[HIGH COURT OF AUSTRALIA.]

THE UNIVERSITY OF BIRMINGHAM AND ANOTHER . . . . . } APPELLANTS;

AND

THE FEDERAL COMMISSIONER OF TAXATION . . . . . } RESPONDENT.

THE EPSOM COLLEGE AND ANOTHER . APPELLANTS;

AND

THE FEDERAL COMMISSIONER OF TAXATION . . . . . } RESPONDENT.

H. C. OF A. 1938.

MELBOURNE, *Oct.* 10; *Nov.* 3.

Latham C.J., Rich, Dixon and McTiernan JJ.

Income Tax (Cth.)—Assessment—Exemption—Charitable or public educational institution—Institution not in Commonwealth—Income derived from sources in Australia—Income Tax Assessment Acts 1936 (*Nos.* 27 *and* 88 *of* 1936), *sec.* 23 (*e*)—*Acts Interpretation Act* 1901-1937 (*No.* 2 *of* 1901—*No.* 10 *of* 1937), *sec.* 21 (*b*).

Sec. 23 (*e*) of the *Income Tax Assessment Acts* 1936 exempts from income tax "the income of a religious, scientific, charitable or public educational institution."

Held that the exemption given by that provision is not limited to the income of such institutions as carry on operations in Australia, but extends also to the income of institutions which carry on their operations outside Australia.

CASES STATED.

On appeals by the University of Birmingham and Frederick Arthur Moule and by the Epsom College and Frederick Arthur Moule (beneficiaries and trustee respectively of the estate of

Thomas Aubrey Bowen deceased) to the High Court from assessments to Federal income tax for the year ended 30th June 1936 *Rich* J. stated cases for the opinion of the Full Court.

Neither the University of Birmingham nor the Epsom College was at any time conducted for profit or gain; each was at all times during its existence a charity within the meaning and interpretation of the preamble to the Act 43 Eliz. c. 4 and a public educational institution; all the activities of each institution were at all times conducted in England, where they were incorporated, and not elsewhere. Each of the institutions was entitled to income derived in Australia from trust funds in the estate above mentioned. The first question submitted by each of the cases stated, which was the only question the court found it necessary to answer, was:

> Whether the said income was the income of a charitable and/or public educational institution within the meaning of sec. 23 (*e*) of the *Income Tax Assessment Act* 1936.

The two cases were heard together.

T. W. Smith, for the appellants. The only point is whether the exemption in sec. 23 (*e*) of the *Income Tax Assessment Acts* 1936 is limited to institutions in Australia. Sec. 23 (*e*) was in the same form in the Act of 1915. The words "charitable . . . institution" in sec. 23 (*e*) should be given their strict legal meaning, and in that sense they include a foreign charity (*Adamson* v. *Melbourne and Metropolitan Board of Works* (1); *Hobart Savings Bank and Launceston Bank for Savings* v. *Federal Commissioner of Taxation* (2)). A charity constituted abroad for objects abroad is a charity within the meaning of the statute of Elizabeth (*In re Robinson*; *Besant* v. *The German Reich* (3)). Both in 1915 and at the present time the legislature, when it wishes to specify a local charity, does so expressly, as in sec. 18 (*h*) of the 1915 Act and sec. 78 of the present Act. The words should be taken in their natural and literal meaning, and the possible intention of the legislature should not be speculated about (*Jackson's Trustees* v. *Lord Advocate* (4); *Jackson* v. *Federal Commissioner of Taxation* (5)). The court should not treat the word "public" as colouring

(1) (1929) A.C. 142.
(2) (1930) 43 C.L.R. 364, at pp. 372, 373.
(3) (1931) 2 Ch. 122, at pp. 126, 127.
(4) (1926) 10 Tax Cas. 460.
(5) (1920) 27 C.L.R. 503.

H. C. OF A. 1938.

BIRMINGHAM UNIVERSITY AND EPSOM COLLEGE v. FEDERAL COMMISSIONER OF TAXATION.

the meaning of the other words in sec. 23 (*e*), viz., "religious," "scientific" and "charitable." The word "public" is used in opposition to "private" and has no necessary reference to the public of Australia. *England* v. *Webb* (1) turned on the Victorian Act of 1895. In that case the Privy Council was approaching the matter from a view contrary to that usually applicable to taxing statutes. The question is: What is the ordinary natural meaning of the words?

Dean, for the respondent. It is not disputed that the gift made is a valid charitable gift by Victorian law notwithstanding that the whole of it is to be executed out of Victoria. The question is whether sec. 23 (*e*) refers only to an institution constituted and existing in Australia. The legislature and the court are more concerned with the place where the charitable works are being carried out than with the place where the money is collected. Sec. 23 (*e*) should be read as a "religious" &c. "institution" carrying on its activities in Australia. It was conceded in *Jackson* v. *Federal Commissioner of Taxation* (2) that the Australian statute should be read as referring to matters in Australia. Sec. 21 (*b*) of the *Acts Interpretation Act* 1901-1937 enacts that any references to localities shall be construed as references to localities in and of the Commonwealth. This gives a primary rule wide enough to cover this case, so that those who say that the rule is excluded must show something sufficiently clear and definite to exclude the rule (*Colquhoun* v. *Heddon* (3); *Inland Revenue Commissioners* v. *Gull* (4)). *England* v. *Webb* (5) is relevant and authoritative in this case. It is much more probable that the Australian Parliament was concerned with those charities which had some connection with Australia than with those which had none, and that it did not intend to benefit charities all over the world. The deductions allowed under sec. 78 are limited to gifts to institutions &c. "in Australia." The words "in Australia" are to be implied in sec. 23.

[RICH J. referred to *Mayor &c. of Manchester* v. *McAdam* (6).]

(1) (1898) A.C. 758, at p. 759.
(2) (1920) 27 C.L.R. 503.
(3) (1890) 25 Q.B.D. 129, at pp. 134, 135.
(4) (1937) 54 T.L.R. 52.
(5) (1898) A.C., at pp. 761, 762.
(6) (1896) A.C. 500, at pp. 507, 508, 511.

T. W. Smith, in reply. In none of the provisions of sec. 23 is one obliged to resort to any other than a natural construction of the language used. The *Acts Interpretation Act* does not apply, and one is simply left with the words in sec. 23 (*e*) " charitable . . . institution." *Inland Revenue Commissioners* v. *Gull* (1) is an authority in favour of the appellants in all its aspects.

Cur. adv. vult.

The following written judgments were delivered :—

NOV. 3.

LATHAM C.J. These two cases were heard together.

The University of Birmingham and the Epsom College derive income from Australia and are admitted to be charities within the meaning of the preamble to 43 Eliz. c. 4. The facts stated in the cases also show that they are public educational institutions. Sec. 23 (*e*) of the *Income Tax Assessment Acts* 1936 provides that " the income of a religious, scientific, charitable or public educational institution " shall be exempt from income tax. The appellant institutions are not incorporated in Australia and do not carry on any activity in Australia. The only question which arises is whether these facts exclude them from the benefit of the exemption in the provision quoted. The argument for the respondent commissioner is that the benefit of the exemption is limited by the Act to such institutions which are institutions " in Australia "—to use the words of sec. 78 of the Act applied in another connection—or at least to such institutions which carry on some form of activity or operate in some way in Australia.

The words of sec. 23 (*e*) are general and do not in themselves contain any local limitation. There are other provisions in the same section and in other parts of the Act (for example, sec. 78) which do contain a local limitation. In sec. 23 reference may be made to par. *a* (ii), the representative in Australia of the Government of another country, par. *c* (ii), clubs in any other part of the British Empire, par. *h*, reference to agricultural &c. resources of Australia, par. *k*, pensions paid to Australian soldiers and pensions paid under the *Finance Act* 1919 of the United Kingdom. The absence of any

(1) (1937) 54 T.L.R. 52.

H. C. OF A. 1938.

BIRMINGHAM UNIVERSITY AND EPSOM COLLEGE v. FEDERAL COMMISSIONER OF TAXATION.

Latham C.J.

local limitation in sec. 23 (*e*), contrasted with the presence of such limitations in other provisions of the same section, goes to support the argument that the words should be given their natural general signification and that the limitation for which the respondent contends should not be read into this particular provision.

The respondent relied upon sec. 21 (*b*) of the *Acts Interpretation Act* 1901-1937, which provides that in any Act, unless the contrary intention appears, references to localities, jurisdictions or other matters and things shall be construed as references to such localities, jurisdictions and other matters and things in and of the Commonwealth. It is argued that the application of this section to sec. 23 (*e*) brings about the consequence that the institutions therein mentioned are such institutions "in and of the Commonwealth." In my opinion, this contention is effectively met in two ways. First, the absence of any local limitation in the words in question and the presence of local limitations in closely associated provisions in the same section (to which attention has already been called) indicate a contrary intention. Secondly, the Income Tax Assessment Act taxes income derived from sources out of Australia by persons who are resident in Australia and also income derived by persons who are not resident in Australia from sources in Australia (sec. 25). Thus, the Act necessarily applies to many persons, matters and things which are out of Australia. As the taxing provisions assume this wide scope, there is not only no reason for introducing into the exemption provisions a local limitation which would be natural if only persons resident in Australia were taxpayers or if only income derived from Australia were subject to tax, but there is a positive reason which supports the rejection of such an interpretation.

The first question asked in each case is in the following form: "Whether the said income was the income of a charitable and/or public educational institution within the meaning of sec. 23 (*e*) of the *Income Tax Assessment Acts* 1936."

A simple affirmative answer to this question would mean that the income was the income either of a charitable institution, or of a public educational institution, or of an institution which was both a charitable institution and a public educational institution within the

meaning of the section. The parties are entitled to a more definite answer. The stated cases show that the parties agree that the institutions are charities within the meaning of the preamble to 43 Eliz. c. 4, but there is no statement in the cases that they are charitable institutions within the meaning of the relevant section of the *Income Tax Assessment Acts* 1936. This question may perhaps be regarded as still open in spite of the decision in *Adamson* v. *Melbourne and Metropolitan Board of Works* (1) (a decision upon sec. 94 of the *Metropolitan Board of Works Act* 1915, which gave water without charge to (*inter alios*) charitable institutions). This decision followed upon decisions as to the meaning of the word " charitable " in other statutes, namely, *Swinburne* v. *Federal Commissioner of Taxation* (2), *Chesterman* v. *Federal Commissioner of Taxation* (3), *Young Men's Christian Association* v. *Federal Commissioner of Taxation* (4) and *Hobart Savings Bank and Launceston Bank for Savings* v. *Federal Commissioner of Taxation* (5).

The question whether the decision in *Adamson* v. *Melbourne and Metropolitan Board of Works* (1) leads to the conclusion that the word " charitable " in sec. 23 of the *Income Tax Assessment Acts* should be interpreted in its technical legal sense has not been argued in the present cases, and it is undesirable to determine such a question in a merely incidental manner. The facts stated in the cases show that both the appellant institutions are public educational institutions.

The first question should, therefore, in my opinion, be answered by stating that the said income was the income of a public educational institution within the meaning of sec. 23 (*e*) of the *Income Tax Assessment Acts* 1936.

As the answer to the first question in each case is sufficient to dispose of the questions which arise in the cases it is not necessary to answer the further questions asked.

RICH J. The grounds upon which the Crown seeks in the present case to limit the general language of the exemption in sec. 23 (*e*) of the *Income Tax Assessment Acts* 1936 bear a strong resemblance to

(1) (1929) A.C. 142.
(2) (1920) 27 C.L.R. 377.
(3) (1923) 32 C.L.R. 362; reversed, (1926) A.C. 128; 37 C.L.R. 317.
(4) (1926) 37 C.L.R. 351.
(5) (1930) 43 C.L.R. 364.

H. C. OF A. 1938.

BIRMINGHAM UNIVERSITY AND EPSOM COLLEGE v. FEDERAL COMMISSIONER OF TAXATION.

Rich J.

those which led me to dissent from the decision of the majority of the court in *Jackson* v. *Federal Commissioner of Taxation* (1), a decision which refused to limit by implication general words of an analogous character in the *Estate Duty Assessment Act* 1914-1916. In *Jackson's Case* (1) the decision of the Privy Council in *England* v. *Webb* (2) was not cited. It is, perhaps, an interesting speculation, although a vain one, as to the influence it might have had on the decision in *Jackson's Case* (1) had it been drawn to the attention of this court. I can only say that I have received some retrospective comfort from its perusal and feel that I have nothing to regret in my dissent, particularly as the legislature re-expressed its intention so as to conform with that which I had attributed to it. Notwithstanding these considerations, I do not feel encouraged to commit the error of construing one legislative provision by reference to the construction which I thought ought to be put on another. The decisions do no more than illustrate the considerations which should be weighed in the determination of a controversy of the class which we have before us. The question whether a limitation restricting an exemption to bodies or persons existing or acting within the country should be implied is one which must be decided on the principles by which a court arrives at the necessary intendment of the legislature. The golden rule must not be neglected still less abandoned. Again, the rule must be remembered *ex antecedentibus et consequentibus fit optima interpretatio.* The plan of the present statute is quite different from that of the *Estate Duty Assessment Act.* It begins by taxing income independently of the locality of source or taxpayer (sec. 17). It then goes on to bring into that conception income of a resident, whencesoever derived, and income from Australia, wheresoever the person deriving it may reside (sec. 25). In allowing deductions to taxpayers the framer of the Act deliberately expresses any local limitation he desires (sec. 78 (1) (*a*)). In the catalogue of exemptions in sec. 25 there are expressed limitations in respect of locality. Where, as in sec. 23 (*e*), an exemption is given in general words without regard to locality, the natural reading of the provision is that it extends to all taxpayers, independently of their place of residence or activity, who fall under the

(1) (1920) 27 C.L.R. 503. (2) (1898) A.C. 758.

description it contains. The exemption is coextensive with the imposition in respect of the persons who enjoy the one and bear the other. I am unable to find any sufficient ground for reading the natural meaning of sec. 23 (*e*) so as to exclude the appellants from its benefit.

For these reasons I am of opinion that both the University of Birmingham and the Epsom College are exempt from taxation as public educational institutions within the meaning of sec. 23 (*e*) of the *Income Tax Assessment Acts* 1936.

DIXON J. The two taxpayers are corporate bodies established in Great Britain for purposes which the commissioner admits would, but for the fact that they are constituted outside Australia and carry on no activities within Australia, bring them under the exemption contained in sec. 23 (*e*) of the *Income Tax Assessment Acts* 1936. That provision says: "The following income shall be exempt from income tax . . . (*e*) the income of a religious, scientific, charitable or public educational institution."

Sec. 21 (*b*) of the *Acts Interpretation Act* 1901-1937 provides that in any Act, unless the contrary intention appears, references to localities, jurisdictions and other matters and things shall be construed as references to such localities, jurisdictions and other matters and things in and of the Commonwealth. Relying upon this provision and upon the considerations stated by Lord *Hobhouse* in *England* v. *Webb* (1) and by *Rich* J. in his dissenting judgment in *Jackson* v. *Federal Commissioner of Taxation* (2) for restricting territorially the operation of the respective exemptions in question in those cases, the Commissioner of Taxation contends that, notwithstanding the generality of the language of sec. 23 (*e*), it applies only to institutions established in Australia or carrying on their work here. In my opinion the exemption should not be so restricted.

By sec. 17 income tax is imposed upon the taxable income of any person, whether a resident or non-resident. Taxable income means the amount remaining after deducting from the assessable income all allowable deductions (sec. 6). Sec. 25 (1) provides that the assessable income of a taxpayer shall include "(*a*) where the

(1) (1898) A.C., at pp. 761, 762.

(2) (1920) 27 C.L.R., at pp. 510-512.

H. C. OF A. 1938.

BIRMINGHAM UNIVERSITY AND EPSOM COLLEGE v. FEDERAL COMMISSIONER OF TAXATION.

DIXON J.

taxpayer is a resident—the gross income derived directly or indirectly from all sources whether in or out of Australia; and (*b*) where the taxpayer is a non-resident—the gross income derived directly or indirectly from all sources in Australia, which is not exempt income."

The territorial basis of taxation is clearly shown by these provisions, and there is, in my opinion, no room for the application of sec. 21 (*b*) of the *Acts Interpretation Act* in relation to any of the matters affecting liability to tax. The liability is in respect of all income, in the case of a resident, which is not exempt income and, in case of a non-resident, of all Australian income which is not exempt income. The exemptions thus enter into the very definition of liability, and to that definition the presumptive territorial limitation has no application. The scope of the exemptions might well be expected to be commensurate with the application of the provisions imposing liability. It being plain that sec. 21 (*b*) of the *Acts Interpretation Act* can have no application to the liability provisions, there is, I think, an inconsistency in turning to the very exemption to which the liability provisions refer and then using sec. 21 (*b*) of the *Acts Interpretation Act* for the purpose of limiting the exemption. An examination of the various paragraphs of the *Income Tax Assessment Acts* 1936, which deal with many exemptions, shows that in some an express limitation is included based on territorial grounds. In sec. 78 (1) (*a*), which allows a deduction to taxpayers in respect of gifts made to institutions of a specified charitable nature, there is an express qualification confining it to institutions in Australia. In view of these matters I think that to imply in sec. 23 (*e*) a restriction which has not been expressed would be to amend and not to interpret the language of the enactment.

What may be called the general considerations of probability relied upon by the commissioner for the view that the legislature could not have meant to exempt foreign institutions appear to me to have little weight in an Act which taxes foreigners upon Australian income and residents upon foreign income.

In my opinion the questions in the special case relating to the University of Birmingham should be answered as follows: (1) Yes;

(2) and (3) Unnecessary to answer; and in that relating to Epsom College: (1) Yes; (2) Unnecessary to answer.

McTIERNAN J. The circumstances under which the University of Birmingham and the Epsom College respectively came to be entitled to receive the Australian income which is the subject of the assessments made by the commissioner and the constitution and objects of each institution are set out in detail in these cases, which have been stated by *Rich* J. These cases raise the question whether the income is exempt from taxation under sec. 23 (*e*) of the *Income Tax Assessment Acts* 1936. It is not disputed in these appeals that the constitution and objects of each institution bring it within the list of institutions set out in sec. 23 (*e*). The question in controversy is whether the provision of the *Income Tax Assessment Acts* is limited in its operation to institutions which are established or carry on activities in Australia. If sec. 23 (*e*) were read without any limitation, it would extend to exempt from taxation the income of any religious, scientific, charitable or public educational institution, wherever it is situated or carries on its work. The commissioner contends that, if the provision applies without any restriction based on locality, it would give a wider exemption than Parliament intended; and the criterion which he suggests for limiting its operation is based on the presumption which sec. 21 (*b*) of the *Acts Interpretation Act* requires, unless the contrary intention appears, to be employed in the interpretation of the Act. The words, "which is not exempt income," at the end of sec. 25 clearly include the income which is the subject of the exemption contained in sec. 23 (*e*). These words incorporate that provision in the definition of assessable income in sec. 25, and that section expressly includes within the definition of assessable income the Australian income of a non-resident and the non-Australian income of a resident. The intention of the Act is that, when a question arises whether the income of an institution is assessable income, the words, "which is not exempt income," at the end of sec. 25 should be read as meaning "which is not the income of a religious, scientific or public educational institution." In such a case these words would have as their antecedent the income of the institution sought to be taxed, whether the institution was within

H. C. OF A. 1938.

BIRMINGHAM UNIVERSITY AND EPSOM COLLEGE v. FEDERAL COMMISSIONER OF TAXATION.

McTiernan J.

or beyond the Commonwealth. It is clear that the legislature intended the exemption to apply to any institution the income of which came within the scope of sec. 25; otherwise, it would have limited the provisions of sec. 23 (*e*) so that, when read with sec. 25, they would not apply generally to a non-resident as well as to a resident. There is, in my opinion, a clear expression of an intention contrary to the presumption of legislative intention expressed in sec. 21 (*b*) of the *Acts Interpretation Act*. In the absence of any express limitation on the operation of sec. 23 (*e*), it should, in my opinion, be construed to apply to the income of any institution which, but for its provisions, would be assessable income under sec. 25.

For these reasons the questions affecting the income of the University of Birmingham should be answered as follows: (1) Yes; (2) and (3) Unnecessary to answer; the questions affecting the income of the Epsom College should be answered as follows: (1) Yes; (2) Unnecessary to answer.

Question 1 *in each case answered as follows*: "*The said income was the income of a public educational institution within the meaning of sec.* 23 (*e*) *of the Income Tax Assessment Acts* 1936. *Other questions—no answer. Case remitted to Rich J. Costs to be costs in the appeal.*

Solicitors for the appellants, *Moule, Hamilton & Derham.*

Solicitor for the respondent, *H. F. E. Whitlam*, Commonwealth Crown Solicitor.

H. D. W.