ARE SURGEONS CHARITABLE?

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THE assumption behind this paper is that each of the constituting professions of this Society has a certain interest in the characteristic methods, problems and solutions of the other. I have long harboured the belief that we in this Society shall come to greater mutual understanding if we modify intensive concentration on matters of common or joint interest and each seek rather to learn and understand something of the essential characteristics of the particular problems and solutions of the works of the other profession. What perhaps in the long run is most likely to reveal ourselves to each other is not those aspects of our work where contacts between us occur but those portions of the two territories which lie most distant from the actual boundaries where we meet. The frontier natives are likely to be a little distorted by strange contacts, to deck themselves in modified coverings. But in the deeps of the forest where they strip off any borrowed plumes and go about their lawful occasions in working dress, or none at all, their more essential selves may be discerned. Let us then make our way into the shadowy fastnesses where the statutes of Elizabeth I illuminate the gloom three hundred and fifty years after their passing and the simple-minded backwoodsmen disport themselves with a life or lives in being and twenty-one years afterwards (with the possible addition of the period of gestation). Let us in short go on to the Chancery side.

The subject of this paper is surgeons, so let us start with death,—but, lest there be any misunderstanding, let it be mortality in its least gruesome form. In 1885 the British Parliament amended the Death Duty Statute so as to ensure that immortals should no longer derive profit from their persistence. Bodies corporate and unincorporate but not carnal paid no succession duties. "To remedy this evil and to prevent these bodies escaping altogether from contributing their proper share"—and I quote this happy phrasing from the Lord President of the Court

of Session in the second volume of Reports of Tax Cases—Parliament imposed an annual duty of 5 per cent on the income or profits of the property of such a body but exempted property "legally appropriate and applied for any purpose connected with any religious persuasion or for any charitable purpose or for the promotion of education, literature, science or the fine arts."

Nothing, I think I may say without fear of contradiction, stimulates subtle research into the fundamental moral elements of human (and particularly corporate) conduct quite so vigorously as the possibility of establishing an exemption from taxation. In the first year of the imposition of the new Succession Duty the Society of Writers to the Signet in Edinburgh, a "corporate body possessed of heritable property in buildings occupied as a library and of personal estate in mortgages, railway shares and bank deposits"—I quote the soulless cataloguing of the Tax Cases Report—found themselves assessed to the sum of £55.4.5. But of course the body was not merely as described. It was the most distinguished association of Scotch lawyers. Yes, lawyers! and Scots! They appealed against the assessment. Did not everyone—or at any rate every lawyer—know that their property was legally appropriated for the promotion of education, literature, science and the fine arts.

Now I pass over any detailed examination of the judgments in that appeal by the Society of Writers to the Signet by the first division of the Court of Session consisting of four of Scotland's chosen judges. Scientific standards would indeed require me to examine this judgment in detail and with care. But none of us is ruled by mind alone and in truth I cannot bring myself to the task. For the decision of the court was unanimous. Mark you, the judges had all at one stage been lawyers. Some of them no doubt had been members of the Society of Writers to the Signet. They could be trusted to appreciate the real objects of the Society. In what surely must be contemplated as one of the basest betrayals in Scottish history the Lord President publicly stated: "People become members of the Society of Writers to the Signet not for the purpose of studying literature or the fine arts or science nor yet for the purpose of being educated. They become Writers to the Signet for the purpose of making pecuniary gain by a profession and that is the object of every member of the Society; everything that the Society has done in its collective capacity in the way of creating a library and other things of that kind are incidental and accessory to

that one great object of making professional gain." (2 T.C. at p. 272.) I like the sturdy Scottish ring about the last eight words, "that one great object of making professional gain." So the assessment was confirmed. But the battle between the professionals and the ex-professionals was by no means over. Lawyers might be neither scientific nor artistic, but there were other professions. The Institute of Civil Engineers felt something should be said, and they said it—or rather Horace Davey and Fletcher Moulton said it for them. You note that last name —himself no mean scientific mind and with family connections in the citadel itself. The Lord Chief Justice and Mr. Justice Field felt that engineers were no different from lawyers. In the Court of Appeal, Lord Justice Lopes was of the same mind, but not so the other two members of that court. With the score two against three the Attorney-General moved on to the Lords. Here he found two Scots against one Sassenach. Lord Watson and Lord Macnaghten were for science and Lord Halsbury for professional gain. So the Institute of Civil Engineers achieved exemption. (See Commissioners of Inland Revenue v. Forrest 1890, 15 A.C. 334.) You may observe that of eight judges in all who adjudicated in this particular case four decided that this professional organization was substantially or in the main appropriating or applying its property for the promotion of science. There were four judges who decided the other way—but they were not the right four.

These two cases to which I have referred illustrate a genuine contrast and all of us here well appreciate the significance of the subject. How far are the purposes of a professional organization directed, as a prime objective, to the general advancement of science or art, and how far to individual professional advancement? It is a subtle and teasing issue, upon which the social philosopher might devote some acute reasoning and upon which also the social historian might expend some astringent scepticism. Her Majesty's judges took the matter in their stride. But as we shall see they had to walk over the same path more than once—and re-measure the stride which originated unconsciously enough.

Meanwhile let me note one curious feature about the path which has so far been trodden. Amongst the exceptions from tax around which the two contests had been waged, in addition to the purposes I have mentioned, namely, the promotion of education, literature, science or the fine arts, there was included

also the expression "any charitable purposes". It might not occur to you to think that the objects of either the Writers to the Signet or the Institute of Civil Engineers were in primary substance charitable purposes. Well, let us wait and see, noting in passing however that "charitable purposes" doesn't mean what you think it means or I might have thought it means, or what the dictionary says it means, but what three centuries of judges have said it means. Of course this was well understood by all concerned in 1890—or was it forgotten? Again I must ask you to wait and see. After all, what we want to understand is how the backwoodsmen live and work. But, curbing your patience, will you note one peculiarity as we go deeper into the heart of the forest. In 1892 Lord Herschell had this point before him. He pointed out that "charitable purposes" had a meaning known only to lawyers—correction, some lawyers. But still in this particular statute, because of the context, these words had a special meaning different from their ordinary extraordinary meaning. In a spirit of pure science he added that it was "unnecessary and [it] would be undesirable to attempt a definition of what are 'charitable purposes' within the meaning of the [particular statutory] definition." (Commissioners of Inland Revenue v. Scott 1892, 2 Q.B. 152, at p. 166.)

Let us pass now to what some of you will feel to be an historic date – 15th April, 1899. The century of science and medical progress was drawing to a close, the Boer was fighting for his life, and . . . but let me go back a little. At No. 37 to 44 inclusive in Lincoln's Inn Fields could have been found one Edward Trimmer, who in 1896 had for thirty-one years well and faithfully served in the office of secretary and on the 28th day of October, 1896, in the course of such office, paid to the Commissioners of Inland Revenue £158.1.0 for tax assessed upon the income of the property of the Society he served. And it was—but of course some of you know the address. It was the Royal College of Surgeons of England. They too were held liable for Succession Duty. Where lawyers and engineers had striven, were surgeons to lag behind in presenting that indomitable front with which nineteenth century Englishmen faced and often outfaced (so unlike their twentieth century descendants) the tax collector. They were no more ready to take it lying down. Let battle be joined in court. A word in passing as to the teams contestant. In the Civil Engineers case the Attorney-General, Sir Richard Webster, and the Solicitor-General, Sir Edward

Clarke, had appeared for the Inland Revenue. But by now—it was 1899—Sir Edward Clarke was no longer in the House, and so he was selected to lead for the Royal College. Webster was still Attorney-General, and had as a colleague a well-known Chancery junior, named Danckwerts. We shall hear this name again. Three Lords Justices sat on the Court of Appeal. They all agreed with and were satisfied with a judgment read by the junior of them, Sir Robert Romer. You may be interested to know that the property of the Royal College at this time amounted to £194,295, and the total income was £13,083. However, the final tax assessment for succession duty worked out at only £158. This amount would not be payable if the property was "legally appropriated and applied for the promotion of science". What then, asked the Attorney-General, was the real purpose of the College of Surgeons? The investigation ranged back to that statute in the eighteenth year of the reign of George II intituled "An Act for making the Surgeons of London and the Barbers of London two separate and distinct Corporations", wherein was created that body politic and corporate known as the "Master Governors and Commonality of the Art and Science of Surgeons of London". But in vain! At the outset Romer, L.J., delivered the fiscal damnation of the College. Let me quote the dread words. "The College has two main objects, each of great importance—in fact it would be difficult to say which of the two main functions imposed on and discharged by the College is the more important. Neither can be considered as merely subsidiary to the other. The one may be shortly described as the promotion of the science of surgery; the other is the promotion and encouragement of the practice of surgery, including the promotion of the interests of those practising or about to practise surgery as a profession." (1899, 1 Q.B., at p. 877.) So the blot was revealed on the escutcheon. But remember it was Parliament and not the judges who frowned thus upon practice—as we shall see hereafter.

Let us then pass on from the nineteenth century and the tax collectors of Queen Victoria, noting as we turn the century some highly relevant facts. Twenty-one years previously an impecunious son of a Middlesex market gardener had entered the medical school of Middlesex Hospital. Two years later he had become a member of the Royal College of Surgeons. Fourteen years before he had become assistant surgeon at the hospital and between his graduation and the time of which I

speak had made no fewer than 152 contributions to various medical societies on anatomy, embryology and pathology. His Tumours Innocent and Malignant was seven years old and already a classic. The year before he had added to his father's name Sutton that of his maternal grandmother, Bland, and in the same year married (for the second time) Edith Heather-Begg. From Lady Bland-Sutton was to come the will which provides the occasion for my story. Let us project ourselves a little forward. Bland-Sutton was knighted in 1912 and two years later donated the money which provided the medical school at Middlesex Hospital with the Pathology Institute which bears his name. Frampton's bust in the Institute recalls the founder with the head so reminiscent of Bonaparte.

Moving on from 1914 we meet next another financial casualty additional to that of 1899. In 1928 the General Medical Council was assessed to income tax in a total amount of £5,864 upon a total income of £11,189. This was no doubt somewhat hard to take, since most of the income, amounting to £9,983, came from registration fees. With half the income going in tax, a fight seemed to be worth while. The G.M.C. appealed finally to the Court of Appeal, finding itself opposed by perhaps the most famous trio to have fought income tax appeals in modern times, namely, Inskip, Stamp and Hills. This was not a matter of succession duty but income tax. Liability could be escaped only if the income was that of a body or trust "applicable to charitable purposes only". It may surprise you to think that the General Medical Council could, even in its supreme danger, think this case worth fighting. How indeed were its purposes charitable only. Actually it was held that they were not. But the issue was not so simple as you might suppose—and is an issue highly relevant to our final problem. Let us therefore plunge further into the legal forest in which we have been wandering and examine more closely the significance of this exemption of charitable purposes. We must turn our back on the inter-war world and search out that of King Edward I. I will remind the less encyclopaedic that the thirteenth year of his reign, which is the significant one for us, was anno domini 1285—a year full of great historic legal echoes. But our concern is with the first Statute of Mortmain. Back in the thirteenth century charity expressed itself, as you can readily appreciate, by gifts to ecclesiastical corporations, for hospitals and medical benefits were substantially socialized by that other institution

which was not less important than the state itself. These corporations, however, held their land without service to any superior lord. A parliament dominated by a Country Party of substantial landowners led by a King who owned more than all others disapproved of this situation. And so the Church was forbidden to take into its dead hand any more land. But charity was not to be gainsaid. A century later the then active trade unions were proving as troublesome as the church bodies as instruments of charity without feudal service. Further enactments were called for and were passed. But charity, like nature, tends to return. The trust took the place of the gift in mortmain for pious or charitable purposes. The inclination to the public good survived economic planning, land was given—and we are in the sixteenth century now—"to trustees on trust to apply the rents and profits every year for ever to say Masses for the donor's soul, to keep his tomb in repair, to teach religious opinions, to distribute food to the poor, to keep up a school or a hospital, and for a multitude of other purposes. One by one the question of the validity of such trusts was brought before the Court of Chancery. . . . [The Court] considered only this. Having regard to all legislative enactments and general legal principles is it or is it not for the public benefit that property should be devoted *for ever* to fulfilling the purpose named. If the Court considered that it was not for public benefit it held the trust altogether void. . . . If the Court considered that it was for the public benefit that the property in question should be devoted for ever to fulfilling the purpose named it held the purpose good." (Tyssen: *Charitable Bequests,* p. 5.) Please note two elementary features in this conception—perpetual operation and public benefit. The perpetual operation is perhaps more real than you would anticipate. There is a scholarship extant at Oxford for the support of poor students which originated in a fourteenth century will containing a charitable trust for the scholarship defined by the testator to continue "usque ad finem mundi". What a stable world that suggests when only the destruction of the world could overwhelm the University! Some idea of the permanence of these mediaeval trusts can be derived from the Reports of the Charity Commissioners published between 1818 and 1837. These reports show that at that period there were existing more than 5,000 separate charitable trusts which had their origin prior to the Statute of Elizabeth in 1601.

The legal conception of charitable trust at the end of the middle ages was all very flexible and shot through with public

purpose and yet conspicuously empirical and without theory. *Solvitur ambulando* was the maxim, with doctrine at a discount and each hurdle faced only when unavoidable. Finally in 1601 a Statute of Charities in the forty-third year of Queen Elizabeth I contained in its preamble a list of the then recognized charitable purposes as approved by the Court. That list remains the nearest thing to an authentic prescription of what is a charitable purpose today—at least in theory. Three hundred and fifty years have added a vast accretion by analogy and distinction. Instances have multiplied, limits have been sketched, disregarded, overstepped, retraced, forgotten and revived, and the total accumulated result, about one thousand cases recorded in law reports in England, tell us what is the connotation and denotation of charitable purposes. So now you can feel yourselves deep in the midst of the forest. There is less systematization of those 1,000 decisions than you as a scientifically trained profession could reasonably credit. And so far as there is any existing classification of them, this arose quite fortuitously. Surely, you would suppose, some scholar would have brought order in part out of this chaos—a professor lecturing to his class or a research worker more anxious for truth than fees. Say no such thing, lest you eliminate the glorious irregularities of our history. Two hundred and three years after the Statute of Elizabeth, Counsel Sir Samuel Romilly happened to be arguing a charitable trust case before Lord Eldon. To clarify his argument he submitted: "There are four objects within one of which all Charity to be administered in this Court must fall: 1st, Relief of the indigent; in various ways; Money: Provisions: Education: Medical Assistance etc. 2ndly, the Advancement of Learning: 3rdly, the Advancement of Religion: and 4thly, which is the most difficult, the advancement of objects of general public utility." (Morice v. The Bishop of Durham, 10 Vesey 522.) In 1891 this catalogue was polished up somewhat and given judicial imprimatur by Lord Macnaghten in an income tax appeal in the House of Lords (Commissioners for Special Purposes of Income Tax v. Pemsel, 1891 A.C., at p. 583). And this is the best one can do to indicate what is meant by "charitable purposes" in the eyes of the law. They are not the less so because they benefit the rich as well as the poor, "as indeed every charity that deserves the name must do either directly or indirectly," as Lord Macnaghten said.

One thing, however, is clear and always has been so, though sometimes clearer than at others. A charitable purpose must be

public and not merely for the benefit of specified individuals. The beneficiaries may indeed be a section of the public, but *au fond* the conception is public benefit. But the brood has been infinitely curious, begotten by judicial empiricism out of social philosophy in haste in darkness and in strange fervour. The Americans have more courage in synthesis in these matters, though their attempt serves merely to illustrate the difficulties of generalizing "charitable purpose". In the Restatement of the Law of Trusts it is pointed out that a purpose is charitable if its accomplishment is of such social interest to the community as to justify permitting property to be devoted to the purpose in perpetuity. As the leading American authority adds by way of comment, the interests of the community however vary with time and place . . . and so too what in one community is regarded as beneficial to the community may in another be regarded as useless if not detrimental. (Scott on Trusts, Vol. III, p. 1975.) And so after nearly six hundred and fifty years we come back to the General Medical Council and its income tax.

The contention for the taxpayer Council in resisting its assessment was necessarily based on its statutory purpose, namely, "to enable persons requiring medical aid to distinguish qualified from unqualified practitioners". This was said to be a charitable purpose "in the Elizabethan sense", albeit aided by analogy. Was the purpose of the Council really for the benefit of the public—or the profession? Here again was the same conflict, in a somewhat different guise, as we have surveyed previously. Clearly the Council could not claim inclusion in the three fairly specific divisions in Sir Samuel Romilly's classification—poverty, education or religion. But was it "beneficial to the community in the spirit and sense of the original statute of Elizabeth"? Actually the Court of Appeal answered this question—and in a sense adverse to the G.M.C.—by adopting the views which had been expressed in the Writers to the Signet case, as contrasted by the Civil Engineer's case. This is what is described in the textbooks as developing the law by the use of analogies. But whether the result is deduced from the analogy or the conclusion justified by the supposition is a matter which lawyers eschew and logicians enjoy. I should add only one more historical comment before we face the final features of our serial. The General Medical Council was held liable to income tax in March, 1928. Whereupon, not unnaturally perhaps, the Commissioners of Inland Revenue looked round for fresh fields to

conquer and promptly assessed the Institute of Civil Engineers. But this was to threaten science itself, in its very citadel. Had not engineers themselves been declared by the House of Lords to be entirely free from all taint of self and entirely, exclusively and purely scientific? The violent hands thus reached out towards the symbol of unalloyed learning belong to the greatest scientific advocate of his day, the exponent of austere intellectuality in various forms. Yes, the spokesman for Inland Revenue was the Solicitor-General, Sir Stafford Cripps himself. And he persuaded Justice Rowlatt that the engineers had sheltered too long in a financial Elysium. But not the Court of Appeal,—including, it may be noted, Sir Mark Romer, a son of that Sir Robert who had written the judgment declaring the liability of the Royal College of Surgeons. Thus often enough do sons differ from fathers, as Bagehot said of Malthus and his father, lest one good custom do corrupt the world. (1932, 1 K.B. 149.)

We have now reached the year 1931. A few score more examples have been added to bewilder the charity lawyers. The welfare State was just round the corner. The nationalization of medicine loomed as a bogey on the horizon. Sir John Bland-Sutton had completed a half century of work, and five years previously his term as President of the Royal College, which Collier's portrait records. Five years later he died. Then another war and in the midst thereof his widow followed him to the grave. And so it is time we made our way nearer to the Middlesex Hospital. It is an easy journey for both professions. Many of the doctors will know the way without assistance from me. And the lawyers who remember their London will have no difficulty. Will I make you too miserable if I remind you how the White Tower looks up Charlotte Street from that ever memorable Percy which harbours the Acropolis and the Elysee, and that just round the corner in Charlotte Street itself the best crepes suzettes in London may be found? Well, we need only move up Charlotte Street and turn left at Goodge Street, and there we are. But what is all this excitement we find? Having arrived we must retrace our steps—in time. You will remember that it was in 1914 that Sir John Bland-Sutton provided a sum of money to build an institute of pathology as part of the medical school at the Middlesex Hospital. Twenty-nine years later Lady Bland-Sutton made her will, on 13th January, 1943, and almost a month later died. She provided that the residue

of her estate should constitute an endowment fund on charitable trusts for so long as the law shall permit "to pay the residue of the income . . . in each year to the treasurer or other proper officer of the Middlesex Hospital for the maintenance and benefit of the Bland-Sutton Institute of Pathology now carried on in connection with the said hospital." Since one of the greatest gynaecologists of his age was the husband in two childless marriages, this no doubt was as near to a family gift as Lady Bland-Sutton could accomplish.

Well, why all the to-do in Goodge Street. This is the kind of family piety which research institutes applaud. But of course medicine lives now in the welfare State. In 1946 the National Health Service Act became law. The medical services became nationalized. Still no doubt research has to continue. But unfortunately there is always the intention of the testatrix to be borne in mind. For, mark you, the will had continued: "Provided always that should the Bland-Sutton Institute cease to be carried on as a pathological research institution or should its name be changed or should the Middlesex Hospital become nationalized or by any means pass into public ownership . . . the bank (i.e., the trustee) shall thereupon pay and transfer the . . . fund both as to capital and income thereof to the Royal College of Surgeons absolutely for the general purposes of the said college."

It is not difficult to guess at the inspiration for this provision. Sir John has been described by one who knew him well as "an operator possessing brilliant dexterity of hand and the faculty of instant appreciation and decision, but most of all a splendid self-reliance which overrode all obstacles of place and circumstance." (Dictionary of National Biography 1931-1940, Supplement art. by Victor Bonney.) May we not detect in such a character the fear of professional sterility lurking behind bureaucratic totality?

Well now let us take stock of the whole situation. The gift to the pathology institute was, though perpetual, no doubt a good charitable trust. It was for the advancement of science unaffected by ideas of professional gain, and unsullied by reference to "practice". But had the hospital become nationalized, and if it had, did this bring into operation the provisions for the defeasaner of the gift? Actually it was far from clear as to whether the hospital was nationalized, in the sense which the testatrix had in mind. But even if this was the case, all was not

lost to it. For the gift to the Royal College was also a perpetual trust. If this gift was a charity then the aspect of perpetuity in the gift was harmless. As we have seen, charities could be (and perhaps ought to be) perpetual. But if it was *not* a charity—and had not some judges so held?—then indeed the gift would fail, be void, and of no effect: and then curiously enough the institute would gain. This is a little puzzling and needs closer scrutiny. If we take our stand at the date of the testatrix's death, when the will took effect, medicine was still unnationalized. The gift to the hospital was good at that time; the advent of Mr. Bevan was by no means certain, though perhaps threatening. So the event upon the happening of which the gift to the institution would terminate was utterly undetermined. It depended upon future political events and no man could say that it would take place—English traditional politics being what they were—at any *particular* time in the then hereafter. If no time could be predicted then the gift to the Royal College depended upon an event of such uncertainty that its date could not be postulated. In truth there was nothing to show, if we stand at the fresh grave of the testatrix, that it would occur within a life or lives then in being and twenty-one years. If the arising of this gift was so uncertain its happening depended upon a perpetuity, and so it would be void. Then the gift to the institution, being a gift of income without limitation, amounted to a gift of the whole fund. By a curious deceit which has always seemed as lacking in logic as in botanical truth it is said on the Chancery side that a gift of all the fruit is a gift of the tree. So if the gift to the Royal College was bad the Bland-Sutton Institute took absolutely. But the surgeons felt they had had enough of being thus put upon. Succession duty they had paid for more than half a century and income tax for several decades. Let science and disinterested learning strike a blow, when the time arrives, and justify themselves. Let us see if the Royal College of Surgeons is not in truth a charity—or at all events let us see if a gift to the College for the general purposes thereof is not a gift for charitable purposes.

On 5th July, 1948, the Medical School ceased to be part of the hospital. That hospital had in truth been nationalized and passed into the ownership of the Minister. On the other hand the school, as part of the University of London, had passed over to a new governing body incorporated and approved by the University and owning and controlling the buildings and assets

of the Medical School, including the Institute of Pathology. So it might be said that there was no nationalization affecting the institute in the sense the testatrix had in mind. And, in any case, if the gift to the Royal College failed because it was not a charitable trust the horrors of nationalization were irrelevant because the gift over failed and the outright gift of income to the institution became absolute.

On 21st June, 1950, they gathered in the Chancery Division before—of all people—Mr. Justice Danckwerts, the son of that Dunckwerts who had aided and abetted Richard Webster almost precisely half a century before to fasten the label of the profit motive on the Royal College. Also he had been, before his promotion, Treasury Counsel for Charities. Now mark you there was a decision that the Royal College was not using its property mainly for the promotion of science. Moreover, it had been held not a charitable purpose. If this was so it was difficult to establish its character as a charity. But maybe the judges sixty years before had not been properly informed. And maybe there was comfort to be found in Lord Herschell's old dictum that the words "Charitable purposes" in the Act of 1885 had a special meaning different from their regular special meaning and of course different from their regular ordinary meaning, though as you remember he had not condescended to explain what was the extraordinary extraordinary meaning different from the ordinary extraordinary meaning.

And so let us come to Mr. Justice Danckwerts. He had before him an elaborate affidavit upon the history and work of the College from Lord Webb-Johnson. He had the text of the first royal charter of incorporation of 1800 as well as charters in 1822, 1843, 1852, 1859, 1888, 1899 and 1926. Curiously nowhere in any charter was there any statement of the objects and purposes of the corporation. But in 1800 it had been recited that "it is of great consequence to the common weal of this Kingdom that the art and science of surgery should be duly promoted." This was well enough, and indeed a fortunate statement. But then note this—the fatal addition—that "the establishment of a college of surgeons will be expedient to the due promotion and encouragement of the study and practice of the said art and science." You note those baleful words "study and practice". You all know what practice means. Sometimes people are paid in practice. You see how awkward this all was. In 1800 there was no welfare State—and in those unregenerate

days surgeons were not only concerned with "practice" but actually put it into the terms of a royal charter. Well judges of a more advanced time would show them the error of their ways.

Actually Mr. Justice Danckwerts was not impressed with all this. It seemed to him that *all* the activities of the College fell within the ambit of charity, and he added with devastating conviction—"in the ordinary sense of that term." He seemed more concerned with what the College was actually doing than with what the charter of 1800 described in its recitals. This was a rather disturbing heresy which may have pleased Lincoln's Inn Fields but doubtless disturbed Lincoln's Inn. Equally he was unconcerned with the theoretical disciplinary control of the College over its members since Parliament had created the General Medical Council for this specific purpose. There were however the decisions in 1899, flanked by those of 1890 and 1932. Could something be done about them? Well they were decisions upon particular statutes. This was a case of the general law as it had slowly developed from the reign of Elizabeth. Still there was that awkward reference to practice. On the other hand there was the expert evidence—note that, the expert evidence. This showed the true significance of practice—for "the art and science of surgery are essentially a practical art and science and that art and that science cannot be promoted without actual practice and experience which can only be carried out by means of a competent body of practitioners whose labours are intrinsically directed towards the cure or alleviation of the ills of mankind." (1951, 1 Ch., at p. 81.) Perhaps the next time you visit counsel's chambers you will look more kindly on the 1951 volume of the Chancery Reports since you now learn that those words are imperishably recorded on page 81!

And so Mr. Justice Danckwerts held that the Royal College of Surgeons is a charity. This certainly rectified any harm due to his father. After this excitement I must confess to an anti-climax. He went on to hold that the detachment of the Medical School from the hospital meant that the whole of the hospital had not been nationalized—and the most relevant portion from the point of view of the testatrix had not been nationalized. So of course the gift to the Institute had not ceased—the Royal College took nothing—Declare and order accordingly.

Well, I suppose you would be dissatisfied if the story ended here. Learning and science had come into its own. Surgeons

at last were brigaded with the engineers and no longer living in enforced intimacy with Writers to the Signet. Honour was satisfied and virtue rewarded. Now what about getting a hand on the trust funds. So the Royal College of Surgeons appealed. What rapacity; what depravity; what a pursuit of the profit motive! After that it will not surprise you to learn that a unanimous Court of Appeal decided that the College was *not* a charity at all. This reversal resulted from the application of the decision of the Court of Appeal in 1899, which proceeded, so it was held, not upon any particular statutory provisions but on the basis of the view taken by the court of the dual character of the purposes of the College, "one of which was the promotion of what may be called the selfish interests of the profession." (1951, Ch. at p. 502.) But what of Lord Webb-Johnson's explanation of the reference to practice? Sir Raymond Evershed, M.R., dealt with that in a manner not unknown to courts bent on maintaining a conclusion of law and disciplining the facts.

"The paragraph [of the affidavit]," he said, "properly emphasizes the point that the art of surgery is a practical art: but I cannot think that the truth of that proposition was unknown to or unrealized by the Court in 1899."

After all this you will not be surprised to learn that the Court of Appeal also held that the Middlesex Hospital had been nationalized, that the defeasance terminating the gift to the Institute had occurred; but as you can clearly see the gift over was not to a charity, and though the gift over had happened five years after the testatrix's death, still it might have been a gift in the remote future at any far distant time. It was therefore void *ab initio*. This was all too clear for any further argument. The two other Lords Justices emphatically agreed. In consequence the Institute took absolutely, despite the fact of nationalization.

The Royal College looked ruefully at its counsel, Sir Andrew Clark. The Bland-Sutton Institute of Pathology passed a vote of thanks to its counsel, Mr. Pascoe Hayward—and the testatrix, hearing that the now irrevocably nationalized hospital was assured in perpetuity of her gift, turned completely over in her grave.

And so we come to the House of Lords. At this stage Mr. Cross took the place of Sir Andrew Clarke as leading counsel for the Royal College, and otherwise the Bar remained unchanged, but not as yet exhausted by their efforts. Whereas the argument

before Mr. Justice Danckwerts occupied two days and before the Court of Appeal three days, no less than five days were occupied before the Lords. But then of course four judgments had been added to the facts and law which previously had existed. The personnel of the tribunal is not without interest, consisting as it did of Lord Normand, Lord Morton, Lord Reid, Lord Tucker and Lord Cohen. Just consider that court. The problem was one peculiar to English law, for the law of charitable trusts could have developed in its precise form only in English jurisprudence. Moreover, the subtlety of the problem lay in a certain intuitive perception of the true meaning of an eighteenth century royal charter when related to the essential significance of charitable purpose as this had been slowly accumulated by decisions of English judges and the learning and instinctive appreciation of English chancery lawyers. English law is a national product, as indeed is the law of every mature country, reflecting the nuances of a way of life not completely capable of comprehension except by those who share the feeling and history of the people. Every textbook on jurisprudence will emphasize this feature—so unlike the universality of that science and art of healing which is essentially oecumenical. And, as I have said, this particular question was peculiarly native to the legal system and country in which it arose. But we have already met some paradoxes and so in consequence you will not be surprised to learn that of the five noble and learned lords who constituted the final appellate tribunal three were Scots and one a Jew. So much for the textbooks on jurisprudence!

The House of Lords was of course not in any sense bound by the decision in 1899 of the Court of Appeal, as Sir Raymond Evershed and his colleagues had to some extent been. But then Danckwerts, J., had been able to "distinguish" this decision, and so no doubt could the Court of Appeal have done had they been so minded. Let us try and see how, approached as a genuine problem of analysis, this problem gets solved. Let me remind you again of what precisely the problem was.

The Royal College of Surgeons was a body corporate with certain purposes. If those purposes were charitable, then if the hospital had been nationalized the gift to the College was good. To be charitable the purposes had essentially to be public. If the College had two co-ordinate purposes, one being public and the other aiming at the promotion of the interests of the profession, then it was *not* a charity. These dual purposes had

already been held to exist. The Royal College in Ireland had also in 1918 been held to display the same dual character by a Court of Appeal in Ireland (Miley v. A.-G., (1918) 1 I.R. 455) and a similar conclusion had been reached as long ago as 1892 in respect to the Royal College in Edinburgh (Sulley v. Royal College of Surgeons, Edinburgh, (1892) 3 T.C. 173.). Whilst it was not necessary to confine the contention on behalf of the College to demonstrating that it was aimed at the promotion of science and it was permissible to rely upon its purposes concerned with the advancement of education, still if the protection and promotion of the interests of the profession could not be concealed or denied as a co-ordinate purpose, then the College would not be a charity.

It is worth considering a little the nature of this problem viewed apart from the legal issues. The assessment of the character of social entities has been one of the most intriguing problems of modern psychology, history and political philosophy. Argument has proceeded as to whether the personality of the group was real or artificial. Was the group self something distinct from its members. Was it a matter of historical fact or spiritual substance? The law had tried its hand on this problem, not always to the satisfaction of the philosophers. But here was an even more elusive problem—the purpose of the group. At once you may imagine the sceptic asking, "Ostensible or actual purpose?" Was purpose identical with motive? Was it the conscious purpose or the inner nature? Could lawyers cope with these elusive or perhaps illusory distinctions? Perhaps the French with their feeling for accurate simplicity supply us best with the phrase—what was the raison d'être of the Royal College?

How then did the Lords go about solving this teasing question—for I imagine our interest is rather in how the solution was achieved than what it was, though I suppose there is a mild interest in this last matter also.

First of all let us see one aspect clearly. The problem could not be affected to the slightest degree by what the Royal College of Surgeons was doing, or striving for, or aiming at, in 1948. Its Court of Assistants, Masters, Governors, Fellows, Licentiates and Diplomates might be all of one single emphatic and unanimous opinion and might with equality and unanimity put that opinion into effect. But in vain. What unreality and vanity inspires them?

In this respect the problem was entirely different from that which had fallen to be resolved by the High Court of Australia seven years before. The Royal Australasian College of Surgeons was incorporated under the Companies Act 1928 and its memorandum of association set out variegated purposes and powers. When it sought exemption from income tax as a "scientific institution" it might indeed have been a little embarrassed by the frank avowals which the draftsman had included in the memorandum, such as "to cultivate and maintain the highest principles of surgical practice". However, facts are the important matter in law, as no doubt in medicine. The High Court had apparently no difficulty in deciding that this income tax liability was not a matter of faith but works. Indeed this is a principle frequently crystallized in income tax law in what are not inartistically described as betterment tables. In consequence the High Court examined what the Royal Australasian College actually did—or what it said it actually did. The nature of the registered purposes was in fact equivocal, but "by its fruits ye shall know them." This inquiry loses the fine flavour of any philosophical search and equally abandons the glories of antiquarian accuracy. Only a young and vulgar community could embrace with such enthusiasm the *is* of the *here* and *now*. So I note merely that the Court in five judgments occupying less than ten pages held the College exempt (R.A.C.S. v. Federal Commissioner of Taxation, 2 A.I.T.R. 490). Let us leave these hasty spoil sports and return to an atmosphere of historical tradition and metaphysical nicety where the realities of corporate existence are no longer dealt with as questions of fact or "perhaps . . . mixed questions of fact and law proper to be stated for the opinion of this Court." (Starke, J., 2 A.I.T.R. at 496.)

For the House of Lords tradition is richer and less inescapable. The purpose of the Royal College was to be derived from the written terms of the royal charter granted in 1800. It may be indeed that all unnoticed by the Court of Chancery the College might have developed and changed. If so, it was time the matter was corrected. But no historic experience or practical activities could be permitted to interpose between the mind of the court and the words of the charter. If the expert evidence of the ex-President showed that the activities here and now in this day and age happened to coincide with the purpose as expressed in the charter then that was an interesting, though

quite irrelevant, coincidence. If these activities were not indeed what George III had contemplated, then, however real, commendable, unmistakable and invaluable, they were improper and invalid. Let us have no nonsense about growth or adaptation to experience. This was a body corporate created by royal charter. So let us to the charter!

And the curious feature of the charter is that no purpose was stated therein—at all events explicitly. The nearest statement was to be found in two sentences in the recitals. I have quoted it before, but since it is the crux of the whole matter I may repeat the relevant passage, "and whereas it is of great consequence to the common weal of this kingdom that the art and science of surgeons should be duly promoted: And whereas it appears to us that the establishment of a college of surgeons will be expedient for the due promotion and encouragement of the study and practice of the said art and science . . . ."

The charter then proceded to constitute the College a body corporate with various powers. Among those powers we may note in particular three groups. In the first place the gifts, grants, liberties, privileges and immunities and possessions real and personal of the late Corporation of the Surgeons of London were to go to the new college. The older corporation had indubitably been a trade guild and subject to the Corporation of the City of London. And so of course there was room for a suggestion that the same thing was true, in part at least, of the new body. Secondly, the future members of the College should be such as should have obtained letters testimonial of qualification to practise the art and science of surgery under the common seal of the College. And this of course involved examinations (a process of human suffering rarely considered to constitute a charity). Finally the governing body of the corporation was empowered to transact and ordain all such matters and things as the late dissolved corporation might have done. Pursuant thereto By-law 15 provided that "the Council will at all times protect and defend every fellow, fellow in dental surgery, member and licentiate in dental surgery of the College in the exercise and enjoyment of the rights and privileges acquired by him as a diplomate of the College."

By-law 16 gave powers to remove from fellowship or membership a fellow or member adjudged guilty of professional misconduct. All this was very awkward, seeming to suggest that protection and promotion of the profession was at least a

co-ordinate purpose of the College. In a carefully framed affidavit Lord Webb-Johnson had demonstrated his exquisite appreciation of the nuances of law on the chancery side. Guiding his college through the shoals and quicksands with a delicacy suggestive of the operating table (in chambers in Lincoln's Inn) he deposed:

"Apart from examinations the College seeks and has sought in the interests of the public to do all it can to secure that surgical practitioners shall not only be technically competent but also shall hold to high standards of professional honour. As a corollary the College feels and has felt itself bound to take and retain powers to defend and protect in their professional capacity its fellows, members and licentiates but this not in their interest but in the interests of the public so that surgeons feeling that they enjoy the support of the College may fearlessly and without anxiety render their best professional services to their patients."

Observe the masterly precision with which all flavour of self and all trace of gain or profit is bowed out of the door of the court. Not for all. Lord Cohen would have none of it. "In the light of this evidence," he wrote, "I am unable to reach a conclusion that the disciplinary and 'defence' activities of the College are purely ancillary to its plainly charitable objects." And so he dissented. In his view the Royal College was not purely charitable though the conclusion was expressed, as he said, "with some reluctance".

Thus, at this stage, we see four judges against the College and one justice, very junior, speaking just three weeks after the first anniversary of his judicial birthday, for the College. What of the remaining four Law Lords?

They were unanimous in restoring the judgment in first instance. And the method? At least it was subtle. You begin with the purpose of the College as set out in the recital. Any powers granted thereafter *must be* incidental to the achievement of the purpose. Powers are means and not ends. And means are not co-ordinate with ends but ancillary thereto. Neat, isn't it? You can see what George III had in his mind, can't you, in 1800—anticipating as he would the history of the next century and a half. Finally, if you have any lingering doubts about the legitimate concern of the Royal College with the interests of the profession, one parthian shot. The discipline and control of the members of the College is a discipline and

control of them as such members, as corporators. "But," said Lord Reid, "I do not think that this means that they are to be disciplined, protected or aided as practising surgeons."

And so you arrive at the ultimate result. The Royal College exists to promote surgery and not surgeons. I hope everyone is happy at the result and suitably impressed by the means of reaching it.

I trust that you can catch some of the inner meanings of our methods—if only to contrast them with your own. Some of the perennial problems are wrapped up in the history of this case. There is for instance the oddly delimited conception of a legal charity itself—developed haphazard and step by step, and barely capable of logical justification at the periphery of the conception. As the leading judgment stated in the House of Lords:

"It is in my view [it was Lord Morton] regrettable that in order to find out what is or is not a charity according to English law it is still necessary to refer to the preamble to a statute passed in the reign of Queen Elizabeth. That statute was not passed for the purpose of giving a definition of 'charity'. . . . I take the opportunity of saying that I hope the legislature will soon embark on the task of giving a comprehensive statutory definition of 'charity'." (Royal College of Surgeons v. National Provincial Bank, (1951) 1 A.E.R. at p. 992.)

Here also is a first rate example of the processes of literal construction of documents, keeping close to the words and letting the result emerge almost by accident (or at all events that is the official theory of the process). Then there is the process of development by analogy and distinction, though in this case the process of refinement is ultimately rejected. Note how the rule begins with one problem (the promotion of science) and expands into another without much consciousness at any phase. Work has to be done, decisions made, guides accepted without too much nicety.

Then again there is the experience of the young judge tentatively rejecting the guidance of the Court of Appeal and of that court correcting his divagation.

Above all there is the spectacle of excessive empiricism at grips with a problem essentially theoretical.

But I have told you the story and it would be wrong to distort it with intrusions of my own. I should let it speak for itself. And so I come to an end.

But no. I see there is still a page. Of course. How could I have forgotten. Important, to be sure. The House of Lords ordered that the costs of all parties in this litigation in all the courts should be taxed on the highest scale as between solicitor and client and paid out of Lady Bland-Sutton's charitable fund.

And so I should remind you that it is just half a century ago that the Chancery Inns of Court were held by a unanimous Court of Appeal to be valid legal charities. (Smith v. Kerr, (1902) 1 Ch. 774.)