[HIGH COURT OF AUSTRALIA.]

RENMARK HOTEL INCORPORATED . . APPELLANT;

AND

FEDERAL COMMISSIONER OF TAXATION . RESPONDENT.

H. C. OF A. 1949.

MELBOURNE, *March* 15, 16; SYDNEY, *March* 29.

Rich J.

MELBOURNE, *Oct.* 10, 11.

Latham C.J., McTiernan and Webb JJ.

Income Tax (Cth.)—Assessment—Exemption—"Public authority constituted under any . . . State Act"—Community hotel conducted by body incorporated under and regulated by State Acts—Committee of management elected by persons on State electoral roll for district—Income Tax Assessment Act 1936-1947 (*No.* 27 *of* 1936—*No.* 63 *of* 1947), *s.* 23 (*d*).

The appellant conducted an hotel in an area defined under South Australian legislation as the Renmark irrigation area. It was incorporated under legislation which was substantially re-enacted in the *Associations Incorporation Act* 1929-1935 (S.A.). After the last-mentioned statute came into force, it obtained a certificate of incorporation thereunder. By s. 2 of the *Community Hotels (Incorporation) Act* 1938-1944 (S.A.) it was enacted that the appellant should be deemed to be and always to have been duly and lawfully incorporated under the provisions of the *Associations Incorporation Act* 1929-1935. By s. 3 of the *Community Hotels Incorporation Act Amendment Act* 1944, it was provided that licences under s. 118 of the *Licensing Act* 1932-1936 might be granted to and held by the appellant. Section 118 of the last-mentioned Act forbade the granting of a licence in the Renmark irrigation area except subject to certain conditions. The appellant duly obtained a licence under s. 118. The appellant was governed by regulations approved by the Treasurer which provided that its business should be controlled by a committee of management, elected in accordance with the electoral law of the State, by the electors on the roll for Renmark; the business and the licence and every renewal was vested in the committee pursuant to the licensing law in trust for the purposes declared in the regulations; the management of the business was under the control of the committee; all moneys accruing from the business were the property of the committee and were to be applied in the expenses of management and any surplus was to be applied in the first place in acquiring the fee simple of the premises in which the business was carried on and in improving, adding to or equipping the premises and thereafter for such local purposes of the irrigation settlement

of Renmark, in the promotion or encouragement of literature, science or art, or for charitable purposes, or otherwise, as the committee should decide and the Treasurer should approve; the Treasurer might withdraw or cancel the whole or any one or more of the regulations, and might prescribe any new regulation or regulations.

Held by *Rich* J. and on appeal by *Latham* C.J., *McTiernan* and *Webb* JJ., that the appellant was not "a public authority constituted under any . . . State Act" so as to be exempt from income tax under s. 23 (*d*) of the *Income Tax Assessment Act* 1936-1947.

Judgment of *Rich* J. affirmed.

APPEAL.

An appeal to the High Court by Renmark Hotel Inc. against an assessment to Federal income tax came before *Rich* J., in whose judgment hereunder the facts are stated.

Ward K.C. and *Litchfield*, for the appellant.

Alderman K.C. and *Zelling*, for the respondent.

Cur. adv. vult.

March 29.

RICH J. delivered the following written judgment:—

This is an appeal against an assessment to income tax on the ground that the appellant falls within the exemption expressed in s. 23 (*d*) of the *Income Tax Assessment Act* 1936-1947. The exemption is expressed in the following words—"the revenue of a municipal corporation or other local governing body or of a public authority constituted under any Act or State Act or under any law in force in a territory being part of the Commonwealth."

The appellant is a body called the Renmark Hotel Incorporated. It is incorporated under the *Associations Incorporation Act* 1929-1935 of South Australia. It conducts a community hotel at Renmark and it has been assessed in respect of income produced by that hotel. The appellant claims that it is a public authority constituted under a State Act. The history of the establishment of the hotel and of the constitution of the body is from a legal point of view unusual. Renmark falls within an area of land in South Australia called Chaffey Bros. Irrigation Area, which was the subject of a special agreement confirmed by and scheduled to *The Chaffey Brothers Irrigation Works Act* 1887 (S.A.) No. 397.

By *The Licensed Victuallers Amendment Act* 1891 (S.A.), s. 40, it was provided that no publican's licence or wine licence should

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be granted to any person in respect of premises situated in that portion of the province of South Australia comprised in the schedule to *The Chaffey Brothers Irrigation Works Act* 1887 (S.A.). By s. 47 of *The Licensed Victuallers Further Amendment Act* 1896 (S.A.) a limited power to grant a licence in that area was conferred upon the Licensing Bench. A condition laid down by the section was that a petition should be presented to the Bench signed by not less than a majority of the householders resident within a mile of the site of the proposed licensed premises praying that the publican's licence should be granted. It was necessary that the petition should pray that it should be granted subject to certain conditions. Then the authority of the Bench arose to grant a licence if it thought fit in respect of premises for which the licence was applied for, but only under and subject to the conditions. The conditions required were (1) that the business should be vested in a committee in trust for the purposes set out in the petition and approved by the Treasurer; (2) that the business should be managed by a committee of management, the first members of which should be nominated by the householders in the petition aforesaid and the mode of appointing members subsequently should be set out in the petition. The licence when granted should not issue until the Treasurer of the province had been satisfied that the proper arrangements had been made for carrying the conditions into effect and until he had approved of the purpose to which any profits were to be applied. Pursuant to this provision, on 3rd March 1897 a licence was granted to one Jane Meissner of the premises on which the appellant's hotel now stands. The documents relating to the original licence were not put in evidence, but it is not in doubt that the conditions prevented the profits being applied otherwise than in acquiring the site of the hotel, improving, adding to and equipping the hotel and then for local purposes for the benefit of the whole irrigation settlement of Renmark and not for private profit.

In 1904 it was decided that the body of persons responsible for the hotel should be incorporated under the *Associations Incorporation Act* 1890. That Act, which is now represented by the *Associations Incorporation Act* 1929-1935, authorized the incorporation of voluntary associations standing outside the companies legislation. The definition of "association" included churches, chapels, religious bodies, schools, hospitals, benevolent and charitable institutions, mechanics' institutes and associations for the purpose of promoting and encouraging literature, science and art, and all other institutions and associations formed or to be formed for promoting the like objects other than associations for the purpose

of trading or securing pecuniary profit to the members from the transactions thereof. The definition excepted associations within the provisions of any Act to provide for the registration of joint stock companies or to limit the liabilities of members thereof. The definition of the present Act adds the purposes of recreation and amusement, but otherwise does not differ materially.

The procedure for incorporation involved the filing in the Supreme Court of a memorial supported by an affidavit. Thereupon the Master of the Supreme Court might grant a certificate of incorporation which it was necessary to deposit in the office of the General Registry. When that was done the association became incorporated for purposes that are described as follows:—(1) for the purpose of using the name of the association, adding thereto the word "incorporated"; (2) for the purpose of having and using a common seal; (3) for the purpose of suing or being sued by the name of the corporation in respect of any claim by or upon the association, upon or by any person, whether interested in the association or not; (4) to purchase and hold lands, tenements and hereditaments in the name of the association; and (5) for the purposes of the association to let, sell &c. and otherwise deal with the same. The memorial was accordingly filed and a certificate of incorporation granted on 16th July 1904. The memorial states the name of the institution to be the Renmark Hotel which, with the addition of the word "incorporated", forms the appellant's name. The object or purpose of the institution was set out. It was stated in these words, "the carrying on of the business of a hotel or public house under a licence granted and issued pursuant to s. 47 of *The Licensed Victuallers Further Amendment Act* 1896 and in manner required in the said section, the net profits being applied in acquiring the unencumbered fee simple of the hotel premises and in improving, adding to and equipping the same and subject thereto for local purposes for the benefit of the whole of the irrigation settlement of Renmark in the promotion or encouragement of literature, science or art or for charitable or benevolent purposes." The names of five gentlemen were given as trustees. The memorial stated that the management of the institution is vested in such trustees as a Committee of Management, one of them being chairman, and was by means of written regulations which incorporated the conditions referred to in the said s. 47 and the arrangements for carrying the same into effect, and which regulations and the purpose to which any profits are to be applied have been approved by the Honourable the Treasurer prior to the issue of the licence. The licensing legislation of that date was consolidated in and superseded by *The*

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Licensing Act 1908, and in turn that has been replaced by the *Licensing Act* 1932-1936. Section 118 of the last-mentioned Act deals with licences at Renmark. Section 118 forbids the grant of a licence in the area unless the Governor has consented and unless a petition has been presented to the Licensing Court signed by a majority of the electors resident therein. The petition is to set forth the purposes for which the profits of the business are intended to be applied, nominate the first members of the Committee and state the mode of appointing subsequent members. The grant of the licence must be upon conditions that arrangements are to be made for the business being vested in and managed by a committee in trust to carry on the business and to apply the profits for the purposes set out in the petition and that the purposes be approved by the Treasurer. The Treasurer is empowered to change or vary the purposes to which the profits shall be applied.

Some doubt appears to have arisen as to the propriety of incorporating the appellant and other similar institutions under the *Associations Incorporation Act* and by s. 2 of the *Community Hotels (Incorporation) Act* 1938, it was enacted that the appellant and certain institutions shall be deemed to be and always to have been duly and lawfully incorporated under the provisions of the *Associations Incorporation Act* 1929-1935. Doubts then seem to have arisen as to the propriety of granting a licence to a body constituted under the *Associations Incorporation Act*. By the *Community Hotels (Incorporation) Amendment Act* 1944, s. 3, it was provided that licences under s. 118 of the *Licensing Act* might be granted to and held by the incorporated association known as the Renmark Hotel Incorporated and other similar institutions. The Renmark Hotel Incorporated is governed in pursuance of the foregoing requirements by certain regulations. These regulations provide for a Committee of Management elected by ballot by the residents of the district who are on the roll for Renmark. The election is to be conducted by a poll pursuant to the *Electoral Act* 1929. The Chief Officer of Police stationed at Renmark or, failing him, the Senior State Election Officer at Renmark is to be the Returning Officer. In July in every year a general meeting of the electors is to be convened, apparently for the purpose of dealing with the manner in which the business of the hotel is being conducted. The rule says that such business shall be brought forward as the chairman may allow. The regulations declare that the licence for the benefit of the business is vested in the committee pursuant to s. 47 of *The Licensed Victuallers Further Amendment Act* 1896 or any Acts amending the same in trust for the purposes stated in the rules,

and that the management and conduct of the business shall be under the control of the committee. The regulations go on to provide that all moneys, credits and effects arising or accruing from the business shall be the property of the committee and shall be applied in the payment of current and working expenses, rent, interest, licence fees and the expense of obtaining the present and every future licence of the premises and that any surplus shall be applied in the first place in or towards acquiring the unencumbered fee simple of the premises in which the business is carried on and in improving, adding to or equipping the hotel premises and thereafter for such local purposes for the benefit of the whole of the irrigation settlement of Renmark in the promotion or encouragement of literature, science or art or for charitable purposes or otherwise as the committee shall decide and the Treasurer shall approve. There is a proviso that the committee with the consent in writing of the Treasurer may from time to time apply such surplus or any part thereof in any other manner in and towards any other object which they may think fit. Another regulation provides that the Treasurer may withdraw or cancel the whole or any one or more of the regulations and may prescribe any new regulation or regulations. Finally, it is provided that the Treasurer may upon breach of any of the regulations revoke and cancel the licence of the premises and thereupon the licence shall be void.

It will be seen that the appellant is incorporated under one State Act—the *Associations Incorporation Act*, but the form of its regulations is governed by the conditions prescribed for the licence issued to it under another State Act—the *Licensing Act*. The *Associations Incorporation Act* is not very specific in its statement of the consequences of a failure to observe the conditions set out in the memorial or other application for incorporation. But presumably contravention of these conditions might lead to the cancellation of the incorporation: cf. ss. 14 and 15 of the *Associations Incorporation Act* 1929-1935.

The question whether the appellant was exempt seems to have been decided in its favour by the Commissioner of Taxation in or about 1921. But in consequence of certain decisions of the Board of Review as to the application to similar institutions of s. 23 (*d*) of the *Income Tax Assessment Act* the commissioner in 1947 appears to have called for a return. In the meantime the business of the institution has, as might be imagined, proved profitable. After erecting and maintaining a fine modern hotel they have been able to distribute large sums to various charitable, educational and other public bodies. Since 1904 they have distributed £93,193 in this

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manner. None of the profits have been dealt with in any private interest, and none of them have been distributed except with the approval of the Treasurer of South Australia. The question whether the institution falls within the exemption claimed depends to a great extent upon the interpretation of s. 23 (*d*). In particular, it depends upon the expression "revenue of a public authority constituted under any State Act." The words "public authority" do not seem to be used elsewhere in the Act except in s. 160 (2) (*g*) (iv). There it is used in granting a rebate in respect of gifts. Among the gifts subject to a rebate is a gift to a public authority engaged in research into the causes, prevention or cure of disease of human beings, animals or plants where the gift is for such research or a public institution engaged solely in such research. The context is so different that little light upon s. 23 (*d*) can be obtained from this use of the expression.

The words "public authority" are in frequent use, but they do not appear to have been the subject of any clear definition. It is an expression used as a very general designation of a diversified class of bodies concerned in carrying out public functions. We speak of a highway authority, a sanitary authority, a water supply authority, a lighting authority, a harbour authority, a tramway authority, a transport authority or a railway authority, and in relation to railways or tramways where a different body is charged with construction we speak of a construction authority. Without much consideration of what common characteristics all these possess or how much further the expression will go, we speak of public authorities to embrace these and many other bodies carrying on public functions. A well-known legal text book, *Robinson* on *Public Authorities*, takes its title from the term, but a definition of the term will not be found in the work. It would appear by inference, however, that the Crown itself is considered by the author to fall within the expression, that it extends to the Ministry of Health, to municipal corporations, to the Postmaster-General, to the guardians of the poor, to educational authorities, to the trustees of turnpike roads, to health authorities and to various local and municipal bodies. In England the expression is employed as the title to the *Public Authorities Protection Act* 1893. That Act is the subject of much case law and if it were not for the fact that the application of the Act depends rather on the character of the powers, duties and functions exercised or fulfilled than upon the classification of the bodies concerned, the judicial decisions might have proved a guide in the determination of the present case.

It is clear, however, that the Act extends far beyond municipal corporations. Highway authorities are included, boards of guardians, the Mersey Docks and Harbour Board and many other bodies: see *The Johannesburg* (1). In two cases in the House of Lords extensive consideration was given to the Act—*Bradford Corporation* v. *Myers* (2); *Griffiths* v. *Smith* (3). It is unnecessary to discuss these decisions beyond saying that they do not bear directly on the definition of the words "public authority" but that the most apposite statement on the subject is contained in the speech of Lord *Porter* in *Griffiths* v. *Smith* (4):—"What then is a public authority? As Sir Gorell Barnes says in the latter case (*scil. The Johannesburg*), the phrase is not confined to municipal corporations. There are many other bodies which perform statutory duties and exercise public functions and examples of such bodies are given by the learned President (5).

The distinction which he draws is between a body carrying out transactions for private profit and those working for the benefit of the public. Profit they may undoubtedly make for the public benefit: see *The Ydun* (6) and *Lyles* v. *Southend-on-Sea Corporation* (7), but they must not be a trading corporation making profits for their corporators: see *Attorney-General* v. *Margate Pier and Harbour Proprietors* (8).

That the managers of a public elementary school, however, whether provided or non-provided, are a public authority I cannot doubt. They form part of the machinery whereby elementary education is provided for in this country, and a school which the managers provide is maintained and kept efficient by means of public rates even though the building is provided and repaired by the managers themselves. In carrying on the school they are undoubtedly exercising a public function."

In dealing with the expression "public school" Lord *Sands* said that it seemed unfortunate that a composite and ambulatory expression of this kind was not defined by statute. He said: "In the absence of definition we must take it that the exemption applies to any institution which according to popular expression and understanding is a public school. It is not, I think, legitimate to analyse the expression and to determine whether this institution is public and this having been answered in the affirmative to go on to inquire whether in any reasonable sense it can be regarded as a

(1) (1907) P. 65, at pp. 79-82.
(2) (1916) 1 A.C. 242.
(3) (1941) A.C. 170.
(4) (1941) A.C., at p. 205.
(5) (1907) P. 79.
(6) (1899) P. 236.
(7) (1905) 2 K.B. 1.
(8) (1900) 1 Ch. 749.

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school." There are a number of composite expressions the interpretation of which in this latter way would lead to very startling results, e.g. "public house"—*Scottish Woollen Technical College Galashiels* v. *Commissioners of Inland Revenue* (1). This observation is no less applicable to the expression "public authority." There is no Australian judicial authority, so far as I am aware, dealing with these words contained in the exemption except *Incorporated Council of Law Reporting of Queensland* v. *Federal Income Tax Commissioner* (2). The Incorporated Council of Law Reporting was registered as an association not for profit but for the purposes of publishing law reports, but it was held to be neither a public authority nor a public educational institution. The court so decided on the simple ground that "this company clearly is not a public authority." During the course of the argument *Isaacs* J. said: "I do not know how this body of persons are able to constitute themselves a public authority. I can only understand their constitution as a public authority by the exercise of some statutory power authorizing them to act on behalf of the public or on behalf of the State."

The characteristics of a public authority seem to be that it should carry on some undertaking of a public nature for the benefit of the community or of some section or geographical division of the community and that it should have some governmental authority to do so. In s. 23 (*d*) it is made clear that it must be constituted under a State Act. Coercive powers over the individual are given to many governmental authorities which could be called public authorities, but it is not an essential part of a conception of a public authority that it should have coercive powers, whether of an administrative or a legislative character. It may, however, be an essential characteristic of the conception that it should have exceptional powers or authority, for instance a tramway board or trust has the exceptional authority of taking its trams down a public street. A water authority may lay its water mains, a lighting authority may do the like. Some exceptional powers of doing what an ordinary private individual may not do are generally found in any body which we would describe as a public authority. The words "public utility" have a wider significance, embracing public utilities carried on for profit by private enterprise. No-one would describe as a public authority an electric lighting company which had obtained statutory powers but possessed a share capital issued to shareholders and which carried on for profit, but we might call it a public utility. In s. 23 (*d*) it is to be noticed that the words

(1) (1926) 11 T.C. 139, at p. 150.

(2) (1924) 34 C.L.R. 580.

are not " by any State Act," but " under any State Act." The exemption therefore seems to contemplate the possibility of the public authority being established in pursuance of an Act as well as an authority constituted by a State Act.

In the case of the appellant, its corporate being is obtained from the certificate granted under the *Associations Incorporation Act*, but it is not easy to say that it is constituted under that Act. The associations which obtain a certificate under the Act are treated as being in existence independently of their corporate character. Their corporate character is conferred upon them for specific and limited purposes. The appellant can hardly be regarded as constituted under the *Licensing Act*. The *Licensing Act* has been used as a means of placing conditions and limitations upon its functions and the manner of their exercise. The word " constituted " is not the same as " incorporated." For the purposes of s. 23 (*d*) it is conceivable that an unincorporated body might be constituted under a State Act so as to satisfy the exemption. On the other hand, mere incorporation under an Act does not constitute the body. The word " constituted " immediately follows " public authority." It means constituted as a public authority. But apart from these considerations its claim to be a public authority requires a very wide and strange use of that expression. The mere fact that it carries on the business of an hotel-keeper without private profit and distributes the net profits derived from the business to charitable and public purposes cannot place it in that category. A control exercised over it by the Treasurer arises only from the necessity of excluding private profit and superintending the application of the actual profits. It appears to be a measure of police or discipline. It has no statutory powers enabling it to do what a private individual could not do. The elements upon which the appellant relies for the claim to be a public authority are restrictive, not enabling. They consist of provisions of the law and of documents adopted under the law directed to confine its activities to public purposes.

If the appellant had been a company limited by guarantee and its articles of association had required it to devote its revenues first to the betterment of its undertaking and next to public charitable objects, it would have been in no different position. The fact that the Committee of Management is elected pursuant to its own rules by members of the public and that the consent or approval of the Treasurer is necessary can hardly change its character. No-one would maintain that a company limited by guarantee devoting its profits to charity was a public authority. Judging the matter by the general understanding of the words " public authority," I think it

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is not possible to bring the appellant within that expression. It is unfortunate that a community hotel doing its work so well and with such benefit to the public and charitable objects of the district should be subjected to tax, but that is a matter which I cannot take into account. Possibly a reconsideration of the manner in which community hotels are set up under State legislation might lead to them being constituted by State law as public authorities. If this be possible and were done they would, of course, qualify for the exemption. As it is, the appeal should be dismissed.

From this decision the appellant appealed to the Full Court of the High Court.

Ward K.C. (with him *Litchfield*), for the appellant. Under the relevant legislation no-one but the appellant was allowed to carry on a hotel in the Renmark area. This set it apart as carrying on a special statutory function in the area even though it may have been merely carrying on a business commonly carried on in other places by many persons and bodies. The words of s. 23 (*d*), "public authority constituted under any . . . State Act," have not a technical meaning. It is true that any licensee of a hotel might dispose of his earnings from his hotel in the manner provided by the appellant's regulations; but he would do so of his own free will. The appellant was bound so to dispose of its profits; the requirement of the Treasurer's approval gave the regulations the force of law. Under the conditions under which the appellant organization was conducted, the State, through its Government—that is, through its Treasurer—had control over the activities of the organization. It was separated out and dealt with in a special way—different from all other licences that were applied for under the licensing legislation in any other part of the State; and the Government exercised its continuous control through the regulations as regards not only the purposes but the actual way in which the committee carried out its functions. *Bradford Corporation* v. *Myers* (1) is not of assistance here because it was mainly concerned with considerations under the *Public Authorities Protection Act* 1893 (Imp.) which are not relevant here. The question whether the body concerned is acting for private profit is treated in the English authorities as a most important feature—almost the determining one. A body may be a public authority and still make profits—the important thing is that the profits must not go to the benefit of the corporators or other persons conducting the body. [He referred to *Griffiths v. Smith* (2).] There is no closed category of public authorities.

(1) (1916) 1 A.C. 242.

(2) (1941) A.C. 170.

Of course, a public function must be exercised. Here, the appellant's hotel, by virtue of the legislation, was virtually the property of the community.

Alderman K.C. and *Zelling*, for the respondent, were not called upon.

The following judgments were delivered :—

LATHAM C.J. This is an appeal from a decision of *Rich* J. upon an appeal under the *Income Tax Assessment Act* 1936-1947. The question which arose related to the application of provisions contained in s. 23 (*d*) of the Act, which are in the following terms— " The following income shall be exempt from income tax . . . (*d*) the revenue of a municipal corporation or other local governing body or of a public authority constituted under any Act or State Act, or under any law in force in a territory being part of the Commonwealth." The appellant, the Renmark Hotel Incorporated, contends that it is a public authority constituted under a State Act or Acts, i.e., statutes of the Parliament of South Australia.

The appellant conducts an hotel at Renmark in South Australia within an area which is an irrigation area and is described in the schedule to an Act passed in 1887 which approved or authorized the execution of an agreement scheduled to the Act with the Chaffey Brothers. The Act is *The Chaffey Brothers Irrigation Works Act* 1887.

The appellant is incorporated under what is now the *Associations Incorporation Act* 1929-1935, having originally become incorporated under an earlier Act with the same title.

Some question arose as to the validity of the incorporation under that Act, and two statutes, the *Community Hotels (Incorporation) Act* 1938 and the *Community Hotels Incorporation Act Amendment Act* 1944, validated the incorporation under the principal Act.

It is, I think, doubtful whether the fact that the appellant has obtained incorporation under these Acts amounts to a constitution of the appellant within the meaning of s. 23 (*d*) of the *Income Tax Assessment Act*. *The Licensed Victuallers Further Amendment Act* 1896 gave power to grant a licence within what I will call the Renmark area, if certain conditions were specified. Those conditions included the presentation of a petition, the vesting of the business of the hotel in a committee in trust for purposes set out in the petition and approved by the Treasurer, and a provision that the business should be managed by a committee of management. It was also necessary that the Treasurer should be satisfied that

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proper arrangements had been made for carrying the conditions into effect, and it was further provided that he should approve of the purpose to which any profits were to be applied.

It was in pursuance of the powers conferred upon the licensing authorities by this Act that a licence was granted in 1897 to Mrs. J. Meissner of the premises which were the original hotel premises.

However, it is open to question whether, with regard to the liability to income tax which is the matter of inquiry in these proceedings, the company is to be regarded as established by or under the Act to which I have referred—the Act of 1896. That Act makes no reference to the establishment or constitution of the company which is the appellant in this case.

As far as the other legislation is concerned, (the *Associations Incorporation Act* as amended by the subsequent Acts relating to community hotels) it is also difficult to say that an association which obtains registration of incorporation under those Acts is constituted under those Acts. The phrase in s. 23 (*d*) however is not "constituted by" a State Act, but "constituted under" a State Act, and it may be that the appellant is constituted under one or other or all of these Acts. I am not prepared to decide the case upon the ground that the appellant is not so constituted.

Mr. *Ward* has referred to various attributes of the appellant and to various circumstances affecting the carrying on of business by the appellant upon which he relies in order to establish that the appellant company is a public authority constituted under a State Act. In the first place, there is special legislation as to liquor licences in the Renmark area where the appellant carried on the business. Since 1891 it has been the law that no licence can be granted in the district without the consent of the Governor. That was provided in a statute of 1891 and the same condition is prescribed by s. 118 of the *Licensing Act*, 1932-1936.

It was pointed out that the hotel is conducted by a committee which is elected by the State electors who are entitled to vote at the polling places in the Renmark district. The hotel is conducted in pursuance of a statute of the Parliament of South Australia—*The Licensed Victuallers Further Amendment Act* 1896. Next, the licence is held by the committee of management in trust. Further, the profits do not belong to the committee or the manager of the hotel, but must be distributed with the approval of the Treasurer for the benefit of the whole irrigation settlement in promotion and encouragement of literature, art and similar useful public purposes.

In my opinion, all these provisions amount to a set of special provisions for controlling the sale of liquor in a particular area

and the disposition of the profits arising from such sale; but, in my opinion, the appellant company is not given any power or authority by law in the form of a State statute to do any acts in relation to the public which otherwise would be beyond its power or unauthorized. The licence to sell liquor plainly does not make the licensee a public authority. If this were the case, licensees of all premises licensed to sell liquor would be public authorities. It cannot be suggested that they are such authorities.

In the case of *Griffiths* v. *Smith* (1) Lord *Porter* used the following words in arriving at a determination as to whether a particular body consisting of the managers of a school, was a public authority. He said: "There are many bodies which perform statutory duties and exercise public functions." In my opinion, those words indicate the nature of the attributes which a person or body must have in order to be a public authority within the meaning of the relevant words in the *Income Tax Assessment Acts*. In my opinion, the appellant company does not perform any statutory duties or exercise any public function.

The provisions relating to the management of the hotel and the disposition of the profits of the hotel are limitations or restrictions upon the licensee in respect of operations conducted by virtue of the licence. The introduction of a system of public control exercised through the suffrages of the electors of a particular area, even when combined with the provision that the profits should be devoted to useful public purposes, does not in my opinion produce the result that the managing authority or the person or corporation which conducts the business is a public authority within the meaning of the Act. It might be a very desirable thing that there should be an exemption from income tax in the case of what the evidence shows is an admirably conducted hotel, but in my opinion the appellant is not entitled to claim the exemption sought.

Accordingly, in my opinion, for these reasons, the appeal should be dismissed.

McTIERNAN J. I agree. I think that the attributes of the appellant by which Mr. *Ward* endeavoured to show that it is "a public authority" do not establish that proposition. It is necessary that an entity which claims to be a public authority for the purpose of this provision of the *Income Tax Assessment Act* should be constituted under statute and that it should also be given by statute powers or duties to be exercised for public objects.

(1) (1941) A.C. 170, at p. 205.

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McTiernan J.

The appellant is licensed by the *Licensing Act* to sell alcoholic liquor. A licence is not in the ordinary sense a statutory power given to the licensee to act on behalf of the public. A liquor licence is a permission without which it would be illegal for the holder of the licence or anyone else to sell liquor.

The appellant is managed by a publicly elected committee and bound by its constitution to devote the profits to public objects, but that does not necessarily make it a public authority constituted under statute. It is the nature of the authority which is the test, and that must be considered.

This appellant is not given any powers, duties or authorities which would make it a public authority in the ordinary sense of the expression. It does not appear to be in a position which is in any relevant way different from the position it would hold in respect of the Act if it were licensed to sell a commodity other than liquor; a commodity which the law requires a trader to have a licence to sell. All that can be said about it is that the licence which is granted to it was granted to it in a special way and that the conduct of the business which the existence of that licence rendered lawful, is subject to special legislative rules. I agree with the reasons of his Honour the Chief Justice.

WEBB J. I agree that the appeal should be dismissed and I have very little to add to what has been said by the Chief Justice and *McTiernan* J.

Paying full regard to the legislation which has been passed to assist this particular body, I am unable to find in it any statutory power authorizing this body to act on behalf of the public or the State—to apply the test laid down by Mr. Justice *Isaacs* in the course of the argument in *Incorporated Council of Law Reporting for the State of Queensland* v. *Federal Commissioner of Taxation* (1).

Appeal dismissed with costs.

Solicitors for the appellant: *Ward, Mollison, Litchfield & Ward*, Adelaide.

Solicitor for the respondent: *G. A. Watson*, Crown Solicitor for the Commonwealth.

E. F. H.

(1) (1924) 34 C.L.R. 580.