, we, the Commissioners, held that the Wimbledon School was a public school and accordingly we allowed the claim of the Respondent Trust.

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

Given under our hands this eight day of October, 1928.

PERCY H. CLARKE,
J. V. ELLIOTT TAYLOR,
K. VAUGHAN MORGAN,
FRED. GROSE,

} Commissioners for the General
Purposes of the Income Tax
Acts for the Division of
West Brixton.

GEORGE F. BERNEY,
Clerk to the Commissioners,
94, East Hill,
Wandsworth,
S.W.18.

The case came before Rowlatt, *J.*, in the King's Bench Division on the 23rd January, 1929, when judgment was given in favour of the Crown, with costs.

The Solicitor-General (Sir F. Boyd Merriman, K.C.) and Mr. R. P. Hills appeared as Counsel for the Crown, and Mr. A. M. Latter, K.C., and Mr. G. Beagley for the Respondents.

JUDGMENT.

Rowlatt, J.—I need not trouble you, Mr. Solicitor, because I think in this case it is not open to me to decide otherwise than to allow this appeal, and I do not think it was open really to the Commissioners to find as they did, having regard to the interest which the shareholders in this Company—preference shareholders as they are called—have in this Trust and have in these schools.

Now this school is one of a number of schools kept and maintained by this Trust. Speaking quite generally the position is this, that the Trust was founded with no commercial motives; that is to say, it was not a case of people thinking how they could get the best return on their investment consistent with safety, or anything of that sort; but the position was this. A number of persons doubtless were anxious to further education and felt sufficient interest in it, but still did not see their way to acquiring a very large sum of money by public subscription to start a school or series of schools. They saw that even with their great interest in education they could not afford to part with their money altogether, but that if the schools were started with a very limited reward in the shape of a share in the profits to those who subscribed—a limited and perhaps precarious right to share in the profits, but with a right also to get back their capital, if there was capital available for them, that on those terms they could collect a fund together and start schools. It was a very public-spirited thing to do, and nobody is cavilling about it at all, but in these cases it seems to me that I must be guided by what was laid down by the Court of Appeal in *Blake's case*⁽¹⁾, the *City of London School case* decided forty years ago, which has always been considered the leading declaration and guiding declaration of law upon this point. Now in that case it was a school the existence of which was derived entirely and provided entirely by funds of the Corporation, and so on. But the element which gave rise to the dispute in that case was that the pupils made payments for their education, and the point which came up for discussion there was: Are they schools which have a limited number of places where there is gratuitous education given? It was held that it was not so, but the Court said this. Lord Justice Fry in his judgment in the authorised reports of the Queen's Bench⁽²⁾, which differ slightly, and are a little condensed, from the actual verbatim report in *Tax Cases*, says: "The school in this case has certain characteristics which denote a public school. It has a perpetual foundation; a portion of its income is derived from charity; it is managed by a public body; no private person has any interest in the school; no profit was or is in the contemplation of its founders or managers". Now those two last sentences are the crucial ones here: "No private person has any interest in the school; no profit was or is in the contemplation of

(1) *Blake v. Mayor, &c. of London*, 2 T.C. 209. (2) Q.B.D. 79, at p. 82.

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“its founders or managers.” Then Lord Justice Lopes put it rather more shortly, because he said⁽¹⁾: “The intention was to “relieve schools not carried on for profit and in which the public “were interested.” Now reading the two together, and especially looking at how Lord Justice Lopes summarises it, I do think that here there is an absence of the two characteristics—that a portion of its income is derived from charity, and that no private person has any interest in the school, and that no profit was in contemplation. I think those two must be regarded as essential characteristics, and I do not think they are present here, and that is the ground of my decision.

Now what are the facts here? Preference shareholders, which really means all the shareholders except a few nominal shares, represent all the people who subscribe the capital. What is their position? If the school pays its way—they are not doing so at present, but at least this one might—if it does pay what is the result to all these people? Why, they have got their four per cent. free of Income Tax; and as a fund accumulates it will ensure their getting their capital back, practically speaking, or 19/20ths of it. Now is it possible to say that the proprietors, who are private persons, have not had an interest in the school when it depends upon the prosperity of the school whether they get interest on their money, whether they get an interest return on their capital, or whether they get the capital itself back? In my view it would be absolutely impossible to say that.

Now Mr. Lister has said that I ought to look at the substance of it and, looking at it in that way, to say that these people are really only in the position of creditors—that although they are shareholders they are wholly in the position of creditors. Of course the school is mortgaged, and interest has to be paid, but that does not mean that the mortgagee is a private person having an interest in it. That is not the meaning of the words used. But I do think the answer is that they are not creditors, they are the proprietors, and their interest is not the interest of a creditor who is claiming a debt at all. They have simply to look at this property in this school as managers to give them what they are entitled to as proprietors. It seems to me that to say that is a matter of substance is not correct. It is really saying the thing is what it is not, and I cannot look at it in that way. I must leave somebody else to decide it if the case is to proceed on those lines, and I cannot see that I am justified in doing that.

Then again it is said here in this case that no profit was ever in the contemplation of the founders or managers. Even now if a profit is made it will enure. They are trying to make a profit; they must be trying. They are not sacrificing the efficiency of the school

(1) Q.B.D. 79, at p 82.

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for monetary considerations; of course not, but it was in the contemplation of the proprietors that this school should be run so as to pay for its outlay, and it would be very much better if it did, and that the school should be disembarrassed. That is a thing which is better for everybody, that the school should be free from incumbrance as a beneficial trust.

Now it is quite true that the Council of the Trust consists of persons elected on account of their qualifications in education. Their sole object is to maintain the school Trust at the highest level of efficiency. That may be, but at the same time I cannot possibly say that profit is not in contemplation. The Commissioners have never said the contrary, but what the Commissioners have said is this. They have said that a school receiving Parliamentary grants must not be conducted for private profit, and the Board of Education has held that the Wimbledon School complies with that condition. Now it would have been very much more material for the Commissioners to say that they held that, because what the Commissioners hold, in point of fact, is of great importance. What the Board of Education as a Board really hold on any point is of no importance at all. I take the earliest opportunity of saying that very clearly. The Commissioners did not find it, and they cannot take the responsibility of saying what the Board hold from this point of view; but it is relevant from this point of view, that the Commissioners have to decide what is the truth of that matter and not the Board of Education.

Now upon the whole, therefore, it seems to me that upon the authorities there is only one answer to this case in this Court, and that is that the appeal must succeed with costs.

The Company having appealed against this decision, the case came before the Court of Appeal (Lord Hanworth, *M.R.*, and Lawrence and Slesser, *L.J.J.*) on the 13th and 14th June, 1929, 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.*, Mr. G. M. Edwardes Jones, *K.C.*, and Mr. G. Beagley appeared as Counsel for the Company and Sir F. Boyd Merriman, *K.C.*, and Mr. R. P. Hills for the Crown.

JUDGMENT.

Lord Hanworth, *M.R.*—This case presents, at first sight, a great many difficulties, and we have had in consequence a very interesting argument upon the question which arises for our

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determination, but after examining the facts I have come to the conclusion that the judgment of Mr. Justice Rowlatt was right and must be supported.

First of all I want to deal with the nature and quality of the Appellants. The Appellants here are The Girls' Public Day School Trust, Limited. They are a company, and, looking at their annual report—I have got before me the report of the council to the shareholders for the twelve months ending the 31st March, 1925, with the balance sheet and profit and loss accounts—that shows that this Company has an authorised capital of £200,005, divided into 40,000 preference shares of £5 each, and 100 new shares of 1s. each. The annual report, in its close, says this: "As stated in "the 1920 report, a repairs reserve account of £7,000 was "created in that year to meet the exceptional running expenses "accumulated during the War. The arrears of repair work having "been fully overtaken, the £7,000 was withdrawn in the past year "from reserve as a contribution to the expenses in question. The "surplus at the end of the year was £16,722. After writing off "ordinary depreciation, £4,050, there remains a balance of "£12,672 to be carried forward. Out of this balance it is proposed "to pay a 4 per cent. dividend, less Income Tax, on the preference "shares, which, with the amount to be paid to the Income Tax "Commissioners, will absorb £6,131." It is plain from those excerpts that I have made from the annual report that one is dealing with a limited company carried on, and complying with the regulations which it is necessary for it to comply with, under the Companies Acts. That Company carries on a number of schools, and upon that share capital, to which I have already referred, in that particular year it proposed to pay a 4 per cent. dividend.

The assessment against which the Company appeals is an assessment in respect of the amount of tax for the years 1920-21 down to 1926-27, charged on premises situate at Wimbledon, in the County of Surrey, and known as The Wimbledon High School for Girls, which is owned and occupied by the Trust. As its name implies, the Company carried on the business of providing and equipping and maintaining certain schools for girls, and the Wimbledon School is one of them. In respect of that Wimbledon School, there was an assessment made. It was an assessment under Schedule A. I need not refer to the well-known Case and Rule; they will be found on page 331 of the red Dowell. The relevant portions of the Schedule are: "Tax under Schedule A "shall be charged in respect of the property in all lands, "for every twenty shillings of the annual value thereof", and under the General Rule, if the premises "are not let at a rack-rent so fixed, then the rackrent at which they are worth

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"to be let by the year." But there are certain exemptions granted from any such assessment. The one that is in question here is the exemption which is given under what is called No. VI of Schedule A, that is to say under the Rules which are made "in respect of further allowances", and the relevant one is No. VI, 1, (c): "The amount of the tax charged "on any hospital, public school, or almshouse, in respect of the "public buildings, offices, and premises belonging thereto, and so "far as not occupied by any individual officer or the master thereof "whose total annual income, however arising, estimated in "accordance with this Act, amounts to one hundred and fifty "pounds or more, or by a person paying rent for the same". It is claimed that in respect of this assessment under Schedule A upon the Wimbledon School, that School is entitled to this exemption given under the Rule which I have read because it is a public school, and it is entitled under that Rule to be immune from taxation in respect of the "public buildings, offices and premises "belonging thereto". The question, therefore, that we have to decide is whether or not the Appellants have brought themselves within the terms of the exemption. The Commissioners who heard the case came to the conclusion that they had, and decided, as they say—I wish to state this in order to show that the Commissioners have paid very great attention to the case; indeed, as they always do—"After considering the facts and the contentions "of both parties, we, the Commissioners, held that the Wimbledon "School was a public school and accordingly we allowed the claim "of the Respondent Trust."

Mr. Justice Rowlatt has allowed the appeal from the Commissioners, and so the case comes before this Court. I think the Commissioners, in their statement, ought really to say not "accordingly we allowed the claim of the Respondent Trust", but I think it would have been more accurate to say, or less equivocal to say, that they allowed the claim of the Respondent Company.

It is plain that in some cases a school is a public school, and it is entitled to that exemption. Equally it is plain, as I think was stated by Lord Watson in his observations in the *Dilworth* case⁽¹⁾, that there are certain schools which are known as private schools, but the difficulty is to determine whether a particular school is entitled to this immunity as public or whether it is what is known as a private school or at any rate not entitled to this exemption. As the matter stands upon the facts which I have stated, it would appear plain that it was not entitled to exemption, for here is a Company which has a school; it, in the ordinary

(¹) *Dilworth and others v. The Commissioner of Stamps, and Dilworth and others v. The Commissioner for Land and Income Tax*, [1899] A.C. 99.

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course, pays dividends upon its capital and, therefore, trading would seem to be connoted by the activities of the Company, and if that be so it would seem, within the observations made in the decided cases, that the Company had no claim to immunity for their so-called public school.

One difficulty which I have had throughout the case is to decide whether or not this point is one of fact, and if of fact, one essentially for the decision of the Commissioners; in other words, whether it was right for Mr. Justice Rowlatt to impose his decision on a matter which had been determined as a question of degree and of fact by the Commissioners; and whether, therefore, in the same way this Court could interfere with the decision of the Commissioners. But I have come to the conclusion that Mr. Justice Rowlatt was right, and the point upon which the case turns is one of law, and, therefore, that it is one on which Mr. Justice Rowlatt and this Court must express their effective opinion.

Certain rules or observations have been made to guide and assist those who have to try to determine what is a public school. I am rather inclined to agree with the view presented by Mr. Latter, that it would be putting the judgment of Sir Edward Fry too high to say that in the observations that he made in the *Blake* case⁽¹⁾ he was, in any way, laying down characteristics which must be found and which are necessarily guides on one side or the other. But whether that be so or not, the observations that are made in the *Blake* case are, to my mind, of importance, and cannot be brushed aside. They are indicative of matters which must be taken into account. Sir Edward Fry in that case, summarising some of the characteristics which denote a public school, said of that particular school⁽²⁾: It has a perpetual foundation; a portion of its income is derived from charity; it is managed by a public body; no private person has any interest in the school; no profit was or is in the contemplation of its founders or managers. The reason why I have some doubt and rather incline to the view that Mr. Latter has presented to us is this, that, saying that a portion of its income is derived from charity does not seem to be of assistance either one way or the other, for if the income is derived from charity then there are special exemptions in respect of that income, and whether or not the school is a public school it would, I think, if that income is devoted to charity, be entitled to exemption in respect of it. I have myself, in a judgment in the *Brighton* case⁽³⁾, shown that there are specific and appropriate exemptions in the case of income paid to charities quite apart from what may be called the general nature of the body that receives them. But with that observation I do not, in any way, wish to mitigate the great

(1) *Blake v. Mayor, etc. of London*, 2 T.C. 209.

(2) *Ibid.* at p. 217.

(3) *Brighton College v. Marriot*, 10 T.C. 213.

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value of the observations which are made by Lord Justice Fry, and, indeed, they are also repeated in substance in the decision stated by Lord Watson in the *Dilworth* case. I, therefore, turn to look at the features in the present case to see whether or not it can be said that this Company is a body in which no private person has any interest and no profit was or is in the contemplation of its founders or managers.

Originally the Company was incorporated on the 26th June, 1872. Plainly enough it was incorporated for the purpose of doing a public service and providing advantages of education which, in the days of the early seventies, were by no means available as they are at the present day, and I have no doubt that those persons who joined together as incorporators of the Company in its original incorporation were minded more to provide education than to seek any profit. At the same time for the purpose of collecting money for the lofty objects they had in mind it was necessary to give some sort of return to those who would undertake the responsibility of subscribing to the Company's funds and so the structure of the Company was used, the security of a limited company was given, and interest was made payable in respect of the share capital. That structure was much altered at a later date, as set out in the Case. In 1911 very considerable alterations were made. The Company, which was called originally The Girls' Public Day School Company, had its name altered to The Girls' Public Day School Trust in 1905, and the alterations which were made in 1911 are set out in the Case. But whatever the alterations made were, there still remains this basis, namely, that it is and was a Company—whatever its name—that it still has an authorised capital of a substantial amount, £200,005, and it still is bound to act and make its returns as a limited company, and those persons who are shareholders are entitled, under certain circumstances, to receive a limited dividend, and if the Company be wound up they are entitled in certain circumstances to the repayment of their share capital.

Now what are the circumstances which make those facts, which are plain enough as they stand, somewhat difficult to estimate on the point which we have to decide? The memorandum of association has ultimately taken a particular form, and we have got the document before us as Exhibit A. It is claimed by Mr. Latter, and rightly claimed, on behalf of his clients that one of its objects as it stands now, clause 3 (c), is: "With the approval of the Board of Education to purchase or acquire such land, and erect, purchase or hire, and furnish such buildings as may be from time to time found desirable for the above purposes" and that there is in clause (e) a prohibition of this nature: "the income and property of the Trust whencesoever derived shall be applied solely towards the promotion of the objects of the Trust as set forth in

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“ the Memorandum of Association of the Trust, and no portion thereof shall be paid or transferred directly or indirectly by way of profit to the members of the Trust ”; provided that the payment of a dividend of not exceeding 4 per cent. or the repayment of capital on a winding-up may still be made.

Mr. Latter also calls attention to certain of the articles. They are articles 5, 14, and others. I need not go through them all, but to take article 14: “ No transferee of a preference share and no person becoming entitled to a preference share by transmission or in any other way than by transfer shall be registered as a member or have any of the advantages or privileges of a member unless approved of by the council. And no transferee of a new share and no person becoming entitled to a new share by transmission or in any other way than by transfer shall be registered as a member or have any of the advantages or privileges of a member unless approved of by the Board of Education ”, and there are other articles which show a connection between the Board of Education and the Company.

At the end of fifty years from the date when the plan was first originated, which brings the date, I think, to 1956, it is contemplated that the Company should be wound up, and that if there is any surplus beyond the mere repayment of the share capital that should then be devoted to an educational trust. Whether or not there is an educational trust at the moment seems a little more doubtful, but it is fair to say that such is the nature of the undertaking and the way in which it is carried on that there is a constant effort made to improve the schools which the Company carry on; to provide a good education in them; not to make use of any of its income beyond a possible 4 per cent. to the shareholders; and, in priority to that, or any dividend to the shareholders, there are provisions whereby the possessions of the Company shall be freed from mortgage debts, and the assets of the Company accumulated, not to the ultimate advantage of the preference shareholders, who would then on the winding-up be able to divide up the accumulated assets, but for the benefit of this educational trust in 1956. All those facts clearly point to the altruistic purposes of the Company, and, more than that, they indicate that there is a direct effort made on the part of the Company to maintain a standard which will enable them to justify a demand for a grant from the Board of Education towards the maintenance of a high standard of education, and there is no doubt that they are associated—I use that loose phrase—with the Board of Education. As pointed out in the Case, the Board of Education can intervene, or must be appealed to if the Company seeks to exercise some of its powers which otherwise would be quite independent of the Board of Education. For instance, under paragraph 4 (d) of the Case :

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"The Board of Education exercises its Charitable Trusts jurisdiction over all the property of the Trust and whenever any land is sold the sanction of the Board to the sale under the Charitable Trusts Acts is obtained." I, therefore, wish to give every possible credit to the Company for the manner in which it conducts its business for the purposes for which it is constituted, and to give full weight to its association with the Board of Education.

It is true that one of the reasons why it is associated with the Board of Education is that it desires to be able to receive grants. Those grants are paid to it and, to that extent, it increases the sum which is available as income for the purposes of the Trust, but the totality of the income, whether derived from one source or the other, is undoubtedly expended in maintaining a high level of education in these schools. All that is true, but when it has been stated does that alter the character and nature of the structure of the Company? I feel compelled to say "No." The Company remains a company; the Company is seeking a profit. I use that word "seeking" in the usual Income Tax sense. In common parlance it is the last thing it is seeking; it is seeking to provide a good education for the pupils, who come to the schools, but technically it is still seeking a profit and it is seeking it, though it is only seeking it for the purpose of providing a good education and so that it may be able to pay the very limited reward to the shareholders of 4 per cent. and to accumulate, if possible, a sufficient amount of assets to enable the repayment of the capital to be made.

The fact that the Company is associated with the Board of Education and the fact that it maintains these schools does not appear to me to eliminate from the basic nature of the Company the fact that it is a body of corporators associated together in carrying on the purpose of the Company.

Now if that be so, is it a question of fact or not? It was contended before the Commissioners that this Parliamentary grant and the manner in which the schools are carried on render the school a public school. I quite give value to all that, but it does not seem to change the nature of the entity. In the *Brighton College* case⁽¹⁾, I went through a number of cases and dealt with the mode and circumstances under which there is some exemption given from the tax. But it all comes back to this: Is this particular Wimbledon School a public school? It is owned by the Company and subject to certain conditions, which it would not be very difficult to comply with, the school could be closed and another school opened elsewhere, or possibly no school in the place of the Wimbledon School carried on. It seems to me, therefore,

(1) 10 T.C. 213.

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that the Company still retains its power of conducting its own business, and it cannot be said that the characteristics which (or some of which) must be found if it is a public school are complied with.

I will only add one more word on whether this matter is a question of fact. I agree that there are many facts here to be considered, and if it were possible to get away from the legal entity of the Company and the question of the shares and the dividend upon them, it might be possible to say that the Commissioners had complete seizin of the matter, but when one has to bear in mind that the legal structure of The Girls' Public Day School Trust, Limited, is, as it always was, a company, it seems to me impossible to overlook that fact and to say that it is a question of fact for them to determine.

For these reasons it appears to me that Mr. Justice Rowlatt was right and that this is a matter upon which, as a matter of law, it was not possible for the Commissioners to come to the conclusion which they did, and that Mr. Justice Rowlatt is right in holding that this particular school in respect of which exemption is sought has not established its title to that exemption.

The appeal, therefore, must be dismissed with costs.

Lawrence, L.J.—This case raises an interesting question of some general importance, namely, whether a school, one of a number owned by a company registered under the Companies Acts with limited liability, and having a capital divided into preference and ordinary shares of fixed amounts upon which shares by its memorandum it is empowered to pay a dividend not exceeding 4 per cent. per annum free of Income Tax—a power which it, in fact, exercises in respect of its preference shares—can properly be held to be a public school within the meaning of Rule VI (1) (c) of the "Rules" in respect of further Allowances" applicable to Schedule A of the Income Tax Act, 1918; or, to put the question in another way: Does the fact that the Company is authorised to and does, in fact, apply part of its profits earned by carrying on the school in paying a dividend to its preference shareholders, necessarily prevent the school from being a public school?

Mr. Lattar has strenuously contended that the public nature of the services which the Company renders, the educational opportunities which it affords the members of the public, and the public control which is exercised over this particular school by the Board of Education and other bodies, not only afford ample evidence upon which the Commissioners could come to the conclusion that the school is a public school, but definitely stamp the school as a public school. He points to the fact that the school is in receipt of annual Government grants which, during the period under review, were not to be made to a private school; that, in order to earn such

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grants, the Company in the management of this school had to comply with the requirements of the Education Act of 1921, and of the regulations made by the Board of Education under that Act; and, further, that compliance with those requirements entailed certain consequences of which the following are the chief ones relied upon by him, namely, that the school had to be open to inspection by Government Inspectors, that no pupil could be refused admission on other than reasonable grounds, that no formulary of any distinctive religious denomination might be taught in the schools except at the request of the parent or guardian of the pupil, that the rates of fees had to be approved by the Board of Education, that gratuitous education had to be provided for at least 10 per cent. of the pupils of the school, and that one-third at least of the governing body had to be appointed by the Local Education Authority for Higher Education. He also relied on the fact that the scheme under which this school was conducted had received the approval of the Board of Education, and particularly, on the fact that by the memorandum of association of the Company the shareholders were only entitled to a limited dividend so long as the school was a going concern, and that on the winding-up they were only entitled to a return of the capital paid up on their shares, and that any surplus went to some other educational institution or institutions, having objects similar to the objects of the Company. He contended that that latter provision to which I have referred placed the preference shareholders in the position of debenture holders for all practical purposes; they were only entitled to get back the money which they had embarked in the concern; they were only entitled to 4 per cent. interest on that money; and his argument was that they are really and substantially in the position of creditors of the Company. In my judgment that latter argument is ill-founded. There is a broad distinction between the proprietors of a concern who are making a profit out of it and creditors who are supplying goods or lending money to the concern for the purpose of its being carried on by the proprietors.

If it be open to the Commissioners to find that a school owned by a limited company paying a dividend to its shareholders is a public school, I agree that there is material in the present case upon which the Commissioners might have come to the conclusion they did, and that such a finding could not properly be disturbed by the Court. To my mind the main question is whether the absence of private pecuniary interest and personal gain on the part of those who own and are concerned in the carrying on of the school is or is not an essential characteristic of a public school. If, in a case where there is an element of profit-making for the benefit of those who have embarked their money in the concern, it be a question of degree, the true test being whether the dominating activities of the school are educational facilities for the public

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or profit-making, then Mr. Latter is right in saying that it is a pure question of fact upon which the Commissioners are the sole judges. On the other hand, if the existence of such an element is fundamentally opposed to the conception of a public school, then the Commissioners have come to a wrong conclusion in law, and their finding cannot be upheld. It seems to me that in such a case it would be wholly immaterial whether the persons who embarked their money on the adventure did so with a view to furthering public education, or with the view of making a profit by carrying on a school. It seems to me that if the making of profit by the persons who embarked their money in carrying on the school is part of the scheme for carrying on the school, it is wholly immaterial whether the one or the other is the dominating motive which actuated the persons in advancing their money.

Mr. Latter, however, relies on *Blake's case*⁽¹⁾, reported in the Court below in 18 Q.B.D. 437, and in the Appeal Court in 19 Q.B.D. 79, as showing that the words "public school" are not words of art, and that the question whether a particular school is a public school is necessarily one of fact. Colour is lent to that argument by the passage which he has cited from Mr. Justice Denman's judgment on page 445 of 18 Q.B.D. There he says: "I do not think that the words 'public school' in this Act must 'be construed as words of art. The question is what is the 'common understanding of those words, and that is a question 'not of law but of fact'". It has to be remembered what the question to be decided in *Blake's case* really was. It was there contended that the charge for tuition made the school not a school which could be properly described as a public school; that, in order to be a public school, it was essential that the education should be given gratuitously. The school there was owned by the Corporation of London, that is to say, a public body. No question there arose as to the profit-making by the persons who were managing and carrying on and owning the school, but a charge was exacted for tuition—a moderate fee for the purpose of meeting some of the expenses of the carrying on of the school—and it is in the light of those facts that the passage in question must be read. Mr. Justice Denman had no thought of dealing with a case where the persons concerned in carrying on the school were dividing for their personal benefit profit earned in carrying on the school.

In the Court of Appeal the case was dealt with, and some very useful guidance, in my opinion, was furnished by the judgments, especially of Sir Edward Fry and Lord Justice Lopes. Those two learned Lords Justices dealt with the absence of certain characteristics there which would tend to stamp it as a private school if they had existed. I agree with Mr. Latter that they did not attempt to

⁽¹⁾ *Blake v. Mayor, etc. of London*, 2 T.C. 209.

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lay down any exhaustive definition of a public school, nor did they say in words that if any one of the characteristics mentioned by Lord Justice Fry was absent that would necessarily prevent a school being a public school; but I think it is obvious from both the judgments that the learned Lords Justices considered that a school in which private persons have a pecuniary interest, and a school in which a profit is in the contemplation of the founders and managers would not be a public school. At all events, be that as it may, I for myself have come to a clear conclusion that no school can be properly termed a public school which purports to make a distribution of profits among the proprietors of the school, and it seems to me to be wholly immaterial that the amount which is so distributed is limited by the constitution of the company. It seems to me to introduce into the school an element which precludes it from being what is termed in common parlance a public school as distinguished from a private school.

Sir Boyd Merriman has referred us to a passage in the judgment of the Privy Council in *Dilworth's* case, in [1899] A.C. at p. 108, and there is one sentence in that which I should like to quote in support of the conclusion at which I have arrived: "Schools founded or maintained by the community, and managed by its representatives, are clearly public, while schools conducted by individuals for their own emolument are as clearly private." A company conducting a school for the emolument of its preference shareholders in my judgment comes directly within the purview of that sentence in the judgment, and it stamps the school as a privately owned school, as distinguished from a public school. It seems to me essential for the purpose of constituting a public school that no person concerned in its management, conduct, or ownership should receive a personal profit out of its conduct and carrying on. For those reasons I think that Mr. Justice Rowlatt was right in his decision, and that the appeal fails.

Slessor, L.J.—I agree. In my opinion, the evidence before the Commissioners in this case was not such that as a matter of law they could find that this was a public school. The difficulty in part has arisen from the fact that there is no definition of a public school in Rule 1 of No. VI of Schedule A of the Income Tax Act, 1918, but when that Rule is considered there are certain types of institutions—colleges, halls, hospitals and almshouses—all mentioned in the same Rule as that dealing with public schools, which assists us in giving a construction to that term. Mr. Justice Denman in *Blake's* case⁽¹⁾ says that in his opinion the object was not merely to exempt institutions purely charitable but "institutions *ejusdem generis* with the colleges and

(1) *Blake v. Mayor, etc. of London*, 2 T.C. 209.

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“halls which form the first class of property exempted”, and therefore were there no other ground in any other authority, and no indication as to what was the meaning of a public school one would imagine from the collocation of words there that something of a real public nature in which the private emolument of a private individual is not sought was what was intended. But, as a matter of fact, as has been pointed out by my Lords, in the Court of Appeal in *Blake's* case, there is a very valuable indication as to what is meant, or at least what must be looked for as part of the criterion in deciding whether a school is or is not a private school. At any rate, it does appear there, and it is also made clear, I think, in the decision of the Privy Council in the case of *Dilworth*⁽¹⁾, that a school which is carried on for private emolument or profit is not normally properly to be regarded as a public school within the meaning of Rule 1 (c) of No. VI of Schedule A.

Here there is no doubt at all on the evidence which was before the Commissioners that, in fact, however laudable—and indeed it was laudable—was the motive of The Girls' Public Day School Trust, Limited, the constitution of the Trust and of the Company was such that interest at a rate not exceeding 4 per cent. was to be paid to the holders of the preference shares, and therefore, I think, it is impossible to say that this Company—this Trust—was not run, at any rate as one purpose, for the purpose of emolument of the corporators. If that be so, it seems to fall within the observations of Lord Watson, and to fall within the indications which we find in the case of *Blake*. Mr. Justice Rowlatt in giving judgment in this case has followed the view which he took in the earlier case which he decided of the *Cardinal Vaughan Memorial School*, 7 T.C. 611, at page 619. There also he says: “Now, what is the position of the school? It satisfies the requirements which were indicated by Lord Justice Fry in the passage which is very well known in his judgment in *Blake v. Mayor, etc. of London*.”

For these reasons I think that the learned Judge is right, and this appeal should be dismissed.

Sir F. Boyd Merriman.—My Lord, following upon the decision of the Commissioners the school obtained repayment of the allowance for the six preceding years. No application was made before Mr. Justice Rowlatt, pending an appeal, for that repayment to be repaid. I ask that an order to that effect may be included in your Lordship's Order.

Lord Hanworth, M.R.—Yes. The Order will be “Assessment to stand.” That is what we usually say.

⁽¹⁾ *Dilworth and others v. The Commissioner of Stamps, and Dilworth and others v. The Commissioner for Land and Income Tax*, [1899] A.C.99.

Sir F. Boyd Merriman.—I am instructed that the Revenue always make this application in cases where a consequential repayment has been made. I am dealing now with something which is outside the particular assessment.

Lord Hanworth, M.R.—The assessment must stand, and there will be an Order for payment accordingly.

Sir F. Boyd Merriman.—An Order for repayment of the allowance in the six preceding years?

Lord Hanworth, M.R.—It will not be exactly the same money. The Order will be for "Payment accordingly". They will have to draw a cheque for the same amount. They have not put it to any deposit account anywhere. They have got the money back, and now you want some money equivalent in amount.

Sir F. Boyd Merriman.—Yes. I want my six years' allowance back.

Mr. Latter.—There is no difficulty about it. It is waiting for them in a suspense account.

Lawrence, L.J.—You have it on deposit. It will be only a matter of form, I expect.

Mr. Latter.—Yes.

The Company having appealed against this decision, the case came before the House of Lords (Viscount Hailsham, and Lords Warrington of Clyffe, Atkin, Thankerton and Macmillan) on the 19th and 20th June, 1930, when judgment was reserved. On the 29th July, 1930, judgment was given unanimously against the Crown, with costs, reversing the decision of the Court below.

Sir John Simon, K.C., Mr. A. M. Latter, K.C., Mr. G. M. Edwardes-Jones, K.C., and Mr. G. Beagley appeared as Counsel for the Company and Leading Counsel appearing for the Crown in the House of Lords was Mr. R. W. Needham, K.C., and not the Attorney-General, as stated.

JUDGMENT.

Viscount Hailsham.—My Lords, in this case the Appellants claim to be exempt from Income Tax chargeable under Schedule A in respect of the annual value of the premises of the Wimbledon High School for Girls by virtue of the provisions of Rule 1 (c) of No. VI of Schedule A which grants an allowance under that Schedule of "The amount of the tax charged on any hospital, public school, or almshouse, in respect of the public buildings, offices, and premises belonging thereto," with certain exceptions

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not material to this case. The General Commissioners held that the Wimbledon High School for Girls was a "public school" and allowed the claim. Their decision was reversed by Mr. Justice Rowlatt and his judgment was affirmed by the Court of Appeal.

The question which arises for determination is whether there was evidence on which the Commissioners could find that the school in question was a public school during the years in respect of which exemption was claimed. Before dealing with the consideration which led the Courts below to answer this question in the negative, it will be convenient to summarise the facts as found by the Commissioners with regard to the school.

The Appellant Company was originally incorporated under the Companies Act in the year 1872. Between the years 1905 and 1912, the memorandum and articles of association of the Company were altered in consultation with the Board of Education in order to meet the requirements of that Board and to enable the school to receive grants from public funds; and the name of the Appellant Company was altered to its present title. After the alterations, the capital of the Appellant Company was £200,005, divided into 40,000 preference shares of £5 each and 100 new shares of 1s. each. The issued capital consists of 30,669 preference shares and 100 new shares. The new shares are held upon the terms of a Deed of Trust by which they are held upon trust to transfer and dispose of the shares and to exercise their rights and powers in such manner as the Board of Education direct. These shares are not entitled to any dividend, but special voting rights are attached to them which enable the Board, through their holders, to exercise in certain circumstances a veto upon proposals to alter the constitution of the Company or to wind it up.

The preference shareholders are entitled to a dividend of 4 per cent. per annum free of Income Tax, cumulative for two years; and they are entitled on a winding-up to receive back their capital and two years' arrears of dividend; but there can be no winding-up against the will of the holders of the new shares unless the dividends of the preference shares are in arrear for two years.

There are also provisions by which after the year 1956, the preference share capital can be extinguished and the assets of the Trust handed over to a public charitable trust. The school is managed by a governing body consisting of twenty-four persons, of whom one-third are nominated by the Local Education Authority and the remainder appointed by the Council of the Trust.

The fees charged have to be approved by the Board of Education. Free places are awarded in the school to the extent of 10 per cent. of the total number of pupils admitted to pupils who have attended a public elementary school for the preceding two years. So long as the Trust is in receipt of Parliamentary grants it cannot refuse

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to accept a pupil except on such grounds as the Board of Education considers to be reasonable, and it is bound to receive a certain number of free pupils, including scholars to whom scholarships are allotted by the Local Education Authority.

The Commissioners found as a fact that the school is recognised by the Local Education Authority as providing for the residents of the North Eastern part of the County of Surrey what is commonly described as a "public school education"; and that the council of the Trust consists of persons elected on account of their qualifications to administer education, and that their sole object is to maintain the schools of the Trust at the highest level of efficiency. By the Secondary School Regulations, the conditions of the receipt of Parliamentary grants include a requirement that a school receiving Parliamentary grants must not be conducted for private profit. The Board of Education holds that the Wimbledon High School for Girls complies with that condition, and the school has during all material dates been recognised by, and in receipt of Parliamentary grants from, the Board of Education.

The basis of the decision in the Court below is contained, I think, in the concluding words of the judgment of Lord Justice Lawrence. The learned Lord Justice says⁽¹⁾: "In my judgment "it is essential for the constitution of a public school that no "person concerned in its foundation or maintenance should receive "a personal pecuniary benefit out of the profits earned by carrying "it on."

The question for your Lordships' consideration is whether this opinion is correct. It is common ground that the expression "public school" is in no way defined in the Income Tax Act, 1918, but it is said that there are decisions of great authority which compelled the Court below to reach the conclusion which I have stated: I propose to turn at once to these decisions.

The first, and in some ways the most important, is the case of *Blake v. The Mayor and Citizens of the City of London*⁽²⁾, reported in the Court of first instance, 18 Q.B.D. 437, and in the Court of Appeal, 19 Q.B.D. 79. In that case the Respondents had made a claim for exemption under the Rule corresponding to that now under discussion in respect of a school known as the City of London School. The Commissioners had decided that the school was a public school and had granted relief. Objection was taken to this decision on the ground that fees were charged for admission to the school and that in order to fall within the exemption, the school must be one at which education was given free. The Court rejected this contention and upheld the allowance of exemption.

(1) See page 555 *ante*. Quoted as reported at [1929] 2 K.B. 301.

(2) 2 T.C. 209.

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In the Court of first instance, Mr. Justice Denman says :
“ I do not think that the words ‘ public school ’ in this Act must
“ be construed as words of art. The question is what is the
“ common understanding of those words, and that is a question not
“ of law but of fact. In many senses the City of London School
“ is a public school according to common understanding; and if
“ some charitable element be necessary in order to satisfy the
“ words creating the exemption, that element exists. Looking at
“ all the facts before the Commissioners, I am of opinion that
“ they might reasonably come to the conclusion that this was a
“ public school within the meaning of the Act,” and Mr. Justice
Hawkins concurred in this decision.

In the Court of Appeal the decision was affirmed. Lord Esher said⁽¹⁾ that he would not attempt to give an exhaustive definition of the term “ public school,” but that he was of opinion that the City of London School was a public school within the meaning of the Rule, and he added : “ The object of the school is the education
“ of a sufficiently large number of persons to enable us to say that
“ it is a public object.” Lord Justice Fry in agreeing says⁽²⁾ :
“ It seems to me that it would be unwise to endeavour to lay
“ down any definition in the sense of saying what would or would
“ not be a public school in all cases; but I think that the school in
“ this case has certain characteristics which denote a public school.
“ It has a perpetual foundation : a portion of its income is derived
“ from charity : it is managed by a public body : no private person
“ has any interest in the school : no profit was or is in the contem-
“ plation of its founders or managers : and, lastly, the object of the
“ school is the benefit of a large class of persons. All these circum-
“ stances concurring, I think this institution may be said to be a
“ public school.” Lord Justice Lopes said : “ I do not propose to
“ attempt to give an exhaustive definition, but I think the intention
“ was to relieve schools not carried on for profit and in which the
“ public were interested, because a sufficiently large number of the
“ public received education there either gratuitously or to a great
“ extent gratuitously.”

My Lords, it is plain that the decision in that case does not conclude the present case. All that the Courts decided was that the fact that fees were taken did not prevent a school from being a public school; but it is suggested that the criteria formulated by Lord Justice Fry included the absence of any interest of any private person in the school and the absence of any profit in the contemplation of its founders or managers, and that this shows that a school which does not satisfy these criteria cannot be a public school. In my opinion, this is a misconception of the Lord Justice’s meaning. Lord Justice Fry had expressly disclaimed any attempt to lay

⁽¹⁾ 2 T.C. at pp. 216 and 217.

⁽²⁾ *Ibid.* at page 217.

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down a definition of what would or would not be a public school in all cases; but he was indicating some characteristics which enabled him to say that the school in question was a public school. This is not in the least the same thing as saying that no school which does not possess all these characteristics can come within the expression. I have no doubt that the fact that no private person has any interest in the school and the fact that no profit is in the contemplation of its founders or managers are very material aids in reaching the conclusion that a school is a public school; but that does not necessarily involve that unless these facts are present the school must fall outside the clause.

In the same way, Lord Justice Lopes expressly disclaimed any attempt to give a definition and I do not read the Lord Justice's words as meaning that no school from the conduct of which any person could derive pecuniary benefit could in any circumstances be a public school, although no doubt the fact that a school was not carried on for profit would be a very material consideration as pointing in that direction.

Your Lordships were also referred to a decision of the Privy Council in the case of *Dilworth v. The Commissioner of Stamps*, [1899] A.C., page 99. In that case the question for decision arose under certain New Zealand Acts and the Privy Council had to decide whether a school known as the Dilworth Ulster Institute was a "public institution" within the meaning of a Dominion Statute. Lord Watson in the course of delivering the judgment of the Board uses these words:—"the context of the Act does not define, . . . what, according to the general understanding of the Colony, constitutes the essential difference between a public and a private school. As these words are used in England, there would be no difficulty in pointing out some schools which are public, and others which are unmistakably private; but it might be troublesome to explain the reason why some schools are called public whilst others, not very different in their character and circumstances, are known as private. . . . Schools founded or maintained by the community, and managed by its representatives, are clearly public, while schools conducted by individuals for their own emolument are as clearly private. . . . the character of the school, as public or private, must depend, not upon the scholars to whom education is given, but upon the terms on which and the circumstances in which education is given."

My Lords, the language of Lord Watson commends itself to my judgment apart altogether from the great authority of its author. I think that the terms on which, and the circumstances in which, education is given are the determining factors, and I think that a school conducted by an individual for his own emoluments would

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clearly not be a public school. But I do not think that it follows that wherever there is a possibility of any profit arising to an individual in the course of carrying on a school that this of necessity prevents the school from having the character of a public school.

A further point was urged on behalf of the Crown that no school could be a public school unless it had a permanent foundation and that this school did not satisfy that test. The contention was based partly on a sentence in Lord Justice Fry's judgment, in the case of *Blake*, to which I have already referred. The learned Lord Justice said of the City of London School: "It has a perpetual foundation." I have already given what I believe to be the answer to this argument. The learned Lord Justice was not laying down a series of conditions each of which had to be satisfied in order to constitute a public school, but enumerating a series of factors whose combined effect enabled him to regard that particular establishment as a public school. And it was conceded in argument before your Lordships' House that a public elementary school must be regarded as a public school although it has no perpetual foundation. Reliance was also placed on a decision of Mr. Justice Rowlatt in *The Birkenhead School v. Dring*, 11 T.C. 273. In that case a limited company carried on a high class secondary school under Articles which provided that no bonus, dividend or profit was to be paid, allotted or divided to or amongst the members. Practically the whole of the receipts of the company arose from fees paid by pupils. The Commissioners found that the school was not a public school and Mr. Justice Rowlatt upheld that decision.

I think this decision was correct. The only fact relied on to make the school a public school was the fact that it was not carried on for private profit and I do not think that this is a conclusive test. The learned Judge said in his judgment⁽¹⁾: "The school has not really any permanent . . . character about it. . . . I certainly think that the element of permanency, without using it in its technical sense, which is connoted by the word 'foundation', something of that sort, is part of the essentials of a public school". If by that the learned Judge meant to imply that it was of the essence of a public school that there must be something in the nature of a foundation which rendered it necessary that it should be permanently carried on as such, then I am bound to say that I do not think that he was justified in laying down that principle. The existence of a perpetual foundation is one of the factors which require consideration, but it is not by itself conclusive.

It was further argued that there must be something in the nature of public ownership in order to constitute the school a public school. Again, I would say that ownership or management by a

(1) 11 T.C. at page 277.

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public body would be a factor that has to be taken into account, but I cannot hold that it is an essential condition. I agree with Mr. Justice Denman in thinking that the question is: What is the common understanding of the expression? And that is much more a matter of fact than of law.

In the present case we have a school which at all material dates was open to the general public, from which the Appellant Company could not exclude any would-be pupil except with the approval of the Public Education Authority; a large proportion of its pupils are scholars from the public elementary schools; a great proportion of its governing body is nominated by the Local Education Authority. We have an express finding of fact that the "sole object" of the council which carries on the school is to maintain the school at the highest level of efficiency and that the education provided is recognised by the Local Education Authority as being what is commonly described as a public school education.

During all the material dates the school was largely maintained by public monies and in the view of the Board of Education the school satisfied the regulation which prohibits any Parliamentary grant to a school conducted for private profit. The concurrence of all these factors seems to me to afford ample material to enable the Commissioners to reach the conclusion of fact that this school was a public school, and if there were material on which they could reach that conclusion, it is not open to review by the Courts.

It follows that the appeal should be allowed with costs here and below and I move your Lordships accordingly.

Lord Warrington of Clyffe.—(Read by Lord Macmillan):

My Lords, the only question in this appeal is whether the Commissioners were entitled in law to hold as they have held that the Wimbledon High School for Girls, owned and carried on by the Appellants, is a public school within the meaning of Rule 1 (c) of No. VI of Schedule A of the Income Tax Act, 1918.

On a Case stated for the opinion of the Court the decision of the Commissioners was reversed by Mr. Justice Rowlatt, and on appeal his Order was affirmed by the Court of Appeal (Lord Hanworth, Master of the Rolls, Lords Justices Lawrence and Slesser).

The ground of the decision of the Court of Appeal was, that the fact that the Appellants are authorised to and do in fact apply part of the profits which the school earns in paying a dividend to the preference shareholders necessarily prevents the school from being a public school. The real question in the present appeal is whether on this ground the decision can be supported. Lord Justice Lawrence in giving his judgment said⁽¹⁾: "If it be open to the Commissioners to

⁽¹⁾ See page 553 *ante*. Quoted as reported at [1929] 2 K.B. 299.

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“ find that a school owned by a limited company paying a dividend to its shareholders is a public school, I agree that there is sufficient material in the present case upon which the Commissioners might have come to their conclusion, and that such a finding ought not to be disturbed.” With this view I entirely concur. It is quite unnecessary to repeat the detailed statement of the facts contained in the Case, but I would call attention to one statement which in my opinion has an important bearing on the question we have to decide. It appears in paragraph 4: “ Evidence which we accepted was given that:— . . . (b) The council of the Trust consists of persons elected on account of their qualifications to administer education and their sole object is to maintain the schools of the Trust at the highest level of efficiency.” In other words, although if, after fulfilling this object, a balance of profit is earned, this may be applied in payment of a rigidly limited dividend to the shareholders, the making of this profit is not one of the objects affecting the actions of those who conduct the affairs of the Trust.

The Act contains no definition of “ public school ”, and it is therefore the function of the tribunal in each case to say whether the school in question is properly so described. In arriving at a conclusion there are obviously many elements to be taken into consideration, and to say that, whatever the other circumstances may be, the existence or non-existence of one element affords an irrefutable test is open to the objection that by doing so the tribunal *pro tanto* binds itself by a definition which the Statute does not contain.

For myself, without for the present any reference to authority, I should be prepared to hold that the fact that the school is owned and carried on by a limited company whose constitution allows of the payment of a dividend out of profits is nothing more than an element for consideration, and one that bears against the view that the school is a public school, but for all this, one that is capable of being outweighed or qualified by others. In the present case, I am of opinion that the effect of the bare fact of the possible or actual payment of dividends ought not to be allowed to stand by itself, but should be considered together with the statement quoted above as to the “ sole object ” with which the affairs of the Trust are run. So considered the fact in my opinion ceases to be conclusive—if indeed it ever were so, which I venture to doubt—and the question is open for decision as one of fact.

As to the authorities: The most important case is *Blake v. The Mayor of London*⁽¹⁾, 18 Q.B.D. 437, before Mr. Justice Denman and Mr. Justice Hawkins, and 19 Q.B.D. 79 in the Court of

⁽¹⁾ 2 T.C. 209.

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Appeal. The question for decision in that case was whether the City of London School, maintained and carried on by the Corporation with the aid of a permanent endowment, was excluded from the class of public schools by the mere fact that fees were taken from the parents and guardians of boys admitted to the school. The Commissioners found in fact that the school was a public school within the meaning of the Act. This finding was upheld in both Courts. Mr. Justice Denman, in giving judgment in the King's Bench Division, makes some remarks very apposite to the present case. He says at page 444: "There is no definition of a public school to be found in any text-book or Act of Parliament. The question, therefore, seems to be a mixed question of law and fact, and indeed is very much in the nature of a question of fact" and at page 445, "I do not think that the words 'public school' in this Act must be construed as words of art. The question is what is the common understanding of those words, and that is a question not of law but of fact." With the views so expressed I agree. In the Court of Appeal, Lord Justice Fry said it would be unwise to lay down any definition in the sense of saying what would or would not be a public school in all cases, and with this I concur. He then enumerates certain characteristics which in his opinion denote a public school, one of which was that no profit was in the contemplation of the founders or managers. But this is to say that that fact is one that tells in favour of the conclusion. It would be quite a different thing to say that without it, whatever be the other circumstances, the same conclusion could not properly be reached. This the learned Lord Justice does not say, and in fact implicitly deprecates such a view in the passage I have referred to above. Lord Justice Lopes goes further, but if he really meant that a school carried on for profit could not under any circumstances be a public school, I venture respectfully to say that I cannot agree and prefer the view expressed by Lord Justice Fry. It was mainly on this case that both Mr. Justice Rowlatt and the Court of Appeal founded their judgments.

In *The Trustees of the Cardinal Vaughan Memorial School v. Ryall*, 7 T.C. 611, the Commissioners held that the school in question was not a public school because in their opinion it was denominational. Mr. Justice Rowlatt, in agreement with the Solicitor-General on that point, held that that fact, if it were a fact, did not conclude the matter, and under all the circumstances came to the conclusion that the Commissioners' finding could not be supported. This case then in effect decided that the Commissioners were wrong in law in treating the one fact as conclusive, and is therefore really in favour of the Appellants' contention.

The other cases referred to do not in my opinion conflict in any way with the views I have above expressed.

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One other point was made in argument for the Crown. It was said that a school cannot be a public school unless it is possessed of some permanent endowment or subject to a trust for charitable purposes. I cannot find any justification for holding that there is in law any such essential condition. Lord Macnaghten's famous judgment in the *Pemsel* case⁽¹⁾, [1891] A.C. 531, was referred to, but the point decided in that case was that the expression "charitable purposes" in the Income Tax Act of 1842 included purposes within the wide legal meaning of charity and was not confined to the relief of the poor. It is true that the noble and learned Lord on page 587 said that on the words of Schedule A the Legislature considered the purposes of a public school to be charitable. The advancement of education is among the purposes included in the wide legal meaning of charity, and I think all that Lord Macnaghten meant was that the fact that the Legislature coupled public schools with almshouses and hospitals supported his opinion on the point raised for decision.

On the whole I am of opinion that the appeal should be allowed with costs here and below, and the finding of the Commissioners should be restored.

Lord Atkin.—My Lords, the question is whether the Wimbledon High School for Girls is a public school, so as to be entitled to the allowance provided by the Income Tax Act, 1918, Schedule A, No. VI., Rule 1 (c) "The amount of the tax charged on any hospital, public school, or almshouse, in respect of the public buildings, offices, and premises belonging thereto". I find it unnecessary to recapitulate the facts. The Commissioners have found that the school is a public school, and if that finding can be supported in law we have no jurisdiction to alter it. It is said, however, that a school cannot be a public school "where a distribution of the profits of carrying it on is made among the proprietors." If that test, which is applied by Lord Justice Lawrence⁽²⁾ is correct, this school does not satisfy it. In argument before this House the case of the Revenue authorities was put in different language, but to the same effect. No institution it was said, can be a public school unless it is publicly owned and not privately, that is, owned by a public corporation or by a body of trustees who hold not beneficially but subject to a public charitable trust. My Lords, I am satisfied that the suggested tests are too narrow. The words "public school", as has been said before, are not words of art: they are to be given their ordinary meaning in what context they may be found. In this particular context of exemption from the provisions of the Income Tax they are first found in collocation with hospitals and almshouses in the Income Tax Act of 1803, Schedule A, No. IV, Rule 2. At

(¹) *Special Commissioners of Income Tax v. Pemsel*, 3 T.C. 53.

(²) See page 555 *ante*. Quoted as reported at [1929] 2 K.B. 301.

(Lord Atkin.)

that date I conceive the obvious distinction would be between public school and private school; and such I believe to be the distinction to-day. But, as pointed out by Lord Watson, *Dilworth v. Commissioner of Stamps*, [1899] A.C. 99 at page 108, while there would be no difficulty in pointing out some schools which are public and others which are unmistakably private, it might be troublesome to explain why some schools are called public whilst others not very different in their character and circumstances are known as private. He proceeds: "Schools founded or maintained by the community, and managed by its representatives, are clearly public, while schools conducted by individuals for their own emolument are as clearly private the character of the school, as public or private, must depend, not upon the scholars to whom education is given, but upon the terms on which and the circumstances in which education is given." The circumstances in which education is given will vary as the years pass. Probably in 1803 there were very few public schools which were not charitable foundations; there were certainly very few founded or maintained by the community, whether the State or a local authority. At the present date schools founded or maintained by the community outnumber all others; public elementary schools and public secondary schools are obviously public schools. I refer to these facts as demolishing the suggestion that the conditions enumerated by Lord Justice Fry in the *City of London School* case⁽¹⁾ are each of them essential to the conception of a public school. The first two are that it has a perpetual foundation; a portion of its income is derived from charity. Neither of these conditions exists in the case of a public elementary school. There seems no reason, therefore, for regarding his fourth condition as any more conclusive—"no profit was or is in the contemplation of the managers." My Lords, I am inclined to think that Lord Watson's test, which in his view clearly put a school behind the line of private school, "a school conducted by individuals for their own emolument," is sufficient for the purposes of the present case. In every respect except for the distribution of profits the school is on the public side of the line: the nature of the education, the public benefits conferred, the extent of public control both locally and generally by the Board of Education and the amount of public money contributed to its maintenance are "circumstances in which the education is given" which to the fullest extent support the finding of the Commissioners.

Does the circumstance that the profits if made are distributed among the preference shareholders on the special terms of the articles of association of the company outweigh all the other considerations? My Lords, I am satisfied that so to hold would be to give too narrow and technical a construction to the words "public

(1) *Blake v. The Mayor etc. of London*, 2 T.C. 209 at page 217.

(Lord Atkin.)

“ school ”. It seems to me a travesty of facts to suggest that this school is conducted by individuals for their own emolument. One ought to look at the dominant purpose of those who conduct the school. That seems to me to be, as expressed, to give a public school education to girls. The purpose of making a profit is completely subsidiary. From this point of view there can in substance be no difference between persons who wish to provide public education and do it by vesting the school in a company raising money by debentures at interest and those who do it by vesting the school in a company raising money by preference shares at a limited interest. The former case is the *Brighton College* case⁽¹⁾ in which I have no doubt that the allowance on Schedule A was rightly made. The latter is the present case. That debenture holders are not proprietors is obvious enough, but the distinction seems to have too great importance when it alone converts public schools into private. My Lords, in my opinion the finding of the Commissioners was one at which they were entitled to arrive on the evidence, and I agree that this appeal should be allowed.

Lord Macmillan.—My Lords, the Appellants are a limited company registered under the Companies Acts and own certain property at Wimbledon in the county of Surrey in which they carry on a school known as the Wimbledon High School for Girls. The question is whether this school is a “ public school ” within the meaning of Schedule A, No. VI, Rule 1 (c) of the Income Tax Act, 1918, so as to entitle the Appellants to be relieved of the amount of tax charged under Schedule A in respect of the public buildings, offices and premises belonging to the school. The General Commissioners after considering the facts and contentions of the parties, held that the school was a “ public school ”. Their determination was reversed by Mr. Justice Rowlatt whose judgment has been affirmed by the Court of Appeal. The circumstance which has been held to be fatal to the Appellants’ claim is that the preference shareholders of the Company, who have provided part of the capital embarked in this and other schools owned by the Company, are entitled to receive a dividend on their shares out of such profits as the Company may earn from the carrying on of their schools. The dividend is no doubt limited to four per cent., but this limitation is immaterial “ if ”, to quote Lord Justice Lawrence⁽²⁾, “ the existence of the element of profit making for the private benefit of the founders and managers is fundamentally opposed to the conception of a public school ”. “ In my judgment ”, says the same learned Lord Justice in conclusion, “ it is essential

⁽¹⁾ *Brighton College v. Marriott*, 10 T.C. 213.

⁽²⁾ See pages 554 and 555 *ante*. Quoted as reported at [1929] 2 K.B. 299 and 301.

(Lord Macmillan.)

“ for the constitution of a public school that no person concerned in its foundation or maintenance should receive a personal pecuniary benefit out of the profits earned by carrying it on ”.

If this be right as a proposition of law there is an end of the matter. With all respect to the learned Lord Justice, who has so admirably focussed the question in debate, and to his colleagues who have agreed with him, I find myself unable to subscribe to their view. The Statute does not define the expression “ public school ”. It does not prescribe that no school shall be deemed a public school if any part of the profits earned by conducting it is paid over to the persons who own and manage it. If this is to be laid down as an absolute criterion it must be derived either from previous authoritative judicial interpretation of the expression or from its essential and inherent meaning. So far as authority is concerned it is true that Lord Justice Fry in *Blake v. Mayor &c. of the City of London*, (1887) 19 Q.B.D. 79, which raised a similar question affecting the City of London School enumerated “ certain characteristics which denote a public school ” among which he mentioned that “ no private person has any interest in the school : no profit was or is in the contemplation of its founders or managers ”, while Lord Justice Lopes expressed the opinion that “ the intention was to relieve schools not carried on for profit ”. But both of these learned judges were careful to emphasise that they were not attempting to state an exhaustive definition of a public school. Certain of the characteristics enumerated by Lord Justice Fry are plainly not essential, for example, that “ a portion of its income is derived from charity ” for it is admitted that the schools conducted by education authorities out of the rates are public schools within the meaning of the Act. Nor is “ a perpetual foundation ” an essential.

So far as the expression itself is concerned, I do not think that the fact that there is an element of private profit involved necessarily precludes a school “ from being what is termed in common parlance “ a public as distinguished from a private school ”. (Lord Justice Lawrence⁽¹⁾ at Appendix, page 163). The adjective “ public ” is so elusive in meaning that the authors of the New English Dictionary preface their attempt at definition by the warning that “ the varieties of sense are numerous and pass into each other by many intermediate shades of meaning. The exact meaning often depends upon the substantive qualified and in some expressions more than one sense is vaguely present; in others the usage is traditional and it is difficult to determine in what sense precisely the thing in question was originally called ‘ public ’ ” All are agreed that the expression “ public school ” as used in the

(1) See page 555 ante.

(Lord Macmillan.)

Act is not limited to public schools in the sense of the ancient foundations of Eton and Harrow, though if common parlance were to be the guide this might well be the result.

I certainly regard the circumstance that the owners of a school have a personal pecuniary interest in the profits which it earns as an element of importance in deciding whether the school is or is not a public school. But I do not regard it as decisive in the negative. I think that this element like other elements is examinable. It may be negligible in character or may be more than counterbalanced by other elements. In short, all the features of the school must be considered and there is no individual feature the presence or absence of which taken by itself can be said in law to be conclusive of its character as public or private. If the features which are indicative of the school being a public institution predominate then it may fairly be said to be a public school. It is thus a question of degree in every case and, that being so, there is in the case of this school ample material in the facts which the Commissioners have found proved and which have been detailed in the speeches of the noble and learned Lords who have preceded me to entitle the Commissioners to reach the conclusion which they did. The question resolves itself into one of fact and the determination of it is for the Commissioners and not for this House.

I would only add on the question of the conclusiveness of the element of private profit that the methods in which financial assistance may be given to a public object may obviously vary. A benefactor may give or bequeath a capital sum to enable a school to be founded and endowed or he may lend money to the promoters at no interest or at a low rate of interest or indeed at ordinary rates. In the former case the school would be regarded as possessing one of the characteristics of a public school and in the latter case the school would not be precluded from being regarded as a public school. Does it make all the difference that the promoters have themselves furnished the necessary finance on the footing that they shall receive a limited rate of interest if there is a sufficient surplus of revenue to pay it? The exemption in favour of public schools is to be found in Income Tax legislation so far back as 1803, long before the existence of limited liability companies, or for that matter of rate-provided schools. The conception of a public school cannot be stereotyped in consonance with the ideas of more than a century ago. If a modern benefactor in order to assist financially the promotion of an educational project avails himself of the method of subscribing the requisite funds to a joint stock company I do not think that that necessarily deprives the institution which he has thus helped to found of the character of a public school. It all depends upon the terms of the transaction and its true object. No one could reasonably say on the facts found in the present case

(Lord Macmillan.)

that the Wimbledon High School for Girls was "carried on for profit". I therefore concur in the motion that the appeal be allowed.

My Lords, I am desired by my noble and learned friend Lord Thankerton to say that he concurs in the judgment which I have just read.

Mr. Edwardes Jones.—I ask your Lordships for an Order that the amount we paid may now be repaid to the Trust with 5 per cent. interest. My learned friend Mr. Hills says that is now allowed usually.

Viscount Hailsham.—What do you say about that, Mr. Hills?

Mr. Hills.—It is a thing which is very often put in the Order. I do not know whether it is strictly necessary. The tax has been paid and the Act provides that it shall be repaid with interest.

Viscount Hailsham.—Is 5 per cent. right?

Mr. Hills.—Perhaps at this time one has thought the rate ought to come down, but the Court of Appeal has allowed 5 per cent.

Viscount Hailsham.—The rate of 5 per cent. has been the practice for some time?

Mr. Hills.—It has been, although the rate of interest on money has gone down.

Viscount Hailsham.—Then the Order will be that the determination of the Commissioners be restored, that the Respondent do pay to the Appellants their costs here and below, and you want to add that the amount of tax paid be repaid?

Mr. Edwardes Jones.—That the amount of tax be repaid with 5 per cent. interest from the date of payment.

Questions put.

That the Order appealed from be reversed.

The Contents have it.

That the determination of the Commissioners be restored, that the Respondent do pay to the Appellants their costs here and below, and that the amount of the tax be repaid by the Respondent to the Appellants with interest at the rate of 5 per cent. per annum from the date of payment.

The Contents have it.

[Solicitors :—Solicitor of Inland Revenue ; James Gray and Son ; and Linklaters & Paines.]
