VOL. VII—PART IX

No. 421.—High Court of Justice, Ireland (King's Bench Division). —16th, 17th and 28th January, 1918.

Court of Appeal, Ireland.—5th, 6th, 7th, 11th and 12th June, 1918, and 28th February, 1919.

House of Lords.—19th, 20th, 22nd, 23rd April, and 13th May, 1920.

The Governors of the Rotunda Hospital, Dublin, *v.* Coman (Surveyor of Taxes).[1]

Income Tax.—Hospital.—Profits derived from letting rooms belonging to and connected with Hospital.—Income Tax Act, 1842 (5 *and* 6 *Vict. c.* 35), *Section* 61, *Schedule A, No. VI, and Section 100, Schedule D, Income Tax Act,* 1853 (*16 and* 17 *Vict. c.* 34), *Section* 5.

The Governors of a maternity hospital established for charitable purposes by Royal Charter in 1756, *were the owners of a building which comprised rooms adapted for public entertainments, and which was connected with the hospital buildings proper by an internal passage.*

The hospital derived a substantial income from letting the rooms for public entertainments, concerts, etc., for periods varying from one night to six months and applied the income to the general maintenance of the hospital.

The rooms were let upon terms which included the provision of seating, heating, and attendance, but an additional charge was made for gas and electricity consumed.

Held, *that the profits derived from the letting of the rooms were assessable to Income Tax under Schedule D, either under Case I, as the profits of a trade or business, or under Case VI of that Schedule, and that there was, therefore, no exemption conferred by the Income Tax Acts which was applicable to the profits.*

[1] Reported, H.L., 36 T.L.R. 646.

CASE.

Stated under 43 and 44 Vic., Ch. 19, Section 59, by the Commissioners for the special purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice in Ireland.

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1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts, held in Dublin on 22nd October, 1915, for the purpose of hearing Appeals, the Governors of the Rotunda Hospital, Dublin (hereinafter called the Appellants) appealed against the following assessments made upon them under Schedule D of the Act 16 and 17 Vict., Ch. 34, in respect of the profits derived from the letting of the Rotunda Rooms :—

For the year ended 5th April, 1912	£755
For the year ended 5th April, 1913	768
For the year ended 5th April, 1914	797
For the year ended 5th April, 1915	742

The Appellants were represented by Mr. Gerald FitzGibbon, K.C., Counsel.

2. The following facts were proved or admitted :—

(1) The Rotunda Hospital was established by Royal Charter dated 2nd December, 1756, for the relief of poor lying-in women.

Certain Bye-laws and Ordinances for the more effectual welfare of the Hospital were approved at a Board of the Governors and Guardians on 28th January, 1786, and subsequently received the assent of four of the Chief Judges of His Majesty's Courts of Ireland.

No. XX. of the aforesaid Bye-laws and Ordinances provides :—

> " XX. That, as the principal support of this Charity is produced from public entertainments in apartments contiguous to the Hospital, it must be of the utmost advantage to contrive every possible accommodation for servants, to prevent noise and disturbance—and therefore that the Board will be pleased to direct (when their funds can admit of it) a large hall, extending from Great Britain Street to the Rotunda, to be erected, of such considerable breadth as to admit of a railed passage for company, and a space with three fireplaces on either side for waiting servants ; and such other accommodation as the Governors of this Charity may judge necessary."

Certain Resolutions have been passed from time to time by the Governors and Guardians of the Hospital.

X. Provides for the general management of the Rotunda Rooms.

XIX. Defines the duties of the Keeper of the aforesaid rooms and fixes the scale of remuneration for his services, etc.

In the Appendix Schedule II., the scale of Charges for the use of the Public Rooms is set forth.

A copy of the aforesaid Charter, Bye-laws and Ordinances, Collection of Resolutions and Appendix is attached hereto (marked " A ") and forms part of this Case.(1)

3. The Rotunda Rooms—which are connected with the Hospital proper by an internal passage—are let by the Appellants for entertainments, concerts, cinema shows, etc., for periods varying from one night to six months—the letting price including the use of seating and heating. Further charges are made for gas and electric light in accordance with the consumption as shown by the respective meters.

The printed reports of the Hospital for each of the six years ended 31st March, 1909, 1910, 1911, 1912, 1913 and 1914, respectively contain " General Cash Accounts " into which the profit or loss derived from the letting of the Rotunda Rooms is brought. The reports for the years ended 31st March 1912, and 31st March, 1913, contain also details of income and expenditure on the " Rotunda Rooms Account."

In the report for the year ended 31st March, 1909, the following note appears:—

> " It will be observed from the appended Cash Account that the Rotunda Rooms show a deficit of £377 10*s.* 8*d.* This is due to the expenditure of £1,057 1*s.* 8*d.* on the construction of a proscenium and new platform in the Round Room, to the design and under the supervision of Mr. A. E. Murray, F.R.I.B.A., but for which expenditure the rooms account would have shown a profit of £770. It is anticipated, however, that these improvements will result in increased patronage of the Rooms."

Copies of the aforesaid printed Reports are attached hereto (marked respectively " B," " C," " D," " E," and " F ") and form part of this Case(1)—with the exception of the Report for the year ended 31st March, 1912—of which no copy is available—the figures relating to the " Rotunda Rooms Account " for that year have, however, been entered in the margin of page 14 of the corresponding Account for the year ended 31st March, 1913 (marked E).

4. The Poor Valuation as regards the Rotunda Hospital and the Vaults below is as under :—

	Rateable Valuation.
Rotunda Lying-in Hospital and Gardens ..	Exempt
Vaults under Rotunda	£65

At the hearing of the Appeal it transpired that in a recent Revaluation List the following item was included for the first time :—

	Rateable Valuation.
Rotunda Concert and Ball Rooms—Occupiers, Governors of Rotunda Hospital	£300
and an assessment to Income Tax Schedule A in the sum of	£300
less the statutory deduction of one-sixth for repairs, viz., £50, was subsequently raised for the year ended 5th April, 1917.	

(1) Omitted from the present print.

The vaults under the Rotunda, which are let to a tenant, have been assessed to Income Tax, Schedule A, for several years past, but the duty charged and paid has been repaid under the provisions of Section 61, Schedule A, No. VI of 5 and 6 Vic., Ch. 35, as being applied to Charitable Purposes.

5. The Appellants contended :—

(*a*) That all profits derived from the lettings of the Rotunda Rooms are—in accordance with the intention of the original Royal Charter, as shown by No. XX. of the " Bye-laws and Ordinances " made pursuant to the powers granted by such Charter—(*vide* paragraph 2 of this Case) applied to the general support of the Hospital.

(*b*) That the moneys received from the temporary lessees or occupiers of the Rotunda Rooms are rents and profits of tenements belonging to a Hospital within Section 61, No. VI., Schedule A, of the Income Tax Act, 1842, as extended and applied to Ireland by Section 5 of the Income Tax Act, 1853 ; and that these moneys, so far as they are applied for charitable purposes, are exempt from Income Tax.

(*c*) That the judgment of Buckley, *L.J.*, in the " *Essex Hall* " Case(1) (C.A. [1911], 2 K.B., p. 434) must be taken as implying that had Essex Hall been a *Hospital*, the exemption sought in respect of the casual rents derived from letting portions of the premises would have been granted.

6. The Surveyor of Taxes, who appeared for the Crown, contended :

(1) That no exemption exists under the Section relied on by the Appellants in respect of rents and profits of tenements in the occupation of the owner.

(2) That admitting the rents received from letting the Rotunda Rooms—after payment of expenses incurred in connection with such lettings—to be applied to charitable purposes, the Appellants are carrying on a concern the profits of which are assessable to Income Tax under the First Case, Schedule D, of the Income Tax Act, 1842, and that the exemption granted by Section 105 of the aforesaid Act does not extend to trading profits, even though such profits may be applied to charitable purposes.

In support of the foregoing contentions he relied, as regards No. 1, on the judgment in the *Essex Hall* Case—and as regards No. 2 on the following Cases :—

St. Andrew's Hospital (*Northampton*) v. *Shearsmith* ([1887] 19 Q.B.D. 624 ; 57 L.T. 413 ; 35 W.R. 811 ; 2 T.C. 219).

Trustees of Psalms and Hymns v. *Whitwell* ([1890] 1 T.L.R. 164 ; 3 T.C. 7).

Grove v. *Young Men's Christian Association* ([1903] 67 J.P. 279 ; 88 L.T. 696 ; 19 T.L.R. 491 ; 4 T.C. 613).

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(1) 5 T.C. 636.

7. In arriving at the precise *quantum* of liability, the Surveyor of Taxes was prepared in the circumstances to allow the net annual value, £250, of the Rotunda Rooms (*vide* paragraph 4 of this Case) as a deduction in arriving at the profits assessable under Schedule D. He also admitted that certain adjustments fell to be made in respect of renewals of flooring, platforms, seating and furniture—also a proportion of the general administrative salaries as applicable to the letting of the Rooms, with the result that the amended liability would be as under :—

	£
For the year ended 5th April, 1912	223
For the year ended 5th April, 1913	327
For the year ended 5th April, 1914	405
For the year ended 5th April, 1915	381

The Appellants agreed that, if the profits in question are held to be assessable to Income Tax, Schedule D, the figures as above may be taken as correct.

8. Having considered the facts and contentions herein set forth we were of opinion that the profits derived from letting the Rotunda Rooms were assessable to Income Tax, Schedule D, and we therefore reduced the assessment to the sums set forth in paragraph 7.

The Appellants immediately upon the determination of the Appeal gave notice of dissatisfaction with our decision as being erroneous in point of law, and in due course required us to state a Case for the opinion of the High Court pursuant to 43 and 44 Vic., Ch. 19, Section 59, which Case we have stated and do sign accordingly.

Chas. H. Rickman
H. W. Page-Phillips
} Commissioners for the Special Purposes of the Income Tax Acts.

York House, Kingsway,

London, W.C.2.

13th August, 1917.

The Case was argued in the Court of King's Bench, Ireland, before Sir James Campbell, C.J., and Gibson, Madden and Kenny, JJ., on the 16th and 17th January, 1918, Mr. Gerald Fitzgibbon, K.C., and Mr. A. V. Mathieson, B.L., appearing on behalf of the Appellants and Serjeant McSweeney, K.C., and Mr. G. W. Shannon, B.L., for the Respondent. Judgment was delivered on the 28th January, 1918, in favour of the Appellants, Sir James Campbell, C.J., dissenting.

JUDGMENT.

Kenny, J.—The questions argued before us in this Case arise on a Case Stated under the 43 and 44 Vic., Ch. 19, Sec. 59, by the Commissioners for the Special Purposes of the Income Tax Acts in relation to the assessments to Income Tax under Schedule D of the Income Tax Acts of 1842 and 1853, made for the years 1912, 1913, 1914 and 1915 in respect of certain portions of the property of the Governors of the Rotunda Lying-in Hospital in Dublin. The Schedule in question is conversant—*inter alia*—with the tax on annual profits and gains arising or accruing from any profession, trade, employment or vocation, and, it being admitted that a considerable part of the revenue of the Hospital is derived from the letting for public entertainments of what are known as The Rotunda Rooms, the Commissioners held that the profits derived from such letting were assessable under Schedule D—on the ground that the Hospital was carrying on a trade within the meaning of the Schedule. The Appellants—the Governors of the Hospital—contend that in the circumstances of this Case there is no trade carried on by them within the meaning of Schedule D and that the Schedule under which they are properly assessable is Schedule A. If the Appellants be right in their contention, they would be entitled to what the Act calls an allowance—but which is in substance an exemption—from the tax, whereas if they came under Schedule D it is conceded that they could not claim exemption.

The scheme of the general Income Tax Act of 1842, which was extended—with some alterations in phraseology—to Ireland by the Income Tax Act of 1853, was to impose Income Tax duties on various descriptions of property which were set out in five Schedules marked A, B, C, D and E, and to declare that the duties so imposed should be assessed and charged under certain rules which are also embodied at considerable length in the Act of 1842. Unless very incidentally, the questions in this Case turn on Schedules A and D and the Rules in connection with them.

The property taxable under Schedule A, as described in the Act of 1853, is " property in all lands, tenements, hereditaments and heritages "—that under Schedule B is " for and in respect of the occupation of all such lands, tene- " ments, hereditaments, and heritages as aforesaid," and that under Schedule D is " for and in respect of the annual profits or gains arising or accruing . . . " from any kind of property whatever . . . and from any profession, trade, " employment, or vocation, and . . . of all interest of money, annuities, and " other annual profits and gains not charged by . . . any of the other Schedules." The foregoing being the several classes of property (so far as it is material to state them) made chargeable by the Act of 1853, it becomes necessary to revert to the Act of 1842 in order to ascertain from the rules therein contained the prescribed method of estimating the value of these several properties—the deductions and allowances to be made—the mode of assessment—and the incidence of the tax. Section 60 and the following Sections deal with these matters. The sixth Rule—coming under Section 61—is that to which the arguments have been mainly directed and on the construction of which the questions for determination largely depend. It provides that allowances are

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to be made in respect of certain of the duties in Schedule A, which allowances for the purpose of this Case I may take as falling under three heads—namely :—

(*a*) Certain duties charged on Colleges and Halls of any University in respect of its public buildings and offices.

(*b*) Duties charged " on any hospital, public school, or almshouse, in respect " of the public buildings, offices, and premises belonging " thereto " and not occupied by any officer thereof " in receipt of a specified income or by any person paying rent for the same—and for the repairs thereof.

(*c*) Duties charged " on the rents and profits of lands, tenements, heridita- " ments, or heritages belonging to any hospital, public school, or " or almshouse, or vested in trustees for charitable purposes, so far " as the same are applied to charitable purposes "—such last-mentioned allowances to be granted on proof of the application of such rents and profits to charitable purposes only.

The 62nd Section then provides that the aforesaid allowances under Rule VI are to be embodied in a certificate to be given by the Special Commissioners—which certificate is to be accompanied by an order for payment—the effect of which would appear to be that there must be an assessment in the first instance before any remission or allowance is certified for. The 9th Rule—coming under Section 63—provides that the duties are to be charged on and paid by the occupier for the time being and that every person having the use of any lands or tenements should be taken and considered, for the purposes of the Act, as the occupier of same. This is an important provision in view of the contention of the Crown that the Hospital must be regarded as the occupiers of the " Rotunda Rooms " and, as such, liable for the duties assessable in respect of the profits arising from the manner in which they utilise these rooms and which manner of using the rooms is alleged to be a " trading " under Schedule D. The rules as to assessments under the latter Schedule will be found under Section 100 of the Act—a drag-net Section which declares that the duties under this Schedule D are to extend to every description of property or profits which shall not be contained in the preceding Schedules and not specially exempted, and are to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade (see 1st Case under Section 100). The duty is to extend to every person or corporation and to every adventure or concern carried on by them " except always such adventures or concerns on or about lands, " tenements, " hereditaments, or heritages as are mentioned in Schedule (A), and directed to " be therein charged." Furthermore, the computation of duty in respect of any trade, manufacture, adventure, profession, or concern is to be made " exclusive of the profits or gains arising from lands, tenements, or hereditaments occupied for the purpose of such " profession, trade, manufacture, adventure, or concern." (See 2nd Rule applying to First and Second Cases under Schedule D.) As I have already pointed out, it is admitted on behalf of the Hospital that, if the profits from its alleged trading are held to be chargeable under Schedule D, the latter Schedule contains no provision for an allowance or exemption in favour of the Hospital applicable to the circumstances of the present case. The only Section in connection with Schedule D dealing with charitable institutions is the 105th, which exempts " any yearly interest or other annual payment chargeable

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" under Schedule (D) . . . in so far as the same shall be applied to charitable " purposes only " to the same extent as was granted in Schedule C in respect of stock or dividends. It is not contended that the profits sought to be charged in the present case could be regarded as coming within the meaning of " yearly " interest or other annual payment " as contemplated by this Section.

The only Section of the Income Tax Act of 1853 to which further reference is necessary is the 13th, which provides that in Ireland the duties under Schedules A and B are to be assessed on the Poor Law Valuation of the rateable hereditaments.

The special circumstances relating to the Rotunda Hospital are interesting. They indicate the stages which, from very small beginnings, mark the progress and development of this great Institution which now enjoys a European reputation. It owes its foundation to the philanthropy and munificence of a Dublin physician, Dr. Bartholomew Mosse, who in the year 1745 founded a lying-in hospital for poor women, with 24 beds, in George's Lane in this city, and there carried on his charitable work for several years—with results so eminently successful that about the year 1752 a petition was presented to the Lord Lieutenant of Ireland by " many persons of quality and distinction, who " had announced their intention of contributing largely to the building and " support of the Hospital, praying for a Grant of Incorporation from the King." I would gather that the building of the present Hospital in Great Britain Street had commenced in the previous year. However that may be, the prayer of the petition was acceded to, and on the 2nd December, 1756 (30 Geo. II) the Hospital's Charter of Incorporation was granted. At what precise date the buildings in Great Britain Street were completed and the present Hospital opened for the reception of patients, I am not in a position to say—probably—from a note in Thom's Directory—about 1757 ; but, at any rate, it was in existence, with its gardens and contiguous rooms in 1785, when the Act of the Irish Parliament, 25 Geo. III, Ch. 43, to which I shall presently again refer, was passed.

The buildings comprise (1) the Hospital proper ; (2) those contiguous rooms —known as the Rotunda Rooms—connected, as the Special Case finds, by an underground passage with the Hospital proper ; and (3) some vaults under the buildings.

The Charter confers on the Governors of the Hospital a power of purchasing lands to the extent of £1,000 in yearly value and " all manner of personal " estate". It gives a power of leasing for any term not exceeding 31 years or 3 lives and a power to make bye-laws.

The Charter was followed by the Act of 1785 of the Irish Parliament—25 Geo. III Ir. Ch. 43. It was an Act for the better lighting of Rutland Square and for the better support and maintenance of the Hospital, and, after reciting that the funds of the latter principally arose from the public entertainments which its gardens and Rotunda afforded, it provided a fund arising from a Tax or levy on the letting of sedan chairs, which was to be handed over to the Hospital for its support. The Act also conferred on the Governors a further power of making bye-laws in respect of the proper management and direction of such places of public entertainment and resort as should stand on the premises belonging to the Hospital. It also provided a Square Tax.

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Bye-laws and ordinances pursuant to the Charter and the Act of 1785 were from time to time made. I find that one set of Rules bears date the 2nd January, 1786, and, *inter alia*, deals with the rooms " contiguous to the " Hospital " where public entertainments are carried on. The Rules in question recite that the principal support of this Charity is produced from these entertainments and provides for additional accommodation for " company " and for " waiting servants " and prescribes certain traffic regulations for " carriages " coming to the public rooms ".

It would appear that these Bye-laws were from time to time followed by Resolutions passed by the Governors and which were regarded as in the nature of further Bye-laws or Regulations for the management of the Institution. They largely dealt with the internal economy of the Hospital—the dietary—Elections and duties of Officers—Examination and certificates of pupils—management of the Gardens and Rooms, &c., and they have been relied on by the Crown as showing that notwithstanding any lettings or hirings of the rooms by the Governors the latter must be deemed to be in occupation of them within the meaning of the Income Tax Acts and that the proceeds of such lettings or hirings could not come within the category of " rents and profits " of lands tenements hereditaments or heritages belonging to any hospital " which are entitled to an allowance under the 6th Rule of Section 61. These Resolutions provide that the Rotunda Rooms are to be under the immediate charge of the Keeper of the rooms—that the Registrar and Secretary shall have the general management and superintendence of them under the direction of the Board and House Committee—that the Keeper is to reside and remain constantly on the premises and keep the rooms clean and in proper order—that he shall prepare the rooms for all entertainments and see that they are given up at the period agreed on by the parties engaging them and report any injury, and that he be allowed to receive from parties taking the rooms a remuneration in accordance with a specified scale.

A scale of charges for the rooms is annexed, but the Scale is to be subject to variation by the Governors " for the letting of each room for public " entertainments, meetings, etc."

The Registrar is to receive all moneys for the rooms and also keep a Rental of the house rents and Rutland Square Tax and a book with entries of " all " agreements made for hire of the Rooms and Gardens ".

The Income of the Hospital as appearing in its Report for 1913, which is the latest we have seen, comprises Government and Corporation Grants, Rents, Surplus from the Rotunda Rooms and Gardens, subscriptions, donations, and fees. The Income from the rooms is considerable—the amount for 1913 being £845 19*s.* 5*d.* In the year 1909 there was a deficit, as the Governors in that year incurred a large expenditure on the construction of a proscenium and new platform in one of the rooms.

The Case Stated finds—*inter alia* :—

(1) That the appeal of the Governors is in respect of assessments under Schedule D of profits derived from the letting of the Rooms for the years 1912, 1913, 1914 and 1915.

(2) That the Rooms are let by the Appellants for entertainments, etc., for periods varying from one night to six months—the letting prices including the use of seating and heating, while further charges are made for gas and electric light.

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(3) That the Poor Law Valuation up to a recent re-Valuation showed that the " Rotunda Lying-in Hospital and Gardens " had no stated rateable Valuation but were marked " Exempt " while the Vaults which were let to a tenant were assessed at £65.

(4) That in a recent re-Valuation list the Governors for the first time appear as being rateable as occupiers of the " Rotunda Concert " and Ball Rooms " on a valuation of £300—with an assessment to " Income Tax, Schedule A, in the sum of £300 " less the statutory deduction for repairs, £50.

(5) That the duty charged on the Vaults has been repaid in accordance with Section 61, Schedule A, No. VI (already referred to) as being rents applied to charitable purposes.

As a result of these findings it would appear that in the years in respect of which duty under Schedule D is now claimed, viz., 1912, 1913, 1914 and 1915, there was not only no assessment under that Schedule, but no separate valuation or assessment of the Rotunda Rooms—that in the Valuation for those years they apparently were treated as being part of the Hospital and therefore exempt—and that they separately appear now for the first time for a year—1916—with which the present Appeal is not conversant.

The contention before the Commissioners on the part of the Hospital was that the profits from the lettings of the rooms were applied to the general support of the Hospital, and, for the purposes of allowance or exemption, were in the same position as the Hospital proper, and further, that they were " rents and profits " within Section 61, Rule VI, and therefore exempt. While, on behalf of the Crown, it was argued that the Rooms must be regarded as in the occupation of the Governors and that the profits derived from them were consequently not " rents and profits " within Rule VI, and further, that even if such profits were applied to charitable purposes, they were the profits of a concern or trading carried on by the Hospital and were assessable under the First Case, Schedule D, and were not exempt under Section 105.

The 8th paragraph of the Case states that the Commissioners were of opinion that "the profits derived from letting the Rotunda Rooms were assessable " to Income Tax, Schedule D," and they set forth the amounts of the assessments for the four years in question, which apparently are arrived at in the following manner. They take the sum actually received for the letting of the Rooms in each year as appearing in the Hospital's Annual Reports and deduct therefrom the net annual value of the rooms, namely £250, and also certain other adjustments which I need not here particularize,—the £250 being the Poor Law Valuation, less by £50 allowed for repairs. The balances after these deductions are supposed to represent the annual profits or gains from a trade or concern or business carried on in the rooms, such business presumably being that of the " letting of rooms ", in the language of Kennedy, *L.J.*, in the *Essex Hall* Case ([1911] 2 K.B. at p. 444).[1]

Having now stated, at perhaps somewhat undue length, the facts of this Case and referred to the statutory enactments bearing on them, I approach the determination of the Special Commissioners. The Income Tax code is a

[1] 5 T.C. 636

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complicated one, not easy of interpretation, and presents many difficulties when applied to facts such as we have before us. Points have been discussed as to the nature of the " occupation " contemplated by the Statutes,—as to what is included under " premises " and under " rents and profits " in Rule VI, —as to the class of Hospital referred to in the same Rule.—as to the statutory character of the profits and gains derived from the user of the rooms, and whether this particular user can be properly described as a trade or business or concern carried on by the Hospital—or, if not, whether as a source of profits it otherwise comes within the drag-net language of Schedule D—and, finally, as to whether the rooms are not in reality part of the Hospital proper and used in accordance with the Charter and Bye-laws, and not premises used separately and independently of the Hospital for a purpose collateral to the direct object of the foundation.

There can be no doubt that the Hospital is a Charitable Institution and no question arises such as was discussed in *Needham* v. *Bowers* (21 Q.B.D. 436).(1) The broad question is whether the manner in which it deals with these rooms comes within Schedule D as being a trading or a business or by reason of its producing a " profit " not contained in the antecedent Schedules. If it comes within Schedule D no allowance or exemption is permissible.

I conceive the objects and effects of the Schedules in the Income Tax Acts are these :—Schedule A is conversant with the duties on the ownership of lands —Schedule B with the duties in respect of occupation. If the owner be also the occupier he is chargeable as owner and occupier, and in making the Valuation regard would be had to the capability and earning power of the rooms having regard to the manner in which they were used—just as in the case of licensed premises regard must be had to the existence of the licence (*Armstrong* v. *Commissioners of Valuation*) ([1905] 2 I.R. 448, 497). If the mode of user amounted to the carrying on of a trade the profits of the latter would be assessable under Schedule D, credit being allowed for the amount of the Valuation of the premises on which the trade was carried on pursuant to Section 100, Rule 2 applying to Cases Nos. 1 and 2. In these circumstances the first question to be answered seems to me to be—is the Hospital the " occupier " of these rooms within the meaning of the Income Tax Acts? On that question I think it is impossible to arrive at any other conclusion unless that the " occupation " is in the Hospital. Lettings of the rooms with lighting and seating accommodation are made from day to day and from week to week and from month to month and possibly for longer terms, but in all lettings the Governors retain a large amount of control over the user of the rooms while they are in the hands of those who engage or hire them. They appoint a keeper of the rooms who resides and is bound to be constantly on the premises and whose duties comprise the keeping of the rooms in good order, the preparation of them for all entertainments and the proper delivery up of them at the end of the hiring. If the parties thus hiring the rooms for occasional and merely temporary purposes were to be regarded as in occupation under Schedule B the argument of the Crown that in such a case it would be absulutely impossible to assess or collect the duties under that Schedule seems to me of very great weight. The names of these parties would never appear in the Valuation Lists

(1) 2 T.C. 360.

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as occupiers on account of the variable and uncertain character of their alleged occupation, and assessment on them under Section 13 of the Act of 1853 would be impracticable if not impossible. I therefore think that the Hospital must for the purposes of the Income Tax Acts be deemed to be in occupation of the rooms. The circumstances relating to the hiring of the two large rooms or halls in the *Essex Hall* Case ([1911] 2 K.B. 434) (1) were almost identical with those in the present, and the Case was argued on the footing that the occupation as well as the ownership was in Essex Hall. That assumption involved the interpretation of Section 61, Rule No. VI. of the Act of 1842 which deals with the allowances or exemptions in Schedule A, and it was decided by the Court of Appeal, in relation to the second branch of that Rule, that trustees for charitable purposes or a charitable corporation not being a college or hall within the first branch of the Rule nor a hospital, public school or almshouse within the second branch were not entitled to exemption in respect of lands, etc., in their own occupation not producing "rents". It was further held that the sums received by Essex Hall in respect of hirings were not "rents and profits" within the meaning of those words in the third branch of the Rule. And so, in the present Case, it seems to me to be impossible without disregarding the *Essex Hall* Case to hold that the proceeds of the hirings or lettings of the Rotunda Rooms could be regarded as "rent and profits". They would, consequently, not come within the third branch of the Rule even if belonging to an hospital, public school or almshouse, or vested in trustees for charitable purposes. But that decision, dealing as it does only with income, cannot affect the construction of the second branch of the Rule, which exempts from Income Tax, Hospitals, Public Schools and Almshouses in respect of their public buildings, offices and premises not occupied as therein mentioned. It is suggested that, although the main buildings of the Hospital proper, of course, come within the exemption, these rooms do not, inasmuch as they could not be regarded as public offices or public premises. Are they not public in the sense that they are dedicated to charitable objects and that the only participant in their profits is the Hospital authority. In what sense is the word "public" used in relation to the "premises" other than the main building where the business of the Hospital as an Hospital is carried on? I think that these premises described in the Bye-laws as contiguous to the Hospital are an adjunct to the latter—used in conjunction with it as a source of income, and are as much a part of the Institution and therefore "public"—as the main building. I doubt if in favour of that construction it is necessary to rely on the word "premises" in the Rule. I regard the Rooms as being part of the public buildings of the institution and as much within the exemption as the Hospital proper.

The main point, however, made by the Crown is that a business or concern or trade is carried on by the Hospital in these rooms, which becomes taxable under Schedule D—notwithstanding that there is also a liability under Schedule A. I think there is no doubt that the two liabilities can co-exist. A man may carry on a flourishing trade in premises of which he is the owner, and he will be liable for Income Tax on his trade profits under D while at the same time he will be assessable under A in respect of the premises on which he carries

(1) 5 T.C. 636.

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on the trade. I think the second Rule under Schedule D applicable to the first and second Cases establishes this proposition. If a person be taxed in respect of his trade under D, the duty is to be calculated exclusive of profits under A —otherwise he might be taxed twice over in respect of his trade premises. But he is separately assessed under A in respect of the trade premises, so that the Crown does not lose that assessment unless it happens—as I hold it does in the present Case—to come within one of the allowances in Section 61, Rule VI. The claim that a trading is being carried on is based on an observation of Kennedy, *L.J.*, in the *Essex Hall* Case,(1) where he stated that he was inclined to think the profits from the user by casual lettings of part of the premises were profits of a business, " a business of letting furnished or partly furnished " rooms, carried on by the occupier of the premises ". Does such a letting amount to the carrying on of a trade ? It must be remembered that such a user is contemplated by the Act of 1785 and the Bye-laws. If the Hospital were themselves the parties who carried on the entertainments, the case might be different—for the business would be one carried on in the premises, but as a separate and distinct undertaking from the running of an Hospital. It seems to me that as well might it be said that the Hospital authority is carrying on a business in the teaching of nurses and medical students, all of whom pay fees to the Hospital, as to contend that the letting of portion of the Hospital premises amounted to a trading. It is difficult to see how there could be any assessable profit under the circumstances where the very subject matter of the earning power is the sole subject matter of the alleged trading and is exempted. These considerations suggest that the two values must be identical if the principle of Valuation under Section 11 of the Irish Valuation Act, 1852, is to prevail. Under that Section you estimate the rent at which, one year with another, the rooms might in their actual state be reasonably expected to let from year to year. How could there be any value beyond that in the premises ? If the mode of user be equivalent in value to a letting—does not the Valuation under Section 11 include and cover the special mode of user with all its potential earning capacity ?

In my judgment, these rooms are not assessable under Schedule D, and the Special Commissioners were wrong in their opinion.

Madden, J.—In my opinion the building known as the Rotunda Hospital, including what are called the Rotunda Rooms, is assessable for Income Tax under Schedule A of the Income Tax Act, and under no other provision in the Statute. I am also of opinion that the Governors, the owners of the Hospital, are entitled to the allowance prescribed by Section 61, No. VI. Under this Section an allowance is to be made in respect of the duties charged " on any " hospital, public school, or almshouse, in respect of the public buildings, " offices, and premises belonging to such hospital, public school, or almshouse, " and not occupied by any individual officer or the master thereof, whose whole " income, however arising, estimated according to the rules and directions of " this Act, shall amount to or exceed £150 per annum, or by any person paying " rent for the same."

The right to an allowance in respect of the amount of Income Tax assessed is frequently called " exemption " from taxation, and the word is more

(1) 5 T.C. at p. 657.

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convenient than a lengthy paraphrase. But in considering the question as to the particular Sections applicable to any kind of property, it is important to note that what we speak of as exemption is, in legal contemplation, the assessment of Income Tax on property under the appropriate Section, followed by a remission of the amount of the assessment.

The Governors of what is known as the Rotunda Hospital were incorporated by Royal Charter of the 2nd December, 1756. The history of the institution, which is of importance on the question of the relation of the Rotunda Rooms to the Hospital, is briefly but sufficiently stated in the Charter. It will be found in detail in Warburton Whitelaw and Walsh's History of the City of Dublin, Vol. II, page 1, *et seq.*, and the important facts have been stated by my brother Kenny. Confining myself to the Charter, I find it recited that great success had attended an attempt towards an hospital of the kind made by Doctor Bartholomew Mosse, of the City of Dublin, who opened for the purpose a house furnished with twenty-four beds, with the beneficial results stated in the Charter. The Charter was granted on the petition of Lords, Clergy and Gentlemen of Ireland, benefactors of this hospital, which was situated in George's Lane, Dublin. By the Charter the Governors and guardians of the Hospital were incorporated, and empowered to purchase land in Ireland not exceeding in the whole the yearly value of one thousand pounds. The Governors were empowered to make bye-laws for the well-governing of the corporation, and it is in the bye-laws that we find the first mention of the Rotunda, which was erected by the governors under the powers vested in them by the Charter.

The 20th bye-law recites that "as the principal support of this charity "is produced from public entertainments in apartments contiguous to the "Hospital, it must be of the utmost advantage to contrive every possible "accommodation for servants to prevent noise and disturbance"; it provides for the erection of a large hall extending from Great Britain Street to the Rotunda, with fireplaces for waiting servants "and such other accommodation "as the Governors of this charity may judge necessary."

The money received for the use of the Rotunda Rooms is no longer the principal support of the Hospital. In the Report before me (1913) it is substantially less than the amount of subscriptions and donations, added to the contribution from the Dublin Hospital Sunday Fund. As is usual in the case of public eleemosynary Hospitals, paying patients are received, and the receipts from this source, with grants from the Government and Corporation of Dublin, go to the general support of the Hospital.

These Rooms, however, remain a substantial source of revenue to the Hospital, and the manner in which the institution derives support from them is thus stated by the Commissioners. "The Rotunda Rooms—which are "connected with the Hospital proper by an internal passage—are let by the "Appellants for entertainments, concerts, cinema shows, etc., for periods "varying from one night to six months—the letting prices include the use of "seating and heating." As regards the legal character of what the Commissioners call the "letting" of the Rotunda Rooms, it is sufficient for my present purpose to say that I adopt the conclusions of the Commissioners that those lettings do not create tenancies in the portions let, so as to bring

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the proceeds of the lettings within the words " rents and profits " as they are used in Section 61, No. VI, and that the portions of the building, so let, remain in the occupation of the Appellants, as owners.

I adopt what has been said by my brother Kenny, on this branch of the Case.

The exemption in Section 61, No. VI, is not confined to the " Hospital " proper ", by which I understand the buildings immediately connected with the reception and treatment of patients, but it extends to buildings, offices and premises other than the Hospital. To be included in the exemption these buildings must belong to the Hospital, and must be of a " public " character. The Rotunda buildings certainly belong to the Hospital, and if they can be properly described as " public " they are clearly within the exemption clauses. What is meant by the word " public " appears from the words of the Section by which certain buildings belonging to the Hospital are excluded from a right to an allowance, as not being of a public character. If a portion of the buildings is occupied by an officer whose income is of a certain amount, the portion so occupied is regarded as a private residence. If a portion is occupied by " any person paying rent for the same ", the subject of the demise ceases to be part of the " public " buildings of the Hospital. It continues to be property belonging to the Hospital, and the Governors would be entitled to an allowance in respect of the rent received from the tenant if applied to the purposes of the Hospital, under the third clause of Section 61, No. VI.

The Rotunda Rooms are neither used as a residence, nor let to a tenant paying rent for the same. They are occupied and used for the purposes of the Hospital. The law recognises as " charitable " only those institutions which are of a public character. An hospital, such as the Rotunda Hospital, is a charity of a public nature, and buildings which are essential to the successful working of the charity, as the Rotunda Rooms are declared by the bye-laws to be, are, in my opinion, public buildings belonging to the Hospital, and included in the second exemption clause in Section 61, No. VI. So close is the connection of these rooms with the Hospital; that it has derived the name by which it is officially described in the Report before me as—The Rotunda Hospital—not from the particular charitable purpose to which it is devoted, but from the part of the building from which it derives support.

If I am right in my view of the present Case, the decision of the Court of Appeal in *R.* v. *Special Commissioners of Income Tax* (*ex parte Essex Hall*) [1911] 2 K.B. 434 (1) has no direct bearing on it. It is, however, of importance, for it appears from the judgments delivered in the case, impliedly from that of the Master of the Rolls, and expressly from that of Buckley, *L.J.*, that the decision would have been different if they had been dealing with property in the occupation of the particular kind of charitable institution known as a hospital.

The company by which the building known as Essex Hall was owned was incorporated for charitable purposes. There is no statutable exemption in favour of trustees for charitable purposes from Income Tax assessed under

(1) 5 T.C. 636.

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Schedule A in respect of premises occupied by them such as is given to Hospitals, but they share with Hospitals, under a separate clause in Section 61, No. VI, a right to an allowance in respect of " the rents and profits of lands, tenements, " hereditaments or heritages belonging to any hospital, public school or alms- " house, or vested in trustees for charitable purposes, so far as the same are " applied to charitable purposes." The trustees of Essex Hall were in the habit of letting on hire certain portions of the buildings for the purposes of public meetings, conferences, arbitrations, and similar purposes, and they claimed to be entitled to an allowance in respect of the moneys so received as being " rents and profits " of premises vested in them for charitable purposes, and so applied. The Court of Appeal held that the moneys received by the trustees for the hiring of these rooms were not " rents and profits " within the meaning of the section. Although this decision, and the grounds on which it is based, have no relation to the question with which we have to deal, the case is of value, for two members of the Court deal with the general question of exemption under Section 61, No. VI, in a manner which affords assistance in regard to the present case.

Cozens-Hardy, *M.R.*, commences his judgment thus—" The short point " for our decision is this. Is a charitable corporation, not being a college or " hall or hospital, public school or almshouse, entitled to exemption in respect " of property not let but in its own occupation ? It is remarkable that the " first limb of the exemption clause applies only to certain specific charities, " of which this is not one, and that charities other than those specially mentioned " can only claim allowance ' on the rents and profits ' "—quoting the words of the Section. Having made it clear that his judgment does not affect the claim to exemption of the specific charities the exceptional character of which is recognised, he proceeds to deal with the question of the nature of the moneys received by the trustees for the hire of the rooms, holding that they did not amount to " rents and profits " within the meaning of the Section.

The judgment of Buckley, *L.J.*, contains a close examination of the clauses as to allowances which follow Section 61 of the Act of 1842 which are, in his opinion, to be read as follows :—The first clause, relating to " College or Hall," provides that allowance is to be made " in respect of the public buildings " of the College not occupied by individual members or by any person paying " rent for the same. It is an exemption in respect of buildings belonging to " and not producing rent to the Collegiate Authority ". Passing to the second clause—that with which we are concerned—and selecting one of the institutions mentioned in it—the hospital—he says, " that clause provides that allowance " shall be made for the duties charged on any Hospital Authority in respect of " premises belonging to the Hospital Authority in terms similar to those in " the previous clause as regards Collegiate Authorities." These words refer us back to what has been said with regard to duties charged on a collegiate authority. Substituting, as the Lord Justice invites me to do, the word " Hospital " for the word " College," the exemption is in respect of the public buildings of the (hospital) not occupied by individual members, or by any person paying rent for the same. It is an exemption in respect of buildings belonging to and not paying rent to the (hospital) authority—words which are precisely applicable to the Rotunda Rooms if I am right in holding that they

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are public buildings belonging to the hospital. This seems to me to be the important and decisive question in the present Case.

During a portion of the argument it was suggested that the Governors might be entitled to an allowance in respect of the moneys received for the letting of the rooms under the third portion of the exemption clause as being " rents and profits " applied to the purposes of the hospital.

I think that Mr. FitzGibbon acted wisely in basing his claim for exemption under the second portion of the clause, that dealing with the case of an hospital. Having regard to the view that I take of this Case, I do not think it necessary to enter into this question in detail. There are some points of distinction between the lettings in the present Case and those which were considered by the Court of Appeal in the *Essex Hall* Case. Some of the resolutions would seem to point to the creation of a tenancy, but taking them as a whole, and having regard to the character and duration of the lettings, I think the Commissioners were right in their conclusions that no tenancies were created and that the rooms remained in the occupation of the Governors. This being so, if I am right in holding that the Rotunda Rooms are public buildings, they come precisely within the terms of the Judgment of Lord Justice Buckley as being " buildings, belonging to and not paying rent to the Hospital Authority," and, as such, are entitled to exemption.

The Commissioners held " that the profits derived from letting the Rotunda " Rooms are assessable to Income Tax under Schedule D " which imposes the tax on " the annual profits or gains arising or accruing to any person residing " in Great Britain from any profession, trade, employment or vocation," wherever carried on. Businesses coming within the terms of this Section (I adopt the word business as a convenient one) are undoubtedly carried on in the Rotunda Rooms. But they are not carried on by the Governors of the Hospital, nor do the profits of the business arise or accrue to them. Take a cinema show, the most obvious example, for it is apparent to anyone who walks past the Hospital. The carrying on of this business involves the investment of capital in procuring films, and the apparatus necessary for the show, and the employment of skilled operators. The accounts kept by the persons carrying on this business would show on one side the outgoings and on the other side the receipts, resulting in a profit or loss. No such account was kept by the Governors, for the simple and sufficient reason that the business of a cinema show was carried on, not by them but by the person hiring the rooms, to whom the profit (if any) accrued. The general cash account of the Hospital for each year is in evidence. On the debit side in the account before me is found " Rotunda Rooms account—surplus, £845 19*s*. 5*d* ". The exact nature of this item is ascertained from the detailed account, where the net revenue for the hiring out of the rooms is described as " rent ". In so describing it the Governors follow the wording of Resolution 10, in which the money derived from the hiring out of the Rotunda Rooms is called " rent ". But by whatever name it is called, the revenue derived from the rooms does not represent the profit of business carried on by the Governors, but money paid to the Governors for the use of the rooms by the persons by whom business is carried on in them.

For these reasons I am of opinion that the Appellants are entitled to exemption under the second clause of Section 61, No. VI.

Gibson, J.—The main question in this Case is whether the Hospital, which could and ought to have been assessed under Schedule A of the Income Tax Act of 1842 (5 & 6 Vict. c. 35), if the provisions of Section 13 of the Income Tax Act of 1853 (16 & 17 Vic. c. 34) had been complied with, can be brought into Schedule D on the basis that it is receiving profits of a trade character in respect of sums paid for the use of its rooms. The charity was of a very unusual type. In its origin, beginning with a charter, it was governed by an Irish Statute 25 Geo. III, c. 43 which by Section 32 was made a public Act, and which in some of its Sections, e.g., Sections 29 and 31, was of general application in Dublin. It recites that the funds of the Hospital arose principally from public entertainments which its gardens and Rotunda afford to the inhabitants. A special revenue was directed in respect of Sedan chairs. Section 9 authorises bye-laws for the management and direction of such places of public entertainment and resort. Section 11 directs four Grand Juries to assess and present certain sums. Sections 14 and 20 contain provisions for taxation in respect of houses fronting the gardens. The Charter of the Hospital dated 2nd December, 1756, declares the objects of the Charity (Sec. 2), directs leases to be made of its estate not exceeding certain duration, and authorises bye-laws. These bye-laws under the Statute and Charter state that the principal support of the Hospital is produced by public entertainments in apartments contiguous to the Hospital, and state the importance of preventing noise and disturbance. In addition to bye-laws, there were resolutions conceded to have the effect of bye-laws, prescribing the charges for the rooms and the form of engagement to be signed by parties engaging the rooms, which were to be kept under the control and supervision of the Hospital authorities. The engagements covered by the period before us ranged from a night to six months. Before the Commissioners and before us no distinction was drawn between these engagements, whether of a longer or shorter duration, and I shall assume that the dealings were in substance contracts for the use of the rooms which did not any more than an agistment or conacre letting alter the legal occupation of the owner. If the corporation could have demised these rooms by lease under seal (which under existing bye-laws they could not), it did not do so, considering it essential to the security of the Hospital and the comfort of its inmates that the entertainment rooms should be under their direct control. The Hospital owned house property away from the Hospital in respect of which leases would be necessary and we were informed were made. The statute of 25 Geo. III. c. 43 was repealed as to portions not directly affecting the Hospital, by 37 Geo. III, c. 58 (Irish) and the Statute Law Revision (Ireland) Act, 1879, but the Sections governing the constitution of the Hospital are apparently still in force.

Paragraph 3 of the Case describes the rooms and the letting arrangements; we must be careful not to let our personal knowledge, if we had it, add to or qualify the description. The form of letting contract prescribed by Resolution 10, which is in force and regulates all lettings, is not incorporated in the case. The charges for the use of the rooms included seating and heating but not gas or electric lighting which were paid for as consumed by those engaging the rooms.

Under the existing bye-laws and resolutions, the Hospital could not run the entertainments itself, a commercial enterprise which would have involved

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obvious risks. Even if the Hospital could have itself undertaken the entertainments, that could not affect the question before us which relates to existing management of the property. It is present facts not possibilities *in futuro* that determine rights and liabilities. The receipts from the use of the rooms were fixed sums in the nature of rent and were essential to the maintenance of the Hospital; and the use of the rooms as described was a vital part of the Charity Scheme for the utilization of the property of the Hospital. The contention on behalf of the Hospital is that the immunity which it has enjoyed unchallenged since 1853, when Income Tax was first extended to Ireland, was right; that the receipts, being the yield of the property occupied by them, dedicated to that particular use, were not taxable under Schedule D; that the property should have been assessed under Schedule A and was entitled to the allowance given by Schedule A, No. VI.; and that if the receipts were not rents and profits, they represented analogous returns, as if a Hospital could not and did not demise its estate, it must be at liberty to use it to the best advantage, in the case of land by lettings for the season or otherwise, and that the buildings as used were a necessary part of the financial foundation of the Hospital.

Serjeant McSweeney on the other hand contended that the receipts were of a character not within Schedule A, and came within Schedule D, as being in the nature of trade profits, and that the situation was the same as if the Hospital itself gave the entertainments and itself took the receipts from the public. I cannot accept this latter proposition. Between a definite sum charged for use and occupation to third parties and the varying sums received directly for the entertainments there is a marked distinction. The former is analogous to rent, the latter is not; the hiring contractors would be assessed under Schedule D. I express no opinion how the Case would have stood if the Hospital had been authorised to undertake the entertainments directly and in fact did so. Such commercial use of the premises as part of the original Hospital foundation may not be the same as if a charity undertook voluntarily a business, as in *Grove* v. *Young Men's Christian Association*[1] (88 L.T. 696), to help its funds. Under its existing rules the Hospital could only let or hire. In the Golf Club Case, *Carlisle and Silloth Golf Club* v. *Smith*[2] ([1913] 3 K.B. 75), there was a business outside the original and primary use of the Golf Club premises, which business was separately assessable.

The Hospital clearly should have been assessed under Schedule A, No. I. Rules No. II and No. III relate to hereditaments of a different character where profits are the material element. Schedule B contemplates the application of the Rules in Schedule D. The Revenue Act, 1866 (29 & 30 Vic. c. 36), Section 8, brings Schedule A, Rule No. III, within the rules applicable to Schedule D. The difference of A, Rule I, in this respect is noticeable.

The hereditament occupied by the Hospital, coming within Schedule A, Rule No. I, should have been valued in pursuance of Section 13 of the Act of 1853 as a preliminary to assessment and the annual value would have been determined by the earning capacity of the property. That Section makes Poor Law Valuation the basis of assessment, a method not easy to fit into the provisions of Schedule A, No. II and No. III or Schedule B, with which, however,

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(1) 4 T.C. 613. (2) 6 T.C. 198.

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we are not in this case concerned. Our valuation code adopts a uniform method which was explained in *Armstrong* v. *Commissioners of Valuation* ([1905], 2 I.R. 448), a Case dealing with a public house, but the principle is of general application : see pp. 470, 475, 476 and 502. What is valued is the hereditament in its actual state and use with regard (inter alia) to its earning capacity. The property may be occupied by the owner or let to tenants at a rent which may be higher or lower than the valuation. Value, so far as it represents the personal energy of a trader, does not affect hereditament value. His profits of trade from his own use of the hereditament fall within Schedule D, but his receipts from the direct yield of the hereditament, as farmer if occupied by him, or in rent, if let, are covered by the valuation and assessment under Schedule A, Rule No. I, and is so covered are outside Schedule D. I think the yield from the lettings was in the nature of rent for use and occupation of the hereditament assessable under Schedule A, No. I, and that Schedule D does not apply.

Much argument was directed to Schedule A, No. VI, which directs allowances in respect of an assessment under Schedule A. There was no such assessment during the years before us, and a decision either way would not determine the controversy as to assessability under Schedule D, though it may to some extent affect the calculation under Schedule D, if the figures arrived at were the subject of appeal. As the matter has been fully discussed I shall consider it.

Clause 1 relates to Colleges in Great Britain treated as charitable foundations (Tudor, on Charities, p. 64) and includes, in addition to public buildings and offices, gardens, walks, and grounds for recreation. The rents and profits of lands belonging to such Colleges are within Clause 3 ; *R.* v. *Special Commissioners* (78 L.J. K.B. 576). (1)

Clause 2 deals with two classes of institutions. The first consists of three institutions in all of which the eleemosynary note is predominant. It introduces the word " premises " (not found in Clause 1) and refers to gardens and grounds for the sustenance as well as the recreation of the inmates. See *Cawse's* Case(2) ([1891], 1 Q.B. 585). Would not a home farm be included even if surplus produce was sold ? Like Clause 1 it excepts any rented part which would fall within Clause 3. The second class of institution is any building the " property " (as to which see *Manchester Corporation* v. *McAdam*(3) ([1896], A.C. 500) of any literary or scientific institution. It expressly prohibits the occupation of any part at a rent. In Clauses 1 and 2 the rented part is only taken out of the exemption.

Clauses 1 and 2 assume that the hereditaments described occupied by the several institutions are subject and dedicated to the charitable purpose.

Clause 3 refers to rents and profits of lands, etc., belonging (the word used in Clauses 1 and 2) to any of the three institutions named in Clause 2 (omitting colleges in Clause 1, but adding lands vested in trustees for charitable purposes). The allowances are to be made by the Special Commissioners on proof of the due application of the rents and profits to charitable purposes only and in so far as the same shall be applied to charitable purposes only. The allowances are to be claimed and proved by any agent of the charities named in Clause 3,

(1) *Ex parte* University College of North Wales, 5 T.C. 408.
(2) Cawse *v.* Nottingham Lunatic Hospital, 3 T.C. 39. (3) 3 T.C. 491.

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and are not to alter the assessments which are to be in force and levied notwithstanding such allowances. These elaborate provisions have no counterpart in Clause 2 where it is assumed that the premises occupied by the three institutions dedicated to and used for the specific charitable purposes need no such safeguards. It might, however, be said similarly that lands belonging to the institution were equally dedicated to charitable trust and that these revenues (if any) must be so applied as otherwise there would be a breach of trust.

There are several questions suggested by this Clause. What is the effect of the expression "rents and profits"? Is it the same as "rents" alone, "profits" being redundant? Can it be read as "rents, if any"? What is the exact nature of the obligation to apply the rents? Suppose that house property was unlet or that only a half-year's rent at the end or beginning of a lease was payable; in the former case is the charity, in addition to losing the rent to be subjected to Income Tax in full? And in the latter case is it only to be allowed for the half-year's rent received, leaving it liable for the balance of the assessment? Literally construed, the clause would seem to have this effect. It is hard to resist the impression that under one or other of the Clauses (which are mutually exclusive) it may have been intended to give protection. Sections 88 and 105 as to charitable exemption under Schedules C and D point to a result which Lord Macnaghten in *Pemsel's* Case, (1) ([1891] A.C. at p. 589) calls whimsical if the land, unsold, is subject to Income Tax, but, if sold, its proceeds, when invested, are free. Our conclusion, however, depends not on possible general intention, but on the exact language employed. There are three questions for consideration: (1) What does the expression "rents "and profits" comprehend and does it include the receipts from the lettings here described; (2) What is the effect of the description in Clause 2; (3) Does the peculiar constitution and fabric of the Rotunda Hospital as an existing entity bring it within Clause 2, apart from the wide view of Buckley, *L.J.*, in the *Essex Hall* Case(2) ([1911] 2 K.B. 434), that the clause covers untenanted lands of a charitable Hospital?

As to rents and profits in Clause 3 (with which the phrase "profits or "gains arising from lands" in Section 104 may be compared) the *Essex Hall* Case ([1911] 2 K.B. 434) is pressed as a conclusive authority. Unless it can be distinguished we must follow the decision on an imperial statute. The Case was a peculiar one and the report does not show the exact terms of the letting.

The Essex Hall Company being outside the protection of Clause 2 had to rely on Clause 3 for relief against the assessment for £400. Their building was used by two associations at what is described as annual rents—which may mean the annual rate of payment. There was apparently no letting of the exclusive use of the rooms for any definite period; the use was intermittent; when not required by the associations, the Company let the rooms for various temporary purposes, the amount received going in reduction of the larger rents which otherwise might have been demanded from the associations. The total receipts from the building were something over the assessment figure. The Company was treated as being in occupation. The point decided

(1) Rex. *v.* Commissioners for Special Purposes of Income Tax (*Ex parte* Pemsel), 3 T.C. 53.

(2) Rex. *v.* Special Commissioners of Income Tax (*Ex parte* Essex Hall), 5 T.C., 636.

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was that the receipts were not rents and profits, the Company being in occupation; "profits" was read as tantamount to "rents" and as having no substantive operation. Buckley, *L.J.*, held that the expression meant actual sums, not annual value. The inconvenient result of the construction adopted was emphasised by Lord Justice Buckley who indicated the opinion that it would not affect a Hospital which in respect of untenanted land belonging to it might claim the benefit of Clause 2. Cozens-Hardy, *M.R.*, also relies on the three specific institutions being in a different position from the Company. I think the decision was to some extent influenced by the view that the three charitable foundations were protected by Clause 2.

Whatever be the meaning of "rents and profits", they are not defined as arising from a letting for any particular period of time. The *Essex Hall* Case does not decide that the rents must be nominally for a year. What is dealt with is income received in the year of charge. Whether the rent is for the last gale of an expiring lease, or on a short demise the clause equally applies. What is to happen if in consequence of a tenant's bankruptcy the rent is not paid at all? Would the clause which taken literally contemplates actual application of the money for charitable purposes be in that case inoperative? Or should it be read as dealing with nominal rents or annual value, or rents, if any, received? Though for purpose of charge the element of yearly profit is material, where the point is as to exemption it is or may be different.

I doubt also if the Case determines that where exclusive use of premises is let for an ascertained time, *e.g.*, for the season for conacre or grazing, the payment for such use and occupation would not be properly described as rents and profits notwithstanding that the owning body remained in legal occupation. There may be therefore a difference between lettings of the exclusive use of the rooms for six months and those for a night or two. The argument before us was not addressed to any such distinction and I shall assume that the way of escape by Clause 3 is closed.

Clause 2 deals with three charitable foundations essentially branches of public charity though they may only benefit sections of the public, and may exact payments from inmates: *Mary Clark Home Trustees* v. *Anderson*[1] ([1904] 2 K.B. 635); *Shaw* v. *Halifax Corporation* ([1915] 2 K.B. 270). Hospitals and public schools in Schedule A, No. VI, may embrace institutions not within the exclusively charitable exemption of our Valuation system as explained in *O'Neill* v. *Commissioners of Valuation* ([1914] 2 I.R. 447) a case dealing with education. Compare *Cawse's* Case[2] ([1891] 1 Q.B. 585) and the *Ormskirk* Case[3] ([1903] 2 K.B. 498) (as to hospitals) and *Blake's* Case[4] (19 Q.B.D. 79) and the *Charterhouse* Case [5] (25 Q.B.D. 121) (as to Public Schools). Hospitals are however rated for poor rate in England, which here would be exempt: *The St. Thomas Hospital* Case (L.R. 7 H.L. 477). The Rotunda Hospital is essentially a charitable foundation. I cannot accept the dictum of Kennedy, *L.J.*, in the *Essex Hall* Case that the lettings there were in the nature of a trade or business. Even if his view, not supported by the other judgments, was correct in reference to a limited company free to utilize its property as it thought

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[1] 5 T.C. 48. [2] Cawse *v.* Nottingham Lunatic Hospital, 3 T.C. 39.
[3] Ormskirk Union *v.* Chorlton Union. [4] Blake *v.* Mayor &c. of London, 2 T.C. 209.
[5] Charterhouse School *v.* Lamarque, 2 T.C. 611.

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best, it would not apply to this statutory charity. I did not understand Serjeant McSweeney to dispute that Clause 2 might apply, his argument being that the user proved was of a business character caught by Schedule D.

The construction of Clause 2, adopting the interpretation of Clause 3 in the *Essex Hall* Case, is somewhat obscure. The jurisdiction under it is exercised by the General Commissioners. If we put aside the opinion of Buckley, *L.J.* (with whom I think the Master of the Rolls agreed) the argument for extending the provision to the Hospital is twofold—depending on the one hand on the general effect of the language and on the other on the very special character of this particular foundation. The former argument is as follows:—The word " premises " belonging to the Hospital (the word " belonging " occurs also in Clause 3) is sufficiently wide with the context supplied by Clause 3 to cover property belonging to the Hospital but not required for hospital purposes proper; " public " does not govern " premises " ; if it does, it bears only its ordinary charity meaning, as every valid charity must be public ; and the exception of any part occupied at a rent indicates that the premises are not " public " in the ordinary sense ; the exception, in accordance with a familiar principle, enlarges the *prima facie* effect of the antecedent language ; *R.* v. *Shrewsbury* (3 B. and Ad. 216) ; *Haslett* v. *Sharman* ([1901] 2 I.R. 433). This extended operation of Clause 2 largely rests on the restricted effect of Clause 3 in order to avoid the apparent hardship of leaving untenanted and perhaps for the time unprofitable property—house or otherwise—without any benefit of exemption.

The second argument relates to this peculiar Hospital in its actual state as constituted by its charter and statutory foundation, with special taxation appropriated to it, and recognised as serving a public purpose. Its rooms are as necessary as taxes to maintain its existence ; they are its limbs and are just as much part of its corporate life and activity as if they were offices supplying central heating or kitchen requirements ; they came into existence as a section of the Hospital foundation from its birth.

The above considerations, not without weight, do not require decision though I have discussed them in deference to the able arguments at the Bar. The question before us is not whether the Hospital should obtain allowance against assessment under Schedule A, No. I. Even if it could not, so long as it is assessable under Schedule A, No. I, it is outside Schedule D, in respect of use of a hereditament covered by such assessment. I leave this difficult point to be decided when the time comes on appeal against valuation or assessment. Like Lord Justice Buckley, I am struck with the apparent improbability that a hospital owning estates, such as the London Foundling or Dulwich College, with extensive house property, should, from the accident of some part being unlet for the whole or part of a year—which in a declining neighbourhood might often occur—should lose relief to that extent. I should have supposed that a settled administrative practice must have grown up in reference to such cases. No such practice is disclosed in the Case before us as it was in *Pemsel's* Case[1] ([1891] A.C. 531), and apparently Lord Justice Buckley, when he referred to untenanted land, was not aware of any practice inconsistent with his view.

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[1] Rex. *v.* Commissioners for Special Purposes of Income Tax (*ex parte* Pemsel) **3 T.C., 53.**

(Gibson, J.)

I summarise my reasons for allowing the appeal against the Schedule D assessment as follows :—The rooms were assessable under Schedule A, Rule No. I ; the revenue derived from lettings was covered by that assessment, just as much as the produce of a conacre or grass letting, the owner remaining in legal occupation ; the valuation founding the assessment takes into account the profit-earning capacity of the rooms in their actual state and use ; the lettings are not a trade or business not only because the return they yield is from the direct use of the rooms, but also possibly because such use is that to which the rooms are dedicated and appropriated by the existing charitable trust. The receipts are for use and occupation of rooms by persons who for the profits they make from entertainments are subject to Schedule D. It will be seen that, as already stated, the above reasons are quite independent of the right of the Hospital to allowance under Schedule A, No. VI, and apply though the Hospital was not so entitled. It is quite impossible to hold that wherever Schedule A, No. VI, does not exempt, Schedule D applies ; in other words, that Schedule A, Rule No. I, does not apply unless an exemption from that assessment was established. It is certain that where Schedule A, Rule No. I, applies, Schedule D is excluded, so far as regards direct produce of the hereditament. An omission to assess under Schedule A, Rule I, does not authorise an assessment under Schedule D. The Commissioners have no right to elect.

If assessment under Schedule D was competent, I am not satisfied that it is legitimate to confine the calculation to the rooms. The Hospital is run as one concern, supported by taxes, hire of rooms, public grants, subscriptions, etc. It has one statutory identity. On part there is a loss ; on part a gain. The profitable part is dedicated *ab initio* to make good the loss, and it may be that in applying Schedule D the consolidated aggregate income of the Statutory institution is what is to be considered. The situation is not at all the same as if an independent industry was tacked on to the original charity, like the refreshment rooms in *Grove* v. *Y.M.C.A.*[1] (88 L.T., N.S. 693). The imposition of 5*s.* Income Tax in the £, or at a higher rate, might disorder the finance of the Hospital to an extent affecting its maintenance and usefulness or making a further grant of public money necessary. No such question was raised before the Commissioners, but it appears on the face of the case ; it may affect the Schedule D assessment, and I notice it as possibly requiring attention. Though if profits are earned their destination may be immaterial ; there was here no surplus if the Hospital is viewed as one entire concern. *Mersey Docks* v. *Lucas*[2] (8 A.C. 891), does not seem to apply.

The assessment made gives credit for an assessment under Schedule A, No. I, which ought to have been but never was made as required by Section 13 of the Act of 1853. It is not easy to work out the calculation for Schedule D as to a business in connection with a hereditament assessable under Schedule A, Rule No. I, unless that heriditament is legally valued and assessed so as to determine the credit. The sum assessed under Schedule D is only on footing of conjectural Schedule A assessment, which the Commissioners were not entitled to make, there having been no valuation. The sum allowed by way of credit is £250, which represents £300 the annual value lately fixed, less one-sixth for repairs, described as statutory, which I do not quite follow.

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(1) 4 T.C., 613. (2) 2 T.C., 25.

(Gibson, J.)

If the present assessment under Schedule D does not represent the established Revenue practice, and it is intended to make this a test Case to decide an unsettled point, or to overrule Lord Justice Buckley's views as to untenanted land, it is to be regretted that this useful charity, supported by our local legislature 15 years before the Union, and enjoying immunity hitherto, should now be selected to determine such controversy which its financial resources make it ill able to meet. In the *Essex Hall* Case no attempt was made to apply Schedule D assessment.

Sir James Campbell, C.J.—This Case Stated involves an interesting and difficult question of law, which has arisen under the following circumstances. By Royal Charter of 2nd December, 1756, certain persons were incorporated under the name of the Governors and Guardians of the Hospital for the relief of poor lying-in women in Dublin. The Institution is supported by the income of certain endowments, by voluntary contributions, by the fees obtained from paying patients, and from pupil or probationary nurses, while the Governors are also the owners of certain adjoining buildings, the principal or main building being the well-known Round Room, and referred to in No. 20 of their existing bye-laws as " apartments contiguous to the Hospital". These Rooms have been always used for public entertainments and meetings of various kinds, including balls, parties, dinners, concerts, music-hall performances, political demonstrations, and similar gatherings which were public only in the sense that members of the public were eligible for admission, in some cases by payment, and in others by the invitation of the entertainer. It does not appear that the Governors themselves have ever provided these entertainments, but have let or hired the rooms to others for the purpose, nor was there any evidence to suggest or establish that they have ever upon any occasion been used in direct connection with the purposes of the Hospital. Substantial profits have been derived in each year from the use of the rooms in this way, a considerable surplus being available over and above the expenses of their upkeep and management, and this surplus has always been applied for the benefit of the Hospital. In respect of these surplus profits for the four years, 1912 to 1915 inclusive, the Corporation were assessed for Income Tax under Schedule D of the Acts of 5 & 6 Vic., c. 35, and 16 & 17 Vic., c. 34, but it is not necessary to refer to figures or amounts, both sides acquiescing in the position that our decision is only desired upon the question of principle, and that once that has been finally decided the figures and amounts can be amicably adjusted. The Governors appealed to the Commissioners for the Special Purposes of the Income Tax Acts against these assessments, and they, after hearing the parties and their evidence disallowed the appeal but stated this Case for the Court. It is admitted that the premises in question have never been assessed for Income Tax for any of these years or at all under Schedule A of the Act, and that in the year 1915 they became for the first time the subject of a Poor Law Valuation. For the purposes of this Case the Act to be considered is the Income Tax Act of 1842, 5 & 6 Vic., c. 35, the operation of which was subsequently extended to Ireland by 16 & 17 Vic., c. 34, Sec. 5. The contention on the part of the Appellants is shortly stated as follows, that the premises in question are only assessable under Section 60, Schedule A, and are entitled to the allowance under that Schedule, No. VI ; that their liability to charge being thus exhausted, they cannot be made liable under Schedule D, in respect of any profits or gains derived by them by reason of their ownership or occupation of these same premises, and applied

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to the maintenance of the Institution. Upon the other side it is contended that assuming the premises to be, as I understand it was admitted they were, entitled to allowance under A as belonging to and in the occupation of the Hospital, the Appellants were nevertheless liable to be charged under Schedule D in respect of a different subject-matter, namely, the proceeds from the lettings or hiring of the rooms as being profits or gains with the meaning of that Schedule.

The claim for allowance under Schedule A is based upon the provisions of No. VI of that Schedule, which grant allowance (*a*) for the Duties charged upon any Hospital in respect of the public buildings, offices and premises belonging to such Hospital, etc., or (*b*) on the rents and profits of lands, tenements, hereditaments or heritages belonging to any Hospital, etc.

In the earlier stages of the argument before us it seemed as if the material question for decision was whether the proceeds of the lettings or hirings in this Case were rents and profits within the meaning of the above clause (*b*) but later Mr. FitzGibbon, K.C., for the Appellants definitely and distinctly stated that in view of the decision of the English Court of Appeal in the *Essex Hall* Case(1) ([1911] 2 K.B. 434) to which I will subsequently refer and of the fact that the profits in that Case were substantially identical in nature and origin with those arising in the present Case, he had, before the Commissioners, and would before us, argue the Case upon the assumption that these proceeds were not rents and profits within the allowance clause, but without prejudice to his right to question the decision in the *Essex Hall* Case upon this point in a higher Court.

In the words of Kindersley, V.C., in *Lovat* v. *Leeds*, (2 Dr. and Sm. 77), " the most usual and proper meaning of rents and profits is annual rents and " profits," and in the *Essex Hall* Case, *Rex* v. *Commissioners of Income Tax* ([1911] 2 K.B. 434) (2) it was expressly decided by the English Court of Appeal that lettings or hirings of a similar nature were not rents and profits within the allowance in this Section. Cozens-Hardy, *M.R.*, in his judgment at page 439(3) says : " In my view it makes no difference that certain sums have, in the " present instance, been received by the trustees. Sums so received were not " ' rents or profits of lands, etc.,' within the meaning of the Act." Kennedy, *L.J.*, p. 444(4), states : " I am inclined to think, the profits made in the present " Case by Essex Hall the occupying owners, from use of parts of the premises " are really not in their nature ' rents or profits of lands, etc.,' within the " meaning of this allowance clause, but rather profits of a business, a business of " letting furnished or partly furnished rooms, carried on by the occupier in the " premises." It has been suggested that Buckley, *L.J.*, though concurring in the decision kept this point open by the following words, p. 442(5), " A sub- " sidiary question was mentioned, namely, whether Essex Hall are entitled in " respect of the sums received for casual lettings, to the same allowance as has " been conceded in respect of the rent received from the Inquirer Publishing " Company," but in my opinion his judgment is precise on the point. The sole and only question argued or decided in the case was whether Essex Hall were themselves in the occupation of the premises, or were, on the other hand, in receipt of the rents and profits therefrom as it was only in the latter event that Essex Hall would have been entitled to the allowance, and each member of the Court bases his decision upon the conclusion that they were in fact in

(1) Rex *v.* Special Commissioners of Income Tax (*ex parte* Essex Hall), 5 T.C., 636.
(2) 5 T.C., 636. (3) *Ibid.* at p. 654. (4) *Ibid.* at p. 657. (5) *Ibid.* at p. 656.

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occupation themselves, and Buckley, *L.J.*, sums it up in the following words, " I conclude, therefore, that Trustees for charitable purposes are not entitled to " an allowance in respect of lands in their own occupation not producing rent." The onus of proof that the proceeds of the letting or hiring agreements in the present Case were " rents and profits " rests upon the Appellants but no proof or evidence as to their nature was given beyond the statement that they were for periods varying from one night to six months, nor was there any evidence that even in a single instance did any of such transactions result in a tenancy or create the ordinary relation of landlord and tenant. Such proof if it existed was readily available because the Registrar and Secretary of the Hospital is required to keep a book in which shall be entered " all agreements made for the " hire of the Rotunda Rooms and Gardens denoting the period for which the " same shall be hired." Having regard to the scope and purpose of many of the bye-laws and resolutions of the Governors I am quite satisfied that, at least the great majority of the transactions were merely agreements for the hire of the rooms under which the occupation was retained by the Appellants. But this contention was dropped out of the argument before us for another reason, namely, owing to the substantial alternative contention of the Appellants that the Hospital was in fact in the occupation of these halls or rooms, and that they were therefore entitled to the allowance under the earlier words of the Section. My brother Gibson in the course of the hearing suggested that probably upon their true construction these earlier words only applied to buildings, etc., belonging to an Hospital, actually used and employed in the special work of the Hospital, and if this was the true view it would in my opinion dispose of the appeal, but Counsel for the Respondent did not adopt the suggestion or attempt to argue it before us. I cannot, however, dispose of it so easily because I am satisfied that some such limitation is essential if the Section as a whole is to receive a sensible and consistent interpretation. The allowances in respect of the duties under Schedule A of the Income Tax Act, 1842, are all contained in the same Section, namely, Section 61, No. VI, and are applied as follows :—

(*a*) To colleges and halls in the universities in respect of the *public buildings and offices belonging to them* and not occupied by any individual member thereof or by any person paying rent for the same.

(*b*) To an hospital, public school or almshouse in respect of the public buildings, offices and premises belonging to them and not occupied by any individual officer or the master thereof whose whole income however arising shall amount to or exceed £150 per annum or by any person paying rent for the same.

(*c*) To any building the property of any literary or scientific institution used solely for the purposes of such institution, provided that the said building be not occupied by any officer of such institution nor by any person paying rent for the same.

(*d*) To the rents and profits of lands, tenements, hereditaments or heritages belonging to any hospital, public school or almshouse or vested in trustees for charitable purposes so far as the same are applied to charitable purposes.

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It is said, and the contention of the Appellants, that the particular buildings with which this Case is concerned, are entitled to the allowance under (*b*), requires it to be said, that the words " public buildings, offices, and premises " belonging to " an hospital in this part of the clause are co-extensive with and cover the same subject matter as the words " lands, tenements, hereditaments " or heritages belonging to any hospital " in the later part (*d*) of the Section, the only distinction being that in the one case they are assumed to be in the occupation of the hospital and in the other, in the occupation of its tenants.

I am satisfied, however, that a careful analysis of the Section will demonstrate that this is not the true construction. It would be strange that if this had been the intention, the same phraseology should not have been adopted in both cases, and that the description of the same subject matter should be so widely different. It involves, as I shall show, that the word " premises " must be read without the preceding limitation of the word " public " and as including premises of every kind as otherwise the words " public buildings, offices, and premises " would plainly not be synonymous with " lands, tenements, hereditaments, or " heritages," and as I understand the judgment of my brother Gibson he so construes the term " premises ". Now in the first place I think it is clear that this word " public " governs both " buildings " and " offices " in part (*a*) of the clause dealing with the colleges and halls of universities, and if so I think it necessarily follows that it also governs the enumeration in part (*b*) of the " public buildings, offices, and premises " of an hospital. Further it will be noticed that in part (*c*) which deals with literary or scientific institutions the allowance is confined to buildings " used solely for the purposes of the " institution," while in part (*d*) it is confined to the rents and profits of lands, tenements, etc., of any hospital " so far as the same are applied to charitable " purposes." It follows from this last limitation that the Section assumes there may be lands or tenements of an hospital which are not applied to charitable purposes, and if these words are synonymous with " premises " in (*b*) the allowance under that portion of the Section must extend to all premises no matter to what use they are applied and even though the proceeds are not applied to charitable purposes, because there are no words of limitation to be found in (*b*) similar to those in (*c*) and (*d*), or of any other kind, unless they are to be found in the expression " public " as read with premises as well as with " buildings and offices ". To read " premises " in any other way would result in depriving the words " public buildings and offices " of any substance or effect whereas upon the contrary they seem to me to have been designedly used for the express purpose of confining the allowance to buildings, offices and premises used for and dedicated to the public purpose of the hospital and to exclude such as, for example in the present case, are applied to some use foreign and external to this purpose. Otherwise we would be faced with the strange result that while premises so used, would, if in the occupation of the hospital be entitled to the allowance under the Section wholly independent of the application of the proceeds, no allowance on the other hand would be given in respect of the rents and profits of the same premises if in the hands of tenants, unless they were applied to charitable purposes. It seems to me that for the purposes of the Section the property of the hospital is divided into two parts, the first being the buildings, etc., in the occupation and within the curtilage, so to speak, of the

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Hospital itself, and used as part of, and for the work of the institution, and the second, any other lands and tenements not coming within this description and in the hands of the tenants upon the Appellants' construction. The exclusion from the allowance under part (*b*) of all public buildings of an hospital, occupied rent free and as part of their emoluments by members of the staff, with salaries, however arising, of £150, would be in strange contrast to the grant of the same allowance in respect of premises in the occupation of the Hospital but used for some purpose foreign to the work of the Hospital itself, such as the holding of public entertainments or any other form of a business venture or concern. Again it is clear that the buildings and premises mentioned in (*b*) are expressly excluded from the allowance *if in the occupation of any person paying rent for the same* while, upon the construction suggested, the rents so paid would be restored to the allowance under (*d*). It is said that these words in (*b*) " or by any " person paying rent for the same " compel to the construction of " premises " in the unrestricted sense but I cannot accept this argument. The use of the word " same " refers us back to the same subject matter, and if this is to be confined, as I suggest, to the premises that are public in the sense of being used for the public purpose of the hospital, the exception would only apply to premises occupied for that purpose either by officers with a certain salary rent free or by them or other persons paying rent for the same. But the conclusive answer to this argument is supplied by the very next succeeding words in the same Section, which plainly demonstrate that it expressly contemplated and provided for the case of a building which though used solely for the purposes of the institution was at the same time in the occupation of some person, other than an officer, paying rent for the same. They are as follows: " or on any building the " property of any literary or scientific institution, *used solely for the purposes* " *of such institution*, . . . provided . . . that the said building be not occupied " by any officer of such institution, nor by any person paying rent for the same." In my judgment it is impossible to construe this Section as excluding from the allowance the buildings of an hospital which are occupied by any persons paying rent for the same, and at the same time including in the allowance the rents paid by such persons in respect of the same buildings, and the conclusion seems, to me at least, irresistible that the buildings and premises so dealt with are something essentially different from the " lands and tenements " in part (*d*) of the Section, the difference being that in the first case the buildings and premises dealt with are " public ", that is to say, used and applied for the public purpose of the institution while in the other they are lands and tenements not used or required for such purpose but let to strangers under ordinary contracts of tenancy. Upon the assumption that the allowance under (*b*) is to be confined to the premises of the Hospital in its own occupation but used for its purpose, I think it is clear and indeed no argument to the contrary has been addressed to us that these rooms contiguous to the Hospital and devoted to entertainments were not used for the purpose of the institution. In *The Queen* v. *The Overseers of Fulham* (6 B. & S. 451) the question for decision was whether a County Lunatic Asylum was entitled in respect of a garden of 20 acres and a farm of 30 acres to the allowance in respect of local rates conferred by 16 & 17 Vic., c. 97, Sec. 35, upon lands purchased or acquired for the purposes of any asylum *while used for such purposes*. The garden and farm were cultivated by gardeners

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who were part of the establishment, assisted by the patients, and the resulting profit derived from the sale of the surplus produce was applied to the maintenance of the Asylum. It was held by the Court, that the Asylum was entitled to the allowance, Cockburn, *C.J.*, stating in his judgment:—"I assume, for the "practice is matter of common knowledge that the primary object of the "managers of an Asylum, in taking lands for cultivation is not to make a profit "of the agricultural or garden produce, but to provide such of the unfortunate "inmates as are capable of it with sanitary occupation, with a view to their "restoration and this, *being one of the purposes for which the lands are used*, I "think they are lands acquired for the purposes of the Asylum within the spirit "and terms of the Act."

This Case illustrates the clear distinction between premises which are used for the purpose of an hospital and premises, the proceeds of which are applied to its maintenance. I have not been impressed, as apparently other members of the Court have been, by the argument that as these rooms are hired out for *public* entertainments, they must necessarily be treated as "public buildings "belonging to an hospital". It seems to me that no effect can be given to these words of the Section "public buildings belonging to an hospital" save and except by the construction which would confine them to buildings actually used for the public purpose of the institution, namely, the reception and treatment of poor lying-in women, including of course the necessary accommodation for the resident medical and nursing staff, and would exclude rooms such as these devoted to entertainments which are only public in the sense that they are open to persons from outside on such terms as to admission as the hirer of the rooms may determine. I have only to add, in connection with this question in the case, that I find nothing in the judgment of Buckley, *L.J.*, in the *Essex Hall* Case(1) which conflicts with the opinion I have expressed. He does say that the allowance under part (*b*) of the Section is confined to premises in the occupation of the particular institution, and in this I entirely concur, but he nowhere defines the extent of the subject matter nor did the case require that he should do so. I have dealt with this portion of the case with, I fear, undue elaboration, but the language of this Section 61, Schedule A, No. VI, of the Act of 1842, is complicated and confused and the construction which I have adopted has not been suggested or argued by Counsel. I might stop here, because in my opinion, if I am right in holding that the buildings in this Case, having regard to the use and purpose to which they are applied, are wholly outside the allowance Section under Schedule A, it seems to me to follow that the profits or gains acquired by their use are liable for charge under Schedule D, and the whole argument before us on behalf of the Appellants has been based upon the assumption that these rooms were entitled to the allowance under Schedule A, nor has it been at any time contended that the gains acquired from the use of these rooms would, unless upon this assumption, escape assessment under Schedule D. I am, however, also of opinion that even if the premises, assuming them to be capable of assessment under Schedule A, were entitled to the allowance under that Schedule, this does not in itself suffice to exempt the profits from assessment under D. I am compelled to use the words "assuming them "to be capable of assessment under Schedule A" for the following reason. The Income Tax Act of 1842 was extended to Ireland by 16 & 17 Vic., cap. 34,

(1) 5 T.C. 636.

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and by Section 13 it is enacted that the assessment under Schedule A shall be made upon the Poor Law Valuation of the premises, but the buildings or rooms with which this case is concerned have always until the year 1915 been scheduled as " exempt " in the Valuation lists. In that year they were rated for the first time, the entry being as follows: " Rotunda Concert and Ball Rooms; " Occupiers, Governors of Rotunda Hospital, Rateable Valuation £300 ", so that for very many years these premises have been singularly fortunate in escaping not only from imperial taxation but from all local taxation as well. This result is probably due to the earlier decisions upon the subject in this country which in the light of the more recent authorities can no longer be regarded as law. Assuming, however, that they were, during the four years with which this Case is conversant, capable of assessment under Schedule A, any such assessment must have been upon the occupation, and I am of opinion that the Governors of the Rotunda Hospital, in applying the rooms to the particular use that was made of them were acquiring, above and in addition to the benefit of ownership, profits or gains within the drag-net of Schedule D. The subject matter of the charge under Schedule A is the ownership of the lands or tenements by the owner. Such ownership need not necessarily result in any profits, but where profits, other than rents, do in fact result from the occupation the provisions of Schedule D seem to be expressly framed with the object of charging all such profits with the duty.

The third Case under that Schedule in the Act of 1842 deals with " the " duty to be charged in respect of profits of an uncertain annual value *not* " *charged in Schedule (A)* ", while the sixth Case applies to " the duty to be " charged in respect of any annual profits or gains not falling under any of the " foregoing Rules, and not charged by virtue of any of the other schedules " contained in this Act." These two Cases will be found summarised in Schedule D as re-enacted by the Act of 1853. I am also of opinion that for the purposes of this Schedule the question of any special appropriation or destination of such profits or gains, whether by Statute, Charter, Trust or Contract is wholly immaterial, the one and only exemption being contained in Section 105 in favour of " yearly interest or other annual payment " where such payment is " applied " to charitable purposes only ". The decisions to this effect will be found collected in Dowell on the Income Tax Laws, 7th Edition, page 259, *Mersey Docks* v. *Lucas*,[1] (8 A.C. 897) being the leading example and deciding that once profits are earned which come within Schedule D the duty must be paid upon them wholly irrespective of the purpose or destination to which they are applied. In the subsequent Case of *Paddington Burial Board* v. *Commissioners of Inland Revenue*[2], (L.R. 13 Q.B.D., p. 9) the Plaintiffs were constituted a burial board under an Act of Parliament which obliged them to apply all surplus income in aid of the Poor Rate. It was held that in running a cemetery they were carrying on a trade or business the gains from which were liable for duty under Schedule D regardless of the application. In the *Mayor and Corporation of London as Governors of St. Thomas' Hospital* v. *Stratton* (7 H.L. 477), it appeared that this well-known Hospital was founded by Charter, the lands being provided by the State and the Charter directed that the revenues should be applied for " the use and maintenance of the poor sick and infirm folk of the said Hospital ". The buildings and premises were exclusively used for the purposes of the Hospital, no portion being applied as in the present case to an external object.

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(1) Mersey Docks and Harbour Board *v.* J. G. Lucas, 2 T.C. 25. (2) 2 T.C. 46.

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It was contended that as every farthing of the income was expressly appropriated by the Charter to the charity, the Hospital was not liable to be rated to the relief of the poor of the parish, but the House of Lords, affirming the Queen's Bench and Court of Exchequer Chamber held that it was liable and that the appropriation of the revenues was immaterial.

We have next to consider whether the profits or gains in this case must necessarily escape from assessment under Schedule D merely by reason of the fact, which I assume for the purpose, that the rooms themselves would, if assessed under Schedule A, have been entitled to the allowance thereunder. There is very little in the way of direct authority upon this question, but so far as I have found there are two decisions which assist to a conclusion. In *St. Andrew's Hospital* v. *Shearsmith*(1) (19 Q.B.D. 624) the Hospital had been assessed upon the annual value under Schedule A and it had also been assessed under Schedule D in respect of the profits derived from the fees of patients. These profits had averaged for the three years over £8,000, but from this was deducted the annual value assessed under Schedule A, leaving for assessment under D the sum of £7,000. It had been founded by voluntary contributions and made large profits in each year from paying patients which were applied in part to the maintenance of the poorer patients and the balance in carrying out, at the request of the Commissioners in Lunacy, necessary works for the efficiency of the Hospital. It claimed exemption under Section 105 contending that the profits were " a yearly interest or other annual payment " and " applied to " charitable purposes only ", but it was held that the Section did not apply inasmuch as the Governing Body of the Hospital were under no obligation to apply the profits to charitable purposes but could dispose of them at their will. Lord Coleridge, *C.J.*, in his Judgment says :—" I will assume, but I assume it " for the purpose of this Judgment only, that this institution is a corporation ' for charitable purposes only. I will assume also that this profit is ' yearly " ' interest or other annual payment ' within Section 105, *though I do not think* " *it is*. But I am of opinion that it clearly is not applied to charitable purposes " only within the meaning of the exemption." In *Needham* v. *Bowers*(2) (21 Q.B.D.436), the Hospital had been assessed under Schedule A in respect of the house, pleasure grounds and buildings used and enjoyed as part of the institution for the purposes thereof and *also* under Schedule D for profits acquired in keeping a Lunatic Asylum. The profits in that Case were admittedly expended on the upkeep of the Hospital, but Sir Horace Davey, Q.C., and A. T. Laurence, as those eminent judicial personages were then known, while strenuously insisting that the premises were public buildings belonging to an Hospital and therefore entitled to an allowance in respect of the assessment under Schedule A, expressly abandoned the appeal in respect of the assessment under Schedule D conceding it was governed by the decision in *St. Andrew's Hospital* v. *Shearsmith*. In *Needham* v. *Bowers* the profits were acquired in the direct use of the buildings for the special purpose of the Hospital, and were applied for its support, but nowhere, either in the arguments or judgments, is it suggested that either of these considerations affected the liability for duty under Schedule D.

The subsequent Case of *Cawse* v. *The Committee of Nottingham Lunatic Asylum*(3) ([1891], I.Q.B., p. 585), also has an indirect bearing upon this same

(1) 2 T.C. 219. (2) 2 T.C. 360. (3) 3 T.C. 39.

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question. The Hospital in that case was partly and substantially supported by voluntary contributions but derived some income from paying patients and from the sale of the produce of a farm belonging to the institution, such income being more than sufficient to defray the expenses of the Hospital by an amount ranging from £350 to £650 a year. It further appeared that the land and buildings upon it were held upon trust for the purposes of the Hospital and inmates and for no other purpose. It had been assessed for duty under Schedule A, but the Commissioners discharged the assessment and stated a case. It was held by the Court that as the institution was not wholly self-supporting but was maintained in part by charity, it came within the exemption in that Schedule. Pollock, B., in the course of his Judgment says : " It is to be remembered that " this is not an assessment under Schedule D of profits ; if it were so a very " different consideration would arise," and later on he adds :—" Before I leave " it I will remark that this is not an assessment under Schedule D. If the " profits were assessed, apart from the buildings as a going concern upon which " profit was derived, a very different question would arise."

I am unable to find anything in the Income Tax Acts which provides for either allowance or exemption in the case of such profits or gains as were acquired in this case from the use of these rooms, and this is the more important where we find provision for allowance under Schedule A in the case of profits, in the shape of rents, and for exemption under Schedule D of profits or gains which are yearly interest or other annual payment devoted to charitable purposes. It would have been a very simple matter for Parliament, had it intended to confer allowance or exemption under either Schedule upon profits or gains derived from the occupation as distinct from the letting of premises belonging to an Hospital, to have inserted appropriate words for the purpose, as it did, for example, in the Customs and Inland Revenue Act, 1885. By Section 11 of that Act a new duty of 5 per cent. was imposed on the annual value *income or profits*, on all bodies corporate or unincorporate, of their real and personal property, subject to certain exceptions, one of which is as follows :—" *Property* " *which, or the income and profits whereof* shall be legally appropriated and " applied for any charitable purpose." No such words are to be found in the Acts we have to consider here, nor do they contain anything which entitles me to insert them from any implication as to the intention of Parliament. The profitable purposes to which buildings belonging to an Hospital or public school, and not required for the special purpose of the institution *might be applied* cover the entire field of business and trading enterprise and might conceivably produce profits running into thousands of pounds. I put the question to Counsel whether if the buildings in this case had been converted by the Governors into a brewery or distillery or had been run by themselves as theatres, concert or music halls, etc., producing substantial annual profits which were applied to the maintenance of the Hospital, he would still contend that such profits were exempt from charge under Schedule D, but the only reply I could elicit was that neither of those modes of user had in fact been adopted ; and if, as was decided in *Carlisle and Silloth Golf Club* v. *Smith*(1) ([1912] 2 K.B., p. 186) the green-fees of casual visitors to a private golf club are profits or gains within the Schedule resulting from an enterprise carried on apart and distinct from the ordinary functions and activities of a golf club, considerations of a much more

(1) 6 T.C., 198.

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cogent character compel to the conclusion that the Governors of the Rotunda Hospital in devoting these rooms to public entertainments were engaged in an enterprise separate and apart from the business of an Hospital. In *Grove* v. *Young Men's Christian Association*(1) (67, J.P. 279) the Respondents used the premises Exeter Hall for the philanthropic purposes of the association but they also conducted a restaurant therein which was run on business lines and made a profit. It was held that they were liable under Schedule D for the duty on these profits and that they could not be set off against any lost in the philanthropic work of the institution. The fact that the Appellants by shifting the purpose to which these rooms are applied may be entitled to allowance or exemption cannot assist them. In the *Essex Hall* Case Buckley, *L.J.*, at page 442(2), points out that the decision involved many strange anomalies and made the incidence of taxation depend not upon the substance but on the form of the transaction, but adds, " I, however, am not concerned with consequences, " but with construction, and upon construction it seems to me that the " words of the third clause do not fit the present case." Equally unavailing is, in my opinion, the suggestion that the profits or gains in this case should be pooled with the rest of the income of the Hospital upon the plea that the total expenditure would balance the receipts and no surplus profit would remain for taxation. The proceeds from the hiring or letting of these rooms have always been separately kept and the surplus after payment of the expenses of management, etc., appears as a separate item in the accounts, but in any event it appears to be the established principle, applicable in all cases where a separate venture of this kind is carried on, that the only expenses which can be deducted in arriving at the surplus for taxation are those necessarily incurred in the earning of the profit. See *Carlisle and Silloth Golf Club* v. *Smith* and *Grove* v. *Young Men's Christian Association* (*supra*). There only remains to consider how far the position is affected by the suggestion that the Governors of the Rotunda Hospital are compelled by their trust to manage these rooms as places of public entertainment. The able and experienced Counsel, Mr. Gerald FitzGibbon, K.C., who appeared on their behalf before the Special Commissioners did not put forward any contention of the kind before them, nor has he raised it before us, and I refer to it only because it has apparently influenced the decision of my colleagues. I assume that, if such a trust exists, the evidence of it can only be found in one or more of the following sources, the deed or deeds under which these buildings were originally acquired by the Governors, the Charter of Incorporation, and the Acts of 24 Geo. III, c. 57, 25 Geo. III, c. 43. As to the first of these, no evidence of any kind as to the contents of any such deed was tendered or given at the hearing of the appeal on behalf of the Governors upon whom the onus of proof lay. The Charter and the Acts of Parliament speak for themselves and I have failed to find anything in either which necessarily restricted the user to any such purpose. Now for this purpose the Charter may be put entirely aside as it contains no reference of any kind to these particular buildings. It is true that clause 11 of the Charter contains the usual power of making bye-laws and that one of such bye-laws, No. 20, commences as follows : " That as the principal support of this charity is produced from public enter-

(1) 4 T.C., 613.

(2) 5 T.C. at p. 656.

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" tainments in apartments contiguous to the Hospital, etc." The Governors also passed from time to time a number of "resolutions", which I will assume for the purpose of this question were in effect bye-laws, several of which provide for the management and hiring of the rooms, but I can hardly imagine that it will be contended that a trust of the character alleged is created by bye-laws, which the Governors could repeal or alter at will. I now turn to the Acts of Parliament, and similarly I have failed to find reference of any kind to these buildings in the earlier Act of 24 Geo. III, c. 57, while the following appear to be the only portions of 25 Geo. III, c. 43, which relate to them. The Preamble states that the funds of the Hospital principally arise from the public entertainments which its gardens and Rotunda afford to the inhabitants of the City of Dublin. Section 9 empowers the Governors to make bye-laws, rules, orders and regulations for the proper management and direction of such places of public entertainment and resort as shall stand on the premises belonging thereto, while Section 10 enables them to " annul, change, alter or revoke all such bye-laws," etc. There are many other Sections which confer upon the Governors of the Hospital power to levy certain payments from the inhabitants of the Square which surrounds their premises for the upkeep, lighting, etc., of the Gardens attached to the Hospital, which do not, in my opinion, bear upon the question for decision. This exhausts the matter so far as my investigations have gone, and I therefore hold that on the evidence before us there is absolutely nothing in the Charter or in these Acts to prevent the Governors from turning these buildings at any time into operating rooms, dormitories, or recreation rooms for the patients, or devoting them to any enterprise in the nature of a business or venture provided always that the proceeds are applied to the maintenance of the Hospital. Even assuming that a trust or dedication of the buildings as places of public entertainments and resort exists, I cannot understand how it affects the liability for duty of these profits under Schedule D. Under any such trust the Governors would be clearly entitled to use these buildings in any one of the following ways, either (*a*) themselves to give the entertainments and for this purpose to run a theatre, skating rink, cinema, etc., in them, to which the public would be admitted on such terms as to payment as the Governors in their absolute discretion might fix, or (*b*) to let them to tenants for these or similar purposes for any term not exceeding thirty-one years or three lives, or (*c*) hire them out for the same objects to licensees, or (*d*) last but not least in importance in this connection, to rent them to a lessee for a similar term who in turn would rent or hire them to others for public entertainments. I need hardly add that, if the Governors were to apply these buildings in the method and for the purpose suggested at (*d*), they would be fairly certain having regard to the fact that they themselves while so conducting them have been able to derive average surplus profits of £700 a year, to receive a substantial rent from some one of that familiar class of persons, whether companies or individuals, who in our large cities hire or let buildings of the kind for public entertainments. Upon my construction of the Income Tax Act the profits resulting from (*a*) and (*c*) would be liable for duty under Schedule D, while the rents received under (*b*) or (*d*) would come within the allowance under Schedule A. If I am right in this construction it is obvious that the Governors have become liable for duty on these profits not as the result of any trust or statutory obligation, but of their own deliberate act in

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selecting a method of management resulting in profits which are not within any allowance or exemption in either Schedule ; and it is equally clear that as in the *Essex Hall* Case the Governors of this Hospital have the remedy in their own hands either of utilising these rooms for the purposes of the institution or by leasing or letting them to a tenant. I hold therefore that the buildings in this case, though in the occupation of the Hospital, are not public buildings belonging to it and are therefore not entitled to the allowance under Schedule A and also that, even if so entitled, the Hospital is nevertheless liable for the duty under Schedule D in respect of the profits or gains acquired from the use of them for the purpose of public entertainments, such profits or gains not being rents and profits, nor yearly interest or other annual payment. I am also of opinion that in neither view would the result be different even if the Governors were under an obligation by Act of Parliament, Charter or otherwise to confine the use of the rooms for this purpose of public entertainments, as I am unable, in this connection, to distinguish between the destination of the profits and the destination of the premises. While I must unaffectedly distrust the soundness of the conclusions at which I have arrived, as they are at variance with those which commend themselves to the great judicial experience of the other members of the Court, and have consequently reconsidered them with care and anxiety, I feel unable to alter them. The questions at issue are for the reason I have stated of comparative insignificance to the Appellants but are of grave and far-reaching importance for the Crown, as the decision of the majority of the Court must make a wide and elastic gap in the net of the Income Tax Acts.

Notice of Appeal having been given, the Case was heard in the Court of Appeal in Ireland, before O'Connor, M.R., and Ronan, L.J., and Molony, C.J., on the 5th, 6th, 7th, 11th and 12th June, 1918, when judgment was reserved. Mr. W. M. Jellett, K.C., Mr. Gerald FitzGibbon, K.C., and Mr. A. V. Mathieson, B.L., appeared as Counsel for the Appellants, and Serjeant McSweeney, K.C., Mr. S. L. Brown, K.C., and Mr. G. W. Shannon, B.L., as Counsel for the Crown.

On the 28th February, 1919, judgment was delivered against the Crown, with costs, affirming the decision of the Court below (O'Connor, M.R., dissenting).

JUDGMENT.

O'Connor, M.R.—This is an appeal by the Surveyor of Taxes from the judgment of the King's Bench Division which decides that the Governors of the Rotunda Hospital are not liable to be assessed for Income Tax under Schedule D in respect of profits derived from buildings known as the Rotunda Rooms, the property of the Governors.

The judgment of the Court below was not unanimous. Three of the learned judges were of opinion that the Governors were not liable, while the Lord Chief Justice, now Lord Chancellor, held that they were. This difference of opinion, the result of long and elaborate arguments and embodied in almost all the judgments, indicates that we have to deal with a difficult matter. It is also one of very great importance, important to the Inland Revenue because a principle

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is involved which will rule other cases, and important to the Hospital because it concerns a claim against the slender resources of a noble charitable institution.

The claim arises in this way :—The Governors of the Hospital were incorporated by Royal Charter in the year 1756 for the relief of poor lying-in women in the city and suburbs of Dublin, with power to acquire and hold lands up to the value of £1,000 per annum. At the date of the Charter the hospital was in a poor locality and only capable of holding 24 beds, and the Governors, with the view of extending the benefits of the hospital, and with the assistance of funds which had been subscribed, acquired the site of the hospital and buildings, since known as the Rotunda Hospital and Rotunda. These buildings consist of the hospital proper and certain " apartments contiguous to the hospital " (the description given to them by the bye-laws) which were not constructed for any surgical, medical, curative or scientific purpose, but for the purposes of giving accommodation to such of the citizens who would require them for meetings, concerts, balls, or assemblies, and who would pay for the use of them. In other words, the Governors, having built their hospital, invested some of their funds in the construction of a building in which they could cater for the amusements of the citizens and thus earn an income for the support of the hospital.

This building " contiguous to the hospital," but no part of it, has been used for the purposes for which it was constructed and is so used at the present day. It is a substantial source of income to the Hospital, and has thus fulfilled the expectations of the Governors who designed it.

It is in connection with this building that the claim of the Income Tax Commissioners arises, and therefore I think that it will be convenient to give an account of the nature and management of the building by the Governors before I approach the question of law which is involved in the present appeal.

The building consists of a round room—the Rotunda, so conspicuous that it has given its name to the whole group of buildings including the Hospital—a ballroom, concert room, exhibition rooms, small concert room and refreshment room. I got these particulars from the schedule to the bye-laws which are in evidence. These several rooms are hired to various persons who require them for various entertainments—meetings for various purposes, concerts, balls, etc. The terms of hiring are various, for one, two or three days, a week or weeks or a month or months. A scale of charges is prescribed by the bye-laws, and these charges yield a considerable income.

But the legal character of these hirings or the contracts under which the use of the rooms is given remains to be determined. Did these hirings or contracts —call them what you will—constitute lettings creating tenancies properly so called, making the parties taking the rooms the legal occupants, or did the Governors remain the legal occupants giving merely the temporary use of the rooms to the persons who paid for their use ? It will be seen that it is all important to settle this point.

Reference to the bye-laws shows that the subject matter of the hirings or lettings is not bare rooms, but rooms with seating and heating. In addition the Governors undertake the lighting of the rooms by gas or electricity at certain charges according to consumption. There is further an officer of the Governors, called the Keeper of the Rotunda rooms, whose duty it is to prepare the rooms

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for all entertainments and to see that no smoking or improper conduct is permitted at any entertainment or meeting. He is further bound to remain constantly on the premises and to be attentive and accommodating to all parties occupying the rooms. He is also bound to attend to the lights and fires, and he is entitled personally to receive for his services certain prescribed charges from the persons who engage the rooms. These circumstances seem to me to be inconsistent with the creation of legal tenancies giving estates carrying with them the right to legal occupation. They seem rather to support the view that the Governors of the Hospital were to retain the legal possession while they gave the accommodation of the rooms with the addition of seating, heating and lighting apparatus.

Having thus determined the legal relations, as I conceive them to be, of the Governors of the Hospital and the parties who use the rooms under contracts with them, I proceed to consider the claim of the Income Tax Commissioners.

The Commissioners are entitled to make assessments on all kinds of property and profits enumerated in the Schedules A, B, C, D and E, but the assessments are to be made according to certain prescribed rules and subject to certain prescribed allowances.

The conjoint effect of the several Schedules, the Rules and the allowances has to be considered, but it seems to me that in order to arrive at their true interpretation we must, in the first place, determine with accuracy the subject matter of each particular Schedule and having done so then proceed to consider the Rules under which the assessments are to be made and the allowances to which they are subjected. *Prima facie* rules for assessment should not enlarge or abridge the subject matter of assessment ; and allowances against assessments should not be considered until the subject matter of assessment is first ascertained. In saying so I must not be taken to suggest that Rules embodied in the Acts or that the terms in which allowances are thereby prescribed may not be guides to the meaning of the enactment which fixes the subject matter of the assessment. In the case of indefiniteness or ambiguity the language of the Rules and the nature of the allowances might be valuable aids for the purpose. I only mean to lay down that as a matter of logical procedure our first endeavour should be to mark out the property which by each Schedule is subjected to taxation. If the Schedule in itself is clear there ought not to be any need for reference to the Rules or allowances for its proper interpretation.

I will now deal with Schedule A. The material words are :—" The property " in all lands, tenements, hereditaments and heritages ". There is no obscurity about this and there is no difficulty in applying it to the Rotunda rooms, which are the property of the Governors of the Hospital and come within the description of lands, tenements, hereditaments and heritages. This property then is subject to assessment under Schedule A. But is this property co-extensive with the subject matter of the lettings, hirings or whatever the contracts may be which the Governors made for the purpose of providing an income for the Hospital ? It clearly is not. The Schedule covers only property in lands, tenements, hereditaments and heritages. But the contracts embrace something more—seating, heating, the use of lighting apparatus, the superintendence and

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care of the Keeper of the rooms, a servant of the Governors. These accommodations cannot by any stretch be brought within the description of property in lands, tenements and hereditaments, so that the contracts covered the lands, etc., and something more ; and the charges exacted were measured by something more than the value of the lands. The property in the rooms—*quâ* lands and tenements—is no doubt assessable under Schedule A, but so much of the profits arising from the hiring contracts which is to be attributed to the accommodation given in the several ways I have mentioned is outside it and must escape taxation altogether unless caught by some other schedule. This brings me to Schedule D, and here we have a schedule embracing an unlimited subject matter. Schedule A embraces only property in lands, tenements, hereditaments and heritages. Schedule D covers any kind of property and all profits and gains not charged by the other schedules, a kind of drag-net clause to capture everything ; so that, while the Rotunda rooms are taxable merely as lands according to their annual value, they are also taxable as an establishment with a certain equipment making it to some extent a going concern and thereby a profit-earning investment. This does not mean that the Governors are subject to double taxation because it will be seen later on that for a case like the present provision is made for giving credit against any assessment made under D for any assessment made under A.

So much for the Schedules which so far as they concern the present case seem to me not to present any difficulty. I will now come to the Rules.

There are the Rules under Schedule A. The general Rule I prescribes how the annual value is to be ascertained for the purpose of assessment and it says expressly that it shall be construed to extend to all lands, tenements and hereditaments or heritages capable of actual occupation. There is nothing in this which suggests any extension of the subject matter of Schedule A. It is in fact a confirmation of the limitation to lands, tenements, hereditaments and heritages properly so called. Next comes the Rules No. II, the first five Sub-rules of which deal with special hereditaments or heritages—tithes, ecclesiastical dues, manors and fines. These may be passed over. The sixth Sub-rule deals with " all other profits arising from lands, tenements, hereditaments, or heritages " not in the actual possession or occupation of the party to be charged, and " not before enumerated ". I will deal later on with the qualification of not being in actual possession or occupation. I am now insisting on the limitation of the subject matter of Schedule A to lands, tenements, hereditaments and heritages, and here again we have this limitation confirmed. Rule No. III is in the same way confined to special kinds of lands, tenements, hereditaments and heritages, and is not capable of extension to any other kind of property. I now come to Rule No. IV, which contains several Sub-rules. I may pass over Sub-rules 1 to 8 as not throwing any light on the question, but Sub-rule 9 is of importance. It provides for the deduction by occupiers from their rents of the Income Tax paid in respect of every 20*s.* of such rent. But again this Rule deals only with the rents of lands, tenements and hereditaments. It is inapplicable when the thing for which the rent (if it is a rent) is paid is of a composite character made up of lands plus seating accommodation, heating and the use of lighting apparatus. Some part of the rent must be attributable to such additional items. This brings me on to the allowances to be made against the duties and

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which are provided for by Rules V and VI. Rule V I may pass over, but Rule VI is of importance and it has been much discussed. In dealing with it at this stage I must again point out that for the present I am only on the question whether Schedule A comprises anything more than lands, tenements, hereditaments and heritages properly so called. The Rule raises another question as to what are public buildings, which I postpone the consideration of. The first allowances provided for are the duties charged on any college or hall in any of the universities in respect of the public buildings belonging to such college or hall or any hospital, etc., in respect of its public buildings. Now the duties here mentioned are the duties chargeable on the subject matter comprised in Schedule A, that is, the property in lands, tenements and hereditaments and nothing else. The allowances I have mentioned, therefore, are only on the mere buildings, constituting colleges, halls or hospitals. Once we have a profit made out of something more than the mere building there is at least a part of that profit entirely outside Schedule A and the allowance in respect thereof. But the Rule also provides for an allowance on the rents and profits of lands. Now, there has been a long discussion as to the increasing of rents and profits, and I must go into this later on, but for the present I satisfy myself by establishing that the terms in which the allowances are granted confirm the proposition that Schedule A covers only property in land, and that the allowances are only in respect of the rents and profits of that property, so that if there are rents and profits or gains attributable to any other kind of property or convenience, they must escape Income Tax altogether unless caught by some of the other Schedules.

I come back now to the question whether the profits of the Rotunda rooms come within Schedule D. I have already referred to what has been called the drag-net clause of this Schedule. Let me now refer to the Rules thereunder. These are the rules governing the first Case :—" Duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade, not " contained in any other Schedule of this Act." Now have we here a description which covers the mode of user of the Rotunda rooms by the Governors of the Hospital ? They are surely engaged in a kind of trade or adventure, viz., that of catering not for the persons entertained but for the entertainers by providing equipped rooms and conveniences which are always ready for immediate use or else require little preparation. If this is not a trade it is at least an adventure in the nature of trade because it is carried on for profit. The second Rule under Case 1 shows its comprehensive nature, because it is applied to every art, mystery, adventure or concern. But if the profits are not included in Case 1, there is the sixth Case which is of the most sweeping drag-net character, bringing in all profits and gains not charged by any of the other Schedules. If, therefore, the profits in question are not within Schedule A, and I am satisfied that they are not, they are of necessity within Schedule D. That would end the case we are dealing with were it not that in making an assessment under Schedule D the second of the Rules which apply to both Cases 1 and 2 provides that the computation of the duty is to be made exclusive of the profits or gains arising from lands, tenements or hereditaments occupied for the purpose of a profession, trade, manufacture, adventure or concern. The object of this is to provide against a double assessment, firstly, under Schedule A in respect of

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property in lands, and, secondly, in respect of the profits of an entire trading concern made up of lands and other property. The lands are valued under Schedule A (in Ireland under the Valuation Acts), and the assessment in respect thereof is deducted from the computation of profits under Schedule D. Part of the subject matter of the assessment is therefore within Schedule A, which raises the question in the present Case whether the assessment in respect of the lands apart from the accessories, which are included in the contracts, is subject to any allowance under Schedule A. Allowances are claimed by the Governors of the Hospital on the ground that the Rotunda rooms are public buildings belonging to the Hospital and so come within the second clause of Rule VI dealing with allowances under Schedule A. This clause provides for an allowance on any hospital, public school or almshouse in respect of the public buildings, offices and premises belonging to such hospital, etc. It is clear that " public " governs " buildings, offices and premises ", but what is the meaning of " public " ? Hospitals, public schools and almshouses are in a sense public institutions, and the buildings in which their work is carried on must in the same sense be public. It is only in this sense that the word " public " seems to be used in the clause I have mentioned. If a building is a public building merely because it is the property of a public institution and is contiguous to it, the result would be curious. The Rotunda rooms have heretofore been used as places for entertainments, but there is no legal impediment in the way of using them for some other purpose. Suppose, for instance, that part of the Rotunda rooms was converted into a private nursing home for paying patients, could it be called a public building ? There must be something more than architectural features and contiguity to make the buildings belonging to a public institution themselves public. I can find no characteristic which would make them such except the use of the buildings as part and parcel of the working concern, which is in a sense a public institution. If the fact that the income goes to support the institution makes the building out of which it issues a public building a private dwelling-house which has been given to the Hospital as an endowment and which was let would be a public building.

The next head under which an allowance is to be made is " rents and profits " of lands". I have little to say on this part of the Case because in my opinion it has been exhaustively dealt with by the Lord Chancellor, lately Lord Chief Justice. In my opinion it is clear that " rents and profits " must mean rents and profits of land not in the occupation of the party assessed, because the allowance to be made is against an assessment under Schedule A which deals only with property in lands, while Schedule B deals with the occupation of lands. The subject matters of the two schedules are quite distinct. I have already dealt with the question of occupation. I have referred to the fact that the Governors notwithstanding the contracts always retain control over the rooms, provide for the superintendence and services of their own officer, undertake to keep up fires and to supply light. All this is inconsistent with a tenancy which carries with it the right to exclusive possession. I agree with the Lord Chancellor that the present Case is completely covered by the *Essex Hall* Case(1) and I have little to add to what he has so well said.

(1) Rex *v.* Special Commissioners of Income Tax (*ex parte* Essex Hall), 5 T.C. 636.

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Stress was laid by Counsel for the Respondents that " rents and profits " have a wider signification than rents reserved on tenancies. That is true. They were intended to cover the whole subject matter of Schedule A, which includes more than " rents ". This schedule as shown by Rule II embraces tithes, ecclesiastical dues, royalties and fines, which are not rents, and, therefore, when the allowance was provided for against an assessment under Schedule A, it was necessary to give it in terms on something more than rents and hence the addition of profits. No doubt by the sixth Sub-rule of Rule II there is brought into the subject matter of Schedule A all other profits arising from lands, tenements or heritages not in the actual possession or occupation of the party to be charged. I confess I find it hard to point to any specific profits which would come within this sixth Sub-rule, but it seems to me that it was intended to cover profits of a like character to those mentioned in the first five Sub-rules, lest there should have been an omission, as shown by the words " and not " before enumerated ".

But the point is that, whatever the profits are, they are profits of lands not in the actual possession or occupation of the party to be charged. Now the Governors of the Rotunda Hospital are, as I have pointed out, in the actual occupation of the premises in question, and never part with the legal possession.

I have not at all omitted to consider the extraordinary results to which the conclusion I have arrived at leads. These have been noticed by Buckley, *L.J.*, and with him I say that we are concerned not with consequences but with construction.

Lastly, I would say with that learned Judge that in a Revenue Case it is very desirable that decisions should be in agreement in the different parts of the United Kingdom, and that it would require very strong reason to make me dissent from the judgment of an English court of co-ordinate jurisdiction in a Case like that before us.

Ronan, L.J.—In this Case I have arrived at the conclusion that the judgment of the Court below should be affirmed.

In addition to the reasons contained in the judgments of the majority of the Court there appears to me to be matters of great importance in support of this view which have not been discussed up to the present. I was very anxious that these matters should be submitted for criticism at the Bar but we were informed that the parties did not desire to have any further argument.

This present judgment deals mainly with these additional matters.

The facts of the Case and of the *Essex Hall* Case ([1911] 2 K.B. 434) have been fully stated in the judgments in the Court below and by the Master of the Rolls. Buckley, *L.J.*, held that in a Case like the present Case the conclusion was repugnant to common sense, even assuming that the Governors are carrying on the business of letting out seats and lighting on the premises. Let us assume for a moment that the seats and heat were supplied by a third party.

Would not the annual value be precisely the same and therefore the duty under Schedule A is in no way affected by the supply of seats and heat ? If a

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third party supplied them, his profits could be assessed under Schedule D. So here, if the Respondents make any profits out of the supply of heat and seats, they can be assessed for same under Schedule D. My observations assume a general knowledge of the Case. The points are so connected with each other that I have found it impossible to avoid much repetition.

This Case is an experiment by the Inland Revenue entirely based on the *Essex Hall* Case, a decision of the English Court of Appeal on the allowance claim in Rule VI of Schedule A of the Income Tax Act of 1842 dealing with the rents and profits of lands, etc., belonging to any Hospital, etc., or vested in trustees for charitable purposes.

The decision is not binding on this Court but it has often been laid down that it is eminently desirable that the decisions of the courts of England, Scotland and Ireland should be uniform in the case of Statutes extending to all three countries with a view to uniformity of practice in administering the Acts.

This consideration does not in my opinion govern the present Case, as the enactment in question has been repealed by the Income Tax Act of 1918 and only partly re-enacted in a different form and further because the Special Rules (Schedule A, Rule I and Rule II (6)) on which the Case was decided never applied to Ireland, and the distinction between those two Rules does not exist in Ireland.

In that case the Court of Appeal decided that Essex Hall was not entitled to the allowance in question on the construction of Rule VI as applied to the facts of that Case. But no one of the six judges before whom the Case came suggested that Essex Hall was not rightly assessed under Schedule A. The allowance in question is only in respect of the duties under Schedule A. If the assessment was under Schedule D, there would be no allowance even though the party would have been entitled to it if assessed under Schedule A.

The basis of the entire argument for the Crown was the decision in the *Essex Hall* Case, and it is on the authority of that Case that the judgment of the Master of the Rolls in the present Case is based. The question is whether the Respondents are entitled to the allowance under Schedule A. If they are, the Crown do not argue that they should be deprived of it.

In the present Case there was no assessment under Schedule A. The only assessment is under Schedule D. This course has been plainly suggested by the following passage in the judgment of Kennedy, *L.J.*, in the *Essex Hall* Case[1].— " And, further, as I am inclined to think, the profits made in the present case by " Essex Hall the occupying owners, from the use of parts of the premises are not " really in their nature ' rents or profits of lands, etc.,' within the meaning of " this allowance clause, but rather profits of a business, a business of letting " furnished or partly-furnished rooms, carried on by the occupier in the " premises." I do not understand him to differ from all the other judges in holding that the premises were not liable to be or not properly assessed under Schedule A. So far as the allowance is concerned, it is only in respect of the duties under Schedule A. The duties on the occupier under Schedule B have

[1] 5 T.C. at p. 657.

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nothing to say to it. They are to " be charged in addition to the duties under " Schedule A." (Schedule B., Rule 7). Here I wish to say that I cannot agree with the Master of the Rolls that the Rules are not to be treated as if they were independent sections of the Act. Section 60 expressly says that they are to be so treated. We have only to deal with the duties under Schedule A. The only duties under Schedule A are the duties charged on the annual value of the land, whether vacant or occupied by buildings, whether the buildings are furnished or not furnished, whether, to use a phrase we have heard a good deal of in this Case, but as far as I know has never been mentioned in any Case before, the land is " equipped " or not.

If chattels are let with the land, or services rendered, or coal or gas supplied by the owner, Schedule A has nothing to say to any of these matters. The duties under Schedule A are solely and exclusively charged on the annual value of the land itself.

As I think a great deal of the confusion in this Case has arisen from overlooking this simple fact about which there can be no doubt, I will find it necessary to refer to the statutes and rules at some length. I should be prepared to affirm the decision of the Court below on the grounds stated by the judgments of the majority of the Court. However, I wish to base my judgment specially (1) on the distinction between the law applicable to Ireland and that applicable to England, and (2) on the ground that in England the duty under Schedule A charged on the owner of lands let to tenants is properly assessable under Rule I of Schedule A and not under Rule II (6) of Schedule A. This Rule II (6) of Schedule A does not appear to be referred to in the judgments of the King's Bench Division here and I do not think it was ever mentioned in the argument before us.

In my opinion the judgment of Avory, *J.*, in the King's Bench Division and of the Court of Appeal affirming and adopting his judgment rest on this Rule. It is only in this Rule that " occupation " or " actual occupation " is mentioned. There is no reference to occupation in Rule VI of Schedule A, and as far as I can see the sole ground for excluding the allowance from cases where the owner is in occupation rests on this Rule II (6) of Schedule A. In my opinion the Lord Chief Justice and Hamilton *J.*, were right in holding that Essex Hall was properly assessable under Rule I of Schedule A and not under Rule II (6), and that therefore occupation was immaterial. It is obviously immaterial in Ireland, as is so emphatically stated by Palles, *C.B.*, in the passage cited by the Lord Chief Justice from his judgment in *Attorney-General* v. *Robinson* ([1901] 2 I.R. 67).

I may say shortly that the effect of the decision of the Court of Appeal is to substitute in Schedule A (I) the words " in the actual occupation of the owner " for the words " capable of occupation ". This obviously raises a question of very great importance in England, that whether Rule I of Schedule A is confined to lands in the owner's occupation and the annual value of all tenanted land is to be governed by Rule II, par. 6.

The words in the title of the Act of 1842 are " Duties on profits arising from " property ". Section 1 of the Act of 1853 provides for a duty " for and in " respect of the annual profits or gains . . . from any kind of property . . . *or* " from any profession, trade, or vocation, for every twenty shillings *of the annual*

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" value . . . thereof the sum of . . ." That is, the annual value of the profits or gains. And Section 2 of the same Act enacts that for the purpose of classifying the several properties . . . and gains and for the purposes of the provisions for assessing, raising levying and collecting such duties respectively, the said duties shall be deemed to be granted and made payable . . . in respect of the several properties, profits and gains respectively described or comprised in the several Schedules (A), (B), (C), (D) and (E), and to *be charged* under such respective schedules.

(A.) For and in respect of the property in all lands . . . in United Kingdom . .

(D.) For and in respect of the annual profits or gains arising . . . from any kind of property . . . wherever situate.

(D.) would clearly appear to include (A.) from this.—Section 100 however makes this clear.

" Schedule (D).

" The said last-mentioned duties " (*i.e.*, those in D.) shall " extend to every description of property or profits which shall " not be contained in either of the said Schedules (A), (B) or (C), " . . . and not specially exempted from the said respective " duties . . ."

And the second of the rules applying to Cases I and II of Schedule D says : " The computation of the duty to be charged in respect of any trade, manu- " facture, adventure, or concern, or any profession, . . . shall be made exclusive " of the profits or gains arising from lands, . . . or hereditaments occupied for " the purposes of such profession, trade, manufacture, adventure or concern." This rule will be found in substance in Rule V of the rules to Schedule D in the Act of 1918. What is comprised in A is therefore excluded from D. These premises are properly assessable and have been assessed under Schedule A for and subsequently to the period in question in this proceeding. There was no such assessment for this period.

To return to Schedule A.

Rule I. provides that " *the annual value* . . . shall be understood to be the " rent by the year at which the same are let at rack-rent," if fixed seven years before ; if not so let " then at the rack-rent at which the same are worth to be " let by the year." Then comes the important clause " which rule shall be " construed to extend to *all lands*, tenements, and hereditaments, or heritages, " *capable of actual occupation*, of whatever nature, and for whatever purpose " occupied or enjoyed, *except* the properties mentioned in No. II. and No. III. of this Schedule."

Can there by any doubt that this clause is mandatory ? It has not been obeyed in the present assessment.

A man owning a house may carry on business in the house as a grocer, an engineer or a solicitor. and be assessed under D.

But the house must be assessed under A. So much of his profits as come from the ownership of the house are measured by the annual value and are not to be included in the assessment under D.

What are the profits that arise from a house or land ? A man may occupy it himself, cultivate it, if a farmer, use it for his business, if a grocer, or he may

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hire it or parts of it out to others either as tenants or otherwise. In all these cases the profits are the subject of Schedule A.

Here the profits are made by—

(1) the hiring out of the rooms ;

(2) the heating and seats.

The assessment under Schedule D, mentioned in paragraph 1 of this Case averaged over £750 per annum. The valuation under Section 13 of the Act of 1853, the annual value under Schedule A, was £300. (Case par. (4).) This was reduced to £250. This would only include the " profits " under A and would not include the heating and seating. This would leave £500 for the profits not within A on the heating and seats, which is manifestly absurd, as the profit on this is obviously almost nominal. It is plain that the substantial assessment in the Case was on the actual profits from the rooms themselves and was substituted for the statutory annual value under Schedule A by Section 13 of the Act of 1853 which was admittedly applicable, the mode of valuation prescribed by Rule II (6) of Schedule A which does not apply to Ireland.

The fact is disguised by purporting to do this under Schedule D. Except in a Scotch Case in which a duty appears to have been assessed under Schedule D, because on one occasion a lady let her house furnished, in no case, as far as I know, has a man ever been assessed under Schedule D because he let more or less frequently or for longer or shorter terms his own property. No objection appears to have been made in the Scotch Case.

The profits from the actual user or hiring out of the premises themselves are the subject of Schedule A and that alone.

In my opinion the assessment is bad on this ground.

It is obvious that if the furniture in the Scotch Case, or the heating and seats in the present Case, were provided by a third party, the annual value of the premises under Schedule A would not be affected by this. If the Rotunda Governors do make any profits out of the heating and seats, they can be got at under Rule VI of Schedule D. They are entirely outside the scope of Schedule A.

I may here point out that, if all the lettings were in fact actual lettings for longer or shorter periods instead of licenses, the making of such lettings would be just as much within Schedule D as the granting of the licenses.

The experiment made in this case of making an assessment under D by first calculating the entire profits and then deducting the probable amount of an assessment under Schedule A cannot in my opinion be supported.

Rule 2 of Schedule D, 1st and 2nd Cases, is explicit and clear. It is not repealed by Section 9 of the Finance Act, 1898, as is shown by the enactment of the Rule in the Act of 1918. Section 9 of the Act of 1898 does not authorise any departure from Rule 2 to the detriment of the subject.

The process here adopted is really this. First, to include in the total profits the profits of the hereditaments themselves, the subject of Schedule A but *not measured* by the annual value as prescribed by Schedule A but measured

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on a scale which the figures I have given show makes them more than twice the amount of the annual value; then to subtract from the total profits not the amount originally included, but only the annual value under Schedule A. The result is that, contrary to the provisions of Schedule D itself and to the Rule of that Schedule, profits properly assessable under A are improperly brought into D.

The rents of lettings consist of two parts, (1) payment for use of hereditaments themselves, (2) payments for other matters, such as heat and seats. (1) alone is included in assessment under Schedule A, and the measure of the profits is the annual value as ascertained in England and Ireland respectively. Schedule A must be applied to this. (2) are captured by Rule VI of Schedule D.

With reference to the allowance, the impossible position arrived at appears thus :—

First, assume the party *not* entitled to the allowance of the tax under Schedule A. Then the assessment is on the entire profits deducting the assessment under Schedule A. Secondly, assume the party to be entitled to the allowance. Is he to be in the same position as if he were not entitled to it? This would be the result in the present Case if the Rotunda is so entitled. Can it be suggested that the assessment under Schedule A should be deducted twice over? This would be the only means for giving the party entitled to the allowance the benefit of it, as compared with the party not entitled to it.

Rules II and III, Schedule A, provide that "the annual value" of all the properties comprised therein shall be the full amount for one year or the average amount for one year of the profits received therefrom within the times therein limited. The matters stand thus: Title of Act, "Duties on Profits arising from Property," etc.

Section 1. For and in respect of the property in any lands *and* for and in respect of profits or gains arising or accruing to any person from any kind of property whatever wherever situated. Schedule A. Lands; duty to be charged on "annual value". Rule I, General Rule for ascertaining "annual "value". Rules II and III, Special Rules for ascertaining "annual value" from profits. "Profits to be annual value."

There is no tax under A except on "annual value". In the one case of a seven years old rent the rent is the measure of the annual value. In cases within II and III the profits are the measure of "the annual value". In every other case the *hypothetical* rent is the measure of the annual value. There is no tax on this *quâ* rent. There is no tax on the profits *quâ* profits. Rents and profits are in the cases in which they are mentioned simply the measure of the annual value. This is so as to rent only in the one case mentioned. In the case of profits, however, it is so in numerous important cases.

In Ireland the matter is governed by Section 13 of the Income Tax Act of 1853, re-enacted by Section 187 of the Act of 1918. "The duties chargeable "in Ireland under the respective Schedules (A.) and (B.) of this Act shall be "charged and assessed by a poundage rate upon the annual value of all tene- "ments and rateable hereditaments, according to the respective surveys and "valuations made or to be made and from time to time in force for the purpose "of the rates for the relief of the poor in Ireland." These surveys and valuations are made under the Irish Valuation Code by the Commissioners of

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Valuation established by the Valuation Act of 1852. It was this same Act of 1853 which first applied the Act of 1842 to Ireland.

The result is that there never have been any duties charged under Schedule A in Ireland except those charged on the annual value ascertained under this Section, which is thus substituted in Ireland for Rules I, II, and III of Schedule A as to the ascertainment of annual value. This as will be seen goes to the root of the application of the *Essex Hall* Case(1) to the present Case.

It is important to see how the annual value is ascertained under the Irish Valuation Code. This is ascertained as to lands by the prices of wheat and certain other produce mentioned in the Act of 1852, Section 11. "And such "valuation in regard to houses and buildings shall be made upon an estimate "of the net annual value thereof; that is to say, the rent for which one year "with another the same might in its actual state be reasonably expected to be "let from year to year the probable average annual cost of repairs, insurance "and other expenses (if any) necessary to maintain the hereditament in its "actual state and all rates and taxes and further charges if any (except tithe "rent-charge) being paid by the tenant": [Valuation (Ireland) Act, 1852, Section 11.] This is the one and only annual value in all cases of houses and buildings in Ireland, and on this all duties under Schedule A must be charged.

The result is that in Ireland the portion of Rule I of Schedule A dealing with the hypothetical rent is the sole and universal rule applicable to buildings.

Schedule A, No. VI of the Income Tax Act, 1842, consists of six paragraphs which I have numbered 1, 2, 3, 4, 5, 6. The entire Act is repealed by the Act of 1918. It is replaced by Schedule A, VI, of that Act. This Schedule re-enacts paragraphs 1, 2 and 3 of the former Schedule. Paragraph 1 of the former Schedule is replaced by Section 1 (*a*) and (*b*) of the new Schedule. Paragraph 2 by Section 1 (*c*), (*d*) and (*e*) of the new Schedule. Paragraph 3 of the old Schedule by Section (2) of the new Schedule. Paragraphs 4, 5 and 6, on which this case turns, are dealt with thus: paragraphs 5 and 6 disappear altogether but paragraph 4 appears quite apart from its former context and in an altered form in Section 37 (1) (*a*) of the Act. The language of the old Schedule is involved and elliptical.

The new Schedule splits it up into plain intelligible propositions as far as it goes.

Unfortunately it does not deal with our paragraphs 4, 5 and 6, but it seems to me to clear up the difficulty very much.

I omit the portions dealing with repairs, (1) (*b*) and (*d*) of the new Schedule and the corresponding part of the old Schedule. Taking the old Schedule, the title is "Allowances to be made in respect of the said duties in Schedule (A.)" Paragraph 1 says: "For the duties *charged on* . . .", etc.

The new Schedule, Section 1, says: "The following further allowances "shall be made under this Schedule."

(*a*) "The amount of the tax charged on". This is the translation of "For the duties charged on". It is repeated in Section 1 (*c*) and (*e*) of the new Schedule.

(1) R. *v.* Special Commissioners of Income Tax (*Ex parte* Essex Hall), 5 T.C. 636.

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In the old Schedule the phrase " For the duties charged on " is only mentioned in paragraph 1. It is carried into paragraphs 2 and 3, and what is of vital importance into paragraph 4, simply by prefacing to each the words " or on ". The old Schedule down to the end of paragraph 4 is in one sentence, and its grammatical construction is of great importance.

Paragraph 2 of the old Schedule says :—

(X) " *Or on* any hospital, etc. . . in respect of the public buildings, etc., belonging to such hospital . . . "

(Y) " *Or on* any building the property of any literary or scientific institution . . . "

(Z) Then paragraph 4 (our paragraph) says " *or on* the rents and " profits of land, etc., belonging to any hospital, etc., or vested " in trustees for charitable purposes, so far as the same are applied " to charitable purposes."

It is plain that " belonging to any hospital " in (Z) means the same thing as " belonging to such hospital " in (X) and " the property of any literary " or scientific institution " in (Y), but 1 (*c*) of the new Schedule is identical with (X) and 1 (*e*) with (Y). In 1 (*c*) " The amount of the tax charged on " any hospital . . . in respect of the public buildings, etc., belonging thereto " must mean " charged on the annual value of the building ", because there is no other tax under Schedule A. So in 1 (*e*) " The amount of the tax charged " on any building " must for the same reason mean the same thing. Applying this to the same words in the old Schedule, they must have the same meaning.

It seems clear that the part of paragraph 2 of the old schedule, which I have marked (Y), if expanded must read : " An allowance to be made for " the duties charged *on* any building the property of any literary or scientific institution." That the allowance is the entire of such duties. (" The amount " of the tax.") New Schedule (*a*) " For " means " of ". The only duties charged on the building under Schedule A are the duties charged on " the annual " value of the building ". Therefore, these words must be implied or there will be no duties and no allowance.

So in the continuation of the same sentence in paragraph 4 of the old Schedule, expanding it in the same way, it must read : An allowance to be made for the duties charged " on the rents and profits of lands, etc., belonging to " any hospital, public school, or almshouse, *or* vested in trustees for charitable " purposes, so far as the same are applied to charitable purposes."

Those again are the duties under Schedule A. There are none but those *charged* on the annual value of the lands. Unless we read, " charged on the " rents and profits of lands ", " charged on the annual value of the lands ", there would be no duties and no allowance dealt with by the clause.

Here those duties charged on the rents and profits of the lands must mean " annual value " of the lands.

It is not suggested that the clause does not apply to Ireland. But the only means of ascertaining the annual value in Ireland is the valuation under the Valuation Acts. There can be no duty charged under Schedule A otherwise than on that valuation.

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Therefore, unless we read the clause " charged on the annual value of " the land ", it would certainly not apply to Ireland, and if applied to Ireland, " Duties charged on rents and profits of the lands " must read " charged on " the annual value of the lands as ascertained under Section 13 of the Act of 1853 ", for these are the only duties under Schedule A in Ireland. In England it would be the duties on the annual value as ascertained under Rules I, II and III of Schedule A for the same reason.

I must now take paragraphs 5 and 6 of the old Schedule which have not been re-enacted. Paragraph 5 says: " the said last-mentioned allowances " to be granted on proof . . . of the due application of the said rents and " profits to charitable purposes only, and in so far as the same shall be so applied." That is the proof.

Paragraph 6 " by affidavit ". Stating what ? " the amount of *the duties* " *chargeable*, and the application *thereof* " ; that is all.

Let us assume that the duty is 1*s*. in the £ and that the amount of the duty is £5 or 100 shillings, that will show that the annual value is £100. Nothing more. But what is the meaning of " the application thereof " ? Strictly of course it means the amount of the duties, the £5, but the only thing else it can mean is the £100, *i.e.*, the subject of the duties. We must remember the Case of *London County Council* v. *Attorney-General*(1) ([1901] A.C. 26), to which Hamilton, *J.*, and the Lord Chief Justice attached so much importance in the *Essex Hall* Case(2) and Lord Davey's statement at p. 45(3) :—

" The word ' profits ' is the word selected by the Legislature for describing " generally the subjects of taxation under the Income Tax Acts. . . . The " Income Tax is intended to be a tax upon a person's income or annual profits, " and although (for conceivable and no doubt good reasons) it is imposed " in respect of the annual value of land, that arrangement is but the means " or machinery devised by the Legislature for getting at the profits."

The affidavit in paragraph 6 appears to me to be a clear application of this machinery to the ascertainment of the application of the rents and profits under paragraphs 5 and 6 of Schedule A, No. VI. The annual value is the subject of taxation and it represented the income, *i.e.*, the rents and profits.

In the *Essex Hall* Case(2) Hamilton, *J.*, says : " There is a wider ground, " . . . which is that in the Case of the London County Council, it was pointed " out that the charge under Schedule (A) is a charge upon the person . . . who " has to pay, and is a charge *in respect of a kind of property*, and is in turn " *not in respect* of the *property* itself, but of the annual advantage of having " such property, measured, as it is, under the different rules mentioned in " Section 61." This is entirely in accord with the judgment of the Lord Chief Baron in *Attorney-General* v. *Robinson*(4) to which the Lord Chief Justice will refer.

If " duties charged on the rents and profits of lands " in VI, Paragraph 4 be simply taken as a general description of the subject of the tax, *i.e.*, the annual

(1) 4 T.C., 265. (2) 5 T.C. at p. 645. (3) 4 T.C. at p. 300. (4) (1901) 2 I.R. 67.

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value, and this is adhered to, it will make paragraphs 4, 5 and 6 consistent, *it will apply the allowance to Ireland*, it will be a construction in favour of the subject.

It is plain that the other view could not be carried out except by an account of the rents and profits and of their application. It is plain from VI, 6 that no such account was contemplated. But even if 6 directed such an account in terms and the machinery of annual value was not to be used, what possible justification is there for striking out the word profits and substituting an account of rents only, and this in order to impose a tax on the subject, and in the words of Buckley, *L.J.*, in the *Essex Hall* Case, in order to arrive at " a " conclusion which is repugnant to common sense "—(the words of the Act are " the due application of the said rents and profits ")?

I may point out that paragraph 6 of Schedule A, No. VI, provides that the affidavit may be made by any steward, etc., of any such school, hospital or almshouse. This plainly shows that the condition as to the application applies to the school, hospital and almshouse. As the Master of the Rolls in the *Essex Hall* Case(1) at p. 439, and Buckley, *L.J.*, at p. 441, held that it did not, it is plain that their attention was not directed to this important paragraph. At the same page Buckley, *L.J.*, refers to the " proof " of the application of the rents and profits in terms quite inconsistent with the affidavit in paragraph 6 of Schedule A, No. VI. Taking paragraphs 4 and 5 together in a popular sense, the meaning would obviously be that an account should be taken of the rents and profits and of their application, and that so far as applied for charitable purposes they should be free from taxation. The ordinary meaning of such an account would plainly include lands in the owner's occupation. But the rents and profits of the lands are not the subject of the tax. It is the annual value which is the measure of the rents and profits.

Accordingly, paragraph 6 instead of directing an account of the rents and profits only provides for the ascertainment of the amount of tax which will give the annual value. Buckley, *L.J.*, says : " Annual value is but an hypo- " thetical sum arrived at in a certain manner. It is not cash or value capable " of being applied in the manner mentioned." Neither is the average under Rule II (6) of Schedule A. This confirms my view that the attention of the Court of Appeal was not called to paragraph 6 of Rule VI of Schedule A and to the only thing in the nature of an account provided for, and it is most emphatically not an account of rents and profits and still less an account of rents as distinguished from profits.

All duties under Schedule A are charged on annual value. But there is (in England) a distinction as to how annual value is to be *estimated*. The true distinction in my opinion is to be found in the words of Section 35 of the Finance Act of 1894, viz. : " Annual value estimated otherwise than " by " relation to profits " : that is one class. The other class is, of course, annual value estimated by relation to profits. It is plain that Rules II and III of Schedule A constitute this latter class. It is equally plain that every case not within those rules is within Rule I, which therefore governs all cases of the former class, *i.e.*, that mentioned in Section 35 of the Finance Act.

It is plain that Rule I, on the one hand, and Rules II and III on the other, are mutually exclusive.

(1) R. *v.* Special Commissioners of Income Tax (*Ex parte* Essex Hall) 5 T.C. at 654–5.

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Rule II says : " The annual value of all the properties hereinafter described " shall be understood to be the full amount for one year, or the average amount " for one year, of the profits received therefrom." It then mentions 1st, tithes ; 2nd, ecclesiastical dues ; 3rd, tithes, if compounded, and all *rents* and other money payments in lieu of tithes ; 4th, manors and other royalties, including all dues and other services (not being rents or other annual payments reserved) ; 5th, fines, and 6th (the one referred to as governing the present case), " all other profits arising from lands . . . not in the actual possession or " occupation of the party to be charged." Do these words include all rents reserved on ordinary lettings of lands to tenants ? If so, of course, all such lands are excluded from Rule I, and Rule I can only apply to cases where the owner of the land is in occupation and the lands are not let to tenants. If this were intended, is not the omission of the word from Rule II (6) " rents " inconceivable. But read Rule I (His Lordship reads). The very first clause makes this construction impossible. There is not from the beginning to the end of Rule I even a suggestion that it is only to apply where the owner is in occupation. I really cannot do more than read the clause. As far as I can find there is no case in which it was ever suggested that this was the construction of Rule I.

It is remarkable that in the 1913 Edition of Dowell, in the note of Rule II (6) at p. 129, 130, there is only *one case* referred to in which Rule II (6) appears to have been applied, and that case was after the *Essex Hall* Case.(1) In the previous edition there is no note at all to Rule II (6). But more remarkable still ; if Rule II (6) is the rule applicable to all lands not in the owner's occupation, *i.e.*, all tenanted lands, the vast majority of hereditaments in England, it seems to me that this must have been known to Sir Francis Gore, the solicitor to the Inland Revenue, the author of the title Income Tax in 16 Halsbury. Yet at p. 624 we find this note on Rule II (6). " It is not clear to what lands or " tenements these words apply." If we turn back to 623 and read Article 1260 and then turn to p. 619 and read 1253 it seems plain that in the year of publication, 1911, and after the *Essex Hall* Case, it never occurred to him that this Rule II (6) applied to all the tenanted land in England, and that Rule I was confined to premises in the owner's occupation. The articles taken together entirely confirm the view I have taken and are in entire accord with the judgments of the Lord Chief Justice and Hamilton, *J.*

But, however this may be in England, there is no doubt as to Ireland. Rules I, II, and III, of Schedule A never applied to Ireland. Section 13 of the Act of 1853 is explicit. There never was any provision of the character of Rule II (6) applicable to Ireland. Annual value in Ireland was never estimated by profits. It was simply the Valuation Act under which the valuation was made, in every case wholly independent of occupation as to land on the prices of produce, as to buildings on the hypothetical rent, as I have explained. It is plain that, if the principles of the judgment of Avory, *J.*, adopted in specific detail by Kennedy, *L.J.*, and in substance by the Master of the Rolls, govern this case, Ireland is wholly excluded from the allowance. Such a construction should not be adopted if another construction is possible ; (*a*) because in the Income Tax Act an allowance or exemption clause should be construed in favour of the subject and a narrow construction should not be adopted : *The Commissioners for Special Purposes* v. *University College of North*

(1) 5 T.C. at p. 636.

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Wales, 5 Tax Cases, at p. 416, and *Essex Hall* ditto, at p. 646; (*b*) because "words occurring in a statute imposing taxation through the United "Kingdom should be construed so as to make the incidence for taxation alike "in every part of it," 27 Halsbury, p. 181, Article 347 and cases in note (Y).

But in my opinion, even assuming *Essex Hall* Case rightly decided in the Court of Appeal, it has really no application to the present Case. The facts are much more fully stated in 5 Tax Cases than in (1911) 2 K.B. It appears from a table at p. 640 of 5 Tax Cases that the rents received from the *two societies* amounted in each of the years 1906, 1907 and 1908 to £93 10*s*., that the amount received from the casual lettings for meetings, etc., amounted to £290 in 1906, £345 17*s*. 6*d*. in 1907, and £291 in 1908. The head-note says there was no agreement between Essex Hall and the two societies. Now the only analogy to the present Case is that of the casual lettings. The majority of the King's Bench held that the Essex Hall was entitled to the exemption or allowance. At p. 442 of (1911) 2 K.B.,(1) Buckley, *L.J.*, says: "*A subsidiary question* was "mentioned, namely, whether Essex Hall are entitled in respect of the sums "received for casual lettings, to the same allowance as has been conceded in "respect of the rent received from the Inquirer Publishing Company. But *this* "*is not the subject of the Appeal before us* and I say no more about it." This was stated in the presence of the Master of the Rolls; Kennedy, *L.J.*, delivered his judgment immediately after, and neither suggests the least doubt as to the accuracy of this statement. I cannot see how anyone can treat the Case as a decision on the casual lettings. It cannot be treated as a comparatively trifling matter as the amount received in respect of these lettings was three times as great as that received from the two societies. This subsidiary question is the only question in the present Case. How can the decision in the *Essex Hall* Case be any authority on it? The judgment of Avory, *J.*, is equally clear. "And it is said that *those rents which they receive from the other Societies* are rents "and profits . . . within the meaning of the Act," 5 Tax Cases 644; and I think it plain from the judgment of Cozens-Hardy, *M.R.*, that he was only dealing with the case of the two societies.

I shall now read the short judgment of Avory, *J.*, and the first paragraph of the judgment of Hamilton, *J.*, from 5 Tax Cases (reads). They raise the net question. They agree that Schedule A applies. The difference is between Rule I and Rule II (6). As I have said, the Master of the Rolls adopts this judgment of Avory, *J.*; Kennedy, *L.J.*, almost repeats it in terms. I think Buckley, *L.J.*, must also be taken to adopt it as there is no expression of any difference of opinion among the members of the Court of Appeal. It is remarkable, however, that while Kennedy, *L.J.*, quotes paragraph 4 of Rule VI according to its grammatical construction (as does Campbell, *C.J.*, in the present Case), the Master of the Rolls reads it as if it were "an allowance on the rents "and profits" and not "of the duties charged on the rents and profits," as it should be read. I am not sure that this did not affect the judgment of the Master of the Rolls.

For the reasons I have already stated so fully, I respectfully adopt the judgments of the Lord Chief Justice and Hamilton, *J.*, in preference to those of Avory, *J.*, and the judges of the Court of Appeal. I naturally attach great

(1) 5 T.C. at p. 656.

(Ronan, L.J.)

weight to the opinion of the Lord Chief Baron, which accords with the judgments of the Lord Chief Justice and Hamilton, *J.* I am of opinion that if the Rotunda is entitled to the benefit of the exemption the assessment is bad in substance because it deprives it of this benefit. I am also of opinion that it is bad because the profits derived from the hereditament itself are solely the subject of Schedule A and cannot be taken into account under Schedule D, whether profits of the owner from the use of the hereditaments himself or received for giving other persons the use of them. As to the separate profits, if any, derived from the heating or the letting of seats, those are immaterial so far as the allowance under Schedule A is concerned, as they are not the subject of the tax under Schedule A.

The Master of the Rolls and Buckley, *L.J.*, emphatically point out that the decision in that Case is *on form*, not substance. It is plain from the judgments of Avory, *J.*, and Kennedy, *L.J.*, the former expressly adopted by the Master of the Rolls, that the decision was that the exemption only applied to cases within Rule II (6) of Schedule A, as distinguished from Rule I of that Schedule. As there is not and never was in Ireland any provision except Section 13 of the Act of 1853, and there is not and never was any provision resembling Rule II (6) of Schedule A, the result would seem to be that the exemption never applied to Ireland at all. I cannot accept this view. I therefore hold that it must apply to all cases within Section 13, as there is no such distinction in Ireland as that alleged between Rules I and II (6) of Schedule A in England.

I am further of opinion that in England the annual value of lands held under ordinary tenancies is regulated by Rule I of Schedule A and not by Rule II (6), and that Rule I is not confined to lands in the occupation of the owner.

Molony, C.J.—The history and special circumstances of the Rotunda Hospital are so fully stated in the judgments of the court below that I do not think it necessary to refer to them again.

The net question to be determined in this Case is whether the profits derived from letting the Rotunda rooms are assessable to Income Tax under Schedule D. It is contended on the part of the Governors that they are only liable to be assessed under Schedule A, and that as against this assessment they are entitled to the allowance given by Section 61, No. VI. (B), of the Income Tax Act, 1842.

It is necessary, in the first instance, to arrive at an accurate knowledge of what is, in Ireland, assessable under Schedules A and B. The amount payable under Schedule A is assessed " for and in respect of the property in all lands, " tenements, hereditaments, and heritages in the United Kingdom, and to be " charged for every 20*s.* of the annual value thereof," and under Schedule B " for and in respect of the occupation of all such lands, tenements, heredita- " ments, and heritages as aforesaid, and to be charged for every 20*s.* of the " annual value thereof."

By Section 60 of the Act the duties granted in Schedule A are to be assessed under certain rules, of which No. I and II (6) are material to be considered in the present case.

Under Rule I " the annual value of lands, tenements, hereditaments, or " heritages charged under Schedule (A) shall be understood to be the rent by the

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" year at which the same are let at rack-rent, if the amount of such rent shall " have been fixed by agreement commencing within the period of seven years " preceding the 5th day of April next before the time of making the assessment, " but if the same are not so let at rack-rent, then at the rack-rent at which the " same are worth to be let by the year ; which rule shall be construed to extend " to all lands, tenements, and hereditaments, or heritages capable of actual " occupation, of whatever nature, and for whatever purpose occupied or enjoyed, " and of whatever value, except the properties mentioned in No. II and No. III " of this Schedule."

Under Rule II " the annual value of all the properties hereinafter described " shall be understood to be the full amount for one year, or the average amount " for one year, of the profits received therefrom within the respective times " therein limited," and by the 6th sub-rule, the duties on " all other profits " arising from lands, tenements, hereditaments, or heritages not in the actual " possession or occupation of the party to be charged, and not before enumerated, " on a fair and just average of such number of years as the said Commissioners " shall, on the statement of the party to be charged, judge proper (except such " profits as may be liable to deduction in pursuance of the ninth or tenth rule " in No. IV, hereinafter mentioned,) to be charged on the receivers of such " profits, or the persons entitled thereto."

These rules must, I think, be taken in connection with the special provisions applicable to Ireland, to which I shall now refer, and so far as inconsistent with them ought to be disregarded.

When Income Tax was extended to Ireland under the provisions of the Income Tax Act, 1853, advantage was taken of the valuation which had been made in Ireland for the purpose of the rates for the relief of the poor, and accordingly by Section 13 it is provided that " the duties chargeable in Ireland " under the respective Schedules (A) and (B) of that Act shall be charged and " assessed at a poundage rate upon the annual value of all tenements and rate- " able hereditaments, according to the respective surveys and valuations made " or to be made and from time to time in force for the purposes of the rates for " the relief of the poor in Ireland ; and the assessment of the said duties in " Ireland chargeable under the said Schedule (A) shall be made upon the land- " lord or immediate lessor of such tenements or rateable hereditaments, or if it " shall appear to the commissioners for special purposes to be necessary or " proper, the said assessment shall be made upon such person as the rate for " the relief of the poor shall be made upon in respect of any such property under " the provisions of the Acts in that behalf ; and the assessment of the said " duties chargeable under the said Schedule (B) shall be made upon the occupier " of such property : . . . . "

It is necessary to look for a moment at the way in which we in Ireland at that time and still are assessed for the purpose of the poor-rate, and this will be found in Section 11 of the Valuation (Ireland) Act, 1852, under which the valuation as regards lands " shall be made upon an estimate of the net annual " value thereof, with reference to the average prices of the several articles of " agricultural produce hereinafter specified, all peculiar local circumstances in " each case being taken into consideration, and all rates, taxes and public " charges, if any (except tithe rent-charge), being paid by the tenant," and as

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" regards houses and buildings " shall be made upon an estimate of the net annual " value thereof; that is to say, the rent for which, one year with another, the " same might in its actual state be reasonably expected to let from year to year, " the probable average annual cost of repairs, insurance and other expenses (if " any) necessary to maintain the hereditament in its actual state, or rates, " taxes or public charges (if any) (except tithe rent-charge) being paid by the " tenant."

The effect of this method of valuation upon the assessment of Income Tax was considered by Palles, *C.B.*, in the Case of the *Attorney-General* v. *Robinson* ([1901], 2 I.R., p. 67). He says (at p. 81): " Income Tax under Schedule A " is assessed in respect of the '*property in land*': that is, of land viewed as a " thing capable of producing rent, in the economic sense of the word. Income " Tax under Schedule B is assessed in respect of the 'occupation of land.' I " need not say that the two taxes under these two schedules are distinct in their " nature, that the latter tax is in respect of the produce resulting from the " application of skill and labour to land which produce, after deducting rent and " the value of the labour, is estimated to leave a surplus, which will be the " profits incident to the occupation of the land, or, less accurately, the profits " of the business of farming. These profits the Legislature has thought proper " to tax, not according to their actual amount, as they would have been taxed " had the Legislature deemed the cultivation of land a profession, trade, em- " ployment or vocation within Schedule D, but upon an estimate which in the " Act of 1842 is fixed at five-fourteenths of the rent taxable under Schedule A, " the fact that the person to be assessed is, or is not, in occupation of the lands " is absolutely irrelevant: the fact cannot affect either the amount or the " incidence of the tax under Schedule A, nor even the *total* amount of Income " Tax payable under both Schedules A and B. It is material only so far as it " ascertains the person who is to pay the tax under Schedule B. If a fee simple " proprietor were in occupation of land in England (to which Section 13 of the " 16 and 17 Vict., c. 34, is not applicable) he would be liable to be assessed under " both Schedules A and B. Under Schedule A he would be assessed at the rack- " rent at which the same were worth to be 'let by the year,' in other words, in " identically the same way as if he were hypothetically tenant to himself. He " would also be liable under Schedule B in exactly the same way as if he were " such hypothetical tenant."

It follows, therefore, that the Rotunda rooms are assessable for Income Tax under Schedule A of the Income Tax Act, and that the assessment covers all the revenues derived from lettings of the premises.

Admitting this to be so, the Governors claim to be entitled to the benefit of the allowances given by Section 61, No. VI, of the Income Tax Act, 1842, for the duties charged on a hospital, etc.:—

(*a*) " in respect of the public buildings, offices, and premises belonging to " such hospital, etc., and not occupied by any individual officer or the " master thereof." Or alternatively,

(*b*) " on the rents and profits of lands, tenements, hereditaments, or herit- " ages belonging to any hospital, etc., or vested in trustees for " charitable purposes, so far as the same are applied to charitable " purposes."

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As regards (*a*), it does not seem to me to be necessary to decide in the present Case whether these allowances can be properly claimed, but I am not to be taken as dissenting from the views which Madden, *J.*, and Kenny, *J.*, have expressed on the point.

As regards (*b*), the Crown contend that no exemption exists under the Section in respect of rents and profits of tenements in the occupation of the owner, and rely upon the case of *Rex* v. *Special Commissioners of Income Tax* (ex parte *Essex Hall* ([1911], 2 K.B. 434).(1)

The *Essex Hall* Case has been subjected to a good deal of criticism, and its applicability to Ireland has been doubted, but in the view I take of the present Case it is unnecessary to discuss it here.

Admitting, as both sides do, that the premises are taxable under Schedule A, and admitting, for the purposes of argument, as the Crown contend, that the Governors are not entitled to the allowances granted by Section 61, No. VI, the Crown say that the Governors are carrying on in the rooms a business the profits of which are assessable to Income Tax under Schedule D.

By Section 100 of the Income Tax Act, 1842, the duties under Schedule D extend " to every description of property or profits which shall not be contained " in either of the Schedules (A), (B), or (C), and to every description of employ- " ment of profit not contained in Schedule (E), and not specially exempted from " the said respective duties."

It is prescribed in the 2nd Rule of the 1st Case for ascertaining the duties under the said Section, that the duty shall extend to " every art, mystery, " adventure, or concern . . . except always such adventures or concerns on or " about lands, tenements, hereditaments, or heritages as are mentioned in " Schedule (A) and directed to be therein charged."

It is further prescribed in the 6th Case under Schedule D that the duty shall extend to " any annual profits or gains not falling under any of the foregoing " Rules, and not charged by virtue of any of the other Schedules " contained in the Act. This clause has been called, not inappropriately, the drag-net clause.

The Crown contend that the Governors are carrying on an adventure or concern the profits of which are assessable to Income Tax under the Schedule. It appears that the Appellants let the Rotunda rooms for entertainments, concerts, cinema shows, etc., for periods varying from one night to six months, the letting prices including the use of seating and heating, and that further charges are made for gas and electric light in accordance with the consumption as shown by the respective meters. While admitting that the assessment under Schedule A is made on the basis of the rent for which the rooms might reasonably be expected to let from year to year, it is nevertheless contended that the fact of fires being lighted and the use of chairs given, makes the profits derived from letting the rooms assessable also under Schedule D.

In considering the question it is necessary to bear in mind that the Income Tax is all one tax, and that there is no difference in kind between the duties of Income Tax assessed under Schedule D and those assessed under Schedule A, or any of the other schedules of charge. The tax under all the schedules is

(1) 5 T.C. 636.

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simply a tax on *profits or gains*, and if the profits or gains are included in Schedule A, they cannot be again included under Schedule D. This was very clearly stated by Lord Macnaghten in the *London County Council* v. *The Attorney-General* ([1901] A.C. 26, at p. 35).(1), " Income Tax, if I may be pardoned for " saying so, is a tax on income. It is not meant to be a tax on anything else. " It is one tax, not a collection of taxes essentially different. There is no " difference in kind between the duties of Income Tax assessed under Schedule D " and those assessed under Schedule A, or any of the other schedules of " charge. One man has fixed property, another lives by his wits ; each contri- " butes to the tax if his income is above the prescribed limit. The standard of " assessment varies according to the nature of the source from which taxable " income is derived. That is all. Schedule A contains the duties chargeable " for and in respect of the property in all lands, tenements, and hereditaments " capable of actual occupation. There the standard is annual value. It is " difficult to see what other standard could have been adopted as a general rule. " But there again, if the subject of charge be lands let at rack-rent, the annual " value is ' understood to be the rent by the year at which the same are let.' " In every case the tax is a tax on income whatever may be the standard by " which the income is measured. It is a tax on ' profits or gains ' in the case of " duties chargeable under Schedule A, and everything coming under that " schedule, the annual value of land capable of actual occupation as well as the " earnings of railway companies and other concerns connected with land just " as much as it is in the case of the other schedules of charge. And it is to be " observed that the expression ' profits or gains ' which occurs so often in the " Income Tax Acts is constantly applied without distinction to the subjects of " charge under all the schedules. I need not trouble your Lordships by giving " instances of this use of the expression, because I shall presently have again to " call your Lordships' attention to a section in the Act of 1842 in which it so " happens that the expression ' profits or gains arising from lands, tenements, " 'hereditaments, or heritages ' is used to denote the annual value of lands " capable of actual occupation brought into charge under Schedule A. I will " only refer in passing to one rather striking example. The ' general declaration ' " required by the Act of 1842, Section 190, Schedule G, XV, is described as " ' general declaration by each person returning a statement of profits under " ' Schedules A, B, D or E.' "

In so far as there are profits or gains arising from the premises they are, in my opinion, assessable under Schedule A alone. It is quite true that, if there is a business carried on in premises assessed under Schedule A, the profits of the business can be assessed under Schedule D, and it is accordingly sought to be established in the present Case that the letting of the rooms, which have been described as " equipped rooms ", is such a business. The only equipment referred to is the fact that the sum charged for the use of the rooms includes heating, and also the use of the seats, and the limited services of a caretaker. It seems to me that the profits derived from letting the Rotunda rooms are not assessable under Schedule D, and that consequently the Commissioners are wrong in their determination.

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(1) 4 T.C. at p. 293.

(Molony, C.J.)

I find myself in complete agreement with all the reasons given by Gibson, *J.*, for allowing the appeal against the Schedule D assessment, and which he has summarised at the conclusion of his judgment. I wish, however, to point out that if it could be shown that a profit was in fact made on the heating and seating considered by themselves, an assessment might be justified under Schedule D, 6th case, limited to the amount of the profits or gains solely derived from the amount paid or estimated to be paid for such heating and seating, but this would necessarily be a very small sum, and is not the subject matter of the appeal.

In my opinion the judgment of the King's Bench Division was right and the appeal ought to be dismissed with costs.

Notice of Appeal having been given by the Crown, the Case was heard in the House of Lords before the Lord Chancellor, Viscounts Finlay and Cave and Lords Atkinson and Shaw of Dunfermline on the 19th, 20th, 22nd and 23rd April. On the 13th May, 1920, judgment was given unanimously in favour of the Crown, reversing the decisions of the Courts below.

The Attorney-General (Sir Gordon Hewart, K.C., M.P.), Mr. S. L. Brown, K.C., Mr. G. W. Shannon, and Mr. R. P. Hills appeared as Counsel for the Crown, and Mr. W. M. Jellett, K.C., Mr. Gerald Fitzgibbon, K.C., and Mr. A. W. Mathieson as Counsel for the Respondents.

JUDGMENT.

The Lord Chancellor.—My Lords, this is an appeal from an Order of the Court of Appeal in Ireland dated 28th February, 1919. The Commissioners for the Special Purposes of the Income Tax Acts had, on an appeal by the present Respondents, held that they were liable to be assessed to Income Tax under Schedule D in respect of their profits from letting the Rotunda Rooms, Dublin. The Respondents appealed by way of Case Stated to the King's Bench Division (Revenue Side) and that Court, by order dated 28th February, 1918, reversed the decision of the Commissioners and this reversal was affirmed on appeal to the Court of Appeal. The assessments in dispute are four in number and relate to the four years ending 5th April, 1915. The facts proved or admitted at the hearing before the Special Commissioners are set out in the Case Stated and the documents annexed to it. (Appx. page 3.)(1)

The Respondents are a Corporation, incorporated in the year 1756, for the purpose of conducting a hospital for poor lying-in women. The Letters Patent, Appx. pp. 9. *seq.*(1) appear to be in the nature of an exemplification. They are dated 1766, when George II had been dead 6 years. From internal evidence the incorporation appears to have been by Letters Close dated 26th July, 1756. The date, 2nd December, 1756, given by the parties and most of the Judges, is

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(1) Omitted from the present print.

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without any warrant. The Hospital is at present a Maternity and Gynaecological Hospital, and as such is clearly a Charity. The Hospital is managed in accordance with the Charter and Bye-laws made under the authority of the Charter and an Irish Act, 25 George III, c. 43, and also certain resolutions passed from time to time by the Governors and collected together. The premises occupied by the Respondents at Dublin consist of the Hospital, the Rotunda Rooms and the Rotunda Gardens. The vaults under the building are separately let. The Hospital and the Rooms are connected by an internal passage way, but it does not appear that the Rooms are used for any hospital purposes, save that of earning profits which are applied towards the maintenance of the Hospital. The Rotunda Rooms are in a building, and consist of a number of rooms, suitable for public entertainments of various kinds. There is a large proscenium, and all the rooms are equipped with platforms, seats and proper fixtures and fittings to enable them to be lighted and heated. They appear to have been erected towards the end of the 18th century, in pursuance of Bye-law XX, with the avowed object of obtaining funds for the support of the charity. (Appx. p. 28.)(1)

By Resolution X (page 35) the general management and superintendence is entrusted to the Registrar, who is responsible for the revenue derived from letting the Rooms, for which he accounts in the manner prescribed by Resolution XVII (page 38). The Rooms are in the immediate care of the Keeper of the Rooms who by Resolution XIX (p. 40) is responsible for the cleaning, etc., of the Rooms and for the due and orderly behaviour of the persons resorting to them. He is entitled for his own and the attendants' services to charge in accordance with a fixed scale, and from the terms of the Resolution it would appear that he has charge of certain furniture which may or may not be required for the use of the Rooms and presumably is placed there when required and removed when no longer required. The Registrar makes the arrangements for letting, the charges for which are made in accordance with a scale, which may, however, be relaxed on certain consents being obtained (Appx. p. 46, see Resolution 10(1)). There is a printed form of agreement, which, however, was not put in evidence. Gas and electricity must be paid for, but not heating. It is clear from these facts that the lettings, which may be for the day, week, or month, are not such as to constitute the relation of landlord and tenant, but that the possession and occupation of the Rooms remains in the Respondents, who afford the hirers not merely a right or licence to use the Rooms, but also fixtures and fittings, some of which are clearly not part of the building but are separate chattels, and the Respondents provide certain services, such as heat, light and attendance. The moneys so received yield profits which form no inconsiderable part of the revenue of the Respondents, and the question which your Lordships have to decide is whether these profits are covered by the valuation and assessment of the premises for the purpose of Schedule A of the Income Tax Acts, or whether such profits are something not so covered and may properly be assessed under one or other of the Cases of Schedule D.

The law relating to Income Tax is not quite the same in Ireland as in Great Britain. The former country was excluded from the Income Tax Act, 1842, and was first included by Section 5 of the Income Tax Act, 1853, and Section 13 of this Act provided that in Ireland assessments for the purposes of Schedule A should be made upon the Poor Law Valuation of the premises in question in any case (Appx. p. 332(1)). The Irish Valuation Act, 1852, Section 11, requires

(1) Omitted from the present print.

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such valuation to be made on an estimate of the net annual value, that is to say, " the rent, for which, one year with another, the same might in its actual state " be reasonably expected to let from year to year, the probable average annual " cost of repairs, insurance, and other expenses (if any) necessary to maintain " the hereditament in its actual state, and all rates, taxes, and public charges, if " any (except tithe rent-charge), being paid by the tenant." By Section 2 of the Irish Valuation Act, 1854 (p. 333(1)), the Committee of Valuation are to " distinguish all hereditaments and tenements, or portions of the same, . . . " used for charitable purposes . . . and all such hereditaments or tenements, or " portions of the same, so distinguished, shall, so long as they continue to be " . . . . used for the purposes aforesaid, be deemed exempt from all assess- " ment." Until 1915 the Rotunda Rooms had been scheduled as exempt in the Valuation List and accordingly were not assessed for rating or Schedule A purposes. The assessments now under review are in respect of the four tax years ending 5th April, 1915, during which no assessment under Schedule A was in fact made, but the respondents have not been prejudiced thereby, as the Special Commissioners in adjusting the respective amounts of assessments have allowed the amounts of assessable value under Schedule A.

The contention on behalf of the Appellant can be stated very concisely. In effect, it is said : the Respondents carry on a trade or a concern in the nature of a trade, and that is found as a fact in the Case Stated or at least is the only conclusion that can be deduced, either as a matter of law or as an inference of fact, from the Case. He points out that the sole object of the Rooms, as shown by Bye-law XX and the Annual Reports, is to afford revenues : that the course adopted to procure such revenues is not a course adopted on special occasions but a regular habitual course of business. The Respondents, it is said, retain control of the premises, select the persons to whom the user is granted and regulate the conduct and behaviour of the persons allowed to resort thereto, and, for the purpose of enabling or facilitating the making of contract for such user, they have properly fitted up the Rooms with fixtures, fittings and other things—some at least being clearly chattels—and provide attendance and other services. Such utilisation of property, it is claimed, goes far beyond the scope of Schedule A. Even if not a trade or concern in the nature of trade within Case I of Schedule D, then it is argued that the profit obtained is not taxed by any other Schedule and comes within the drag-net provided by Case VI of Schedule D. The argument is reinforced by this illustration. Assuming that the Respondents had let the Rooms to a tenant who paid the Schedule A valuation and utilised the premises in exactly the same way as the Respondents, then in such case it could not be contended that his profit was within the ambit of Schedule A, nor would it be contended that such a tenant would not be carrying on a trade or concern in the nature of trade, much in the same way as persons earn a living by letting furnished apartments.

The contentions of the Respondents were necessarily much more elaborate and detailed, and from them I deduce the following series of propositions, which, I think, accurately sum up the objections in point of law to the assessments now under review. 1. That the Respondents are a single statutory corporation constituting an indivisible charitable trust, and that, before considering the question of liability to Income Tax, it must first be ascertained whether the Respondents make a profit on the results of their activities, taken as a whole. Therefore, as the Respondents' accounts show a deficit, no assessment can be

(1) Omitted from the present print.

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justified under any Schedule. 2. That all moneys received by the Respondents in respect of the use of the Rotunda Rooms are assessable under Schedule A alone. 3. That these Rooms and the money so received are exempt from taxation under Schedule A for one or two reasons; either because they are public buildings belonging to a hospital, or, if the word "public" does not apply, they are premises belonging to a hospital; or else because the moneys are rents and profits of lands, tenements, or hereditaments belonging to a hospital and applied to charitable purposes. In other words, that these premises and moneys are within No. VI of Schedule A (Income Tax Act, 1842, Section 61). 4. That if there were any profit derived from the use of the seating and heating considered *per se*, the amount of such profit has not been ascertained and there are no materials upon which an assessment can be made. 5. That there has been no finding of fact by the Special Commissioners that there is a liability under Schedule D. They have merely stated that in their opinion, if a certain state of facts existed, it would follow that such liability would arise. 6. That in any event what is done by the Respondents does not constitute a trade, manufacture, adventure or concern in the nature of trade. 7. That, as Case VI of Schedule D, in terms, excludes from its operation any moneys charged by virtue of any of the other Schedules, and as the receipts under consideration can only be charged under Schedule A, by which they are exempted from taxation, no assessment can be made under the Sixth Case of Schedule D.

My Lords, I do not accept any of these propositions. If the first proposition were an accurate statement of the principle of law applicable, then, in my opinion, at this stage of the history of the Income Tax Acts, it would have been so well established that no argument would be necessary to establish it, and no objection could or would be made to the contrary. In my judgment the proposition is contrary to the whole scheme of the Acts and to the Cases which have been decided under the Acts. Income, for the purposes of taxation, is not ordinarily aggregated. It is grouped according to the source from which it is derived. Without saying that aggregation of income for Income Tax is never permitted (for that would in some cases be contrary to the Acts themselves), I am clearly of opinion that a composite assessment of the kind which would be necessary in this case would not only be entirely novel, but difficult, if not impossible, to reconcile with the rules applicable to the different Schedules. In the case of a charity, some income may be exempted from taxation by virtue of Section 61 of the 1842 Act, other income by virtue of Section 105. In order to secure those exemptions, the income in question must be separated and regarded as severable items assessed to Income Tax upon a basis which varies according to the Schedule or to the Case of the Schedule applicable. This consideration applies not merely to charities, but to many other cases of allowance, exemption and abatement occurring in these Acts, and there is frequently a clear difference of treatment according to the source of the income, so that in many cases a loss is not set off against a profit. For example, in the *Religious Tract and Book Society of Scotland* v. *Forbes*,[1] it was held that the Appellant Society, which carried on a religious colportage and booksellers' business, could not set off the profits of the latter against the losses of the former, as the colportage was not a trade or business. Again, the Young Men's Christian Association, which is a philanthropic institution running classes, gymnasia, etc., and also conducting on ordinary business lines a restaurant open to the general

[1] 3 T.C. 415.

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public, was held not to be entitled to deduct the losses on the classes, etc., from the profits of the restaurant, *Grove* v. *The Young Men's Christian Association.*(1) *The Carlisle and Silloth Golf Club* v. *Smith*(2) (1913), 3 K.B. 75, also shows that an activity which is outside the ordinary functions of a club will, if resulting in profit, be taxable, whatever may be the result shown by the accounts taken as a whole ; and retention of tax such as that in question in *Sugden* v. *Leeds Corporation*(3) (1914), A.C. 483, cannot be properly allowed unless the source of income be very carefully examined and dealt with as a separate item. The proposition when examined really amounts to no more than this :—that the whole income, including the profits now under consideration, is being devoted to charitable purposes, but that fact cannot alter the effect of the Rules under the Schedule applicable to the particular income. If Schedule A applies, then Section 61 confers the allowances there mentioned, but, if Schedule D applies, then such exemption as exists is conferred by Section 105 of the Act of 1842.

The second proposition assumes that the profits are in respect of the *property* in the Rotunda Rooms, but this provision of Schedule A clearly shows that the object is to tax what, for the sake of brevity, may, with substantial accuracy, be called the landlord's income. Over and above that income, there is almost without exception a user of the premises whereby a further or tenant's profit is sought to be made. It is for that purpose the Schedule B is directed to tax the benefit of occupation where the land or tenement is not occupied as dwelling or warehouse, or for the purpose of carrying on a trade or business, the profits of trade or business being assessed under Schedule D. The Case finds the facts in such a way as to leave no doubt that there is a profit above what may be described as the Schedule A or landlord's profit, and it is I think clear that No. III of Schedule A cannot in any way be said to apply to this Case. Thirdly, I do not think that much assistance can be derived from an examination of the allowances under Schedule A. They cannot in any way affect the present assessments which are under Schedule D. For the same reason I do not propose to discuss the *Essex Hall* Case(4) (1911), 2 K.B. 434, which was dwelt upon so much in the course of the argument. The assessment in question was an assessment under Schedule A, and that Case, therefore, has no bearing on the present issue. The dictum of Lord Justice Kennedy, p. 444, is in point but it was *obiter*. If Schedule A alone applies, then that Case would be relevant to any question arising on an assessment under that Schedule. The issue before your Lordships is whether these assessments, made under Schedule D, are valid assessments. Fourthly and fifthly, the seating and heating are not the only matters to be considered, and to treat the user of the premises in this way is not the proper method to adopt. The question is whether the utilisation of these Rooms and the provision of facilities and services in the way set out in the Case, yielding, as it does, a regular annual income to the Respondents above the letting value as a property and over and above the profit assessable to Schedule A, amounts either to the carrying on of a trade or business under Case I of Schedule D or to a profitable activity which is assessable under Case VI of that Schedule. The provision of seating and heating is part of the whole of the circumstances upon which the determination of the real question depends. It is true that the Special Commissioners have not expressly stated whether they

(1) 4 T.C. 613. (2) 6 T.C. 48 & 198. (3) 6 T.C. 211. (4) Rex *v.* the Commissioners for Special Purposes of the Income Tax (*ex parte* Essex Hall) 5 T.C. 636.

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found that Case I or Case VI applied, but, having regard to the contention of the Surveyor of Taxes, as set out in paragraph 6 of the Case Stated, I think it is clear that they were of opinion that the Respondents were in fact carrying on a business and intended so to hold. The point, however, is not of great moment, as in my opinion one or other of these Cases applies, and the assessments, if not valid under Case I, could in any case be supported under Case VI. The absence of precise data forming materials for assessment is not necessarily in itself an objection to an assessment, but the Case clearly shows that there was evidence before the Special Commissioners upon which they came to a conclusion to which they could properly come. There is in my opinion no substance in the objection. The sixth proposition I have in substance already rejected. It would, in my view, be impossible to say that the Respondents did not carry on a trade or adventure in the nature of trade without also excluding the business of letting furnished houses or many of the cases of letting or allowing the use of theatres, music halls and other places of public entertainment, or without over-ruling the *Carlisle* Case [1] which in my opinion was rightly decided. The seventh proposition has also already been dealt with and is equally without substance.

When the facts set out in the Case Stated and the document annexed to it are considered as a whole, it becomes plain that the Respondents, with the laudable object of raising an income for the support of their charitable activities, have engaged in what can only be described as a business or a concern in the nature of business, and thereby have earned annual profits which are outside the scope of Schedule A. They are, therefore, taxable under Schedule D. No exemption conferred by the Income Tax Acts is applicable to these profits, and it follows that they are liable to Income Tax and that the assessments appealed against were duly made. I therefore move your Lordships to reverse the decision appealed against and to restore that of the Special Commissioners.

Viscount Finlay.—My Lords, the Rotunda Hospital was incorporated by Royal Charter dated 2nd December, 1756, for the relief of poor lying-in women. The Rotunda Rooms are contiguous to the Hospital and are vested in the Governors of the Charity, the Respondents on this Appeal. The legal occupation of the Rooms is and always has been in the Respondents, but they are hired out by them for entertainments, concerts, cinema shows, etc., for periods varying from one night to six months. The rooms have a proscenium and platforms, and when they are hired out they are equipped with seats, and heating, lighting and attendance are provided by the Respondents.

The Respondents were assessed under the Income Tax, Schedule D, in respect of the profits made from the letting of the Rooms thus equipped, and the Commissioners for Special Purposes stated a Case for the opinion of the Court, upon which this Appeal arises. Paragraphs 7 and 8 of the Case are as follows:—

" 7. In arriving at the precise *quantum* of liability, the Surveyor of Taxes was " prepared in the circumstances to allow the net annual value, £250, of the " Rotunda Rooms (*vide* paragraph 4 of this Case) as a deduction in arriving at " the profits assessable under Schedule D. He also admitted that certain " adjustments fell to be made in respect of renewals of flooring, platforms, " seating and furniture—also a proportion of the general administrative salaries " as applicable to the letting of the Rooms, with the result that the amended

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[1] Carlisle and Silloth Golf Club *v.* Smith, 6 T.C. 48 and 198.

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" liability would be as under :—For the year ended 5th April, 1912, £223 ; for " the year ended 5th April, 1913, £327 ; for the year ended 5th April, 1914, " £405 ; for the year ended 5th April, 1915, £381. The Appellants agreed that, " if the profits in question are held to be assessable to Income Tax, Schedule D, " the figures as above may be taken as correct. 8. Having considered the " facts and contentions herein set forth we were of opinion that the profits " derived from letting the Rotunda Rooms were assessable to Income Tax, " Schedule D, and we therefore reduced the assessment to the sums set forth in " paragraph 7."

The Case was argued before the King's Bench Division (Revenue) of the High Court of Justice. The Court held, the Lord Chief Justice dissenting, that the decision of the Commissioners was erroneous in point of law and that the Respondents were not liable to be assessed under Schedule D. The Court held unanimously " (*a*) That the Respondents for the purpose of the Income Tax " Acts were in legal occupation of the Rotunda Rooms, and therefore the " income derived from the hirings was not ' rents and profits ' within the " meaning of the third branch of Section 61, Schedule A, No. VI, of the Income " Tax Act, 1842, so as to be thereby exempt from tax : (*b*) That, if the profits " were chargeable under Schedule D, they would not be exempt from tax by " reason of their application to charitable purposes, for the only exemption of " that kind is to be found in Section 105, which is restricted to profits in the " nature of ' yearly ' interest or other annual payment." But the majority of the Court held that the Rooms were assessable to Income Tax only under Schedule A, while the Lord Chief Justice held that the use made of the Rooms brought the profits within the operation of Schedule D. An Appeal was brought, and in the Court of Appeal it was heard by the Master of the Rolls, Lord Justice Ronan, and Lord Justice Molony. The Court differed in opinion, the Master of the Rolls agreeing with the judgment of the Lord Chief Justice in the King's Bench Division that the profits derived from the use of the Rooms were assessable under Schedule D, while the other Members of the Court agreed with the majority of the King's Bench Division that they were not. The points on which the decision of this Appeal must mainly turn are whether the letting out of the Rooms, with furniture, heating, lighting and attendance, constitutes a concern in the nature of a business falling within Schedule D, and whether the " Allowances " granted by Section 61 of the Income Tax Act of 1842 are applicable to such profits.

The Income Tax Acts were extended to Ireland by the Income Tax Act, 1853, Section 5, and Section 13 of the same Act provided that the duties under Schedules A and B in Ireland should be charged on the annual value of all tenements and rateable hereditaments, according to the valuations made for the relief of the poor, with a provision for reduction on appeal if the assessment be shown to be excessive. Schedule D extends to every description of property or profits which are not contained in either of the Schedules A, B, or C, and to every description of employment of profit not contained in Schedule E, and not specially exempt from the said respective duties (Act of 1842, Section 100, First Case). The First Case under Schedule D is " duties to be charged in respect of " any trade, manufacture, adventure or concern in the nature of trade not " contained in any other Schedule of this Act." The Sixth Case is " The duty " to be charged in respect of any annual profits or gains not falling under any of " the foregoing rules, and not charged by virtue of any of the other Schedules " contained in this Act." Section 105 of the Act of 1842 provided for exemption

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in favour of charitable institutions in respect of any yearly interest or other annual payment chargeable under Schedule D, so far as the same is applied to charitable purposes. But it was held, and I think rightly held, in the case of *Trustees of Psalms and Hymns* v. *Whitwell*,(1) that trading profits do not fall within this provision, which relates only to yearly interest or other annual payments.

Do the profits made by the letting out of Rotunda Rooms fall under Schedule D according to the definitions to which I have referred, or, in other words, are they to be dealt with as trading profits? It appears to me that this question must be answered in the affirmative. The Rooms are hired out not merely as tenements, but with furniture, heating, lighting and attendance. The contention on the part of the Respondents was that the profits fall under head No. VI, "Allowances to be made in respect of the said duties in Schedule (A)," in Section 61 of the Act of 1842. This head provides for allowances to be made *inter alia* "on the rents and profits of lands, tenements, hereditaments, or "heritages belonging to any hospital, public school, or almshouse, or vested in "trustees for charitable purposes, so far as the same are applied to charitable "purposes." The fact that the possession remains vested in the owner and has not passed by demise to the person to whom the use of the Rooms is granted would not, in my opinion, by itself prevent the right to this allowance. Sums received in respect of the use of the Rooms merely as tenements would be profits of tenements within the meaning of this Allowance (No. VI under Schedule A) even in the absence of an actual demise of the Rooms, for, however short a period each hiring might last, and even if the legal possession still remained in the owner. In order to fall within this Allowance there must be "profits" received which are applied to charitable purposes. The receipt of such profits imports that payments are made for the use of the tenement. The Allowance has no application where the tenement is merely used by the owners themselves. Such an occupation clearly does not satisfy the terms of the Allowance. The benefit of such occupation cannot be applied to charitable purposes within the meaning of the Allowance, as such application clearly imports that something has been received for the use of the tenement and that the sum so received is to be applied.

Profits are undoubtedly received in the present Case which are applied to charitable purposes, but they are profits derived not merely from the letting of the tenement but from its being let properly equipped for entertainments, with seats, lighting, heating and attendance. The subject which is hired out is a complex one. The mere tenement as it stands, without furniture, etc., would be almost useless for entertainments. The business of the Governors in respect of those entertainments is to have the hall properly fitted and prepared for being hired out for such uses. The profits fall under Schedule D, and to such profits the allowance in question has no application, as they cannot be properly described as rents or profits of lands, tenements, hereditaments or heritages. They are the proceeds of a concern in the nature of a trade which is carried on by the Governors, and consists in finding tenants and having the rooms so equipped as to be suitable for letting. The Case does not in substance differ from the letting of furnished apartments. The *Essex Hall* Case(2) ([1911], 2 K.B. 434) has no application to the present Case. It was a Case in which the Trustees for charitable purposes of Essex Hall sought relief under the allowance now in

(1) 3 T.C. 7. (2) Rex *v.* the Commissioners for Special Purposes of the Income Tax (*ex parte* Essex Hall) 5 T.C. 636.

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question. They had been assessed under Schedule A in respect of their occupation of the premises. The Divisional Court were divided in opinion. Mr. Justice Avory took the view which was ultimately adopted by the Court of Appeal, and the following passage occurs in his Judgment :—" In my view, this " clause does not apply to a case of this sort at all. My view is that it applies to " a case where a person has let out a building and is in receipt of the rent for " that building, but the rent which he has received is in fact applied to charitable " purposes. This is a case, it appears to me, simply of an assessment for Income " Tax under Schedule (A) in accordance with Rule I of the Schedule. As " Mr. Finlay has said, the assessment is upon the annual value of the lands " which, in fact, are in the occupation of the applicants. For the purposes of " this argument it is admitted that they are in occupation, and it does not " appear to me to be an assessment on the rents and profits arising from lands " within the meaning of Rule II, paragraph 6. They appear to me to be " contemplated all through the Act as separate things altogether—one an " assessment on the actual annual value of hereditaments which are occupied, " and the other an assessment upon the profits derived from land in the shape of " rents, which profits are coming into the hands of a person who is not in " occupation. They appear to me to be two totally different things, and the " exempting clause appears to me to apply only to the cases which come under " Rule II where there is an assessment made on the profits arising from lands, " and does not apply to a case which comes under Rule I where the assessment " is upon the annual value of the lands which are occupied by the person " assessed". His colleagues, the Lord Chief Justice and Mr. Justice Hamilton, differed from him, holding that the beneficial occupation by the Trustees for charitable purposes constituted a case of rents and profits of tenements within the meaning of the Allowance. The Court of Appeal, consisting of the Master of the Rolls, Lord Justice Buckley and Lord Justice Kennedy, reversed the decision of the majority of the Divisional Court, and adopted the view of the Case which had been presented by Mr. Justice Avory. Lord Justice Kennedy says, at page 657 of the Report in 5 Tax Cases :—" And, further, as I am " inclined to think, the profits made in the present case by Essex Hall, the " occupying owners, from use of parts of the premises are really not in their " nature ' rents or profits of lands, etc.', within the meaning of this allowance " clause, but rather profits of a business, a business of letting furnished or " partly furnished rooms, carried on by the occupier in the premises." Lord Justice Buckley said that he concurred with extreme reluctance, and added :— " A subsidiary question was mentioned, namely, whether Essex Hall are entitled " in respect of the sums received for casual lettings, to the same allowance as has " been conceded in respect of the rent received from the Inquirer Publishing " Company. But this is not the subject of the Appeal before us, and I say no " more about it." Some expressions occur in the judgment of the Master of the Rolls at page 654, and in the judgment of Lord Justice Kennedy at page 657, which might seem to import that the reason why the sums received by the Trustees in respect of occasional hirings would not fall within the allowance was because the occupation always remained in the Trustees. If these remarks bear this meaning, I feel unable, for the reasons I have already given in the earlier part of this judgment, to agree with them. The decision really turned on the claim to treat occupation by the Trustees as a case of rents and profits within the meaning of the allowance, and it has no application to the facts of the present Case, which arises on the question of profits actually received by the hiring out

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of the Rooms. The earlier Case of *Maughan* v. *The Free Church of Scotland*(1) is to the same effect as the *Essex Hall* Case. The distinction between rents and profits and the buildings themselves is put with extreme clearness by the Lord President at page 209 of the Report. In that Case also there were some profits derived from rents for use of the hall which amounted to a few pounds a year, but Lord MacLaren said that he did not understand them to be the ground of assessment.

In my opinion, the case of *Grove* v. *The Young Men's Christian Association*,(2) in which Mr. Justice Ridley held a restaurant carried on by the Young Men's Christian Association to be assessable in respect of the profits of the trade there carried on was correctly decided. The *Carlisle and Silloth Golf Club* Case(3) ([1913], 3 K.B. 75) is another illustration of a business separate from the general objects of the Club being held assessable under Schedule D. An effort was made in the present Case to maintain the proposition that the letting of the Rotunda Rooms could not be treated as a separate concern in the nature of trade, but that the only subject which could be assessed would be the whole undertaking of the Governors, including the hospital. It was contended on this view that there were no profits at all, as all the receipts from the hiring out of the rooms were spent on the Charity. I cannot think that this is the correct way of approaching the question. It is merely another way of saying that all the proceeds of the trade carried on in hiring out the Rotunda Rooms are devoted to the purposes of the Charity. The letting out of the Rooms for entertainments and other purposes is as much a separate concern in the nature of trade as was the restaurant in the case of the *Young Men's Christian Association* or the issuing of tickets to non-members for the use of the golf green and club in the case of the *Carlisle and Silloth Golf Club*.

I am of opinion that the Respondents are not entitled to the allowance claimed, and the assessment made by the Commissioners should be restored.

Viscount Cave.—My Lords, the Respondents, the Governors of the Rotunda Hospital at Dublin, are possessed, in addition to the Hospital, of certain rooms connected with it by internal passages and known as the Rotunda Rooms. These rooms are let by the Governors for concerts and other entertainments for periods varying from one night to six months, the lettings not being of such a nature as to create a tenancy but being of the nature of licences, and the legal occupation remaining with the Governors. The letting prices include the use of the movable seats provided by the Governors, and the heating of the rooms, and additional charges are made to cover the cost of lighting and attendance. The prices received, after deduction of all outgoings attributable to the rooms (including a proportion of the general administrative expenses) and of a sum equal to the net annual value of the rooms as ascertained for the purpose of assessment under Schedule A of the Income Tax Acts, yield a profit which in the four financial years 1911–1912 to 1914–1915 amounted on the average to about £330 per annum. The question raised by this appeal is whether these net profits are properly assessable to Income Tax under Schedule D. Prima facie, they are so assessable. Schedule D of the Income Tax Act, 1853, which applies to Ireland, renders taxable all " annual profits or gains " whether arising from property or from any profession, trade, employment or vocation, and all other

(1) 3 T.C. 207. (2) 4 T.C. 613. (3) 6 T.C. 48 and 198.

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annual profits and gains not charged by any other Schedule ; and there can be no doubt that these words, taken by themselves, are wide enough to cover the profits now under consideration. It is pointed out, however, on behalf of the Respondents that, by virtue of the regulations contained in the Act of 1842 (which by Section 5 of the Act of 1853 are incorporated in that Act so far as consistent with its provisions), and particularly of the First Case in Section 100, any profits liable to assessment under Schedule A are expressly excluded from Schedule D ; and it is argued that the profits from the Rotunda Rooms fall within that category. Accordingly, the first question to be determined is whether these profits are assessable under Schedule A. It is contended that they are so assessable in one of two ways, namely, either (1) as being profits of lands, tenements, hereditaments or heritages, and so falling within the general description of property comprised in Schedule A and within Rule 1 in Section 60 of the Act of 1842, or (2) as being profits of a concern of the like nature with ironworks, gasworks, and other undertakings specified under the third heading of Rule III in the same section. With regard to the former of these contentions, I am unable to see how the profits in question can be said to be derived from the Rotunda Rooms alone. They result, not from the letting of bare rooms, but from the whole venture, consisting of the equipment and disposal of the rooms with their fixtures and furniture and the provision of the service of heating, lighting and attendance. They may perhaps be described as profits of a trade or concern in the nature of trade, that is to say, of the business of providing and letting rooms for entertainments, and so, as falling under the First Case in Section 100, Schedule D, but if not, then they fall under the Sixth Case, as profits or gains not falling under any of the earlier rules. In some respects, they resemble profits derived from letting furnished houses or apartments, which are regularly assessed under Schedule D. It is no doubt true that a substantial part of the profits in question arises from the occupation and use of the tenements occupied for the purposes of the business; but this is precisely the event contemplated by the second of the Rules contained in Section 100 and applicable to Cases I and II, which provides that the computation of the duty to be charged in respect of any particular trade, manufacture, adventure, or concern is to be made exclusive of the profits or gains arising from lands, tenements, or hereditaments occupied for the purpose of such trade, manufacture, adventure or concern, and effect has been given to that Rule by deducting the Schedule A assessment. It may be that in the present Case, the share of profits so attributed to the elements in the concern other than the rooms themselves is excessive ; but if so, that is the effect of Section 9 of the Finance Act, 1898, which provides that the sum deducted under the Rule above quoted is not to exceed the Schedule A assessment. The hardship (if there be any) may be obviated by getting the Schedule A assessment increased. As to the alternative argument, that the profits in question are assessable under the third paragraph of Rule III, it is sufficient to say that the undertaking in the present Case cannot be held to be " of the like nature " with ironworks, gasworks, and the other concerns mentioned in that paragraph. The result is that, in my view, the profits in question are not assessable under Schedule A, and accordingly fall to be assessed under Schedule D.

An argument was addressed to your Lordships for the purpose of showing that the profits from the Rotunda Rooms are exempt from taxation under Rule VI of Section 61 of the Act of 1842, on the ground that the rooms are

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public buildings, offices and premises belonging to the hospital or (in the alternative) on the ground that the profits are profits of hereditaments belonging to the hospital and are applied for charitable purposes, but that Rule appears to me to have no bearing on this Case. The exemption relied upon is confined to assessments under Schedule A ; and if, as I have shown, the profits in question are not assessable under that Schedule, then the exemption cannot apply to them. This being so, it is unnecessary to consider the construction of the Rule here referred to, or the effect of the decisions in *Maughan* v. *Free Church of Scotland*(1) (30 Sc. L.R. 666) and *ex parte Essex Hall*(2) ([1911], 2. K.B. 434) which turned entirely on the language of that Rule. It was not contended that the exemption in Section 105 of the Act of 1842, which relates to " any " yearly interest or other annual payment " chargeable under Schedule D which is applied to charitable purposes, entitles the Hospital to exemption in this Case. It was decided in *Trustees of Psalms and Hymns* v. *Whitwell*(3) that trading profits are not an " annual payment " within the meaning of Section 105, and that decision was not challenged in this Case. As a final argument, it was said that, as, by the statute regulating the Hospital (25 George III, Ch. 43), the profits in question are directed to be applied for the maintenance of the Charity, the Hospital, with the receipts from the Rooms, must be regarded as one undertaking, which yields no profit and accordingly is not liable to taxation under Schedule D. It does not appear to me that this argument is maintainable. No doubt the hospital, like other charities, yields no profit : but if the Governors in the course of their management carry on a profitable business, the profits of that business are subject to taxation. Upon this point I agree with the decision in *Grove* v. *The Young Men's Christian Association*(4) (88 L.T. 696), and *Carlisle and Silloth Golf Club* v. *Smith*,(5) ([1913], 3 K.B. 75).

For the above reasons I am of opinion that the profits in question are properly assessable under Schedule D of the Act, and accordingly that the decision appealed from should be set aside and the decision of the Commissioners for Special Purposes restored.

Lord Atkinson : My Lords, I concur. The facts of this Case have already been fully stated. It is unnecessary to repeat them.

It would, I think, be well to bear in mind that, to use Lord Macnaghten's words in his celebrated judgment in the *London County Council* v. *the Attorney General*(6) (1901, A.C. 35), " Income Tax . . . . is a tax on income." When the amount of the income to be taxed under the Act of 1842 and the Acts amending it comes to be measured, different standards are selected, and the words " profits " or gains " are used in reference to all the Schedules in the Act of 1842 to describe the income, the subject of charge. The standard selected as a measure of the amount of the income to be taxed under Schedule A in respect of lands, tenements, hereditaments and heritages capable of occupation is the annual value. If the owner of such properties as these should be himself in occupation of them, it by no means follows that he will, in fact, derive from them an income equal to this annual value ; but, as he has the use and enjoyment of the properties, it is, for the purposes of the Statute, presumed that he does derive from them an income equal in amount to this annual value, and the tax is accordingly, under Schedule A, assessed upon this presumed income. The

(1) 3 T C. 207. (2) 5 T.C. 636. (3) 3 T.C. 7. (4) 4 T.C. 618. (5) 6 T.C. 48 and 198. (6) 4 T.C. 265.

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annual value of properties of these kinds is, in Ireland, ascertained and fixed by methods somewhat different from that applied in England for this purpose. The Income Tax was first imposed in Ireland by the Act of 1853, 16 and 17 Vic. c. 34. It is entitled just as the English Act of 1842 is entitled, " An Act " for granting to Her Majesty duties on profits from Property, Professions, " Trades, and Offices." For the purpose of classifying and distinguishing the several properties, profits, and gains in respect of which the duties are granted, and assessing, raising and levying the same, these profits and gains are described in five separate Schedules marked A, B, C, D and E respectively.

Schedule A comprises all profits and gains " For and in respect of the " property in all lands, tenements, hereditaments and heritages in the United " Kingdom and to be charged for every twenty shillings of the annual value " thereof." Schedule B comprises profits and gains " in respect of the occu- " pation of all such lands, tenements, hereditaments, and heritages as aforesaid, " and to be charged for every twenty shillings of annual value thereof." The properties comprised in these Schedules correspond substantially with those comprised in Schedule A No. I in the Act of 1842. Schedule C in the Irish Act comprises the profits arising from interest, annuities, dividends and shares payable out of any public revenue to be similarly charged. Schedule D comprises the duties in respect of the annual profits or gains " arising or " accruing to any person residing in the United Kingdom from any profession, " trade, employment, or vocation, whether the same shall be respectively " carried on in the United Kingdom or elsewhere, to be charged for every " twenty shillings of the annual amount of such profits and gains." The case of a person non-resident in the United Kingdom deriving profits and gains from any profession, trade, employment, or vocation exercised here is then dealt with, and the Schedule then winds up with the following sweeping provision : " And for and in respect of all interest of money, annuities, and other " annual profits and gains not charged by virtue of any of the other Schedules " contained in this Act, and to be charged for every twenty shillings of the " annual amount thereof." This Schedule substantially is the analogue of Section 100, Schedule D of the Act of 1842, and the last sweeping provision is analogous to the Sixth Case of that Schedule.

By Section 5 of the Act of 1853, it is provided that the duties thereby granted are to be assessed, raised, levied and collected under the regulations and provisions of the Income Tax Act of 1842, and the Acts subsequently passed explaining, altering, amending, or continuing the same, and are, as far as they may be applicable consistently with the provisions of the former Statute, extended to Ireland. It is not disputed, therefore, that for all the purposes of the present Case the Income Tax Code of England is, save as to the matter hereinafter mentioned, substantially identical with the Irish Income Tax Code. The difference between them consists solely in the different method prescribed by Section 13 of the latter Statute for ascertaining the annual values of the several kinds of property mentioned in these Schedules. These are in Ireland ascertained and fixed under the Poor Law Relief Acts in force in that country, the duties chargeable under Schedule A being made upon the landlord or immediate lessor, and those chargeable under Schedule B being made upon the occupier of the property. The valuations for the purpose of these Acts are in Ireland made under the 15 and 16 Vic. c. 63, the eleventh Section of

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which prescribes that land shall be valued in reference to the average prices named of the several agricultural products therein mentioned, and the valuation of houses and buildings is made (very much as it is in England) upon an estimate of the rent " for which, one year with another, the same might in its actual " state be reasonably expected to let from year to year, the probable average " annual cost of repairs, insurance, and other expenses (if any) necessary to " maintain it in its actual state, and all rates, taxes, and public charges, if any " (except tithe rent-charge) being paid by the tenant." It has frequently been decided that, for the purpose of this valuation, not only is the site of the house or building, and its quality and condition to be taken into account, but that, if some lucrative trade or business has been carried on in it, then its inherent capacity (not personal to the occupier carrying on this trade or business) to make a profit should be taken into consideration when seeking to ascertain what the hypothetical tenant would be likely to give by way of rent for it ; for the very sufficient reason mentioned by Lord Macnaghten in *Cartwright* v. *Sculcoates*, 1900 A.C., p. 35, namely, that the volume of business done in the hereditament and the profit thereby earned is the very first thing a tenant who was going to offer for the hereditament would take into consideration, and is one of the circumstances which would influence him when bargaining about the rent demanded from him. But the valuing for the purpose of Schedules A and B of this inherent capacity of the hereditament is a wholly different thing from including for these purposes, as part of its value, the profits gained by the use of this capacity. The building in which a trade or business is carried on may contribute more largely to the earning of the profits of that trade in one case than in another. For instance, in a cotton mill, in which all the expensive and delicate machinery used is not only supported by, but often attached to the fabric or the building itself, the fabric helps to a much greater extent to earn the profits than where the trade carried on is that of a watch-maker, for instance, where the fabric does little more than provide shelter for the workman. In the former case the greater inherent capacity of the building to earn the profit would cause it to be more highly valued for the purposes of Schedule A than in the latter.

The case of licensed premises forms no exception to this rule, for the licence to carry on the trade of a publican is not a licence purely personal to the publican. It only authorises him to carry on his trade in the particular premises named. (See *Mersey Dock and Harbour Board* v. *Birkenhead Committee*, 1901, A.C. 175, 180, 181 ; and *Armstrong* v. *Commissioners of Valuation*, 1905, 2 I.R. 448.) Moreover, the provisions of Section 9 of the Finance Act, 1898 (61 and 62 Vic. c. 10), clearly indicate (1) that the profits and gains themselves accruing from any trade or business carried on in any particular tenement are not to be included in the valuation of that tenement, and (2) that the profits derived from a trade carried on in particular premises may be properly assessable under Schedule D, while the profits and gains accruing from these very same premises themselves may be assessable under Schedule A of that Statute. Section 9 provides that—" Where in estimating " the amount of annual profits or gains arising or accruing from any profession, " trade, employment, or vocation, and chargeable to Income Tax under Schedule " D of the Income Tax Act, 1853, any sum is deducted on account of the annual " value of the premises used for the purpose of such profession, trade, employ- " ment, or vocation, the sum so deducted shall not exceed the amount of the " assessment of the premises for the purpose of income tax under Schedule A

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" to the said Act, as reduced for the purpose of collection under section thirty-" five of the Finance Act, 1894." The course which this Section prescribes was followed in the present Case. The Rotunda Lying-in Hospital and Gardens, being hereditaments or tenements or portions of hereditaments or premises used for charitable purposes, are exempted from liability for poor rates under the Irish Valuation Act of 1854 (17 Vic. c. 18). The annual value of the Concert Hall and Ball Room, of which the Governors are the occupiers, was fixed at £300 for the purposes of Schedule A. This sum was diminished by one-sixth as prescribed in Section 35 of the Finance Act of 1894. Then, as I understand the statement in the Special Case, the net annual profits derived from the use of the Concert Hall and Ball Room in the manner described was ascertained in the usual commercial manner, namely, by deducting from the receipts what it costs to earn them, and then from the amount of the net annual profit so ascertained the sum of £250 was deducted. Whether the letting of the Concert Hall and Ball Room, together with the rendering of the services connected therewith, amounted to the carrying on of a trade or employment within the meaning of Schedule D is a question of law for the decision, in the present Case, of this House. If that be decided in favour of the Appellants then there does not seem to be any valid reason for disturbing the findings of the Commissioners on the questions of fact, the proper amounts to be arrived at. If it were permissible to speculate, I should, however, for myself be inclined to think that, if the suitability of these Rooms for the use to which they have been put, and their inherent capacity to help in winning the profits realised were properly taken into consideration, they ought to have been valued for the purposes of Schedule A at a higher value than was actually put upon them. Mr. Jellett, on behalf of the Respondents, relied much on two of the allowances authorised to be made under Section 61 of the Act of 1842 in respect of the duties assessable under Schedule A, namely, first, the duties assessable on any hospital, public school or almshouse in respect of the public buildings, offices and premises belonging to such institutions, and, second, on the duties on the rents and profits of lands, tenements, hereditaments and heritages belonging to any hospital, public school or almshouse, or vested in trustees for charitable purposes, so far as the same are applied to these purposes. My Lords, the answer given by Mr. Brown on behalf of the Appellants to this contention is, in my opinion, quite convincing. These allowances are exceptions out of Schedule A, not Schedule D. If the duties in respect of which the allowances are to be made did not come with Schedule A and be covered by it, then the words " allowances to be made in respect of the said duties in Schedule A " are meaningless. A particular thing cannot be excepted out of another thing unless it was originally comprised in that other. The question at issue in this appeal is the liability of the Respondents to be charged for Income Tax assessed on their profits and gains under Schedule D. It may well be that, if the Respondents were sued for the Income Tax assessed upon them under Schedule A, they might be able to rely with success on these allowances, but these are matters not arising for consideration in the present appeal. The next point of importance relied upon by Mr. Jellett was that the Rotunda, with its garden and all the building belonging to or connected with it, constituted, for taxing purposes, one unit, and that, if the income taxable under Schedule D was applied to discharge the debts and liabilities incurred in this charitable work, it would be found, after this pooling had taken place, that the Governors had not any profits or gains to their credit. The use made of the Concert

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Hall and Ball Room is undoubtedly very lucrative. Separate accounts can be, and have been, kept of profits thereby realised, as if the letting was a separate commercial enterprise. It is quite true that these profits are ultimately to be applied to the purposes of the charity, but in no other way are these buildings made available for those purposes. The patients or staff do not use them in any way, nor, indeed, as far as appears, have they access to them. If the Governors of a charitable institution, in buildings belonging to them but forming no portion of the buildings devoted to their charitable work, choose to carry on a separate adventure or enterprise of a lucrative commerical and trade character, different and distinct from their charitable work, I fail to see upon what principle they should escape being taxed under Schedule D for the profits and gains realised by that trade or business, and I think it is not the law that they should so escape. In the *Mersey Docks and Harbour Board* v. *Lucas*,(1) ([1883], 8 A.C. 891), Lord Selborne said: "To my mind it is "reasonably plain that the gains of a trade are that which is gained in the "trading for whatever purposes it is used, whether it is gained for the benefit "of a community or for the benefit of individuals: whether the benefit is to "be obtained by dividends or whether it is to be obtained by lightening or "diminishing public burdens, it is all the same."

The case of *Grove* v. *Young Men's Christian Association*(2) (88 L.T., 696) has a direct bearing upon this point. There the defendant Association had for its object the improvement of the spiritual, mental, social and physical condition of young men. With that view they had established educational classes, a gymnasium and a publication department. The fees charged for the work carried on in these departments were so low that they were insufficient to cover the expenses and had to be supplemented by donations and subscriptions. They had also a restaurant carried on upon ordinary commercial principles, and used not only by the persons attending the classes instructed in the above-mentioned departments, but, in addition, by those attending numerous religious meetings held at Essex Hall, by associates of the Association, and by the general public. Should there in any year be a loss on the working of the restaurant, it must be made up out of the above-mentioned subscriptions and donations. It was contended that the undertakings of the Association formed one concern, that the Association was consequently entitled to deduct the losses sustained in the education classes, gymnasiums and publication departments from the profits made by the restaurant, with the result that their accounts would show a loss, inasmuch as the profits earned in the restaurant, amounting to £703, would not cover the losses sustained on the other branches. The Appellants, on behalf of the Crown, contended that the Association was carrying on a competing trade in the business of a restaurant, and was, therefore, liable to be assessed under Schedule D, in respect of the profits made in the restaurant, and that the losses sustained in the other departments could not be set off against these profits. It was decided that the contention of the Crown was right, and that the law is that, if you carry on a trade, you are not to take off the losses connected with something else which you do, however philanthropic and however desirable, from the profits you make in that trade. This decision was based very much on the decision in the Scotch case of *The Religious Tract and Book Society of Scotland* v. *Forbes*.(3) In that case a colportage society, founded for the diffusion of religious literature, sold Bibles and other religious books at a depository shop in Edinburgh, and

(1) 2 T.C. 25. (2) 4 T.C. 613. (3) 3 T.C. 415.

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sent out colporteurs into the country whose duty it was to sell Bibles and also to act as cottage missionaries. The sales in Edinburgh resulted in a profit, the colportage in a loss; the net result of the whole operations resulted in an annual loss, which was met by subscriptions. It was held that colportage was not a trade, and that the loss on it could not, for the purpose of Income Tax, be set off against the profits from the booksellers' business carried on in the shop. Lord McLaren, in delivering judgment, said: "It appears to me, "therefore, that these two branches of the Society's operations cannot be "identified as one and the same trade, adventure, or concern and, therefore, "that under the third rule for estimating profits under Schedule D the Society "is not entitled to set off loss arising from the colportage business in reduction "of the profits upon which they fall to be assessed for their commercial business. "The two being clearly separable, I think the income tax is payable upon "the remunerative part of the Society's business."

The Case of the *Carlisle and Silloth Golf Club* v. *Smith*(1) ([1913], 3 K.B. 75)' is a most important authority bearing directly on the present Case. It is reported in the Court below in (1912) 2 K.B. 177.(2) In it the Golf Club had obtained from the North British Railway Company a lease of the lands upon which the links were formed and the Club house erected. This lease contained a provision that members of the public, not members of the Club, nor introduced by any member of the Club, and not being persons of any particular class, should by the lessees be permitted to play upon the links and use the Golf Club house on payment of the green fees fixed by the lessors. The total annual expenditure incurred by the Club in keeping the links in a fit condition for play exceeded the total amount of fees received from the visitors. Mr. Justice Hamilton, as he then was, on the hearing before him, held that the Golf Club, in permitting these non-members to play upon the links and use the Golf Club house on the terms mentioned, were carrying on an enterprise which was, in itself, outside the scope of the ordinary functions of the Club, and distinct from its ordinary objects and activities, as to which it was possible to keep separate accounts, so as to ascertain whether there were any profits thereby realised, and that any profits derived from the green fees were therefore taxable under Schedule D of the Act of 1842. In the course of his judgment he said(3): "In my judgment, therefore, the club has, for considerations sufficient in its "own view, annexed to its ordinary enterprise of a golf club systematic services "to strangers for the purpose of obtaining, among other advantages, the "revenue that those strangers provide. It is not a case where, owing to "relations of membership or family bonds, persons club together and reduce "the common expenditure on some common object by contributions which "they fixed roughly with some reference to the cost. It is not a case in which "the members as an aggregate (for they are not incorporated) dispose of their "surplus because they have no necessity to consume it, but it is a case in which "this aggregate of gentlemen, who may for practical purposes be treated as "one person, have annexed to their club for the purposes of recreation an "enterprise which is separate from it and which results in pecuniary receipts "to themselves." That decision came on Appeal before a Court of Appeal composed of Lord Cozens-Hardy, the Master of the Rolls, and Lord Justice Buckley (as they then were) and Lord Justice Kennedy. The Master of the Rolls, in giving judgment said(4): "It seems to me there is a real difference

(1) 6 T.C. 198. (2) 6 T.C. 48. (3) 6 T.C. at p. 55. (4) 6 T.C. at p. 199.

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" between moneys received from members and applied for the benefit of members, " and moneys received by the club from strangers. I cannot draw any " distinction between gate moneys . . . and green moneys. In each case the " club would be assessable. Whether there have been any profits or gains " is a matter of fact ; and the answer will depend upon the mode in which " the expenses of maintenance or other outgoings ought to be attributed to the " visitors." Lord Justice Buckley said, pages 80-81(1) : " I agree as well " in the reasoning as in the conclusion of the Judgment pronounced by Mr. " Justice Hamilton. . . If it were necessary (which it is not) to decide whether " the Club were carrying on an ' adventure or concern in the nature of trade,' " I am of opinion that they were. To determine this question it is not the " character of the person who carries on, but the character of the concern " which is carried on, that has to be regarded. If a landlord laid down a " golf links upon his land, and charged fees for admission and use—if, that " is to say, the links were proprietary golf links carried on with a view to profit— " there can be no question but that the proprietor would be assessable. The " adventure of maintaining golf links and charging for the use of them is an " ' adventure or concern in the nature of trade '. If other conditions therefore " are satisfied the club are, I think, assessable under the First Rule of Schedule " D. But, as I have already said, it is, I think, unnecessary to determine " whether that is so or not, for, if it were not a ' concern in the nature of trade,' " yet, other things being satisfied, the club would be assessable under the Sixth " Rule. Further, the question is not whether the members of the club are " making profit, but whether the fraternity or society chargeable under Section " 40 are making profit by the concern in question. The Appellants laid great " stress upon the fact that the expenses in each year exceed the amount received " from green fees from visitors. That fact seems to me irrelevant upon the " question whether the club are assessable." Lord Justice Kennedy said: " Upon the facts appearing in the case, it appears to me that this club is really " carrying on the business of supplying to the public for reward a recreation " ground fitted for the enjoyment of the game of golf, and that the receipts " derived from this business are in the nature of profits and gains in respect " of which it is liable to assessment." Adopting the language of Lord Justice Kennedy to the present Case, the Governors of the Rotunda are, in my opinion, engaged in the business of letting for reward their rooms heated, lighted and furnished with seats in the manner described in the third paragraph of the Case Stated, and cleaned, managed and regularly controlled by their servant, the keeper, as prescribed by the 19th Regulation, for the purpose of providing, through the operation of those who take their rooms, recreation and amusement to such members of the general public as choose to pay for admission. I do not think the services thus given can be regarded as mere incidents attached to the letting of the rooms themselves. What is let, paid for and used is the room, plus the services, as constituting one composite whole, for which money is paid and is obtained from the general public. In my opinion this letting is an " adventure or concern in the nature of trade," within Case I, Rule 1, Schedule D, but, even if not, the profit and gains derived from it are assessable under Case VI of that Schedule. If the Governors, instead of letting their rooms equipped and watched over and attended to as they have been, leased them to a lessee who was bound to use, let, equip and manage them as they have done, I do not think it could be contended that the lessees would not be liable

(1) 6 T.C. 199

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to be assessed under Schedule D for the profits and gains they acquired by obeying the provisions of his lease. I do not think it can make any real difference if the Governors themselves do these things instead of binding their lessee to do them. For the reason given by the noble Lords who have preceded I do not think that the *Essex Hall* Case (1) has any application to the present Case. In my opinion, the Appeal succeeds, the decision appealed from should be reversed, and the decision of the Commissioners mentioned in paragraph 8 of the Case Stated should be adjudged to have been right in law.

Lord Shaw of Dunfermline.—My Lords, I agree. The facts of this Case and the Statutes and decisions bearing thereon have been so fully and clearly brought under your Lordship's notice by my noble and learned friend Lord Atkinson that I hesitate to express any separate opinion ; more particularly as the Case does not appear to me, once those facts and statutes have been explicated, to present any serious difficulty. I may say, my Lords, that I agree in the results of the judgment of the learned Lord Chief Justice and the learned Master of the Rolls, and substantially with the reasons which these learned judges gave for those conclusions. But there are two passages, one relating to fact, and the other on the point of law in issue, which I venture to extract from the judgment of the Master of the Rolls as expressing my own opinion. The facts as to the letting of the Rotunda Concert and Ball Rooms are thus stated by the learned judge :—" Reference to the bye-laws shows " that the subject matter of the hirings or lettings is not bare rooms, but " rooms with seating and heating. In addition the Governors undertake " the lighting of the rooms by gas or electricity at certain charges according " to consumption. There is further an officer of the Governors, called the Keeper " of the Rotunda Rooms, whose duty it is to prepare the rooms for all enter- " tainments, and to see that no smoking or improper conduct is permitted " at any entertainment or meeting. He is further bound to remain constantly " on the premises and to be attentive and accommodating to all parties occu- " pying the rooms. He is also bound to attend to the lights and fires, and he " is entitled personally to receive for his service certain prescribed charges " from the persons who engage the rooms. These circumstances seem to me " to be inconsistent with the creation of legal tenancies giving estates carrying " with them the right to legal occupation. They seem rather to support the " view that the Governors of the Hospital were to retain the legal possession " while they gave the accommodation of the rooms, with the addition of seating, " heating and lighting apparatus." I think, my Lords, that this is right.

When one peruses those bye-laws this occurs to the mind, namely, what would have been the view taken of a good many of the transactions and arrangements provided for had the same language occurred in the Prospectus of a Company ? It would have been said without any hesitation that that language was descriptive of the trade or business of providing, or providing for public entertainments, and that the real estate which was to be in possession of the Company was to be the substratum of that business, with all the arrangements for suiting the market and for commercial adventure being made so as to obtain the largest possible revenue from the public. This is indeed the express language of Section 9 of the Irish Statute, 25 George III, Chapter 43, which authorises the Governors and Guardians of the Hospital to make bye-laws, not only for the management of the Hospital and Funds, but " also for the proper manage- " ment and direction of such places of entertainment and resort, as shall stand

(1) 5 T.C. 636.

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" on the premises." Mr. Brown, in the brief but most helpful address which he made in his reply in this House, stated with great force this view :—Suppose the owners, *i.e.*, the Rotunda Hospital, did demise for its rental value, the concert and ballrooms to a tenant at an annual rent (it might have been, say, a single tenant, or, for better illustration, a theatrical company), and that the lessee had then proceeded to carry on an entertaining business under rules just such as those which exist in the present Case, it seems unanswerable that that company, earning a profit in so doing, would have been liable to taxation under Schedule D. If the Respondents are not so liable, it must be simply that they are the owners and occupiers of the property in which the business is carried on. On this subject there appears, in the judgments of the Courts below, a variety of expressions to the effect that the taxation under Schedule A of owners and occupiers of hereditaments was meant to be " exhaustive ". My Lords, I cannot agree with such a proposition. When income is derived by way of profit from any undertaking, the scope of the statute is that that income shall be liable to taxation irrespective of the identity of the person who earns the income with one who pays Income Tax in respect of other revenue, returns, or profits, under other schedules in the Statute. The aim of the Statute is to gather in all income and make it subject to taxation. That aim may, of course, have been imperfectly accomplished in the Schedule of enumeration. But it is plain also from the language of Schedule D that, while the main object, *i.e.*, the in-gathering of all income as a subject for taxation, was that which was being pursued, yet on the other hand it was necessary to avoid overlapping, so as to prevent a double payment of taxation upon the same amount of income or any part of it. Yet, while the avoidance of overlapping of taxation is provided for, that avoidance cannot be made the reason or cover for escape from taxation. No countenance is given to the idea, which seems to be favoured by some of the judges in the Courts below, that the assessment in, say, Schedule A, remits from the region of taxation any property or profits not reached by such a Schedule but liable under another Schedule. The learned Master of the Rolls thus expressed these ideas :—
" Schedule A embraces only property in lands, tenements, hereditaments, and
" heritages. Schedule D covers any kind of property and all profits and gains
" not charged by the other schedules, a kind of drag-net clause to capture
" everything ; so that, while the Rotunda Rooms are taxable merely as lands
" according to their annual value they are also taxable as an establishment with
" a certain equipment making it to some extent a going concern and thereby
" a profit-earning investment. This does not mean that the Governors are
" subject to double taxation, because it will be seen later on that, for a case like
" the present, provision is made for giving credit against any assessment made
" under D for any assessment made under A." I beg respectfully to express my concurrence with this. If these views be sound, it follows that the profits of the entertaining business, to put the matter thus briefly, do not escape taxation under Schedule D, because they are earned by a taxpayer who is the owner and occupant of buildings taxed under Schedule A. The identity of such owner and occupant with an undertaker, business man or trader, gives him no privilege as a taxpayer in the latter capacity.

The only remaining question, therefore, is whether the owner and occupier escapes by reason of the profits being devoted, as in fact they are, to charitable purposes. On this subject there was no difference of opinion in the Courts below, and I think rightly so. For it was agreed by all of the judges that the Respondents, for the purposes of the Income Tax Acts, were in legal occupation

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of the concert and ballrooms and therefore that the receipts obtained from those who used or hired the premises from the Respondents were not " rents and " profits " within the meaning of the third branch of Schedule A, No. VI, so as to be thereby exempt from taxation. The Courts were further unanimous in holding that, supposing the profits to be chargeable under D, they may not be exempt from taxation by reason of their application to charitable purposes, seeing that the exemption is only applicable to profits in the nature of yearly interest or other annual payment. In my opinion, these views in the Courts below were correct on the two points mentioned. Naturally, the result accordingly is that profits derived from what may be called the entertaining business do not escape taxation under Schedule D. It is important on this head, my Lords, to observe what the Case Stated narrates upon that subject. It says that : " In arriving at the precise *quantum* of liability the Surveyor of " Taxes was prepared in the circumstances to allow the net annual value, £250, " of the Rotunda Rooms as a deduction in arriving at the profit assessable under " Schedule D." To that extent there can be no question of the accuracy of the Surveyor's allowance. By making that allowance and in these terms he avoids the overlapping between Schedule A and D. But the Case proceeds further : " He " (the Surveyor) " also admitted that certain adjustments fell to be made " in respect of renewals of flooring, platforms, seating and furniture—also a " proportion of the general administrative salaries as applicable to the letting " of the rooms." This, my Lords, appears to me to be a clear application of proper commercial principles to the items falling to be debited against the concern under the head of a profit-earning concern ; and it is only after these debited items appear that any net profit emerges. The result is in my opinion that the deliverance of the Commissioners of the 13th August, 1917, must stand.

Viscount Finlay.—Before putting the question, I understand that by agreement of the Attorney-General, the costs of the Respondents are to be paid by the Appellant as between solicitor and client.

Mr. Jellett.—Yes, My Lord.

Viscount Finlay.—I propose subject to what may be said at the bar, to put the question in this form : That by consent of the Attorney-General the Appellant to pay to the Respondents their costs here and below, such costs to be taxed as between solicitor and client.

Mr. Jellett.—My Lord, I think that is absolutely right ; it is certainly what the learned Attorney-General said in opening the Case.

Mr. Hills.—I do not know whether it is really necessary to put it in the Order. I have not considered it carefully, but I thought the Order would be without any reference to costs at all.

Viscount Finlay.—It will have to go into the Order of the House. I think it will be more regular to put it in the question now.

Questions put :

That the Order appealed from be reversed.

The Contents have it.

That the decision of the Commissioners for Special Purposes of the Income Tax Acts be restored.

The Contents have it.

That by consent of the Attorney-General the Appellant do pay to the Respondents their costs here and below, such costs to be taxed as between Solicitor and Client.

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