

VOL. XII.—PART IX.

No. 45*.—HIGH COURT OF JUSTICE (KING'S BENCH DIVISION).—
2ND AND 3RD MAY, 1923.

COURT OF APPEAL.—15TH, 16TH, 29TH AND 30TH NOVEMBER, AND
3RD AND 17TH DECEMBER, 1923.

HOUSE OF LORDS.—23RD AND 26TH JANUARY AND 19TH FEBRUARY,
1925.

- (1) THE COMMISSIONERS OF INLAND REVENUE *v.* THE WESTLEIGH
ESTATES CO., LTD.⁽¹⁾
- (2) THE COMMISSIONERS OF INLAND REVENUE *v.* THE SOUTH
BEHAR RAILWAY CO., LTD.⁽¹⁾
- (3) THE COMMISSIONERS OF INLAND REVENUE *v.* THE ECCENTRIC
CLUB, LTD.⁽¹⁾

Corporation Profits Tax—Company carrying on trade or business or similar undertaking—Company formed for more convenient administration of family estates—Company in receipt of annuity as consideration for constructing a railway—Company carrying on social club—Mutual trading concern—Finance Act, 1920 (10 & 11 Geo. V, c. 18), Section 52.

(1) *A limited company was formed to acquire certain freehold estates with the object of managing the property on behalf of some 25 persons interested under two wills, fully paid shares being allotted to the beneficiaries in proportion to their interests. The revenue of the company consisted of rents payable under surface and mining leases. No property was purchased by the company and with two exceptions none was sold.*

Held, in the Court of Appeal, that the company was carrying on a trade or business or undertaking of similar character, and was therefore liable to Corporation Profits Tax.

(2) *Down to 1906 the South Behar Railway was held by the Respondent Company (subject to an option to purchase by the Secretary of State for India) and worked by another company on behalf of the Secretary of State, the Respondent Company being entitled to a share in the profits in consideration of having supplied funds and materials for the construction of the railway. In 1906 the Respondent Company relinquished the possession of the railway to the Secretary of State, and it was arranged that, until the option to purchase was exercised, a fixed annuity of*

⁽¹⁾ Reported K.B.D., [1923] 2 K.B. 514, C.A., [1924] 1 K.B. 390, and (*South Behar Railway case*) H.L., [1925] A.C. 476.

£30,000 should be paid in lieu of the share of profits. After 1906 the Company did nothing but receive and distribute the said annuity to its shareholders, its only other income being small sums from National War Bond interest, deposit interest, and transfer fees.

Held, in the House of Lords, that the company was carrying on a trade or business or undertaking of similar character, and was therefore liable to Corporation Profits Tax.

The Commissioners of Inland Revenue v. The Korean Syndicate, Ltd.,⁽¹⁾ approved.

(3) A company, limited by guarantee, was incorporated, *inter alia*, to conduct a social club and to provide refreshments to members for payment. It was a members' and not a proprietary club, the members of the company and the club being identical. By its memorandum and articles of association the income and property of the club were to be applied towards the promotion of the objects of the club, no member being entitled to receive any dividend or bonus out of the profits, and on winding-up any surplus was not to be distributed to members, but was to be dealt with as the committee of the club might determine. There were no receipts from anything in the nature of trade from persons other than members, and the company had not been assessed to Income Tax in respect of profits or surplus.

The Company was assessed to Corporation Profits Tax for the year 1920 on the amount by which its income for that year (including subscriptions and entrance fees) exceeded the expenditure.

Held, in the Court of Appeal, that the company was not carrying on a trade or business or undertaking of similar character within the meaning of Section 52 (2) (a) of the Finance Act, 1920, and was therefore not liable to Corporation Profits Tax.

CASES.

(1)

THE COMMISSIONERS OF INLAND REVENUE v. THE WESTLEIGH ESTATES CO., LTD.

CASE

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

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 29th November, 1921, for the purpose of hearing appeals, The Westleigh Estates Company, Limited, (hereinafter called the Company) appealed against an assessment to Corporation Profits Tax in the sum of £190 for

⁽¹⁾ 12 T.C. 181.

the accounting period ending 30th June, 1920, made upon it by the Commissioners of Inland Revenue under the provisions of the Finance Act, 1920, Part V.

1. The Company claimed exemption from the provisions of Corporation Profits Tax as contained in the Finance Act, 1920, Part V.

2. The Company was formed in August, 1900, to acquire the interests of the persons hereinafter mentioned in certain freehold estates (hereinafter referred to as the property) in the Manchester district. The nominal capital of the Company consists of £96,000 of Ordinary Stock of which £94,833 6s. 8d. is issued. There is issued and outstanding £1,166 13s. 4d. "A" Debenture Stock of the Company. This Stock was issued to and is held by trustees for a beneficiary under one of the wills mentioned, in paragraph 4 hereof, who is not of full age. When the beneficiary in question attains majority the said sum of "A" Debenture Stock will be exchanged for a like amount of Ordinary Stock which (when issued) will bring the total amount of the Company's Ordinary Stock issued up to £96,000.

3. The objects of the Company as set out in the Memorandum of Association (a copy of which is annexed and forms part of this Case⁽¹⁾) were (*inter alia*):—

- (a) To acquire and take over certain real estate and rents charge, subject to the leases and agreements for tenancies of some part thereof already granted, situate in or issuing out of land in Westleigh and Hindley in the County of Lancaster or the majority of the undivided shares therein, and with a view thereto to enter into the agreement referred to in Clause 3 of the Company's Articles of Association and to carry the same into effect with or without modifications.
- (b) To acquire and take over from time to time any shares in such real estate and rents charge not comprised within the said agreement.
- (c) To grant leases for any term of years or from year to year and whether absolute or determinable of all or any part of the property of the Company whether with or without the concurrence of the owner or owners of any other undivided shares or share herein in consideration of such royalties rents or reservations as the Company may think fit.
- (d) To purchase take on lease or in exchange hire or otherwise any real and personal property and any rights and privileges which the Company may think necessary or convenient for the purposes of its property or business and in particular any land buildings easements machinery plant stock in trade.

(1) Omitted from the present print.

- (e) To sell improve repair manage develop exchange lease mortgage farm or work as market gardens, dispose of, turn to account or otherwise deal with all or any part of the property and rights of the Company.
- (f) To invest and deal with the monies of the Company not immediately required upon such securities and in such way as may from time to time be determined.

4. The property was formerly owned in equal shares by two brothers J. Hall and W. Hall, who both died a considerable number of years ago. At the date of incorporation of the Company about 24 persons were beneficiaries under the will of J. Hall and became entitled to his share of the property. Mrs. Bubb, daughter of W. Hall, became entitled to the whole of W. Hall's share of the property under the terms of his will.

5. In view of the great number of beneficiaries entitled under the wills and the diversity of their interests it was considered desirable that Mrs. Bubb and the beneficiaries under the will of J. Hall should agree to pool their interests and to place the control of the property in the hands of a limited company. Accordingly the property was conveyed by or on behalf of the beneficiaries to the Company, the agreement being dated 20th August, 1900: the consideration for such conveyance to be the issue to them of stock in that Company. Mrs. Bubb, and the beneficiaries under the will of J. Hall, received fully paid shares in proportion to their respective interests in the property. A copy of the said agreement is annexed and forms part of the Case.⁽¹⁾

6. The following facts were either proved or admitted at the hearing:—

- (a) The Company took over the property exactly as it stood under the wills of J. and W. Hall. When taken over by the Company the greater part of the property (which is coal-bearing land) was in lease to various colliery owners so that the Company acquired the reversion expectant on the termination of these leases, while as to the remainder, which was unlet, the Company acquired the freehold in possession.
- (b) No land was ever purchased by the Company other than that obtained under the terms of the said agreement of 20th August, 1900.
- (c) No land has ever been sold by the Company with the following two exceptions—(1) the Willow Tree Inn was sold in 1910 for £1,050 owing to a difficulty having arisen with regard to licensing, (2) a small sale of property for £310 was effected in 1905 to the Leigh Corporation, who purchased this property for public purposes.

(¹) Omitted from the present print.

- (d) The revenue of the Company is derived from rents obtained from surface and mining leases. A copy of the Revenue Account of the Company for the year to 30th June, 1920, and of the Balance Sheet of the Company as at 30th June, 1920, is annexed hereto and forms part of the Case.⁽¹⁾
- (e) The minerals under the surface of the property have been worked by the various lessees under leases which had and still have many years to run. On expiration these leases have been renewed or fresh leases granted to the same lessees. The Company has never itself worked any of the mines under the property.
- (f) Mrs. Bubb holds half the shares in the Company, her husband is a permanent director of the Company. The shares in the Company can only be transferred among the existing shareholders and their families.

7. Section 52 (2), Finance Act, 1920, enacts that the profits to which this part of this Act applies are, subject as hereinafter provided, the following, that is to say:—(a) the profits of a British company carrying on any trade or business or any undertaking of a similar character, including the holding of investments. By Section 52 (3) of the same Act the expression "British company" means any company incorporated by or under the laws of the United Kingdom. It was admitted at the hearing that the Company was a British company within the meaning of the above Sections.

8. It was argued on behalf of the Company (1) that the Company was not carrying on any trade or business or any undertaking of a similar character. (2) Where no trade or business is carried on, that the mere holding of investments is not an undertaking of a character similar to a trade or business and is not sufficient to bring the Company within the provisions of Section 52 (2) (a), Finance Act, 1920. To involve the profits of an undertaking of a character similar to a trade or business to liability under this Section, the undertaking must be one in which there have been activities of a business character in the way of change of or dealing in investments and that in this case there were no such activities. (3) The property does not constitute an investment within the meaning of Section 52 (2) (a), Finance Act, 1920.

9. On behalf of the Appellants it was contended (1) that the Company was in fact at all material times carrying on a trade or business or undertaking of a similar character, (2) that the Company was at all material times carrying on a trade or business or undertaking of a similar character within the meaning of Section 52 (2) (a) of the Finance Act, 1920, for the reason (3) that mere holding of investments was sufficient to bring the

(1) Omitted from the present print.

Company within the provisions of Section 52 (2) (a), Finance Act, 1920, (4) that the Company held an investment within the meaning of the said Section.

10. Having considered the evidence and arguments addressed to us, we held as a fact that the Company was not carrying on any trade or business or any undertaking of a similar character, and, although we considered that the Company held investments, we were of the opinion that the words in the statute did not operate to tax profits derived from investments held by a Company which did not trade or "carry on" business in some way or other, whether in connection with the holding of investments or otherwise; accordingly we discharged the assessment.

The representative of the Appellants immediately upon the determination of the appeal declared to us his dissatisfaction therewith as being erroneous in point of law, and in due course required us to state a Case for the opinion of the High Court pursuant to the Finance Act, 1920, Section 56 (6), and the Income Tax Act, 1918, Section 149, which Case we have stated and do sign accordingly.

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

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

12th June, 1922.

(2)

THE COMMISSIONERS OF INLAND REVENUE v. THE SOUTH BEHAR
RAILWAY CO., LTD.

CASE

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

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 13th January, 1922, for the purpose of hearing appeals, The South Behar Railway Company, Limited, (hereinafter called the Company) appealed against an assessment to Corporation Profits Tax in the sum of £1,454 16s. 0d. for the accounting period ending 31st December, 1920, made upon it by the Commissioners of Inland Revenue under the provisions of the Finance Act, 1920, Part V.

1. The Company was incorporated on 4th July, 1895, under the Companies Acts, 1862 to 1890. The objects of the Company as contained in the Memorandum and Articles of Association were, to purchase and acquire the "right to enter into and to make with the Secretary of State in Council of India (hereinafter called the Secretary of State) . . . the contract which has been prepared and is expressed to be made between the Secretary of State of the one part and the Company of the other part" and for the other objects therein set out.

A copy of the said Memorandum and Articles of Association is annexed and forms part of this Case.⁽¹⁾

2. The Company claims that in the circumstances herein stated it is not liable to be assessed to or to pay Corporation Profits Tax as imposed by the Finance Act, 1920, Part V.

3. By an Indenture dated 7th August, 1895, made between the Secretary of State of the one part and the Company of the other part it was agreed :—

Under Clause 3 that the Company should supply to the Secretary of State the funds and materials required for the construction, completion, and making ready and fit for public traffic a railway, to be called the South Behar Railway (hereinafter called the Behar Railway).

Under Clause 4 that the Secretary of State should provide free of cost to the Company the land requisite for the construction of the Behar Railway.

Under Clause 5 that surveys, designs, specifications and estimates in relation to the construction or execution of the railway, etc., shall, so far as required by the Secretary of State, be furnished by the Company to the Secretary of State and shall be subject to his approval.

Under Clause 6 that for the more convenient and economical construction of the Behar Railway, the execution thereof will be undertaken by the Secretary of State through such agency as he shall appoint, but at the entire cost and risk of the Company, and so that under no circumstances shall any charge be placed on him by reason of this arrangement, directly or indirectly. The works shall be carried out with due diligence and in accordance with designs and specifications to be approved by the Secretary of State, and under the inspection and supervision of engineers to be appointed or approved by him for that purpose, as well in England as in India. The Company shall from time to time, as required by the Secretary of State, supply him, either in India or in England, with the funds necessary for carrying out the works, as well for the cost of materials and labour procured or engaged in India as the expense of supervising

(1) Omitted from the present print.

staff, including such remuneration (if any) as the Secretary of State may sanction to the officers and servants of the agency employed in or about the said construction, and shall supply such materials as are required to be procured in the United Kingdom at prices to be approved for the said construction in lieu of money.

Under Clause 7 that all expenditure incurred on account of the construction of the railway as approved and sanctioned by the Secretary of State shall be accepted by the Company as conclusive.

Under Clause 19 that the Secretary of State until the determination of the present contract shall work and maintain the Behar Railway.

Under Clause 21 that all the business connected with the management and maintenance of the Behar Railway and the conduct of the traffic, including the traffic interchanged between the East Indian Railway and the Behar Railway, shall in all respects, so far as practicable be carried on in the same manner and subject to the same regulations and control by the Secretary of State as the like business on the East Indian Railway.

A copy of the Indenture of 7th August, 1895, is annexed and forms part of the Case.⁽¹⁾

4. By an Indenture dated 22nd August, 1895, made between the Secretary of State of the one part and the East Indian Railway of the other part, it was agreed that the East Indian Railway should construct the Behar Railway, the Secretary of State supplying the moneys or materials required for the construction in accordance with approved plans and specifications; under Clause 2 that the East Indian Railway should charge such rates and fares for the carriage of goods and passengers over the Behar Railway as shall from time to time be agreed between the East Indian Railway and the Secretary of State. A copy of the Indenture of 22nd August, 1895, is annexed and forms part of the Case.⁽¹⁾

5. By an Indenture dated 11th December, 1906, made between the Secretary of State of the one part and the Company of the other part supplemental to the said Indenture of 7th August, 1895, by which provision was made for the construction, at the cost of the Company, of the Railway and respecting the working and the maintenance thereof, after reciting that it had been agreed that the Secretary of State might determine the contract contained in the Principal Indenture as therein mentioned, and that on such termination the Company was to give up to the Secretary of State the said Railway and its existing stores, and the Secretary of State was to pay to the Company the sum therein indicated, and after reciting that it had been

(1) Omitted from present print.

agreed between the parties that, as from the 1st January, 1906, until the determination of the Principal Contract, such fresh arrangement between the said parties as thereafter appeared should be substituted for the provisions of the Principal Contract relating to the working and maintenance of the said Railway, it was agreed (inter alia) as follows:—

Clause 2.

The Secretary of State shall as from the 1st of January, 1906, until the determination of the Principal Contract be entitled to hold and use and deal with the Railway for his own benefit without any interference or control on the part of the Company, and the Company shall accordingly relinquish the same to him together with all stores now belonging or appropriated to the Railway.

Clause 3.

The Secretary of State shall during the period aforesaid be at liberty by the working agency which he shall select to work and maintain the Railway in such manner as he shall think fit and to make therein or thereto any alterations, improvements or additions which he shall think fit, and any such works which he shall deem to be required shall be executed free of cost to the Company.

Clause 4.

The Secretary of State shall be under no obligation to the Company to keep the Railway in working order, or to work the same, or to execute any works in relation thereto, and the Company receiving from the Secretary of State the yearly payment hereinafter mentioned, shall at all times keep him and the working agency indemnified against all claims, demands, or interference by or from any debenture stockholders or trustees for such holders or any other incumbrancers or other persons claiming to be interested in the Railway through or under the Company.

Clause 5.

As from the 1st of January, 1906, until the determination of the Principal Contract the Secretary of State shall pay to the Company in London the yearly sum of £30,000 by half-yearly payments on every 30th of June and 31st of December, the first such payment to be made on the 30th of June, 1906, and the payments by the Principal Contract required to be made by the Secretary of State to the Company shall cease to be payable. The Company shall not be entitled to any charge, lien, or security on the Railway, or the earnings thereof in respect of the said yearly sum. During the same period the Company shall not be required to pay interest to the Secretary of State on the indebtedness of the Company to him for advances on capital account as

aforesaid, nor shall the Company be liable to repay the amount of the said indebtedness on the determination of the Principal Contract.

Clause 6.

Upon the determination of the Principal Contract by notice of purchase the said sum of £684,580 shall be the sum payable under Clause 56 of the Principal Contract as capital expended on the undertaking with the authorisation of the **Secretary of State**.

Clause 7.

As from the said 1st day of January, 1906, the following Clauses and parts of Clauses of the Principal Contract shall cease and be deemed to have ceased to operate, without prejudice and except as to the rights of either party in respect of any previous breach of any of the provisions thereof, or in respect of anything happening, or done, or which ought to have been done before that date, that is to say :—

The second part of Clause 19.
 Clauses 20 to 26 inclusive.
 Clauses 28, 29, and 30.
 Clause 32.
 Clauses 38 to 45 inclusive; and
 Clauses 53 and 55.

A copy of the Indenture of 11th December, 1906, is annexed and forms part of the Case.⁽¹⁾ A copy of the Company's report and accounts for the year ending 31st December, 1920, is also amended to and forms part of the Case.⁽¹⁾

6. The following facts were either proved in evidence or admitted at the hearing :—

- (a) the Company is a British company within the meaning **of the Finance Act, 1920, Sections 52 (2) (a) and 52 (3)**;
- (b) the agreement of 11th December, 1906, referred to in paragraph 5 above has not been determined and remains and is of full force and effect;
- (c) the whole work of construction and all repairs and maintenance of the Behar Railway were and always have been and are effected by the East Indian Railway on behalf of the Secretary of State;
- (d) the Company since the Indenture of 11th December, 1906, takes no part in working inspecting or maintaining the Behar Railway. The whole work of directing, managing and controlling the business and the accounts of the Behar Railway has been carried

⁽¹⁾ Omitted from present print.

out entirely and exclusively by the Secretary of State and by the East Indian Railway on his behalf. The Company has never had or possessed any rolling stock in India. At all material times the Company has had no agent or representative in India, and no office there;

- (e) the Company receives the sum of £30,000 payable half-yearly by the Secretary of State;
- (f) the shares in the Company are quoted on the London Stock Exchange; the Company's stocks do not frequently change hands. There are about 200 debenture holders and about 400 shareholders in the capital stock of the Company;
- (g) there are 3 directors of the Company, the Chairman receives £200 per annum and the other two directors £150 per annum each as remuneration. The Secretary of the Company receives a salary of £150 per annum;
- (h) the Company has a sum of £6,000 invested in National War Bonds bringing in an income of £300 per annum; in addition small sums are received from fees paid on the transfer of stocks and from money placed temporarily on deposit.

7. Counsel on behalf of the Company contended that—

- (1) the Company had in no way constructed or maintained or used or worked the Behar Railway, and was not and is not carrying on business as a railway company, or any business at all;
- (2) under the provisions of and since the making of the said agreement of 11th December, 1906, the sole rights of the Company have been and are to be paid the sum of £30,000 per annum payable half-yearly by the Secretary of State, or the sum of £684,580 if and when the Secretary of State determines the said agreement;
- (3) the Company is not dependent upon the receipts, or the existence, of the Behar Railway and has no interest or concern in the same;
- (4) the Company is not lessor or landlord of the Behar Railway;
- (5) the Company does not carry on any trade or business, or any undertaking of a similar character within the meaning of the Finance Act, 1920, Section 52 (2) (a);
- (6) the Company does not hold investments within the meaning of the Finance Act, 1920, Section 52 (2) (a);

Alternatively

- (7) the mere holding in the circumstances stated of an investment or investments apart from the carrying on of any

trade or business, or any undertaking of a similar character thereto, does not impose liability to Corporation Profits Tax under the provisions of the said Section.

8. It was contended on behalf of the Commissioners of Inland Revenue (inter alia)—

- (1) That the Company was carrying on a trade or business;
- (2) That the Company was carrying on an undertaking of a character similar to a trade or business;
- (3) That the Company was carrying on an undertaking of a character similar to a trade or business which included the holding of investments;
- (4) That the Company was carrying on a trade, business or undertaking of holding investments;
- (5) That the Company was rightly assessed.

9. The sole question for the determination of the Court is whether the Company is liable to Corporation Profits Tax in the said sum of £1,454 16s. 0d. or any sum by reason of the matters hereinbefore set out.

10. We, the Commissioners who heard the appeal, held as a fact that the Company was not carrying on any trade or business, or any undertaking of a similar character, and we were of opinion that the mere holding in the circumstances above stated of an investment or investments apart from the carrying on of any trade or business or any undertaking of a similar character therein did not cause liability to Corporation Profits Tax, accordingly we discharged the assessment.

The representative of the Appellants immediately upon the determination of the appeal declared to us his dissatisfaction therewith as being erroneous in point of law, and in due course required us to state a Case for the opinion of the High Court pursuant to the Finance Act, 1920, Section 56 (6), and the Income Tax Act, 1918, Section 149, which Case we have stated and do sign accordingly.

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

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

15th February, 1923.

(3)

THE COMMISSIONERS OF INLAND REVENUE v. THE ECCENTRIC CLUB, LTD.

CASE

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

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 15th June, 1922, for the purpose of hearing appeals, The Eccentric Club, Limited, (hereinafter called the Company) appealed against an assessment to Corporation Profits Tax in the sum of £284 4s. for the accounting period ending 31st December, 1920, made upon it by the Commissioners of Inland Revenue under the provisions of the Finance Act, 1920, Part V.

1. The Company was incorporated under the Companies (Consolidation) Act, 1908, on 11th December, 1912.

2. The objects for which the Company was incorporated as contained in the Memorandum of Association were (*inter alia*):

3. (a) To promote social intercourse amongst gentlemen connected (directly or indirectly) with literature, art, music, the drama, the scientific and liberal professions, sport, and commerce, and with a view thereto, to establish, maintain and conduct a club of a non-political character for the accommodation of Members of the Club and their friends, and to provide a club house and other conveniences, and generally to afford to Members and their friends all the usual privileges, advantages, convenience and accommodation of a Club.

3. (f) To buy, prepare, make, supply, sell and deal in, or arrange for the supply of all kinds of provisions and refreshments required or used by the Members of the Club or other persons frequenting the club house or premises of the Club.

3. The liability of the members of the Company is limited by guarantee as set out in Clause 5 of the Memorandum of Association, which states as follows:—

Every Member of the Company undertakes to contribute to the assets of the Company in the event of its being wound up while he is a Member, or within one year afterwards, for payment of the debts and liabilities of the Company

contracted before he ceases to be a Member, and the costs, charges and expenses of winding up, and for the adjustment of the rights of the contributories among themselves, such amount as may be required not exceeding Twenty Shillings.

Clause 6 of the said Memorandum provides for the application of the income and property of the Club as follows:—

The income and property of the Club shall be applied towards the promotion of the objects of the Club as set forth in this Memorandum of Association, and no Member of the Club in his character as such Member shall be entitled to receive, directly or indirectly, any dividend, bonus or other profit out of such income or property, but nothing herein shall prevent payments in good faith to persons in other capacities (such as servants, lenders, landlords, vendors, or in any capacity other than membership), notwithstanding their membership of the Club or the application of the property of the Club upon its winding up in accordance with the Company's Articles of Association for the time being.

4. In the Articles of Association of the Company "The Club" is defined as meaning "The Eccentric Club, Limited"—the following articles were referred to (*inter alia*) at the hearing:—

5. The Members of the Club shall be the subscribers to the Memorandum of Association, and such other persons as shall apply for admission and be admitted as Members.

9. Honorary Members shall not be entitled to receive notices of or to attend or vote at any general meeting of the Club, or to be elected Members of the Committee or other officers of the Club, or to introduce visitors or to propose or second candidates for Membership, but subject and except as aforesaid, or in these Articles otherwise provided

(a) All Members of the Club shall have the same rights, privileges and duties, and

(b) The term "Members" in these Articles or in the Memorandum of Association, in reference to Members of the Club, shall be deemed to include all Members of whatever class.

67. The profits of the Club whencesoever derived shall be applied solely towards the benefit of the Club, or otherwise in the promotion of the objects of the Club as set forth in the Memorandum of Association, and no portion thereof shall be paid by way of dividend or bonus to the Members of the Club.

68. If upon the winding up or dissolution of the Club there remains, after the satisfaction of all its debts and liabilities, any property whatsoever, the same shall

not be paid to or distributed among the Members of the Club, but shall be given or transferred as the Committee may determine.

A copy of the said Memorandum and Articles of Association is annexed to and forms part of the Case⁽¹⁾.

5. The Company's accounts for the year ended 31st December, 1920, show a surplus of income over expenditure of the sum of £5,382 17s. 10d., which sum was carried to the Balance Sheet of the same date. A copy of the Report and Statement of Accounts of the Company and of the Company's Revenue Account and Balance Sheet as at 31st December, 1920, are annexed to and form part of the Case.

6. The following facts were either proved in evidence or admitted at the hearing:—

- (a) The Company is a British company within the meaning of the Finance Act, 1920, Sections 52 (2) (a) and 52 (3).
- (b) Throughout the said Memorandum and/or Articles of Association members of the Company and Club are referred to in convertible terms and are so in fact. Thus the Club is purely a member's club, and not a proprietary club.
- (c) If the amount of the members' subscriptions and entrance fees received during the year ended 31st December, 1920, totalling the sum of £11,442 7s., was eliminated, instead of there being a surplus of income over expenditure, there would have been a deficit, and no liability to Corporation Profits Tax would have existed.
- (d) The Company is not, and never has been, assessed to Income Tax in respect of any profits or surplus there might be.
- (e) There were no receipts from anything in the nature of trade from persons other than members.

7. It was admitted on behalf of the Appellants that to involve liability to Corporation Profits Tax the Company must be brought within the provisions of the Finance Act, 1920, Part V, Section 53 (2) (h), as read in conjunction with the provisions of Section 52 (2) of the same Act.

8. The sole question for the determination of the Court is whether the Company is liable to Corporation Profits Tax on the sum of £5,684 or any sum.

(¹) Omitted from the present print.

9. Counsel on behalf of the Respondents argued:—

- (1) That what the Company was formed for, and did, was not the carrying on of any trade or business, or any undertaking of a similar character, within Sub-section (2) of Section 52 of the Finance Act, 1920, and that, therefore, the Company was not within the charging section (Section 52) at all;
- (2) That even if the carrying out of the objects for which the Company was formed might in certain circumstances amount to the carrying on of a trade or business or undertaking of a similar character within Sub-section (2) of Section 52 of the Finance Act, 1920, the constitution of the Company in this case was such as to preclude the carrying on of any trade or business or undertaking of a similar character within the meaning of the Sub-section (*Styles v. The New York Life Insurance Company*⁽¹⁾, (1889) 14 App. Cas. 381);
- (3) That Section 53 of the Finance Act, 1920, is a "machinery" section, that its provisions do not extend the scope of the charge which is laid on by Section 52, and that if the Company is not within the charge laid on by Section 52, liability to the tax cannot be imposed upon it by virtue of Section 53 or any part of it;
- (4) That the Company is not a mutual trading concern within the meaning of paragraph (h) of the proviso to Sub-section (2) of Section 53 of the Finance Act, 1920;
- (5) That the Company was not liable to Corporation Profits Tax at all; and
- (6) That if the Company were so liable then the amounts received by the Company by way of subscriptions and entrance fees should be eliminated from the computation of its liability.

The following cases were referred to:—

New York Life Assurance Co. v. Styles, (1889) 2 T.C. 460; *Religious Tract and Book Society of Scotland v. Forbes*, 3 T.C. 415; *Grove v. Young Men's Christian Association*, 4 T.C. 613; *Carlisle and Silloth Golf Club v. Smith*, (1912) 6 T.C. 198.

10. On behalf of the Crown, it was contended (*inter alia*) (a) that the Company was carrying on a trade or business or undertaking of a similar character within the meaning of the Finance Act, 1920, Section 52 (2), and (b) that the assessment appealed against was rightly made and should be confirmed.

(¹) 2 T.C. 460.

11. Having considered the evidence and arguments, I, the undersigned, R. Coke, was of the opinion :—

(a) That on the evidence the Company was not carrying on any trade or business or undertaking of a similar nature within the meaning of the Finance Act, 1920, Section 52 (2); (b) that a social club, as admittedly being the object for which the Company was established to provide, could not be said to be "a mutual trading concern," as contemplated by the Finance Act, 1920, Section 53 (2) (h); (c) that in any event the amounts received by way of subscription and entrance fees should be eliminated in computing "the surplus arising from transactions with members," or in computing the profits within the provisions of Part V of the same Act.

I, the undersigned, J. Jacob, was of opinion (a) that the Company was a mutual trading concern, (b) that a mutual trading concern was an undertaking of a similar character to a trade or business within the meaning of Section 52 (2) of the Finance Act, 1920, and that this was made clear by the existence of the provisions of Section 53 (2) (h) of that Act, which would be meaningless if a mutual trading concern was not within the charge to the tax, and (c) that the Company was liable to the tax at any rate on the surplus arising from the provision of meals, bedrooms, etc. I expressed no opinion as to the liability of any surplus arising from entrance fees or subscriptions.

In accordance, however, with the practice of the Commissioners of deciding in favour of the taxpayer in cases where the Commissioners come to opposite conclusions, I withdrew my opinion.

We accordingly held that the Company was not liable to Corporation Profits Tax and discharged the assessment.

The representative of the Appellants, immediately upon the determination of the appeal, declared to us his dissatisfaction therewith as being erroneous in point of law, and in due course required us to state a Case for the opinion of the High Court pursuant to the Finance Act, 1920, Section 56 (6), and the Income Tax Act, 1918, Section 149, which Case we have stated and do sign accordingly.

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

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

10th November, 1922.

ECCENTRIC CLUB LIMITED.

REPORT AND STATEMENT OF ACCOUNTS FOR THE YEAR ENDING 31ST DECEMBER, 1920.

The Committee, in submitting the Accounts for the year ended 31st December, 1920, again congratulate the Members upon the satisfactory result of the year's trading, and the continued prosperity of the Club.

The following is a summary of the Income and Expenditure:—

INCOME.		EXPENDITURE.	
	£	s.	d.
Gross Profits on Trading Accounts	15,576	16	8
Locker Rents	10	10	0
Subscriptions	9,326	12	0
Interest	70	0	3
Entrance Fees	2,115	15	0
Rents, Rates and Taxes, Insurance, &c.			2,710
Salaries and Wages			6,904
Printing, Stationery, Newspapers, Periodicals, Diaries, &c.			1,347
General Expenses and Upkeep of Club, including Light, Fire, Housekeeping, &c.			5,795
Repairs and Renewals			2,397
Renovation and Re-decoration			2,544
Entertainments			16
Balance, being surplus carried to Balance Sheet			16
			12
			1
			5,382
			17
			10
			£27,099
			13
			11

During the year under review the sum of £3,000 was paid off the Mortgage, reducing the amount to £11,000. In view of the fact that the Bankers are now charging 7 per cent. on this, the Committee wish to use every endeavour to lessen the liability at the earliest possible date and they are hoping to make an advancement in this direction during the current year.

In accordance with Article 74, the certified Balance Sheet is posted on the Notice Board of the Club.

By Order of the Committee,

J. A. HARRISON,

Hon. Secretary.

BALANCE SHEET, 31ST DECEMBER, 1920.

LIABILITIES.		ASSETS.	
£	s. d.	£	s. d.
<i>Five per Cent. Debentures—</i>		<i>Leasehold Premises, Furniture,</i>	
Balance at 31st Dec., 1919	5,400 0 0	Balance as at 31st Dec.,	33,285 10 6
Deduct Amount redeemed ...	150 0 0	1919	318 17 6
	5,250 0 0	<i>Add Purchases less sales</i>	
<i>Sundry Creditors</i>	5,831 16 2		33,604 8 0
<i>Loan on Mortgage as per contra—</i>		<i>Deduct Loan on Mortgage</i>	
Balance at 31st Dec., 1919	14,000 0 0	as per contra	11,000 0 0
Deduct Amount paid	3,000 0 0		22,604 8 0
	11,000 0 0	<i>Stock of Wines, Spirits, Beers,</i>	
<i>Subscriptions Account, 1921...</i>	483 0 0	<i>Cigars, &c.—</i>	
<i>Revenue Account—</i>		As per Stocktaker's In-	7,817 14 7
Balance at 31st Dec., 1919	15,485 0 11	ventory	1,008 18 5
<i>Add Balance as per attached</i>		<i>Sundry Debtors</i>	
Account	5,382 17 10	<i>Cash Balances—</i>	
	20,867 18 9	With Bankers on Current	
		Account	276 4 0
		In hand	60 0 0
			336 4 0
		<i>Victory Bonds—</i>	
		3 Bonds at cost	255 0 0
		<i>Sundry Assets, including Stock of Cards,</i>	
		Stationery, and proportion of Insurances,	
		Telephone Rent paid in advance ...	410 9 11
			<u>£32,432 14 11</u>
			<u>£32,432 14 11</u>

" Housekeeping	594	16	11	
" General Expenses	507	5	1	
" Testimonial to Hon. Secretary	525	0	0	
" Hon. Secretary's Expenses	50	0	0	
" Rent of Tape Machine	70	0	0	
" Liveries and Uniforms	172	2	3	
" Accountants' Charges	53	6	7	
" Stocktaker's Charges	45	0	0	
" Legal Charges, etc....	43	8	8	
" Renewals	1,760	19	3	
" Interest on Loan	759	19	9	
" Do. on Debentures... ..	262	10	0	
" Entertainment	16	12	1	
" Renovation and Re-decoration	2,544	5	11	
.....	21,716	16	1	
" Balance, carried to Balance Sheet	...	5,382	17	10

£27,099 13 11

£27,099 13 11

The cases of the *Westleigh Estates Co.* and the *South Behar Railway Co.* were argued before Rowlatt, J., in the King's Bench Division on the 2nd May, 1923, and that of the *Eccentric Club* on the following day. On that day judgment was given in favour of the Crown, with costs, in the *Eccentric Club* case, and against the Crown, with costs, in the other two cases.

The Solicitor-General (Sir Thomas Inskip, K.C.) and Mr. R. P. Hills appeared as Counsel for the Crown in all three cases, Mr. A. M. Latter, K.C., and Mr. Cyril King for the *Westleigh Estates Co.*, the Hon. Sir William Finlay, K.C., and Mr. A. M. Bremner for the *South Behar Railway Co.*, and Mr. E. M. Konstam, K.C., and Mr. R. W. Needham for the *Eccentric Club*.

JUDGMENT.

Rowlatt, J.—I must give my judgment in these three cases now although perhaps there would be the advantage of delivering it in a more polished form if I took time to consider, but I cannot face the prospects of having successive problems of this kind waiting in my mind while I continue to deal with this Revenue Paper. I am afraid I cannot do it.

Now the sections of the Finance Act, 1920, imposing this Corporation Profits Tax, and the sections of the Finance (No. 2) Act, 1915, imposing the Excess Profits Duty, which between them considerably mar the amenities of the Revenue Paper, are to some extent in *pari materia*, that is to say, they use at least the word "business"—the word "business" at least is found in both, but as these are the first cases under the Corporation Profits Tax, I must point out that of course it is a new duty and the words form a different collocation to that which is found in the Act imposing the Excess Profits Duty, and when one finds the word "business" interpreted in an Act, one has I think to exercise some caution in following with too meticulous exactitude every syllable that has been said with regard to that Act when you come to construe another Act in which the same words appear, because it seems to me that no proposition can be stated with such absolute scientific accuracy as, if you continue logically and relentlessly to apply it in every development to infinity, you finally find that you have reached a contradiction or a result which is obviously inadmissible and have to revise the proposition itself; so I think one always has to bear that in mind and use a certain degree of elasticity in applying the guidance which previous decisions give one.

Now the profits to which this part of the Act of 1920 applies are "profits of a British company carrying on any trade or business, or any undertaking of a similar character, including the holding of investments." The first thing to observe is that

(Rowlatt, J.)

the tax is a tax on the profits of a company, if it is a company within the section, including all its profits, certainly it is not the profits of its carrying on the trade or business, and the "carrying on of a trade or business or any undertaking of a similar character" is only to be looked at to see whether the company comes within the section. If it comes within it, it is taxed on all its profits; the trade or business or undertaking might result in a loss, but if you bring in the company and if from other sources you find there is a profit, the company would have to pay the tax on the result of its operations as a whole. Secondly, it is not the profits of every British company that are to be taxed—at least I suppose not. I suppose if there is any use in the remainder of the section, it is not so, because it is to be assumed there might be a British company not complying with the rest of the section, otherwise the rest of the section is superfluous, and, for the same reason, it is not the case that every British company, which is fulfilling the objects of its Memorandum of Association, must thereby *ipso facto* be within the Act. It cannot be that the mere fact that it fulfils its Memorandum by what it does, makes it carry on a trade or business, because then you would merely reach the same result, every British company would then be within the Act. It is to be a "British company carrying on a trade or business, or undertaking of a similar character." It is very difficult to frame these things and one ought not to be too captious about it, but it really gives one extremely little guidance because when one thing is spoken of as being similar to another, one must have something to guide one in respect of where the similarity is to be looked for—in respect of what attribute. One will not go into questions of logic upon it, but it is so difficult to see; no guidance is given here as to what characteristic of a trade or business you are to find repeated in the undertaking which is to be called similar and then there is "including the holding of investments"—again rather a hopeless form of words when one looks at it narrowly and has to apply it, although of course it sounds easy when it is merely read without regard to the particular case. It seems to me that the addition of the words "any undertaking of a similar character" really practically only comes to this, that it adds a sort of fringe to "trade or business" which I suppose the draftsman drafting the Act might have thought would be construed strictly. Really I cannot say much more than that for the reasons I have already outlined. That being the section, I have now to deal with these three cases.

THE COMMISSIONERS OF INLAND REVENUE V. THE WESTLEIGH ESTATES CO., LTD.

The first case is that of the family Company, and the facts in that case stated shortly are that that Company did nothing whatever except what would have been done by the executors and

(Rowlatt, J.)

trustees of a will for the beneficiaries, if they were legally traced—I do not know how it was exactly—administering their trusts; this Company did nothing whatever except what they would have done. Of course they had to have a mining engineer; so would the beneficiaries have to have a mining engineer; they had to have a land agent, I think it was said, too, and they had to renew a lease when it fell in, but there was nothing at all being done there except carrying out the will as I understand, and it merely existed in order that there might be one entity to act in one name on behalf of the very numerous people, many illiterate, not even able to sign their names, who would otherwise have had to concur in every transaction.

Now if there had been only the proprietor of this property doing these acts, I do not suppose anyone would say he carried on a trade or business, but there was this Company doing it, and it was pointed out in the *Korean Syndicate* case⁽¹⁾ that you must not forget that where a company does a thing, that is a circumstance to be taken into consideration. Of course, as I pointed out, possibly having regard to the way this section is worded, that is not so important in this Corporation Profits Tax as it may be in the Excess Profits Duty, because it is quite clear, as I have already indicated—at least I hope it is—that the mere fact that the Company is acting within its Memorandum does not make it carry on a business. It cannot be so on the wording of the section, because otherwise it would be simply superfluity of language. What was said in the course of that case in the Court of Appeal is to be found in the judgment of the Master of the Rolls as clearly as anywhere on page 273 of [1921] 3 K.B.⁽²⁾ : “The fact that a limited company comes into existence in a different way from that in which an individual comes into existence is a matter to be considered.” That is the way the learned Judge puts it. If you are to consider that, it seems to me you may fairly consider the fact and ought to consider the fact that the Limited Company in this case comes into existence without any notion of trade or business at all; so far as its coming into existence is concerned, it comes into existence merely as a convenient form under which the duties and powers of an executor can be grouped and wielded. The Master of the Rolls there of course was speaking of a company. He said “You get a company, it goes to the public, it collects its capital, it gets itself floated and forms itself, it acquires a concession and gets to work to develop it, and in considering whether there is a trade or business here, you must not forget the way the company came into existence.” I think it may fairly be said in this case that one ought not to forget the fact that this Company came into existence not with

⁽¹⁾ 12 T.C. 181.⁽²⁾ *Ibid.* at p. 202.

(Rowlatt, J.)

any notion of trade or business, but merely as a convenient form under which the duties and powers of an executor could be exercised. On the whole I have come to the conclusion that this family Company is not a company which carries on "any trade or business, or undertaking of a similar character." Therefore, that disposes of that case.

THE COMMISSIONERS OF INLAND REVENUE V. THE SOUTH BEHAR RAILWAY CO., LTD.

Now the next case is that of the South Behar Railway Company, and the facts in that case are that the Company had been permitted to perform certainly very unusual functions, very largely of a financial character, with regard to the building of a railway, to put it quite shortly, but undoubtedly it is a company which in the course of its earlier operations was, I should say, carrying on (and I do not think Sir William Finlay disputed it) a trade or business or undertaking of a similar character. But the position at the material time is simply this, that the Company has the right from year to year under covenant to receive a certain sum from the Secretary of State for India. I do not know whether it has a bare legal estate in anything, if they have such things in India, but it has no tangible right to any property so far as I know except its books and furniture. It has no right to anything, it does not do anything except receive its annuity, it has no form, I was going to say, of activity at all—I get into difficulties if I use the word "activity"—but its whole existence is confined to receiving an annuity at present and ultimately receiving a lump sum. There is nothing more to be said about it—nothing whatever.

Now it is said that the Company is carrying on a trade or business. I feel that I cannot say it is. It seems to me really a contradiction in terms to say it is. I said in the *Korean Syndicate* case⁽¹⁾ that the word "business" involved something active, which has been criticised by Lord Justice Atkin. I do not know when I used the word "active" that I meant to indicate or impute anything very feverish in the way of activity. All I meant to say was something you could possibly describe by the use of an active verb, that is all—something positive. However that may be, it seems to me that when a company is in a mere state of being an annuitant and its shareholders so far as they are ordinary shareholders are subjected to paying Income Tax on their annuity—it is nothing more—in construing this Statute, which, after all, is a taxing Statute, I am not justified in saying that the Company is carrying on a trade or business. Therefore I think the claim in that case fails.

(1) 12 T.C. 181.

(Rowlatt, J.)

THE COMMISSIONERS OF INLAND REVENUE v. THE ECCENTRIC CLUB, LTD.

Now I come to the case of the Eccentric Club, Ltd. This Eccentric Club is the property of a company, and what the Company does is to take subscriptions from the members of the Club who thereby become guarantors for the Company. It is a company limited by guarantee. It also takes payments from the members, of course, for the particular services which they get at the Club; it pays the expenses, of course, of carrying on the Club, on the other hand, and having done that, there is a balance which may or may not be profits; but the question to my mind is whether up to that point, at any rate, the Company has carried on "a trade or business or undertaking of a similar character." I have already indicated the difficulty that I find in applying these words "undertaking of a similar character." If the question of similarity depends upon the nature of a transaction by way of buying and selling, it is carrying on a business of an exactly similar character to that of a proprietary club or undertaking—it is exactly similar from the point of view of a proprietary club, but in the ultimate destination of the results of its transactions, of course, it is wholly different from a proprietary club. Is it similar or is not it under those circumstances? It is like asking whether St. Paul's Cathedral is similar to York Minster or whether it is similar to any other building, of which there are some in the Metropolis, which has a dome. In what respect do you seek the similarity? It seems to me that this Company is carrying on an undertaking of a similar character to a trade or business of a company which has a proprietary club. So far I think it is clear.

Then comes the question as to whether I have to look at the surplus of the profits that are made, which, after all, do not go to any shareholders but remain with the Company and benefit possibly the present members, at any rate ultimately benefit the future, if not the present, members of the Club in some form. The difficulties into which one is landed when one begins to consider *Last v. The London Assurance Corporation* ⁽¹⁾ and *Styles v. New York Insurance Company* ⁽²⁾ are very great, but in this case I think I have sufficient guidance in the words of Section 53, although it is a section of computation, because clause (h) clearly shows that profits of a mutual trading concern are to be treated as profits, and therefore I do not think it is possible to say that because a company is designed to conduct its business on the mutual principle, speaking broadly, therefore it is not a company within the Act at all. Therefore, in this case I think the Crown are right—I thought the other way about in the other cases—and therefore the appeal will be allowed with costs. The other appeals will be dismissed with costs.

⁽¹⁾ 2 T.C. 100.⁽²⁾ 2 T.C. 460.

Mr. Konstam.—I do not know whether your Lordship is giving any judgment on the second point as to whether there is to be any differentiation between the subscriptions.

Rowlatt, J.—I do not think there is any distinction. I will say so if you like.

Mr. Konstam.—It appears in the form of a question as to whether we should be taxed on £5,684 or any sum.

Rowlatt, J.—I am bound to say I do not think there is any distinction for the simple reason that I think you are in the position of a proprietary club. You might like me to state that.

Mr. Konstam.—I am much obliged, my Lord.

Appeals having been entered against the decisions of Rowlatt, J., in all three cases, the case of the *Westleigh Estates Co.* was argued before the Court of Appeal (Pollock, M.R., and Warrington and Sargant, L.JJ.) on the 15th and 16th November, 1923, that of the *South Behar Railway Co.*, on the 16th and 29th November, 1923, and that of the *Eccentric Club* on the 29th and 30th November, and the 3rd December, 1923. Judgment, which was reserved in each case, was given on the 17th December, 1923, unanimously in favour of the Crown, with costs, in the *Westleigh Estates Co.* case, in favour of the Crown, with costs, (Sargant, J., dissenting) in the *South Behar Railway* case, and unanimously against the Crown, with costs, in the *Eccentric Club* case, the decision of the Court below being reversed in each case.

The Solicitor-General (Sir Thomas Inskip, K.C.) and Mr. R. P. Hills appeared as Counsel for the Crown in all three cases, Mr. A. M. Latter, K.C., and Mr. Cyril King for the *Westleigh Estates Co.*, the Hon. Sir William Finlay, K.C., and Mr. A. M. Bremner for the *South Behar Railway Co.*, and Mr. E. M. Konstam, K.C., Mr. A. M. Bremner and Mr. R. W. Needham for the *Eccentric Club*.

JUDGMENT.

Pollock, M.R.—These three cases depend upon the right construction to be placed upon the relevant portion of Sections 52 and 53 of the Finance Act, 1920. By Section 52 there is charged the tax, called the Corporation Profits Tax, upon all profits to which Part V of the Act applies and which arise in the accounting period. By Sub-section (2) the profits, to which Part V of the Act applies, are determined to be "the profits of a British company carrying on any trade or business, or any undertaking of a similar character, including the holding of investments." In that Sub-section there is a proviso which eliminates for a limited period the profits of certain companies which may broadly

(Pollock, M.R.)

be described as public utility undertakings, and which are precluded by Statute from charging increased prices or distributing higher rates of dividend than those specifically authorised by the Acts regulating their powers. There is a further exception—under Sub-section (3)—of certain other companies. The effect, therefore, of Section 52, according to the structure of the Act, appears to be this—that *prima facie* Sub-section (2) (a) is a wide embracing section, at first sight operative to include all British companies carrying on trade or business or any undertaking of a similar character, from which it was necessary to exclude certain companies and undertakings, which would otherwise be embraced in its terms. Some light perhaps may also be thrown upon the inclusive nature of the section by Section 43 of the Finance Act, 1922, whereby the profits of charitable and other companies registered without the word “limited” are expressly exempted from the Corporation Profits Tax. This statutory exception appears to have been necessary because, without it, the words which I have referred to in Section 52 (2) (a), would *prima facie* have included the companies expressly excluded by Section 43. Sub-section (2) (a) is undoubtedly difficult to construe. The words “trade” or “business” are very wide words. In the Income Tax Act, 1918, the word “trade” is used without the word “business.” In the present section both the words “trade” and “business” appear, and it is not easy to appreciate what undertaking there could be, similar in character to a trade or business which is not embraced within the two words “trade” or “business.” In the Act which imposes the Excess Profits Duty, the Finance (No. 2) Act, 1915, by Section 39, the trades or businesses to which the part of the Act imposing Excess Profits Duty applies are “all trades and businesses” (whether continuously carried on or not) of any description “carried on in the United Kingdom,” and then follow certain exceptions.

It is not in my judgment possible to form any accurate measure of construction to be put on the words in Sub-section (2) (a) by reference to, or analogy from, the Income Tax Acts, or the Excess Profits Duty Act; the words must be taken as they stand. They impose the tax upon the profits first of all of a British company carrying on any trade or business, and these latter words are in my opinion used in an adjectival sense. There may be a British company which is not carrying on a trade or business. Thus, unless it can be said to be carrying on an undertaking of a similar character, whatever those words may hereafter be held to mean, the company's profits are not subject to tax if it is not carrying on a trade or business. It is not in my judgment possible, nor is it necessary for the purpose of the decision of the three present cases, to give a final definition of what companies are within or without Sub-section (2) (a). It is enough that a British company is *prima facie* included,

(Pollock, M.R.)

provided that it carries on a trade or business. It is admitted that in the three cases now before us the companies whose profits the Crown seeks to tax are British companies. The question to be determined is whether they are carrying on a trade or business, for those are the words relied upon by the Solicitor-General as embracing the three cases before me.

A number of cases have been referred to for guidance. In the *Liverpool and London and Globe Insurance Company v. Bennett*⁽¹⁾, [1911] 2 K.B. 577, it was held by Mr. Justice Hamilton (now Lord Sumner) that an insurance company, which had investments abroad, particularly for the purpose of fulfilling a condition of permission to carry on business in a foreign country, must pay Income Tax in respect of the interest received on the investments abroad, whether made to comply with the foreign law, or voluntarily, to accumulate a reserve in the foreign country, on the ground that the interest on both classes of investments was a part of the profits or gains accruing to the business from the trade it carried on. The interest received was received in the course of carrying on the business of the company. The sums representing that interest, whether remitted to this country or not, would form a part of the assets in the balance sheet of the company, and so be subject to tax. In *The Commissioners of Inland Revenue v. The Marine Steam Turbine Company*⁽²⁾, [1920] 1 K.B. 193, it was held that a company, the liquidation of which was stayed for the purpose of receiving royalties, which were found to be in effect payment by instalments of part of the price of the property which the company had definitely disposed of to a new company, was not carrying on business. The liquidation of the old company was only stayed in order that it might receive from the new company the price to be paid by the new company for the property handed over to the latter, and although the payment was made by instalments instead of by a lump sum, Mr. Justice Rowlatt held that the company receiving these royalties as a payment was not carrying on business and was not liable for Excess Profits Duty. The third case is that of *The Inland Revenue Commissioners v. The Korean Syndicate*⁽³⁾. In that case the company had dealt with certain concessions belonging to it, and had secured royalties to be paid to it by the lessees under a lease of the concession granted by it. Mr. Justice Rowlatt held, [1920] 1 K.B. 598, that the company was not carrying on business within Section 39 of the Finance (No. 2) Act, 1915. This decision was reversed by the Court of Appeal, [1921] 3 K.B. 258. That Court held that the operation carried out by the company was a turning to account of the concession within the memorandum of association of the company, and was,

(1) 6 T.C. 327.

(2) 12 T.C. 174.

(3) 12 T.C. 181.

(Pollock, M.R.)

therefore, part of the legitimate business carried on by it. The Master of the Rolls (Lord Sterndale) calls attention to the importance of seeing what the purpose of the company was as expressed in its memorandum of association, and had regard to that purpose as a factor for consideration when a decision had to be made in the particular circumstances before him on the question whether the company was carrying on business or not. It may be well to remark, in this connection, that although I agree with Mr. Justice Rowlatt's observation in the present case that every British company which is fulfilling the objects of its memorandum of association is not thereby, *ipso facto*, and of necessity brought within Section 52 (2) (a) of the Act of 1920, yet if its objects are business objects and are, in fact, carried out, it follows that the company carries on business, and consequently comes within the Sub-section. Lord Justice Atkin in the *Korean* case⁽¹⁾ expressly holds that the interpretation of the word "business" given by Mr. Justice Rowlatt in the *Inland Revenue Commissioners v. The Marine Turbine Company*⁽²⁾, if intended to be a precise definition, would be too narrow. The Judge had said that the meaning of "business" was an active occupation or profession continuously carried on, and Lord Justice Atkin pointed out that if any emphasis is to be attached to the word "active" he would not agree with it. Whether Mr. Justice Rowlatt did so intend may be open to doubt, for in the case of *The Korean Syndicate, Limited*⁽³⁾, when before him, on page 603, he makes a reservation with which I agree. "It does not follow," he says, "that whenever at some particular moment a company is doing nothing but receiving an income from its investments, it is not carrying on business"; and he indicates that in a certain class of cases, although a company is not actively doing anything, the right conclusion would be that the company was nevertheless carrying on a business.

COMMISSIONERS OF INLAND REVENUE v. THE WESTLEIGH
ESTATES COMPANY, LIMITED.

Coming now to the particular cases which are before us, the Commissioners held in the first, the Westleigh Estates Company, Limited, case, that the Company was holding investments, but inasmuch as it was not carrying on business, in their view, the holding of investments did not bring the Company within the range of the Act. The Company, however, appears to have power to exchange any of its investments and to deal with the monies of the Company as may be from time to time required. They have, as stated in paragraph 6, sub-clause (c), of the Case Stated, on two occasions altered their investments; and in the note attached to the accounts of the Company for the year ending June 30th, 1920, the last account attached to the Case, there is a note:

(1) 12 T.C. 181.

(2) 12 T.C. 174.

(3) 12 T.C. 181, at p. 197.

(Pollock, M.R.)

“ Your Directors would draw the attention of the shareholders to the important fact that the property is to a large extent a wasting asset, and leave it in their hands to say whether the balance shall be all divided as dividend, or dividend and bonus, or whether any part should be set aside and invested by way of sinking fund.”

It is a clear rule that the questions of fact are to be found by the Commissioners, and that their decision cannot be upset if they have rightly applied the law to the facts found by them. It is an equally clear rule that the law must be interpreted by the Courts before which the Case Stated comes. In my judgment the Commissioners have not applied the true rule of law to the facts found. It is impossible to say that the Westleigh Estates Company had ceased to do any business. One of the facts found (see paragraph 6 (e) of the Case) is as follows :—“ The minerals under the surface of the property have been worked by the various lessees under leases which had, and still have, many years to run. On expiration these leases have been renewed, or fresh leases granted, to the same lessees. The Company has never itself worked any of the mines under the property.” As and when, therefore, occasion arises, further leases may and will be granted by the Company. It was in my judgment exactly in that state referred to by Mr. Justice Rowlatt on page 603 in the *Korean Syndicate* case.⁽¹⁾ Its business may have been quiescent, but it was still carrying it on, and I think it falls within the words “ a British company carrying on a trade or business ” without the necessity of having reference to the words “ including the holding of investments.” Those words appear, in my judgment, to sweep into the categories of companies whose profits are subject to tax, companies which are formed for the purpose of holding the shares of another company and dividing the dividends received as may be determined from time to time, and, it may be, other companies as well. In this case, however, it is not necessary to invoke their aid. The Westleigh Estates Company was, in my judgment, carrying on a trade or business and, therefore, I am of opinion that the appeal should be allowed, with costs here and below.

COMMISSIONERS OF INLAND REVENUE *v.* THE SOUTH BEHAR
 RAILWAY COMPANY, LIMITED.

The original purpose of this Company was to supply to the Secretary of State for India the funds and material required for the construction, completion and making ready and fit for public traffic a railway to be called the South Behar Railway. The railway was, in fact, constructed by the East Indian Railway Company, as agents for the Secretary of State.

(¹) 12 T.C. 181, at p. 197.

(Pollock, M.R.)

By the Indenture dated 11th December, 1906, supplemental to the Indenture of the 7th August, 1895, the railway—by that time constructed—was to be held by the Secretary of State “for his own benefit, without any interference or control on the part of the Company, and the Company was accordingly to relinquish the same to him, together with all stores now belonging or appropriated to the railway.” By clause 5 of this Indenture, as from 1st January, 1906, until the determination of the principal contract of 7th August, 1895, it is provided that the Secretary of State shall pay to the Company in London the yearly sum of £30,000 by half-yearly payments on every 30th June and 31st December in each year. A number of the clauses contained in the principal contract were determined, but in particular clause 27 remains in force. It is as follows: “In the event of an agreement being entered into between the Secretary of State and the Company for the construction of any branch of the Behar Railway, the Company, subject to the terms of such agreement, shall either construct the same, or provide the funds or material in lieu thereof required for the construction and completion of the same by an agency to be approved by the Secretary of State.” The Case states that the shares of the Company are quoted on the London Stock Exchange, though the Company’s stocks do not frequently change hands. There are about 200 debenture holders and about 400 shareholders of the capital stock of the Company. There are three directors of the Company, the chairman receiving £200 per annum, the other two directors £150 per annum as remuneration, and the secretary receives a salary of £150 per annum. The Company has a sum of £6,000 invested in National War Bonds, bringing in an income of £300 per annum. In addition smaller sums are received from fees, paid on the transfer of stock and their money placed temporarily on deposit. The Secretary of State has power to take over the railway on payment to the Company of a sum of £684,580, which is the sum determined to be payable under clause 56 of the principal contract, as capital expended on the undertaking, and upon this purchase the principal contract will become determined.

It is agreed that the Company is a British company. Immunity from liability to Corporation Profits Tax is claimed by the Company on the ground that it is not carrying on any trade or business. In my judgment it is impossible to say that the Company is not carrying on any trade or business. It could not be wound up on the ground that its objects had been attained and completed. It is, in my opinion, in the same state that I have already referred to in the previous case. Its business may be quiescent, and to a large extent, a matter of routine. Its receipts may be derived, if not wholly, at least almost entirely from the annual payments made to it by the Secretary of State; but it remains a company alive, and still requiring, if only in smaller details, the direction of its directors and the duties carried out

(Pollock, M.R.)

by its secretary. It is still concerned in the business of disposing of and dividing the profits which it has become entitled to by reason of its greater activity in the past, and that activity, as well as possibly others, may be awakened and quickened in the future. For these reasons I am of opinion that the appeal must be allowed, with costs here and below.

COMMISSIONERS OF INLAND REVENUE *v.*
 THE ECCENTRIC CLUB, LIMITED.

The next case, that of the Eccentric Club, Limited, involves different considerations. It is admitted that the Company is a British company. The two Commissioners who heard the case were divided in their opinion. Mr. Justice Rowlatt has held that it is carrying on business. The Limited Company was formed for the purpose of carrying on the Eccentric Club. By Clause 3 (a) of its Memorandum of Association: "The objects for which the Company is established are—(a) to promote social intercourse amongst gentlemen connected (directly or indirectly) with literature, art, music, the drama, the scientific and liberal professions, sport and commerce, and with a view thereto to establish, maintain, and conduct a club of a non-political character for the accommodation of Members of the Club and their friends, and to provide a club house and other conveniences, and generally to afford to Members and their friends all the usual privileges, advantages, convenience and accommodation of a Club."

By Clause 6: "The income and property of the Club shall be applied towards the promotion of the objects of the Club as set forth in this Memorandum of Association, and no Member of the Club in his character as such Member shall be entitled to receive, directly or indirectly, any dividend, bonus or other profit out of such income or property, but nothing herein shall prevent payments in good faith to persons in other capacities (such as servants, lenders, landlords, vendors, or in any capacity other than membership) notwithstanding their membership of the Club or the application of the property of the Club upon its winding up in accordance with the Company's Articles of Association for the time being." The Members of the Club are to be the subscribers to the Memorandum of Association, and such other persons as shall apply for admission, and be admitted as members. Each man who proposes to be a Member of the Club signs an application by which he affirms: "I desire to become a Member of the Eccentric Club, and I agree, if elected, to become a Member, and to be bound by the Memorandum and Articles of Association and Bye-laws of the Club." The election of Members is vested solely in the Committee and is to be by ballot. An applicant cannot become a member of the Company unless he has first of all been chosen to be a Member

(Pollock, M.R.)

of the Club. But if and when he is elected to be a Member of the Club, he is required to become a Member of the Company. The business of the Company is to carry on the Club, and any profits must be devoted, in accordance with the Memorandum of Association, to the advancement of the objects of the Club. It is argued on behalf of the Crown that the Company is carrying on the business of the Club; while the contention on behalf of the Club is that, although in form it is a company, it does not carry on any trade or business in any just appreciation of those terms, that its object is not business, but to promote social intercourse, and that the Club and the Company do not seek gain, nor do their activities result in profits.

The two cases of *Last v. London Insurance Corporation*⁽¹⁾, 10 App. Cas. 438, and *The New York Life Insurance Company v. Styles*⁽²⁾, 14 App. Cas. 381, were cited and relied upon respectively on either side. It is a well-recognised principle that, in revenue cases, regard must be had to the substance of the transactions relied on to bring the subject within the charge to a duty, and that the form may be disregarded. In the *New York Life Insurance Company* case, the majority of the House of Lords held that in substance the surplus of the premiums contributed by the members was the result of the mutual insurance between members only, and that, although the members were united in a corporation, in truth and in fact the case could be regarded as if they were an unincorporated association of individuals. Lord Herschell asks on page 409⁽³⁾: "Can it be said that the persons thus associated together for the purpose of mutual insurance were carrying on a trade or vocation from which profits or gains accrue to them?" And he answers: "I cannot think so." Lord Macnaghten says⁽⁴⁾ (14 App. Cas., at page 411): "It happens here that the persons who combined to obtain the benefit of mutual insurance became, by the very act of insuring their lives, members of an incorporated company. But the Company (so far as regards the participating policyholders) was not formed for the purpose of carrying on a business having for its object the acquisition of gain. The fact, therefore, that the insured, who are also the insurers, carry on their business through the medium of a company, was properly treated as immaterial. And yet I cannot help thinking that the difficulty in the case such as it is, has been caused by the existence of the Company. Put the Company out of sight altogether, and what remains? Certain persons agree to insure their lives among themselves on the principle of mutual insurance."

Although the *New York Life Insurance Company* case⁽²⁾ was decided upon the Income Tax Acts, and could not be invoked as governing the present case, the reasoning in it may be used

⁽¹⁾ 2 T.C. 100.⁽²⁾ 2 T.C. 460.⁽³⁾ *Ibid.* at p. 482.⁽⁴⁾ *Ibid.* at p. 483.

(Pollock, M.R.)

when, as in the present case, one has to decide whether the form of the Eccentric Club, Limited, alone is to be looked on, or whether one may test the question whether the Company is carrying on business, by looking at the nature and purpose and substance of the transaction by which the Members of the Club are aggregated in the Company. It seems a somewhat far-fetched interpretation of the relevant section of the Act to hold that the association and activities of the Members of the Club connote the carrying on of business. In my judgment the Company was the structure only; it did not carry on a trade or business in the sense intended by Section 52 (2) (a) so as to impose a liability to Corporation Profits Tax on profits. The facts of this case are special and peculiar, and while as a general rule in cases of a company registered with the appendix "Limited" there would be a strong presumption that it was intended to, and did carry on a trade or business, yet, in my judgment, that presumption can be rebutted, and is so, where the facts are such, as in this case, to negative both the aim and the prospect of gain.

The appeal in this case also will be allowed, with costs here and below.

Warrington, L.J.—These are three appeals raising a question as to the true construction of Section 52 of the Finance Act, 1920, by which the Corporation Profits Tax was imposed, under the circumstances in each case. The question is whether the Company, the profits of which are sought to be charged, is "a British company carrying on any trade or business or any undertaking of a similar character, including the holding of investments." The question in each case is raised by a Special Case stated by the Commissioners. In the first two the decision of the Commissioners and of the learned Judge, Mr. Justice Rowlatt, was in favour of the subject, and the Crown appeals; in the third case the position of the parties is reversed.

Before dealing with the separate cases I should like to make a few general observations on the construction of Section 52. In the first place the tax is one upon profits and the object of Sub-section (2) is to define the profits to which the Section applies. They are the profits of a British company bearing a certain character. This character is described by the words, "carrying on any trade or business, etc." These words seem to me intended, on the one hand, to exclude companies, whether limited by shares or guarantee, and whether the word "limited" is omitted from their names or not, which are formed for purposes other than commercial purposes, such, for example, as philanthropic or religious purposes, and which in substance confine their activities to the purposes for which they are formed. On the other hand, the words are made wide enough to include companies

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which, though bearing the characteristic of commerciality, might conceivably be regarded as not carrying on a trade or business in a strict interpretation of those words, and particularly companies not directly carrying on business but holding investments in the securities of other concerns which do so, and from which the Company in question derives profits. Following out the same idea, Section 53, Sub-section (2) (a), contains a very wide definition of profits ending with the words, "other income arising from "investments or any other source." The Commissioners in each case found in favour of the subject and discharged the assessment; on the first two they described the conclusion at which they arrived as a finding of fact, and it has been contended that as such it is not open to review by the Court. In my opinion this contention is not well founded. The findings of fact in the proper sense are those stated in the body of the Case. The decision involves the true construction of the Section having regard to those facts, and is therefore a conclusion of law or mixed law and fact, and as such is open to review.

I will now deal with the cases separately.

COMMISSIONERS OF INLAND REVENUE *v.* THE WESTLEIGH
ESTATES COMPANY, LIMITED.

The question is whether the Commissioners and the learned Judge were right in the conclusion at which they respectively arrived, that the Company was not carrying on any trade or business or any undertaking of a similar character. The Company is admittedly a British company. Amongst the objects of the Company as set forth in the Memorandum of Association are those mentioned in Paragraph 3 of the Special Case, and it is unnecessary to repeat here the description of them. Perhaps the most important is the general one which, in the Special Case, is lettered (e), but in the original is (p), and is as follows: "To "sell, improve, repair, manage, develop, exchange, lease, "mortgage, farm or work as market gardens, dispose of, turn "to account or otherwise deal with all or any part of the property "and rights of the Company." In my opinion the doing of any of the things so described would certainly be the carrying on of a business. In fact the Company has acquired the property, the acquisition of which was its immediate object, and has not acquired any other. The land is coal-bearing land, and the bulk of it is in lease to various lessees who pay the Company rents and royalties. Some of the leases have fallen in and have been renewed by the Company, in each case to the same lessees, a fact mentioned by the Commissioners, but in my opinion immaterial. There are also surface leases from which rents are derived. Two small portions of land have been sold and the proceeds have been invested. I think the facts found by the Commissioners result

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in this: the Company was formed with certain objects. They have done various things in pursuit of one or other of those objects, and they have thereby derived profits. I have already said that in my opinion the description of the objects is the description of a trade or business. It follows that in my judgment the Company have been and are carrying on a trade or business.

A number of cases have been referred to, but in my opinion there is nothing in any of them which would lead to a conclusion different from that at which I have arrived. It was contended indeed that the Company was merely in the position of an ordinary land-owner dealing with his land and granting leases thereof and so receiving rents and profits. But assuming that in the case of an individual to do such things would not be to carry on a trade or business, it does not at all follow that the conclusion would be the same in the case of a company, the end and object of whose being is to transact the business in question and thereby to make a profit for division amongst its shareholders. (See the remarks of Lord Sterndale, Master of the Rolls, in *The Commissioners of Inland Revenue v. Korean Syndicate, Limited*⁽¹⁾, [1921] 3 K.B. 250, at page 273.) It seems to me also quite immaterial that the actual operations of the Company have been few in number and perhaps of no great importance. If you find a company formed to carry on a business, and in fact carrying it on, it cannot matter that its activities have been restricted. The learned Judge seems to ground his decision largely on the notion that the Company "did nothing except what would have been done by the executors and trustees of a will administering the trusts for the beneficiaries." With all respect, this at all events is a false analogy. The Company is not a trustee in any sense; it is doing on its own account and for its own profit the several things authorised by its Memorandum. In this connection I may mention an obvious error of the Commissioners in point of fact. They say in paragraph 6 (f): "The shares in the Company can only be transferred among the existing shareholders and their families." In truth the Articles give to members and certain other persons a right of pre-emption only; failing the exercise of this right the shares may be sold to anyone and at any price.

In my judgment the learned Judge has arrived at the wrong conclusion and his Order should be reversed and an Order made expressing the opinion of the Court that the decision of the Commissioners for Special Purposes of the Income Tax Acts was incorrect and that the assessment appealed against ought to stand. The Commissioners of Inland Revenue ought to have their costs here and below.

(1) 12 T.C. 181, at p. 202.

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COMMISSIONERS OF INLAND REVENUE *v.* THE SOUTH BEHAR
RAILWAY COMPANY, LIMITED.

This case raises the same question but under slightly different circumstances. The Company here was undoubtedly at one time carrying on a business, but it is said that it ceased to do so in 1906, and that it was not at any material time a "company carrying on a trade or business" and so forth.

The Company was incorporated in the year 1895 with the primary object of entering into and carrying into effect an agreement with the Secretary of State for India for the financing by the Company of the construction and equipment of the South Behar Railway, which was to be constructed, worked and maintained by the Secretary of State through the agency as afterwards arranged of the East Indian Railway Company. The Memorandum, however, contained wide powers going beyond the carrying into effect of the particular agreement. It was provided by the agreement that the gross earnings of the railway were to be divided between the Secretary of State and the Company in certain proportions, and the proportion allotted to the Company was to be the net earnings of the Company and dealt with accordingly. Provision was also made for the determination of the contract by notice to be given by the Secretary of State, and in that event for the purchase of the railway works and so forth at their fair value. The rolling stock and working plant was to be provided by the Secretary of State. The railway was duly constructed by the East Indian Railway Company as the agents of the Secretary of State, the money therefor being supplied by the South Behar Company. It was worked by the East Indian Railway Company as the agents of the Secretary of State. In 1906 a further agreement was made between the Secretary of State and the Company. By this agreement it was provided that from the 1st January, 1906, until the termination of the original agreement the Secretary of State might hold, use, and deal with the railway for his own benefit without any interference or control on the part of the Company and should be at liberty to work and maintain the railway in such manner as he should think fit but without being under any obligation to the Company in reference thereto. He was to pay to the Company the yearly sum of £30,000, and the payments provided for in the original agreement were to cease to be payable. The sum to be paid as the fair value of the railway works and so forth on the termination of the original contract was fixed at £684,580.

No notice of termination has been given.

Since the agreement of 1906 the Company has taken no part in working, inspecting or maintaining the railway. It has no office or representative in India. The £30,000 is paid by equal half-yearly payments and is brought into the half-yearly accounts of the Company as revenue. The Company also derives revenue

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from a sum of £6,000 War Bonds held by it. The Company has three directors and a secretary and presents to its shareholders regular reports and accounts every half-year when ordinary general meetings are held for declaring dividends and transacting the ordinary business of the Company including the declaration of dividends and the election of officers.

The Company, having been assessed to Corporation Profits Tax on its profits, appealed to the Special Commissioners, who discharged the assessment, holding as a fact, as in the previous case, that the Company was not carrying on a trade or business or any undertaking of a similar character, and being of opinion that the holding of the investment above referred to did not of itself cause liability to Corporation Profits Tax. They then at the request of the Inland Revenue Commissioners stated a Case for the opinion of the Court, the question being whether the Company was under the circumstances liable to be assessed to Corporation Profits Tax. It is said that the Company is not now and has not since 1906 been carrying on any business. With all respect, I cannot concur in that view.

Referring to the opinion already expressed as to the true construction of the Section, the source of income from which the profits are derived has its origin in and could not have existed but for the business which the Company was formed to carry on and did in fact carry on. The Company bears the character required by the Section, namely, that of a company carrying on a business, and it has not, in my opinion, lost that character because the particular venture in which it engaged has been finished except that the Company receives revenue therefrom and may hereafter receive repayment of capital. I prefer to base my judgment on this broad view, but if this is incorrect I should be prepared to hold that it has never ceased to carry on the business for which it was established. It is part of its business to declare dividends and pay them to its shareholders, to elect officers and transact the other business of its general meetings. There remains also the duty of dealing with the £684,580 if and when received, whether it be by returning their capital to the shareholders through the process of winding-up or by embarking it in new financial transactions within the Memorandum of Association.

On the whole I think the view of the Special Commissioners and Mr. Justice Rowlatt is incorrect, and this appeal ought to be allowed, and the question put to the Court in paragraph 9 of the Special Case answered in the affirmative.

COMMISSIONERS OF INLAND REVENUE *v.* THE ECCENTRIC CLUB, LIMITED.

In this case the Company was incorporated as a Company limited by guarantee. Its main object as described in the Memorandum of Association was "To promote social intercourse

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“ amongst gentlemen connected (directly or indirectly) with literature, art, music, the drama, the scientific and liberal professions, sport, and commerce, and with a view thereto to establish, maintain and conduct a club of a non-political character for the accommodation of Members of the Club and their friends, and to provide a club house and other conveniences, and generally to afford to Members and their friends all the usual privileges, advantages, convenience and accommodation of a Club ; To buy, prepare, make, supply, sell and deal in, or arrange for the supply of all kinds of provisions and refreshments required or used by the Members of the Club or other persons frequenting the club house or premises of the Club.” Incidentally to this the Memorandum described as objects certain things which are usually done by social clubs, for example, the buying, preparing and selling of provisions. The application of the income and property of the Company is regulated as follows : “ The income and property of the Club shall be applied towards the promotion of the objects of the Club as set forth in this Memorandum of Association, and no Member of the Club in his character as such Member shall be entitled to receive, directly or indirectly, any dividend, bonus or other profit out of such income or property, but nothing herein shall prevent payments in good faith to persons in other capacities (such as servants, lenders, landlords, vendors, or in any capacity other than membership), notwithstanding their membership of the Club or the application of the property of the Club upon its winding up in accordance with the Company’s Articles of Association for the time being.” It was formed to take over the assets and liabilities of and to continue the working of an existing members’ Club. The members of the Company are all members of the Club, and every member of the Club on election becomes *ipso facto* a member of the Company, and, therefore, a guarantor of the appointed contribution in the event of winding up whilst he continues a member or within a year from his ceasing to be one. As is usual in clubs of this nature no payments for provisions supplied in the Club are taken from any person not a member. The learned Judge has held that the Company is carrying on an undertaking similar to the trade or business of a club proprietor. With all respect I should have thought that if its profits could be charged with the tax at all it would be because the Company, regarded, as in law it is, as a separate entity or *persona*, is carrying on the actual trade or business of a club proprietor. But can this properly be said of it ? The club proprietor, whether an individual or a company, carries on a business with a view to profit as an ordinary commercial concern. This the present Company certainly does not do. I think the proper mode of regarding the Company in the present case is a convenient instrument or medium for enabling the members to conduct a social club the objects of which are immune from

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every taint of commerciality, the transactions of sale and purchase being merely incidental to the attainment of the main object. What is in fact being carried on, putting technicalities aside, is a members' club and not a proprietary club, nor any undertaking of a similar character. That in such a case one may go behind technicalities and look at the substance is I think shown by the mode in which the House of Lords dealt with a question, similar in this respect, in *New York Life Assurance Company v. Styles*⁽¹⁾, 14 App. Cas. 381. That transactions of sale and purchase may be merely incidental to non-commercial objects and not regarded as in themselves a trade is in my opinion shown by the contrast recognised by the Courts in *The Religious Tract Society of Scotland's* case, 3 T.C. 416, between the book-selling business which was held to be a trade, and the colportage which was held not to be of that character; and in *Young Men's Christian Association v. Groves*, 4 T.C. 613, between the public restaurant and the educational and religious undertaking, although the latter involved the taking of fees from members attending classes, and so forth.

On the whole I am of opinion that the appeal of the Company in this case succeeds, and that the Order of Mr. Justice Rowlatt should be set aside, and the assessment discharged with costs here and below.

COMMISSIONERS OF INLAND REVENUE *v.* THE WESTLEIGH
 ESTATES COMPANY, LIMITED.

Sargant, L.J.—In this case Mr. Justice Rowlatt has found as a conclusion of fact that "this limited company came into existence not with any notion of trade or business but merely as a convenient form under which the duties and powers of an executor could be exercised," and also that "the family company did nothing except what would have been done by the executors and trustees of a will administering the trusts for the beneficiaries," and his conclusions of law are based upon this view of the facts. In my judgment the learned Judge in so finding the facts has not fully appreciated the results of the Agreement of the 20th August, 1900, which appears to me to be much more important and far-reaching than he has supposed.

If under the Agreement the Company had merely been put in the position of an executor and trustee, its operations would necessarily be limited in point of time, and would result within some reasonable period in the realisation of the estates and the distribution of the proceeds, or possibly as to the whole or part of the estates in the allocation or appropriation to and amongst the beneficiaries of aliquot portions thereof, and further the

(1) 2 T.C. 460.

(Sargant, L.J.)

Company would be in a fiduciary position and accountable to the beneficiaries in that capacity. But in fact the position is an entirely different one. The Company has become the absolute legal and beneficial owner of the estates, and no relation of trustee and *cestuis que trust* exists between it and the beneficiaries. They are relegated to the ordinary position and rights of shareholders in an ordinary limited company, and have no further or other interest in the properties which formerly belonged to them in fractional shares, and there is no time limit whatever to the activities of the Company, which may very well endure and carry on the leasing and management of the estates for a century or more.

I am altogether unable to distinguish the case from the ordinary case of the out-and-out sale of a mining or urban estate to a company which is thereafter to manage, improve and develop it, and to distribute the profits to arise therefrom amongst its shareholders in the ordinary way. Companies of this kind are, of course, quite common, and their operations in my view involve the carrying on of a trade or business, or at least of an enterprise of a commercial character such as to be aptly described as "an undertaking of a similar character." The mere fact that the formation of the Company and the exchange of the vendors' fractional interests for corresponding amounts of share capital were rendered desirable by the difficulty in otherwise dealing with the estates is, in my view, immaterial; as is also the fact that the shares cannot be freely dealt with in the open market unless there has been a failure to exercise for one month certain special rights of pre-emption. Neither of these circumstances affects the existing position of the Company as one formed for the purpose of dealing with land so as to return profits to its shareholders, and actually engaged in carrying out the business or enterprise in question. The decision here of Mr. Justice Rowlatt seems somewhat inconsistent with his previous decision a few days earlier in the case of the *Birmingham Theatre Royal Estate Company, Limited*⁽¹⁾.

It is also clear that the finding in the Case Stated that the Company is not carrying on any trade or business or any undertaking of a similar character is not a mere finding of fact, but is at least a finding of mixed law and fact.

In my opinion, therefore, this appeal should be allowed.

COMMISSIONERS OF INLAND REVENUE v. THE SOUTH BEHAR
RAILWAY COMPANY, LIMITED.

On the 7th day of August, 1895, this Company, in pursuance of its memorandum, entered into an Indenture (hereinafter called the Principal Contract) with the Secretary of State in Council of

(1) 12 T.C. 580.

(Sargant, L.J.)

India for the provision of funds and materials for the construction and equipment of a railway called the Behar Railway. The railway when constructed was to be worked, managed and (except for the first two years) maintained by the Secretary of State through such agency as he might choose (the selected agents being in fact the East Indian Railway Company), and the remuneration of the Company was to consist in the receipt as their net earnings after the first two years of 55 per cent. of the gross earnings of the railway. The Principal Contract contained a clause 54 (2), under which the Secretary might, by giving not less than 12 months previous notice of purchase, determine the contract on the 30th day of June, 1919, or on the 30th day of June in the last year of any subsequent period of 10 years, and on the expiration of such notice of purchase the Company had to relinquish to the Secretary of State all claim whatsoever to the Behar Railway or the equipment thereof, and the Secretary of State within four months of the determination of the Principal Contract was to pay to the Company in England such a sum as when added to the unspent capital of the Company should amount to the total paid up capital of the Company so far as such capital other than unspent capital had been expended on the Railway with the authorisation of the Secretary of State.

By another Indenture (hereinafter called the Supplemental Contract) dated the 11th day of December, 1906, and made between the Secretary of State in Council of India of the one part and the Company of the other part, after recitals which showed that the Railway had been constructed in accordance with the Principal Contract and had been worked down to the 1st January, 1906, by the East Indian Railway Company on behalf of the Secretary of State, and that the Capital Stock of the Company amounting to £379,580 and the proceeds, amounting to £305,000, of an issue of £290,000 Debenture Stock, making together a total sum of £684,580 of capital had been expended by the Company with the authorisation of the Secretary of State on the undertaking of the Company, and after reciting that the parties had agreed that as from the 1st January, 1906, until the determination of the Principal Contract such fresh arrangement as thereafter appeared should be substituted for the provisions of the Principal Contract relating to the working and maintenance of the Railway, and otherwise as thereafter mentioned, it was amongst other things agreed and declared to the effect following, that is to say, (Clause 2) the Secretary of State was as from the 1st January, 1906, to deal with the Railway for his own benefit without any interference or control by the Company and accordingly the Company should relinquish the same to him together with any stores belonging or appropriated to the Railway. (Clause 3) The Secretary of State should during the period aforesaid be at liberty to work, maintain and improve the Railway

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by any working agency and in any manner he should think fit. (Clause 4) The Secretary of State should be under no obligation to the Company to keep the Railway in working order or to work the same or to execute any works in relation thereto, and the Company receiving from the Secretary of State the yearly payment therein mentioned should at all times keep him and the working agency indemnified against all claims in respect of the debenture stock or any other incumbrances of the Railway through or under the Company. (Clause 5) As from the 1st January, 1906, until the determination of the Principal Contract the Secretary of State should pay the Company the yearly sum of £30,000 as therein mentioned, and the Company should not be entitled to any charge, lien or security on the Railway or the earnings thereof in respect of the said yearly sum, and (Clause 6) on the determination of the Principal Contract by notice of purchase the said sum of £684,580 should be the sum payable under the Principal Contract as capital expended on the undertaking with the authorisation of the Secretary of State.

I have summarised these two contracts because of the extreme importance I attach to the change effected by the Supplemental Contract in the position of the Company.

The net result of that contract, as applied to the Principal Contract, is plain. It is that as from the 1st January, 1906, the Company made an out-and-out sale of the Railway to the Secretary of State and ceased to have any interest therein whatever. The sale was not the less an out-and-out sale because the consideration was not a lump sum, but was a perpetual annuity commutable into a lump sum at any one of certain intervals at the option of the Secretary of State. As from the signing of the Supplemental Agreement the Company lost all the right and interest to or in the business and undertaking of the Railway, and became simply and solely the recipients of a perpetual personal annuity redeemable by a capital payment.

The only reason for the continued existence of the Company as a corporation appears to be to enable the £30,000 annuity to be received and (after payment of or provision for Income Tax) distributed by way of interest to the holders of debenture stock and by way of dividend to the shareholders. The receipts of the Company from this annuity, from dividends and interest on certain small sums of capital thereafter mentioned, and from transfer fees amount to an annual sum slightly exceeding the total of the interest on the Company's debenture stock and a dividend of 5 per cent. on its issued capital, and accordingly there appear on the Company's balance sheet certain small capital items which would seem to be the result of the accumulation of this excess, or of some balance of revenue prior to the 1st January, 1906, or of both; and the most important of these items is a sum of £6,000 National War Bonds, 1922, which in all probability

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is the result of a purchase made during the War in response to the appeal issued by the Government at that time. But these capital items are mere balancing items of small importance, and the holding of them cannot in my view amount to a "carrying on of a trade or business" by way of "holding investments" within the later words of Sub-section (2) of Section 52 of the Finance Act, 1920, if the Company are not otherwise within the words of Sub-section (2) as "carrying on a trade or business" or an undertaking of a similar character."

The question then is whether at the date of the passing of the Finance Act, 1920, or at any time since, the Company has been "carrying on any trade or business or an undertaking of a similar character." The Special Commissioners have found as a fact that it has not been doing so; and there is nothing in my view to indicate that in so finding the Commissioners have done more than come to a conclusion of fact or have put any legal construction on the words of the Statute. Further, the learned Judge has definitely come to the same conclusion, and speaking for myself I am unable to see how the operations of the Company since the year 1906 can be properly described in any ordinary meaning of the words as a carrying on of a trade or business or an undertaking of a similar character.

The Company did at one time carry on a trade or business which it has disposed of, and it is now merely in the position of receiving the purchase money resulting from the out-and-out sale of that business. If the Company had been a mere individual or individuals it would certainly be held to have ceased to carry on any trade or business and to be living on the proceeds of the disposal of his or its former trade or business. I cannot see that the fact of the Company being a corporation makes any difference in this respect. The fact that it keeps a staff for the distribution of its income between its shareholders and the holders of its debenture stock seems to me to make no difference. Such a process of distribution cannot be called in any ordinary sense of the words "carrying on a trade or business, or any similar undertaking." No doubt the Company is acting within the powers of its Memorandum of Association; but every Company must be supposed to do this. To come within the Statute it must not only act within its powers but act in such a way as to be carrying on a trade or business or a similar undertaking.

The *Korean Syndicate* case⁽¹⁾ has been cited as being in favour of the Appellants' contention, but the facts there are quite different. There the Syndicate had disposed of their concession on the terms that the purchasers should work it and pay them a percentage of the profits. They were directly interested in the working through their purchasers, and were in the position of

(1) 12 T.C. 181.

(Sargant, L.J.)

sleeping partners. Mr. Justice Rowlatt had held that the arrangement amounted to a lease and that the Syndicate were not liable. The Court of Appeal did not indicate that on this view of the transaction he would have been wrong; they differed as to the nature of the transaction. Till the year 1906 the South Behar Company may have been in a position analogous to that of the Korean Company; but as from that year they were in an even more detached position than that of a lessor or even of an owner of a rent-charge. They were merely owners of an annuity having no relation at all to the railway except as a matter of history.

The *Marine Steam Turbine Company* case⁽¹⁾, [1920] 1 K.B. 193, is, like the *Korean* case⁽²⁾, a decision on a somewhat different statute from that now in question, and is therefore only useful by way of analogy. But so far as it is applicable the decision in that case is in favour of the Company here, and it is to be remarked not only that the annuity here, though perpetual, represents a purchase price just as much as the terminable annual payments did there; but that the payments here are completely detached from any business, while there they continued to arise from the business sold by the Marine Steam Turbine Company. In this case I differ from the majority of the Court. I think that the learned Judge was right and this appeal should be dismissed.

COMMISSIONERS OF INLAND REVENUE v. THE ECCENTRIC CLUB,
LIMITED.

In this case it is admitted that under the constitution of the Company the members of the Club and the members of the Company are necessarily identical. This is clearly shown by the form of application which has to be made in writing and signed by each candidate before election. That application is addressed to the Honorary Secretary of the Eccentric Club, Limited, and contains an agreement by the candidate to become, if elected, a member, and to be bound by the Memorandum and Articles of Association and Bye-laws of the Club. Such an agreement is undoubtedly sufficient within Section 24 (2) of the Companies (Consolidation) Act, 1908.

The Club is thus in substance an ordinary members' club, since it is managed by the members for the members as completely as if the property of the Club were vested in the ordinary way in trustees and the management of the Club were conducted by a committee of the members, and the sole question of law is whether the circumstances that the members of the Club are formed into a corporation, and that as a matter of law the property of the Club and the management of its affairs are vested in that corporation, are sufficient to bring the Company within the definition of Sub-section (2) (a) of Section 52 of the Finance Act, 1920.

(1) 12 T.C. 174.

(2) 12 T.C. 181.

(Sargant, L.J.)

Within some of the words of the Sub-section the Club by its incorporation must undoubtedly fall; they have become and are a British company; but are they a British company carrying on any trade or business or any similar undertaking? They contend that their activities do not partake in any way of the nature of a trade or business, but consist solely in the supply to their own corporation of the ordinary amenities of a social club. They insist that this limitation of activities to a system of self-supply altogether differentiates their enterprise from that of an individual or company carrying on an ordinary proprietary club with the object of making a profit out of the supply of club amenities, and they rely in support of this contention on the reasoning of the majority of the House of Lords in the case of the *New York Insurance Co. v. Styles*.⁽¹⁾

In my judgment this contention is correct, and the reasoning of the majority there is completely applicable here. In the speeches of each of the majority of four, Lord Watson, Lord Herschell, Lord Bramwell and Lord Macnaghten, there was a clear recognition of two principles; the first was that no difference was made by the mere fact that the actual dealing was with an incorporated company when in substance the insurers and the insured were the same; and the second was that in the case of such a scheme of mutual insurance not only were there no profits but (the important point here) there was no question of a trade or business in any ordinary sense of the words. On the same principle it seems to me that the present case stands as a question of substance on the same footing as if no incorporated company had been interposed between those who are mutually providing and receiving social amenities, and accordingly that this process of providing these amenities cannot be considered the carrying on of a trade or business any more than the provision in that case of mutual insurance. Mr. Hills, in the course of his careful argument, was driven to admit the difficulty of his position so far as resting on the words of Sub-section (2) (a) of Section 52 only, and he sought to extend the prima facie meaning of these words by the reference to mutual trading concerns in Sub-section (2) (b) of Section 53. But to this argument, quite apart from the consideration that it would hardly be appropriate to enlarge a definition section by the language of a section aimed at processes of calculation, there appears to be this conclusive answer. The phrase "mutual trading concerns" involves "trading," which in itself is a word of rather narrower denotation than the earlier phrase "trade or business, or undertaking of a similar character," and therefore cannot suggest the inclusion in the earlier and wider phrase of any activity or enterprise not already comprehended in that phrase.

I agree that the appeal should succeed in this case.

(1) 2 T.C. 460.

Mr. Reginald Hills.—My Lords, in the South Behar Railway's case the costs were paid over by the Crown, so that the Order of the Court in that case will include an Order for the repayment of those costs?

The Master of the Rolls.—Yes.

Mr. King.—In the case of the Westleigh Estates Company, Limited, do your Lordships think that that is a case for magnanimity with regard to costs? We are quite a small concern.

The Master of the Rolls.—I see no reason why the ordinary result should not follow in that case; I see no particular reason to make any particular Order with regard to the Westleigh Estates Company.

Sargant, L.J.—I thought you had a capital of £90,000.

Mr. King.—I am afraid I was looking at the amount of the tax; I was not so much thinking of the £90,000. Your Lordship is perfectly right, it is £90,000.

The Master of the Rolls.—No.

Mr. King.—I cannot press it any further.

Mr. Konstam.—With regard to the Eccentric Club case I am instructed to ask your Lordships to order that the Certificate here and below should include the shorthand-writer's charges.

The Master of the Rolls.—What shorthand-writer's charges?

Mr. Konstam.—For the transcript of the arguments and judgment in the Court below which were used in this Court.

Warrington, L.J.—You get the judgment as a matter of course.

Mr. Konstam.—The judgment and not the arguments.

The Master of the Rolls.—Yes.

Mr. Konstam.—I am much obliged.

The South Behar Railway Company having appealed against the decision of the Court of Appeal, the case was argued before the House of Lords (Viscount Cave, *L.C.*, and Lords Dunedin, Atkinson, Sumner and Buckmaster) on the 23rd and 26th January, 1925, when Mr. A. M. Latter, *K.C.*, and Mr. A. M. Bremner appeared as Counsel for the Company, and the Attorney-General (Sir Douglas Hogg, *K.C.*), the Solicitor-General (Sir Thomas Inskip, *K.C.*) and Mr. R. P. Hills for the Crown.

Judgment was given on the 19th February, 1925, unanimously in favour of the Crown, with costs, confirming the decision of the Court below.

JUDGMENT.

Viscount Cave, L.C.—My Lords, the question raised by this appeal is whether the Appellants, the South Behar Railway Company, Limited, are liable under an assessment to Corporation Profits Tax made upon them by the Commissioners of Inland Revenue for the accounting period ending on the 31st December, 1920. The answer to this question partly turns on the terms of Part V of the Finance Act, 1920, and partly on the facts of the case.

By the Finance Act, 1920, Section 52, it is enacted that, subject as provided in that Act, there shall be charged on all profits to which Part V of the Act applies, and which arise in an accounting period ending after the 31st December, 1919, a duty (called "Corporation Profits Tax") of an amount equal to five per cent. of those profits. The profits to which Part V of the Act applies include "the profits of a British company" carrying on any trade or business, or any undertaking of a "similar character, including the holding of investments." The expression "British company" is defined as meaning any company incorporated by or under the laws of the United Kingdom. By Section 53 of the Act it is provided that for the purposes of the Act profits shall be the profits and gains determined on the same principles as those on which the profits and gains of a trade would be determined for the purposes of Schedule D to the Income Tax Act, 1918, and that such profits shall include (among other things) all income arising from investments or any other source and recorded in the accounting period. Section 54 provides that for the purposes of the tax the accounting period shall be a period of twelve months ending on the date up to which the accounts of the company are usually made up.

Reading these provisions together, it appears plain that the tax is not payable by all registered companies. The words "carrying on any trade or business, or any undertaking of a similar character" are of qualifying and limiting nature, and the fact that a company exists and has not been wound up will not of itself make the company liable to the tax. On the other hand, the tax is not limited to companies carrying on trading or manufacturing concerns. It is payable by any company which carries on a business or an undertaking of a business nature, and in the case of a company which carries on such a business or undertaking the tax is payable on all its profits and gains, including the income from its investments. The words "including the holding of investments" appear to refer, not to all cases in which a company has money invested, but to cases where the holding of investments is the business or part of the business of a company. That the net of the tax was understood and intended by Parliament to be spread wide is evident from the terms of Section 43 of the Finance Act, 1922, which provides that Corporation Profits Tax shall not be charged on the profits of an association which is registered under Section 20 of the

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Companies Act, 1908, as a company with limited liability without the addition of the word "limited" to its name, or on the profits of a company established solely for the advancement of religion or education and which under its memorandum or articles of association is prohibited from distributing any part of its profits to its members; for that Section affords ground for the view that but for the amendment thereby effected, a company of the nature described, that is to say, a company formed for promoting science, religion, charity or some other useful object, and not for the purpose of making and distributing profit, would have fallen under the tax.

The principal object for which the Appellant Company was formed was (as its Memorandum of Association shews) to enter into a contract with the Secretary of State for India in Council relating to the construction of a railway in India to be called "The South Behar Railway," and to carry the same into effect, subject to such modifications as might be agreed upon between the Secretary of State and the Company, including power to enter into and carry into effect any supplemental or additional contract.

The agreement referred to in the Memorandum of Association was duly entered into and was dated the 7th August, 1895, and the pith and substance of that agreement was as follows:—By clause 3, the Company was to supply to the Secretary of State the funds and materials required for the construction of the railway. By clause 4, the Secretary of State was to provide free of cost to the Company the land required for the railway, and was to allow the Company to have possession of such lands during the continuance of the contract. By clause 6, the construction of the railway was to be undertaken by the Secretary of State through such agency as he should appoint and according to designs and specifications to be approved by him, but at the entire risk and cost of the Company, which was to supply the necessary funds as he might require. By clause 19, the Secretary of State was, as from the opening of the railway and until the determination of the contract, to work and maintain the railway and keep it supplied with rolling stock, plant and machinery. By clause 28, the Secretary of State was in each half year to retain 45 per cent. of the gross earnings of the railway, and the remaining 55 per cent. of such gross receipts for each half year was to be the net earnings of the Company. By clause 48, the Company was not, during the continuance of the contract, without the sanction in writing of the Secretary of State, to engage in or carry on or apply capital to any business "other than the business provided by the contract to be carried on by the Company, and business incidental or subsidiary thereto." By clause 54, the Secretary of State was to be at liberty, by giving to the Company in England not less than 12 months' previous

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notice in writing (therein referred to as "notice of purchase") to determine the contract either on the 30th June, 1919, or on the 30th June in the last year of any subsequent period of 10 years, and thereupon the Company was to give up to the Secretary of State all land, buildings, stores and other things, which were to become the absolute property of the Secretary of State. By clause 56, if the contract should be determined by notice of purchase, the Secretary of State was to pay to the Company out of the revenues of India, in England, such a sum as when added to any unspent capital should amount to the total paid-up capital of the Company so far as such capital had been expended on the undertaking with the authorisation of the Secretary of State.

The South Behar Railway was duly constructed and opened for traffic. The agreement of 1895 has not been determined, but on the 11th December, 1906, a further agreement was entered into between the Secretary of State and the Company. By that agreement, after a recital shewing that the total sum of capital money expended by the Company with the authorisation of the Secretary of State on the undertaking amounted to £684,580, it was agreed in substance as follows:—(clause 2) that the Secretary of State should, as from the 1st January, 1906, until the determination of the contract of 1895 (therein called the principal contract), be entitled to hold and deal with the railway for his own benefit without any interference or control on the part of the Company, and the Company should accordingly relinquish the same to him; (clause 4) that the Secretary of State should be under no obligation to the Company to work the railway; (clause 5) that as from the 1st January, 1906, until the determination of the principal contract, the Secretary of State should pay to the Company in London the yearly sum of £30,000 by half-yearly payments on the days therein mentioned, and the payments by the principal contract required to be made by the Secretary of State to the Company should cease to be payable; (clause 6) that upon the determination of the principal contract by notice of purchase the said sum of £684,580 should be the sum payable under clause 56 of the principal contract as capital expended on the undertaking with the authorisation of the Secretary of State; (clause 7) that certain clauses and parts of clauses of the principal contract therein specified (being 21½ out of the total of 59 clauses) should cease to operate.

Since the date of the last mentioned agreement the Company has had no office in India, but has an office in England with three directors and a secretary in England, who receive the annuity of £30,000 payable half-yearly by the Secretary of State and, after paying the interest on the Company's debentures, hold general meetings and declare dividends in the ordinary way. The Company has a sum of £6,000 in War Loan, but has no other investment.

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In these circumstances it was contended on behalf of the Company that the Company no longer carries on any trade or business within the meaning of Section 52 of the Finance Act, 1920, but has become a mere annuitant, and accordingly that the Company is not assessable to Corporation Profits Tax; and the Commissioners for the Special Purposes of the Income Tax Acts, before whom the question came, so held. On a Case being stated for the opinion of the High Court, Mr. Justice Rowlatt agreed with the Commissioners' view; but on an appeal to the Court of Appeal that Court, by a majority, reversed the decision of Mr. Justice Rowlatt and held the Company liable to the tax, Lord Justice Sargant dissenting. Hence the present appeal.

My Lords, I agree with the Court of Appeal in holding that the finding of the Commissioners is not a finding of pure fact, but is an inference of law founded upon the specific facts found in the case, and accordingly that the decision was open to review; and having listened to the arguments put before the House, I find myself in agreement with the conclusion of the majority of the Court of Appeal. It is true that the Company carries on no trade or manufacture, and that its principal and only function at the present moment is to receive and distribute the fruits of its undertaking; but that is a part, and a material part, of the purpose for which it came into existence. It was not intended to be a trading but a financial company; and its main object was, not to construct or work a railway, but to provide funds for that purpose and, as a reward for so doing, to receive a yearly sum for a period and afterwards a lump sum by way of return of capital. Until the execution of the agreement of 1906 the yearly sum receivable by the Company was dependent on the gross earnings of the railway; but except in that respect the Company had no interest in the railway, and it had no right to interfere in its working. By the agreement of 1906 this fluctuating annuity was converted into a fixed annuity, and as the fixed annuity was made independent of the earnings of the railway, those provisions of the original agreement which compelled the Indian Government to continue to work the line were cancelled; but in other respects the original agreement remained and still remains in operation. The Company can no longer be called upon to fulfil its first purpose, namely, to make advances for the construction of the line, because all the necessary funds have been already advanced; but it is still fulfilling its second purpose, which was to receive an income for its shareholders while the line was running and to distribute it among them, and if and when the principal agreement comes to an end, it will have the further function of recovering and dividing the capital to be repaid. I think, therefore, that the Company still carries on a business or similar undertaking within the meaning

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of Section 52 of the Finance Act, 1920. The case is not unlike *Commissioners of Inland Revenue v. Korean Syndicate*⁽¹⁾, [1921] 3 K.B. 258, with the decision in which case I agree.

For these reasons I am of opinion that this appeal fails and should be dismissed with costs.

Lord Dunedin.—My Lords, it is admitted that this Company was no abortive paper conception, but that it actually, after its formation, proceeded to carry on business. What was that business? Necessarily, the business contemplated by its Memorandum and Articles of Association. Now if these be read it becomes apparent that during the life of the Company there would be, so to speak, two periods, the first during which the Company would be active and engaged in furnishing funds and plant, the second during which it would be quiescent, and engaged in receiving its proportion of the profits of the railways which had been created through its efforts. Accordingly, up to 1906, it seems to me undoubted that this Company was carrying on business.

The sole question, therefore, seems to be if the agreement of 1906 has the effect of sending the Company out of business. What was the agreement of 1906? It was simply this, that instead of taking its remuneration in the form of a percentage of profits, a sum which must necessarily fluctuate, it agreed to take a fixed sum. My Lords, I cannot think that that operated any change in what the Company was doing. The Appellants say that after 1906 the Company became an annuitant. I do not find in the Memorandum any provision to ask the Company to undertake the business of an annuitant, if indeed such a phrase is not in itself absurd, no one ever having heard of such a business. I am, therefore, of opinion that the Company carried on business after 1906 precisely as it did before, and that the appeal consequently fails.

Lord Atkinson.—My Lords, I have had the pleasure and advantage of reading the judgment delivered by my noble and learned friend on the Woolsack and I entirely concur in it.

Lord Sumner.—My Lords, the question is whether on the undisputed facts, the Appellant Company, during the year of charge was "carrying on any trade or business, or any undertaking of a similar character, including the holding of investments." Perhaps I ought to add the words "within the meaning of the Finance Act, 1920, Section 52 (2) (a)," but I think this really adds nothing to the quoted words themselves, and only indicates where they may be found. The Statute does not define any of these words, but leaves them to their vernacular meaning and, where the Legislature did not think fit to tread,

(1) 12 T.C. 181.

(Lord Sumner.)

I certainly have no mind to rush in. Nor is much help to be got from the authorities, for the expression "carrying on a trade" or business" has generally been discussed in totally different contexts. Thus the distinction between a trust for holding property and a "carrying on of a business" is illustrated in *Smith v. Anderson* (15 Ch. D. 247), but there can be no question here of any trust holding property for beneficiaries, and the issue is between carrying on a business and being out of business altogether.

To ascertain the business of a limited liability company one must look first at its Memorandum and see for what business that provides and whether its objects are still being pursued (*Korean Syndicate's case*⁽¹⁾, [1921] 3 K.B. 258). It is common ground that the Company when first incorporated and for some years afterwards did carry on a business, or an undertaking of a similar character, for it embarked its very considerable capital in making a railway, and there, as a matter of fact, that capital still remains. That the actual construction and working of the line were by agreement entrusted by the Company to third parties, does not affect the matter, for this was merely the way in which the Company's business was carried on. Under the contract with the Secretary of State for India, which the Company was formed to enter into, the line may be sufficiently, if not exactly, described as a line built with the Company's money on land provided by the Secretary of State, and worked for the Company by the Secretary's nominees for 45 per cent. of the gross earnings. The residue of the gross earnings belonged to the Appellants. Under this system, the profits made by the Company in carrying on this business would certainly vary from year to year and may have been precarious, but such as they were they accrued from the Company's interest in the working of the line, which its money had built. In 1906, this system was altered by a further agreement and instead of sharing in the gross takings of the line, the Company now received from the Secretary of State a fixed sum of £30,000 a year. This sum was not to be secured by any charge or lien on the railway or its earnings, but, as the original contract provided for no such security for the Company's share of the gross takings, this provision seems to have been inserted merely *ex abundanti cautela*. In other important respects the principal contract remained unaffected, although it may well be that during the year of charge and other years both before and after it some of the provisions of the contract did not in these respects actually become operative. Thus the right of the Secretary of State to purchase the line at a defined price remained and remains unexercised and in being. Accordingly as long as the Secretary of State caused his current obligations to be discharged and did not exercise this right of purchase, the line built with the Company's money would remain

(¹) 12 T.C. 181.

(Lord Sumner.)

beyond its control and the capital embarked in it would be unrealisable. So, too, sundry obligations upon the Company to find further capital remained outstanding, e.g., for the repair of extraordinary damage to the line, and for reasonable alterations in or additions to it. Thus the change made in 1906 would appear to have been less considerable than it looks at first sight. The Company's capital was locked up as before and might be liquidated as before, if the right of purchase were exercised. The outstanding and contingent obligations remained as before. A fixed sum for which the Secretary of State was liable, replaced that fixed percentage of gross earnings, over which, for better or for worse, the Company had no control. This, then, was the only substantial change, and the fact that, under the old regime, the Company was a sharer in the takings, and under the new one was only the Secretary of State's annuitant really makes remarkably little difference.

My Lords, under the old regime the Company admittedly carried on a business and made money out of it. The fact that the fluctuating profits or gains accruing under the former agreement (if earned) became, under the latter, a fixed amount of gains payable by the Secretary of State, whether they were earned or not, makes no difference. In my opinion, it is of little use to ask whether the Company could have been wound up, the purpose of its incorporation having been accomplished, or whether if its shareholders had themselves carried on its actual activities during the year of charge without being incorporated, they would have constituted an illegal association. It is obvious that the Company's objects have by no means been accomplished. It is obvious, too, that during its present period of dormant life it has very little to do. I do not attach much importance to the domestic operations of declaring and paying dividends, remunerating directors and presenting reports, but the operation of receiving and thus discharging the annuity payments goes on continuously, and however simple, it is not a mere passive acquiescence. It is the transaction of business between debtor and creditor resulting periodically in the discharge of a debt. The present is not the case of a company existing to do one act only and once for all. Not only did the Company make the agreement of 1906, but it plays its recurring part in every payment and receipt of gains, and there is here, therefore, that "repetition of acts," which Lord Justice Brett says (15 Ch. D. at p. 277) is implied in "carrying on business." The important thing is that the old business still continues of getting some return for capital embarked in the line. There has not been such a termination of the business formerly carried on or such a complete transfer of it to a new trading company as has been held to be the criterion of ceasing to carry on business under the Bank Charter Act, 1844, s. 12 (*A.G. v. Birkbeck*, (1884) 12 Q.B. D. 605; *Prescott v. Bank of England*, [1894]

(Lord Sumner.)

1 Q.B. 351). If, as was held *In re Dagnall*, [1896] 2 Q.B. 407, a married woman continues to carry on business for the purpose of 45 & 46 Vict., c. 75, s. 1 (5), as long as her trade debts remain undischarged, there would seem to be a presumption that a company continues to carry on business as long as it is engaged in collecting debts periodically falling due to it in the course of its former business. Business is not confined to being busy; in many businesses long intervals of inactivity occur. In the present case at any rate, I think that no change has occurred to enable your Lordships to say that the Company's carrying on of business is a thing of the past, or that the Commissioners could properly find that it is so. Indeed, I do not think there has been much change. The concern is still a going concern though a very quiet one.

I am accordingly of opinion that the appeal fails.

Lord Buckmaster.—My Lords, I agree.

Questions put :

That the Order appealed from be reversed.

The Not Contents have it.

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

The Contents have it.
