ture here sought to be deducted was undoubtedly an expenditure or investment of capital. If that were so the provisions of the 3d rule of the 1st head of section 100 of the Property Tax Act was conclusive, and the judgment of the Commissioners should be affirmed.

At advising—

Lord President—The appellants Messrs Addie & Sons have been assessed under schedule D of the Income-Tax Act in respect of profits arising from their business as ironmasters, and they say there ought to have been deducted from the amount of profits upon which they were so assessed two sums of £5525 and £4435, being a percentage for pit-sinking and for depreciation of buildings and machinery: and this they maintain upon the ground that the sinking of new pits, although it be only an occasional thing, is still part of what may fairly be called the annual expenditure which they necessarily incur in realising the profits from their trade. I think there is only one point to be determined here, and not two as represented, because the machinery and buildings connected with a pit appear to me to be just part of the pit itself. It is one compound structure necessary for the working of the mine; and the question comes to be, whether, under the special rules of the Income-Tax Act, they are entitled to deduct something on account of the amount expended in making a new pit. Now, I am quite clear that the making of a new pit in a trade of this kind is, in every sense of the term, just an expenditure of capital. It is an investment of money, of capital, and must be placed to capital account in any properly kept books applicable to such a concern. Now, if that be so, it seems to me that the provision of the 3d rule under the 1st head of section 100 of the Property Tax Act is conclusive upon the question before us, because it is there provided that in estimating the balance of profits and gains chargeable under schedule D, or for the purpose of assessing the duty thereon, no sum shall be set against or deducted from, or allowed to be set against or deducted from, such profits or gains on account of any sum employed or intended to be employed as capital in such trade. It seems to me that it is quite unnecessary to go beyond that one part of the statute. No doubt some support may be had also from the 159th section, but I think this rule is in itself perfectly conclusive. As soon as you ascertain that this is an expenditure of additional capital, there is an end to any proposal to deduct anything in respect of it; and on that simple ground I think the judgment of the Commissioners right.

Lord Deas concurred.

Lord Ardmillan—I am of the same opinion. I think the two sections, taken together, are quite conclusive.

Lord Mure—I think the third rule of section 100 is quite conclusive on the point.

The Court affirmed the judgment of the Commissioners.

Counsel for the Appellants—Dean of Faculty (Clark), and Balfour. Agents—Gibson-Craig, Dalziel & Brodies, W.S.

Counsel for the Respondent—Solicitor-General (Watson), and Rutherfurd. Agent — Angus Fletcher, Solicitor of Inland Revenue.

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*Tuesday, February 2.*

## FIRST DIVISION.

[Court of Exchequer.

### CASE FOR THE EDINBURGH LIFE ASSURANCE CO. *v.* SOLICITOR OF INLAND REVENUE, AND THE SCOTTISH WIDOWS FUND AND LIFE ASSURANCE CO.

(Under the Customs and Inland Revenue Act, 1874 37 Vict. c. 16.)

*Taxation—Inhabited House Duties*—57 *Geo. III, c.* 25, § 1—5 *Geo. IV., c.* 44, § 4—32 *and* 33 *Vict., c.* 14, § 11.

*Held* that Insurance Companies, whether proprietory or mutual, are not entitled to have their premises exempted from Inhabited House Duties, in terms of section 11 of the Act 32 and 33 Vict. c. 14—not being companies engaged in trade within the meaning of the statute.

The Edinburgh Life Assurance Company, 22 George Street, Edinburgh, appealed to the Commissioners for executing the Acts relating to the Inhabited House Duties for the County of Edinburgh against the charge of £13, 2s. 6d. made upon them for Inhabited House Duty, at the rate of 9d per pound on £350, the annual value of the premises occupied by them at the above-mentioned address. The Company (which was a proprietory Company), occupied the premises in question for the purpose of carrying on their business of life insurance. The area flat, consisting of four apartments, having internal communication with the offices above, was occupied as a dwelling-house by a servant of the Company, who went messages, superintended the cleaning of the premises, and acted as a clerk to the Company to the extent of addressing and booking letters, and with whom resided his wife and a female servant, whose wages were paid by the Company. The appellants claimed relief from the assessment under the Act 14 and 15 Victoria, cap. 36, and under the 11th section of 32 and 33 Victoria, cap. 14, on the ground that they were a proprietory company engaged in trade; that the business carried on for the benefit of, and at the risk of the shareholders, of insuring lives, buying and selling annuities, reversions, &c., was essentially a trading business that the part of the tenement occupied by them in 22 George Street was used "for the purpose of trade only;" and that the person dwelling in the area flat, lived there "for the protection thereof," and to take care of the premises.

The Commissioners were of opinion that the business carried on was not of the nature of trade, and that therefore the premises did not come within the exemption granted by the statute, and they accordingly refused the appeal and confirmed the assessment.

The appellants craved a case for the opinion of the Court of Session, which was accordingly stated by the Commissioners.

The appellants argued—The business of insurance was a trade within the meaning of the Act. An insurance company dealt with risks, undertaking to pay so much in case of death for the price of an annual premium. The Company also dealt to a large extent in money-lending. In regard to the duties performed by their servant or

messenger, they never could be held to be of such a nature as to entitle him to have the designation of a clerk, but were merely of a purely mechanical or subordinate description, such as were invariably performed by any bank or insurance messenger, and that it was frivolous to attempt to magnify the importance of such services by designating the person who discharged them as a clerk.

The respondent argued—The premises did not fall within the exemption quoted,—(1) Because the business carried on by the appellants was not of the nature of trade in the meaning of the Act, and that the premises were not therefore used "for the purposes of trade only." The Act made a clear distinction between trades and professions. And under it the offices of writers, accountants, &c., were charged, although a considerable part of their business was akin to that of banking (which had been held to be a trade), inasmuch as they lent money, purchased shares, &c.; but it was maintained that their offices were not solely used for the purposes of trade, and they were therefore taxed. Life insurance was not a trade: there was neither a buyer nor a seller, but for an annual payment the company guaranteed a sum at death. And (2), Because, even if the business carried on was of the nature of trade, the premises did not come under the exemption claimed, inasmuch as the person residing in them did not dwell there solely for the protection thereof, but was otherwise occupied, sometimes in discharging the duties of a messenger, and at other times the more important duties appertaining to the position of a clerk.

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There was also a case for the Scottish Widows Fund and Life Assurance Company, which was in a similar position to the Edinburgh Life Assurance Company, except that the latter was a mutual and not a proprietary company. Both cases were heard together.

At advising—

Lord President—In the case of the Edinburgh Life Assurance Company the Company claim exemption from the inhabited house-duty upon the ground that they are within the meaning of the 11th section of the statute 32 and 33 Vict. c. 14, and the Commissioners have refused to sustain that exemption because they are of opinion that the business carried on by the Company is not of the nature of a trade, and therefore the premises do not come within the exemption of the statute.

Now, in order to determine whether the business carried on by this Company is of the nature of a trade, it is necessary of course to ascertain what is the meaning of the term trade as used in this statute. But for that purpose, again, it seems to me to be necessary to attend to the legislative history of this inhabited house-duty,—what it is in itself, and how the exemptions have arisen and been introduced into the statute. The duty itself was imposed originally in the year 1808 by 48 Geo. III. along with a great many other taxes, and there cannot be much doubt, I think, reading that Act, that it was intended to assess all houses or tenements which were occupied not merely by persons residing in them, but also by persons occupying them during the day for business purposes. In short, although it was called an inhabited house-duty, it really was something more expansive than that, because an inhabited house in the popular sense of the term is a house in which persons dwell, reside, and spend the night as well as the day. But the tax in its original conception under the 48th Geo. III. was of a more comprehensive description than that. But after it had been in operation for some time, there was first one exemption introduced by the Act of 57th Geo. III. c. 25, and afterwards another by the 5th Geo. IV. c. 44. The first of these, the 57th Geo. III. c. 25, introduced this exemption—"Any person or any number of persons in partnership together . . . . . occupying a tenement or building . . . . . as a house for the purposes of trade only, or as a warehouse for the sole purpose of lodging goods, wares or merchandise therein, or as a shop or counting house, no person inhabiting, abiding, or dwelling therein, except during the day time only, for the purpose of such trade, such person or each of such persons in partnership respectively residing in a separate and distinct dwelling house, or part of a dwelling house, charged to the duties under the said Act, it shall be lawful for the said Commissioners, according to the provisions of this Act, to discharge the assessment made for that year in respect of such tenement or building which shall be so used for purposes of trade, or so employed as a warehouse for the sole purpose of lodging goods, wares and merchandise therein, or as a shop or counting house." Now, this is an exemption applied to trade premises solely, and confined entirely to that, and the words used in this statute are extremely important. It must be a house used for the purposes of trade only, or a warehouse for the sole purpose of lodging goods, wares, and merchandise, or a shop or counting-house, and it must be occupied only during the day for the purposes of such trade, and not occupied during the night as a dwelling-house. Now, *prima facie*, certainly under that statute the word trade is used as meaning the trade of a merchant or shopkeeper,—that is to say, of one who buys and sells as a merchant does on a large scale, or of one who deals in retail like a shopkeeper; and, reading that statute alone, one would be very much disposed to come to the conclusion that the exemption was not intended to extend beyond either a merchant in the proper sense of the term, or a shopkeeper. But then we have the next statute, 5th Geo. IV. cap. 44, which, by sect. 4, extends the exemption to another class, and it is not immaterial to observe that that section has a special preamble referring back to the 57th of Geo. III. in these terms:—"The provisions in the said Act contained for granting exemptions from the said duties to persons in trade in respect of houses, tenements, or buildings in the said Act described." Now, here is the interpretation of the previous statute in this preamble. The exemption extends to persons in trade in respect of houses used solely for the purposes of trade. That is the meaning of the clause in the 57th Geo. III., as construed by the Parliament which passed the Act of 5th Geo. IV., and it extends that provision, and enacts that the exemptions "shall and may be extended and applied by the respective commissioners and officers acting in the execution of the said Act and this Act, on due proof, to all and every person, or any number of persons in partnership together, for or in respect of any house, tenement, or building, or part of a tenement or building, in the said Act described, which shall be used by such person or persons as offices or counting houses, for the purposes of exercising or carrying on any profession, vocation, business, or

calling by which such person or persons shall seek a livelihood or profit, no person inhabiting, abiding, or dwelling therein, except in the day time only, for the purpose of such profession, vocation, business, or calling; such person or each such persons in partnership respectively residing in a distinct and separate dwelling house, or part of a dwelling house, charged to the said duties."

Now, it seems to me that the question we have to solve in the present case is, whether the Edinburgh Life Assurance Company is within the first statute or the second, whether it is a trader within the meaning of the 57th Geo. III., or is a company carrying on a business or calling within the meaning of the 5th Geo. IV. In these two statutes the two classes of persons are placed exactly in the same position. They are equally exempt, but the necessity of distinguishing between the two in this case arises from the provisions of the 11th section of the recent statute 32d and 33d Vict., which provides:—"From and after the fifth day of April one thousand eight hundred and sixty-nine, any tenement or part of a tenement occupied as a house for the purposes of trade only, or as a warehouse for the sole purpose of lodging goods, wares, or merchandise therein, or as a shop or counting house, or being used as a shop or counting house, shall be exempt from inhabited house duties, although a servant or other person may dwell in such tenement or part of a tenement for the protection thereof." The persons who are exempted under the 57th Geo. III. have this additional privilege under the statute of the 32d and 33d Vict., that they may enjoy their exemption although they have a servant dwelling in the house for the purpose of protection; and this is not extended to those who enjoy their exemption under the 5th Geo. IV.—and thence arises the necessity of determining to which class of exempted persons this Insurance Company belongs. Now, I am of opinion that the term trade is used in the first of these statutes in its strict meaning, and that there are a great many businesses which may be regarded as falling within the description of trading that are not trading within the meaning of that statute. I am satisfied, taking these two statutes conferring the exemptions together, that the distinction intended to be made between the two is, that the one exemption is confined to traders in the proper and legitimate sense of the term—merchants and shopkeepers, and that the exemption is extended to all other persons who are carrying on any other kind of business for profit, not being traders in that proper sense; and as the 11th section of 32d and 33d Vict. repeats the very words of the 57th Geo. III. in giving the additional privilege, that additional privilege must be confined to the persons within the meaning of the 57th Geo. III.; and I am therefore of opinion with the Commissioners that this Insurance Company is not a trader. That renders it quite unnecessary to enter upon the question whether the servant whom they had in charge of their premises is within the meaning of the 11th section of the recent statute, for the purposes of protection, and for no other purpose. That might raise some little difficulty, but it is not a question of the same importance as the other. It is sufficient for our judgment, I think, to adopt the same ground that has been adopted by the Commissioners, and in which I think they are quite right. With regard to the case of the Scottish Widows Fund, it is not necessary to say much, because, if a proprietary company like the Edinburgh Life Assurance Company are not traders, still less are the mutual society called the Scottish Widows Fund. I think, if we had held that a proprietary office was a trader in the meaning of the statute, a very serious question would have arisen, whether the same construction of the statute would have applied to the case of a mutual office; but it is not necessary to enter on that question.

I think we can fairly dispose of both cases upon the ground which has been taken by the Commissioners.

Lord Deas—I am of opinion with your Lordship that neither of these companies are to be held as carrying on a business of the nature of trade, so as to entitle them to come within the exemption in the sense of these statutes. I cannot say I see any substantial difference between them. There may be more difficulty in regard to the Scottish Widows Fund than in regard to the other, but it is not necessary to go into that, and I cannot see at present that any distinction can be taken between them. It is sufficient to hold that neither of them are carrying on a trade in the sense of the statute.

Lord Ardmillan—When a court of law is called to decide a question affecting the incidence and distribution of taxation, the question is necessarily important. We have been told that a taxing statute must be construed liberally and favourably to the subjects. In one sense that is true, and the remark is well founded, but on the other hand equality and impartial justice in the incidence of taxation is of greater moment, and the statute should be construed so as to promote that equality and that impartiality of justice. There is no presumption in favour of the exemption of the few from the incidence of the general tax. I think the presumption is for equality, and rather against the partiality which is involved in special exemptions. Therefore, in deciding any case I would consider the question on the statutes according to their true meaning. So viewing the case, I arrive at the conclusion that these insurance companies are not traders within the meaning of the 32 and 33 Vict.—construing that statute by the aid of the preceding statutes imposing and regulating taxation—and that the premises which they occupy are not houses for the purposes of trade only. The question is one of difficulty. I have felt it to be so, but on the whole I am quite satisfied with the construction which your Lordship in the chair has adopted and explained of the series of these Acts, and I have come to the same conclusion that neither of these insurance companies are the occupants of premises used for trade only. There is a distinction between the two, and I do not undervalue it. I think there was a great deal of ingenious argument about it, and if we had come to the conclusion that the proprietary company were engaged in trade, there might have been a doubt whether a mutual insurance society, where every man insures himself as well as the others, is a proper trading company. There may be subtle and delicate questions involved in that. I do not know it is trade for a man to insure himself with himself. I do not know it is sale when a man sells to himself and buys from himself. But it is not necessary to enter upon these questions. Holding—as I concur

with your Lordship in doing—that both societies are liable and not within the exemption, it is not necessary to consider whether one is more liable than the other.

LORD MURE—I concur with your Lordships that the Commissioners have pronounced a correct deliverance in this case, and on the grounds explained by your Lordship in the chair.

The Court affirmed the judgment of the Commissioners.

Counsel for the Appellants—Dean of Faculty (Clark) and Balfour. Agent—James Mylne, W.S,

Counsel for the Crown—Solicitor-General (Watson) and Rutherfurd. Agent—Angus Fletcher, Solicitor of Inland Revenue.

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*Friday, February 5.*

## FIRST DIVISION.

[Lord Young, Ordinary.

### ROBB *v.* SCHOOL BOARD OF LOGIEALMOND.

*School — Schoolmaster — Removal — Fault — Education (Scotland) Act,* 1872, § 60—*Parochial and Burgh Schoolmasters Act,* 1861, § 19.

*Held* that a parish schoolmaster appointed previous to the passing of the Education Act, 1872, and removed by the School Board in terms of the 60th section of the said Act, is entitled to demand a retiring allowance as provided by the 19th section of the Parochial and Burgh Schoolmasters Act, 1861, unless the cause of his removal was occasioned by his own fault.

*Schoolmaster—Dismissal—Fault—Proof.*

A parish schoolmaster appointed previous to the passing of the Education Act, 1872, having been removed by the School Board on a report by one of Her Majesty's Inspectors of Schools that the school had "not been efficiently conducted," and that the schoolmaster, "however he might succeed elsewhere, is unfit for the post of schoolmaster in the said school," brought an action against the School Board for a retiring allowance. The Court allowed the pursuer to amend his record to the effect of showing that he was not dismissed for fault.

*Opinion* (*per* Lord Deas) that the proper course would have been to remit to the School Board to explain the reasons of the pursuer's dismissal.

This was an action at the instance of Alexander Robb, teacher of the Side Parochial School at Logiealmond, against the School Board of that parish, for declarator that the defenders were bound to pay to the pursuer, whom they had removed from office, a retiring allowance.

The parish of Logiealmond was a *quoad sacra* parish composed of parts of the parishes of Monzie, Fowlis Wester, Methven, and Redgorton, and the pursuer was appointed teacher of the school of that parish in 1858. In 1873 the School Board of the parish obtained a special report from Her Majesty's Inspector of Schools for the district, and thereafter removed the pursuer from his office.

The report of the Inspector was as follows:—"According to the instructions received from the Scotch Education Department, of date 22d July 1873, I visited Logiealmond Side Parochial School on 14th August 1873 with a view of inspecting and reporting upon it, pursuant to section 60 (2) of the Education Act (Scotland), 1872.

"The premises are very fair, sufficiently lighted, drained, warmed, ventilated, and supplied with playground and offices. The playground is covered with the grass, and one of the privies is turned into a hen-house. The desk, furniture, and apparatus are sufficient. Mr Alexander Robb, the schoolmaster, seems to be in good health and, with the drawback of a want of a leg, lost in childhood, physically qualified for the due performance of the duties of the school. There are no pupils in attendance, only 6 have been enrolled during the school year, 3 in December, and 3 in January, and no scholar since March. According to lists of names on loose copy leaves, kept mostly in pencil—the only school registers for the last seven years—the number enrolled in 1871-1872, was 9; in 1870-1871, 9; in 1869-1870, 27; in 1868-1869, 14; in 1867-1868, 25; in 1866-1867, 32. In these loose leaves no record of attendance has been kept; but so far as the fact can be ascertained from jottings of fees, the attendance has always been small compared with the number on the roll. According to last census there are in the district 82 children receiving instruction; with the exception of 10 or 12 in outlying parts, they go to school either at Hametfield, about a mile west of Logiealmond school, or to Millhaugh, about a mile east of it. The former school is kept in premises much inferior to those of Logiealmond, and has had nine teachers in the last eight years. It has at times had as many as 90 scholars, while Mr Robb had none; and on 4th August, when I looked in, it had 33 present. The support of it has, according to the statement of the U. P. minister, been always felt to be a burden upon the managers, and it would have been discontinued long before this but for the state of the Side Parish School. The other school at Millhaugh is an adventure school kept in a room in a cottage unsuited for the purpose, by a mistress who has had no special training. It was in vacation at the time of my visit; but had had during the year an attendance reaching a maximum of 23.

"Mr Robb's explanation that the absence of pupils from his school is due to party feeling, clerical squabbles, and sectarian differences in the district, is to a certain extent corroborated by the fact that of 34 names adhibited to a petition against him (of which I send a copy herewith) presented to the School Board on the day of my visit, only two are those of adherents of the Church of Scotland, to which Mr Robb belongs.

"However this may be, the state of the school gives evidence that it has not been efficiently conducted, and that Mr Alexander Robb, however he might succeed elsewhere, is unfit for the post of schoolmaster at Logiealmond."

The defenders denied that the said school was properly a parish school, and averred that the pursuer had not been properly elected, was careless and indolent, and neglected his duties, took no trouble to teach the scholars, and was of intemperate habits.

The pursuer pleaded—"The pursuer's removal